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Powers That Be: A Reexamination of the Federal Courts' Rulemaking and Adjudicatory Powers in the Context of a Clash of a Congressional Statute and a Supreme Court Rule

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THE POWERS THAT BE: A REEXAMINATION OF THE FEDERAL COURTS' RULEMAKING AND ADJUDICATORY POWERS IN THE CONTEXT OF A CLASH OF A CONGRESSIONAL STATUTE AND A SUPREME COURT RULE

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I. INTRODUCTION

This Article examines the long-standing conflict between Rule 17(b) of the Federal Rules of Civil Procedure,[1] which was promulgated by the Supreme Court, and a federal statute, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).[2] The Article emphasizes that, when a Federal Rule incorporates state law, many federal courts have applied an inappropriate analysis to conflicts between congressional statutes and Supreme Court Rules; these courts focus on a clash of federal-state authority, rather than recognizing that the conflict presents a horizontal clash of federal authority.[3]

The Article has three goals. First, the Article identifies the flaw in current statute-Rule conflict analysis when a federal statute conflicts with a Federal Rule that incorporates state law. The Article recognizes that these statute-Rule conflicts present potential power conflicts between Congress's and the Supreme Court's authority to create procedure for the federal courts, rather than conflicts of federal and state law. Second, the Article provides a resolution of the apparent conflict between the CERCLA statute and Rule 17(b). Third, the Article highlights the narrowing power of federal courts in construing federal statutes or filling the interstices in federal statutes with federal common law under current Supreme Court jurisprudence. The Article also compares the courts' narrowed adjudicatory authority in creating federal common law with the federal courts' broader

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[1] FED. R. CIV. P. 17(b). The CERCLA-Rule 17(b) conflict focuses on whether CERCLA or Rule 17(b) defines the duration of amenability to suit of a dissolved corporation. If Rule 17(b) controls, state law incorporated into Rule 17(b) governs, and a dissolved corporation will generally lose capacity to be sued at a set time period after dissolution, usually two to five years. If CERCLA controls, the courts have generally held that the dissolved corporation retains capacity to be sued either until it has distributed all its assets or indefinitely.

[2] Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601–9675 (2000 & Supp. II 2002).

[3] The term "Federal Rule" or "Rule" refers to the procedural rules promulgated by the Supreme Court pursuant to the Rules Enabling Act process. *See* 28 U.S.C. §§ 2072–2074 (2000).

authority when interpreting a federal statute for the purpose of determining if the statute preempts state law. Given the increasingly narrow power of federal courts in statutory construction and creating federal common law, this Article suggests that the Supreme Court's statutorily (and constitutionally) circumscribed procedural rulemaking authority may be broader in many instances than the federal courts' principal authority of adjudicating cases and controversies, at least when the case involves construction of a federal statute.

The allocation of power between Congress and the Supreme Court is the primary consideration when a Rule promulgated by the Supreme Court conflicts with a congressional statute.[4] In a previous article, I concluded that the federal courts' traditional method of analyzing these statute-Rule conflicts—treating the federal statute and Federal Rule as if they were two conflicting statutes and ignoring potential questions of rulemaking power—should be altered.[5] Because there are limits on both Congress's and the Supreme Court's authority to create procedure for the federal courts, the initial question in analyzing a potential conflict of congressional statute and Federal Rule should be whether each rulemaker stayed within the confines of its rulemaking power.[6]

In this Article, I examine a related issue: How should courts resolve conflicts between congressional statutes and Federal Rules when the potentially conflicting Federal Rule incorporates state law? The Federal Rules promulgated by the Supreme Court, although intended to provide uniform procedure across the federal courts,[7] nevertheless incorporated

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[4] *See* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025–26, 1036 (1982); Ralph U. Whitten, *Separation of Powers Restrictions on Judicial Rulemaking: A Case Study of Federal Rule 4*, 40 ME. L. REV. 41, 44–47 (1988); *see generally* Bernadette Bollas Genetin, *Expressly Repudiating Implied Repeals Analysis: A New Framework for Resolving Conflicts Between Congressional Statutes and Federal Rules*, 51 EMORY L.J. 677 (2002).

[5] Genetin, *supra* note 4, at 678–82.

[6] Genetin, *supra* note 4, at 726–27, 749–50; *see also* Burbank, *supra* note 4, at 1052–54 & n.166 ("In fact . . . only Federal Rules that are otherwise valid under the [Rules Enabling] Act supersede inconsistent federal statutes . . . ."); *see infra* notes 56–58, 217–221 and accompanying text.

[7] *See, e.g.*, Burbank, *supra* note 4, at 1023–24; George H. Jaffin, *Federal Procedural Revision*, 21 VA. L. REV. 504, 515 (1935); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 945–47 (1987); Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 702–03 (1995).

state law in a number of instances.[8] When faced with a conflict between a congressional statute and a Federal Rule that incorporates state law, the federal courts have sometimes relied on a statute-Rule analysis of whether the federal statute supersedes the Federal Rule.[9] Here, the courts primarily have used a later in time or "implied repeal" analysis, which treats the statute and Rule as if both were statutes enacted by the same legislature, rather than inquiring first whether Congress and the Court stayed within permissible rulemaking spheres.[10] Federal courts have sometimes relied, instead, on an analysis of whether the federal statute preempts the state law incorporated in the Federal Rule, viewing the issue as a conflict of federal and state law.[11] Finally, the courts have sometimes relied on both analyses.[12]

These "later-in-time/implied repeal" and "preemption" analyses, however, both obscure the underlying issues of separation or allocation of power between Congress and the Supreme Court that should be the initial focus in resolving conflicts between a congressional statute and a Supreme Court Rule. These analyses should, therefore, be abandoned in favor of an analysis that focuses first on whether the Supreme Court and Congress stayed within their permissible rulemaking authority.

The "rulemaking authority" analysis that I apply in this Article, thus, focuses attention primarily on the potential clash of Congress's and the Court's authority to create procedure—a separation or allocation of power issue.[13] This focus, however, also indirectly protects federalism interests by

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[8] *See, e.g.*, FED. R. CIV. P. 4(e) (governing service of process); FED. R. CIV. P. 17(b) (governing capacity to sue); FED. R. CIV. P. 64, 69 (governing provisional and final remedies).

[9] *See infra* notes 43–51, 172 and accompanying text.

[10] *Id.*

[11] *See infra* note 173 and accompanying text.

[12] *See infra* notes 173–174 and accompanying text.

[13] I refer to the appropriate method of analyzing conflicts between congressional statutes and Federal Rules as the "rulemaking authority" analysis because, in this analysis, courts should first examine whether both Congress and the Supreme Court had authority to adopt the potentially conflicting statute and the Rule. If one of the rulemakers lacked authority, that should be the end of the analysis; the standard of the rulemaker with rulemaking power would control. If both have authority, then the courts should turn to the requirements of the supersession clause that the later-in-time controls. Courts, however, have frequently failed to examine whether Congress and the Supreme Court had rulemaking authority. *See, e.g.*, Genetin, *supra* note 4, at 726–51.

acknowledging the limits on rulemaking authority.[14] For example, under the Rules Enabling Act, the Supreme Court may not promulgate "substantive" Rules, but may only promulgate "procedural" Rules.[15] To the extent, then, that a proposed Rule is "substantive," only Congress can make prospective federal law, and, of course, Congress's laws must pass the substantial constitutional hurdles of bicameralism and presentment.[16] Additionally, the Supreme Court has stated that it will construe Federal Rules less expansively to avoid transgressing the "substantive" limit and other limitations on its authority to promulgate prospective Federal Rules.[17] A narrowed construction of the Court's rulemaking authority, taken to avoid a horizontal conflict of congressional and Court authority, however, has the additional, indirect effect of protecting state law and federalism interests: To the extent that the Supreme Court may not (or does not) act and Congress also does not act, state law (if any) controls.[18]

Confining each rulemaker to its appropriate rulemaking authority is not problematic. Congress has few restraints when acting to make procedure for the federal courts. It must only stay within constitutional limits.[19] The

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[14] *See* Burbank, *supra* note 4, at 1106, 1113–14; *see also* Stephen B. Burbank, *Of Rules and Discretion: The Supreme Court, Federal Rules and Common Law*, 63 NOTRE DAME L. REV. 693, 700 (1988) [hereinafter Burbank, *Of Rules and Discretion*].

[15] *See* 28 U.S.C. § 2072 (2000).

[16] *See, e.g.*, Burbank, *Of Rules and Discretion*, *supra* note 14, at 700–01 (noting that federalism interests are protected indirectly because the Rules Enabling Act substantive-procedural limitation "remit[s] to Congress the decision whether there shall be prospective federal law on 'substantive' matters and the content of that law").

[17] *See* Stephen B. Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1712–14, 1736–37 (2004); Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 442 (2000).

[18] *See, e.g.*, Burbank, *supra* note 17, at 1710–11; Burbank, *supra* note 4, at 1025–26, 1106–12; *see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1323–24 (2001). *But see* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 903–04 (1996) (contending that the Supreme Court is wrong in its federal common law jurisprudence, to the extent that it requires federal courts to defer to otherwise applicable state law because, when dealing with federal issues, "protection of state sovereignty diminishes as a relevant concern").

[19] *See, e.g.*, Burbank, *supra* note 17, at 1688; Genetin, *supra* note 4, at 685–88. As a prudential matter, however, commentators have suggested that Congress ought to play a limited role in enacting procedural rules to govern the federal courts. *See, e.g.*, Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 890 (1999); Stephen B. Burbank, *Procedure and Power*, 46 J. LEGAL

Supreme Court, when promulgating procedural Rules, takes on a prospective legislative function that is outside the federal courts' principal adjudicatory role; thus, it is not objectionable if the Supreme Court construes its prospective rulemaking authority in such a way as to ensure that it acts within its delegated role or even in a consciously self-limiting manner. Moreover, because the statute-Rule conflict presents a potential horizontal power issue, i.e., a conflict between law created by two branches of the federal government—the Congress and the Supreme Court—rather than a vertical clash of federal and state law, the preemption doctrine is inapplicable.[20] The inapplicability of the preemption doctrine matters because current preemption jurisprudence allows federal courts more authority to construe federal statutes broadly or purposively to effectuate unexpressed purposes of Congress and more readily to find a need for national uniformity than current separation or allocation of powers jurisprudence.[21]

Part II of this Article reviews why a rulemaking authority analysis that focuses on the horizontal clash of federal power, rather than the vertical federal-state preemption analysis, should control when resolving apparent conflicts between federal statutes and Federal Rules that incorporate state law.

Part III examines the split in federal court decisions and in methods of analysis in the conflict between provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and Federal Rule of Civil Procedure 17(b). This statute-Rule conflict centers on whether the CERCLA statute or state corporate codes, as incorporated into Federal Rule of Civil Procedure 17(b), define the length of time that a

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EDUC. 513, 516–17 (1996); Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1184 (1996); Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1684–87 (1995); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 844–46 (1991); Carl Tobias, *Some Realism About Federal Procedural Reform*, 49 FLA. L. REV. 49, 77–78 (1997).

[20] The Supremacy Clause has been construed as a choice of law provision that operates when federal and state law conflict. *See, e.g.*, Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2088 (2000); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 245–60 (2000). The Supremacy Clause, thus, would not be implicated in a clash of two federal laws.

[21] *See infra* Part IV.B. Thus, the statute-Rule conflict context provides another instance in which "questions of technique are [not] or should [not] be of concern only to academics, at least when the lawmaking powers of federal courts are concerned." Burbank, *Of Rules and Discretion*, *supra* note 14, at 705.

corporation remains liable for cleanup of hazardous substances after corporate dissolution. In virtually every case, the courts have relied on federal common law to determine the scope of the CERCLA statute, but courts have rarely acknowledged that reliance and have rarely focused on the increasingly narrow ability of federal courts to create federal common law.

Part IV applies the rulemaking authority analysis to the CERCLA-Rule 17(b) issue. It returns emphasis to whether the statute and Rule are, in fact, in conflict and whether they conflict in a way that implicates a deficit in the rulemaking authority of Congress or the Supreme Court. I conclude that there is no deficit in rulemaking authority. Indeed, the practical contribution of the rulemaking authority analysis in this instance is its illumination that the preemption analysis is inapplicable (since a conflict between two types of federal law—federal statute and Federal Rule—cannot create a conflict between federal and state law).[22] I also conclude, contrary to the majority of courts to reach the issue, that state law corporate capacity requirements should control. This conclusion, however, is not a function of use of the rulemaking authority analysis. Instead, the change results from applying the current jurisprudence restricting the federal courts' authority in statutory interpretation and in creating federal common law.[23] In other words, the federal courts' current powers in statutory construction and federal common lawmaking are less than the powers that were.

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[22] Use of the correct analysis is important in any situation in which the issue focuses on determining the authority of the federal courts vis-à-vis Congress. It happens in this instance, and probably in many instances, that Congress, which enacted CERCLA after the Supreme Court promulgated Rule 17(b), did not exceed its rulemaking authority. A statute determining the length of corporate capacity after dissolution for a particular statutory scheme would neither violate a constitutional provision, nor unconstitutionally abridge the ability of courts to act as courts. Thus, even if the statute and Rule were to conflict, Congress's statute, which is within Congress's broad rulemaking authority, will control. Using a shorthand analysis that skips steps in the statute-Rule analysis, however, can lead to critical omissions or mistakes, such as not determining when one of the rulemakers exceeds its rulemaking authority or, as in the CERCLA-Rule 17(b) inquiry, not determining that the clash of the CERCLA statute and Rule 17(b) constitutes a clash of two sources of federal law and, thus, precludes preemption analysis.

[23] *See infra* notes 241–268 and 306–345. *But see* Ronald H. Rosenberg, *The Ultimate Independence of the Federal Courts: Defying the Supreme Court in the Exercise of Federal Common Law Powers*, 36 CONN. L. REV. 425, 433 (2004) (suggesting that in the context of CERCLA successor liability issues, the lower federal courts have "largely ignored the Supreme Court's direction" to limit federal common lawmaking).

In short, the inapplicability of the preemption doctrine matters. Indeed, the changed result that I foresee in the resolution of the apparent clash of CERCLA and Rule 17(b) reflects what Professor Meltzer has characterized as a "selective judicial passivity" in subconstitutional decision-making.[24] This selective judicial passivity constricts the role of federal courts in some decision-making, including statutory interpretation and federal common lawmaking (the types that are necessary to resolve the CERCLA-Rule 17(b) conflict), but not in other decision-making, such as preemption analysis.[25] A continued narrowing of the role of the federal judge in adjudicating cases to relying primarily on the intent of Congress as expressed in the text of the statute may ultimately mean that the Supreme Court has more power under its delegated authority to create prospective Federal Rules governing procedure for the federal courts than federal courts have in their principal adjudicatory role when construing federal statutes.[26]

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[24] Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 SUP. CT. REV. 343, 343, 345–57 (2002); *see also* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 226, 230, 232–34, 236–37 (2003) (narrowed authority regarding implied causes of action and equitable remedies); Rosenberg, *supra* note 23, at 430, 442 (the restricted federal common law analysis reflects a more limited view of the legitimate role of federal courts as lawmakers).

[25] *See, e.g.*, Meltzer, *supra* note 24, at 362–68; *see also* Resnik, *supra* note 24, at 246. Additionally, a number of commentators have noted an expanded authority to overturn state law when construing federal statutes in the preemption context. *See, e.g.*, Richard C. Ausness, *Preemption of State Tort Law by Federal Safety Statutes: Supreme Court Preemption Jurisprudence Since* Cipollone, 92 KY. L.J. 913, 967–68 (2004); Mary J. Davis, *On Preemption, Congressional Intent, and Conflict of Laws*, 66 U. PITT. L. REV. 181, 182–83 (2004) [hereinafter Davis, *On Preemption*]; Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C. L. REV. 967, 968–72 (2002) [hereinafter Davis, *Unmasking the Presumption*]; Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 436, 438, 502–12 (2002) [hereinafter Massey, *Federalism*]; Calvin Massey, *"Joltin' Joe Has Left and Gone Away": The Vanishing Presumption Against Preemption*, 66 ALB. L. REV. 759, 759 (2003) [hereinafter Massey, *Vanishing Presumption*]; David G. Owen, *Federal Preemption of Products Liability Claims*, 55 S.C. L. REV. 411, 414–15 (2003); Susan Raeker-Jordan, *The Pre-Emption Presumption that Never Was: Pre-Emption Doctrine Swallows the Rule*, 40 ARIZ. L. REV. 1379, 1382–83 (1998) [hereinafter Raeker-Jordan, *The Pre-Emption Presumption that Never Was*]; Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did* Geier v. American Honda Motor Co. *Eradicate the Presumption Against Preemption?*, 17 BYU J. PUB. L. 1, 27–30 (2002) [hereinafter Raeker-Jordan, *Sleight of Hand*]. *But see* Jean Macchiaroli Eggen, *Shedding Light on the Preemption Doctrine in Product Liability Actions: Defining the Scope of* Buckman *and* Sprietsma, 6 DEL. L. REV. 143, 155, 168–69 (2003).

[26] After promulgating the Federal Rules, however, the Court's power may again diminish, as evidenced in the on-going debate over whether the Court should use a more dynamic approach to

II. THE RULEMAKING AUTHORITY ANALYSIS APPLIES WHEN A CONGRESSIONAL STATUTE CONFLICTS WITH A FEDERAL RULE THAT INCORPORATES STATE LAW

Subpart II.A of this Article traverses the familiar terrain of Congress's and the Supreme Court's authority in procedural rulemaking for the federal courts. It reviews why the rulemaking authority analysis for resolving apparent statute-Rule conflicts should replace the implied repeal analysis traditionally used by federal courts. Subpart II.B then explains that a conflict between a federal statute and a Federal Rule that incorporates state law involves a clash of two varieties of federal law. The rulemaking authority analysis, which analyzes statute-Rule conflicts as clashes between two branches of the federal government, therefore, supplies the appropriate analysis.

A. The "Rulemaking Authority" Analysis for Resolving Conflicts Between Federal Statutes and Federal Rules

The Supreme Court has acknowledged in a number of cases that Congress has authority to regulate the procedure of the federal courts based on Congress's powers under Articles I and III of the United States Constitution to create inferior federal courts and to enact laws necessary and proper to the execution of the powers expressly vested in Congress.[27] Although never addressing the scope of its rulemaking authority in detail,[28]

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interpreting the Federal Rules or should be constrained by the text of the promulgated Rule and the accompanying Advisory Committee Notes. *Compare* Karen Nelson Moore, *The Supreme Court's Role in Interpreting the Federal Rules of Civil Procedure*, 44 HASTINGS L.J. 1039, 1047–53 (1993) (suggesting that the Court use an active or dynamic interpretation of the procedural Rules it promulgates), *with* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1103–09 (2002) (contending that the text of the Rules constrains the Supreme Court and that changes to Rules should be made through the rulemaking process).

[27] Article I provides that Congress may "constitute Tribunals inferior to the [S]upreme Court." *See* U.S. CONST. art. I, § 8, cl. 9. Article III vests the "judicial Power of the United States" in one Supreme Court and "in such inferior Courts as the Congress may from time to time ordain and establish." *Id.* art. III, § 1. Article I also permits Congress to do that which is necessary and proper to execute the powers vested in Congress. *See Id.* art. I, § 8, cl. 18. *See, e.g.*, Mistretta v. United States, 488 U.S. 361, 386–88 (1989); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41–43 (1825); *see also* Burbank, *supra* note 17, at 1681–82; Burbank, *supra* note 4, at 1021 n.19, 1114–16; Whitten, *supra* note 4, at 48–50.

[28] Burbank, *supra* note 17, at 1682–83; Whitten, *supra* note 4, at 48–50.

the Supreme Court has consistently acknowledged that its authority is based principally on Congress's delegation to the Supreme Court of this congressional rulemaking authority.[29]

Congress's current delegation of authority to the Supreme Court to promulgate procedural Rules is set forth in the Rules Enabling Act, as amended in 1988 by the Judicial Improvements and Access to Justice Act.[30] As a practical matter, the Supreme Court plays a limited role in the rulemaking process under the Rules Enabling Act. The Judicial Conference takes a lead role, aided by a Standing Committee and separate advisory committees on the civil rules, criminal rules, appellate rules, bankruptcy rules, and evidentiary rules.[31] After a Rule or amendment is approved by the Judicial Conference, it is submitted to the Supreme Court, which has seven months to approve, veto, or modify it.[32] After approval, the Supreme Court submits the Rule or amendment to Congress, which, likewise, has seven months to approve, delay, modify, or veto a proposed Rule or amendment.[33] Unless Congress takes affirmative action, the proposed Rule takes effect on December 1 of the year in question.[34] Thus, the Rules Enabling Act process permits the Supreme Court to promulgate Rules subject to Congress's authority to delay, modify, or veto the Rules. Congress can also enact its own legislation in lieu of the Supreme Court's Rules. Since 1973, Congress has taken each of these steps, thus reinforcing its authority as a procedural rulemaker for the federal courts.[35]

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[29] *See, e.g.*, *Mistretta*, 488 U.S. at 386–88; *Wayman*, 23 U.S. (10 Wheat.) at 41–43; Burbank, *supra* note 17, at 1681–86. A minority of commentators have contended, to the contrary, that the Supreme Court's authority to promulgate rules of procedure originates from its inherent power. *See, e.g.*, Abraham Gertner, *The Inherent Power of Courts to Make Rules*, 10 U. CIN. L. REV. 32 (1936); Mullenix, *supra* note 19, at 834; Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1297–98 (1993); John H. Wigmore, *All Legislative Rules for Judiciary Procedure Are Void Constitutionally*, 23 ILL. L. REV. 276, 277 (1928).

[30] 28 U.S.C. §§ 2072–2074 (2000). The Supreme Court has also consistently held that Congress may delegate to the Supreme Court the power to create procedural rules for the federal courts. *See, e.g.*, *Mistretta*, 488 U.S. at 386–88; Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941); *Wayman*, 23 U.S. (10 Wheat) at 21–22.

[31] *See* McCabe, *supra* note 19, at 1664–73; *see also* Struve, *supra* note 26, at 1103–04.

[32] McCabe, *supra* note 19, at 1673; Struve, *supra* note 26, at 1104.

[33] McCabe, *supra* note 19, at 1673; Struve, *supra* note 26, at 1104.

[34] McCabe, *supra* note 19, at 1673; Struve, *supra* note 26, at 1104.

[35] In 1973, Congress blocked the Supreme Court's proposed Federal Rules of Evidence, believing that the proposed Rules were substantive rather than procedural. Congress ultimately

In addition to establishing the process for Rule promulgation, the Rules Enabling Act also limits the Supreme Court's rulemaking authority. The Supreme Court may promulgate Rules, in accord with the Rules Enabling Act, as long as the Rules are "procedural" rather than "substantive."[36] This statutory substantive-procedure limitation of the Rules Enabling Act is narrower than the separation of powers dividing line.[37]

Also of importance in resolving statute-Rule conflicts is that Congress included in the original Rules Enabling Act of 1934 a "supersession" clause that permitted the Federal Rules promulgated by the Supreme Court to supersede existing, conflicting congressional enactments. The supersession clause has been retained by Congress and currently provides as follows: "All laws in conflict with [Federal Rules promulgated by the Supreme Court] shall be of no further force or effect after such rules have taken

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substituted its own statutory version of the Federal Rules of Evidence. The year 1973 is often seen as a watershed year, after which Congress began to use its rulemaking authority more often. *See* Burbank, *supra* note 17, at 1695–1706; *see also* Genetin, *supra* note 4, at 694–700; Moore, *supra* note 26, at 1053–61.

[36] The Rules Enabling Act provides, in pertinent part, as follows:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right.

28 U.S.C. § 2072 (2000).

[37] *See* Burbank, *supra* note 4, at 1114–15; *see also* Whitten, *supra* note 4, at 45–46 (noting that the Rules Enabling Act and the Constitution establish independent limitations on rulemaking). A series of scholarly articles underscores the difficulty in determining whether a Federal Rule has substantive effect and, thus, transgresses this substantive-procedural limitation. *See, e.g.*, Bone, *supra* note 19, at 892–93, 899–902; Burbank, *supra* note 4, at 1113–16; Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 *passim* (1989). Indeed, in a House of Representatives Committee Report regarding the predecessor to the 1988 Judicial Improvements and Access to Justice Act, through which Congress amended the Rules Enabling Act, the House of Representatives took pains to stress that the proposed amended version of the Rules Enabling Act would not delegate Congress's full procedural authority to the Supreme Court. *See, e.g.*, Stephen B. Burbank, *Hold the Corks: A Comment on Paul Carrington's "Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 1012, 1033–36 (1989) [hereinafter Burbank, *Hold the Corks*]. Because this purported limitation was discussed in a Committee Report, but no change was made in the statutory language, it is not clear that the 1988 amendments to the Rules Enabling Act put additional limitations on the Supreme Court's procedural rulemaking authority. *See, e.g.*, Moore, *supra* note 26, at 1047–49; Burbank, *Hold the Corks*, *supra*, at 1029–36.

effect."[38] This supersession clause was the subject of intense controversy when included in the bill[39] and when the original Federal Rules of Civil Procedure were presented to Congress for approval in 1937.[40] The issues regarding the propriety of Supreme Court Rules superseding congressional statutes remain. When Congress amended the Rules Enabling Act in 1988, it retained the supersession clause only over objection from the House of Representatives that the provision had served its purposes—conflicting federal statutes had been repealed and Congress today legislates with knowledge of the Federal Rules.[41] Moreover, permitting Federal Rules, under the authority of the supersession clause, to repeal federal statutes might violate the constitutional requirements of presentment and bicameralism by permitting Rules promulgated by the Supreme Court to supersede laws enacted by Congress without meeting the requirements of presentment and bicameralism.[42] It is, in fact, the supersession clause, and

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[38] *See,* 28 U.S.C. § 2072(b). The text of the supersession provision creates what has been referred to as an "express general repealing" clause. *See* 1A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION, § 23:8 (6th ed. 2002). The clause is considered "express" because it is set forth in a statute and "general" because it does not list the repealed provisions. *Id.* It incorporates the principles of the implied repeal canon of statutory construction because it provides that if an irreconcilable conflict arises, the provision that is later in time will control. *Id.* Professor Burbank has related that Congress added the supersession clause to the Rules Enabling Act to serve two purposes: (1) to permit the Conformity Act to continue to control federal procedure in the period after the enactment of the Rules Enabling Act and lasting until the first Federal Rules were promulgated and (2) to quiet concerns that the Court did not have the power to "repeal" prior, conflicting federal statutes. *See* Burbank, *supra* note 4, at 1050–54; Charles E. Clark, *Power of the Supreme Court to Make Rules of Appellate Procedure*, 49 HARV. L. REV. 1303, 1310 (1936); *see also* Clinton v. City of New York, 524 U.S. 417, 446 n.40 (1998).

[39] Burbank, *supra* note 4, at 1052–53.

[40] After the original Federal Rules had been drafted and presented to Congress, House Bill 8892 was introduced in Congress to eliminate the proposed Federal Rules and return to procedure under the Conformity Act. *See* H.R. 8892, 75th Cong. (3d Sess. 1938); *see also* Henry P. Chandler, *Some Major Advances in the Federal Judicial System*, 31 F.R.D. 307, 506 (1963). Moreover, Senate Joint Resolution 281 was introduced in the Senate seeking to delay the effective date of the proposed Federal Rules so that Congress could study the proposed Rules and any potentially conflicting federal statutes. *See* Chandler, *supra*, at 509. The purpose of the proposed delay was to obviate the anticipated difficulty for courts in determining which statutes were to be superseded, to permit a clear statement of which statutes would be superseded and to permit more time to determine if some Rules had an impermissible substantive effect. *Id.* at 509–11. Ultimately, neither House Bill 8892 nor Senate Resolution 281 was approved.

[41] Burbank, *Hold the Corks*, *supra* note 37, at 1037–38.

[42] *See, e.g.*, Burbank, *Hold the Corks*, *supra* note 37, at 1038–43. In *Clinton v. City of New York*, however, the Supreme Court indicated that no such problems arise since the Rules Enabling

the authority that clause provides for Federal Rules to supersede existing, conflicting federal statutes, that creates the potential for clashes of interbranch authority when federal statutes and Rules conflict.

The federal courts have traditionally resolved statute-Rule conflicts under the supersession clause in accord with the later-in-time analysis of the canon of statutory interpretation that disfavors implied repeal of existing statutes.[43] Thus, under the supersession clause, courts have permitted a

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Act, which was subject to presentment and bicameralism requirements, authorized the Supreme Court's later Rules to supersede inconsistent and preexisting legislation. 524 U.S. at 446 n.40. The remaining issue, then, regarding application of the supersession provision is whether the Supreme Court will be sensitive to whether Federal Rules exceed rulemaking authority, particularly, whether the Federal Rules have substantive impact. As to this issue, the Supreme Court's record has been mixed. *Compare* Carrington, *supra* note 37, at 325 (applauding the retention of the supersession clause and asserting that the clause will supersede only Rules that are not "arguably substantive"), *with* Burbank, *Hold the Corks*, *supra* note 37, at 1036–43 (suggesting that rulemakers do not abide by the substantive limitation in the Rules Enabling Act). Recent indications, however, are that the Court is taking pains to honor the substantive rights limitation on its rulemaking authority. Indeed, in a 2004 article, Professor Burbank has noted that, over the past decade, Court rulemakers have exhibited "increased self-discipline" and that the rulemakers have "by and large, taken seriously the Chief Justice's assurance to Congress that they would observe the Enabling Act's limitations." Burbank, *supra* note 17, at 1713–14, 1736; *accord* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001). In *Semtek International*, the Court declined to adopt a particular construction of Federal Rule of Civil Procedure 41(b) that "would arguably violate the jurisdictional limitation of the Rules Enabling Act: that the Rules 'shall not abridge, enlarge or modify any substantive right'" and also cited *Ortiz v. Fibreboard Corp.* as adopting a "limiting construction" of Federal Rule of Civil Prcocedure 23(b)(1)(B) to avoid "'potential conflict with the Rules Enabling Act, and [to] avoi[d] serious constitutional concerns.'" *Id.* at 503 (quoting 28 U.S.C. § 2072(b); Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999)).

[43] *See, e.g.*, Genetin, *supra* note 4, at 701–03. Some courts have relied on the language of the supersession clause to support the implied repeal analysis. The following cases rely at least in part on the language of the supersession provision as creating a later-in-time analysis for resolving statute-Rule conflicts. *See, e.g.*, Henderson v. United States, 517 U.S. 654, 668–69 (1996); Penfield Co. v. SEC, 330 U.S. 585, 589–90 n.5 (1947); United States v. Goodall, 236 F.3d 700, 707–08 (D.C. Cir. 2001) (Randolph, J., concurring); Callihan v. Schneider, 178 F.3d 800, 802–03 (6th Cir. 1999); United States v. Microsoft Corp., 165 F.3d 952, 958–60 (D.C. Cir. 1999); Jackson v. Stinnett, 102 F.3d 132, 135–36 (5th Cir. 1996). Some cases rely in whole or in part on an analogy to the canon disfavoring implied repeals. *See, e.g.*, Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987); S. Nat'l Gas Co. v. Land, Cullman County, 197 F.3d 1368, 1373–75 (11th Cir. 1999); *Callihan*, 178 F.3d at 802–03; Baugh v. Taylor, 117 F.3d 197, 200 (5th Cir. 1997); *Jackson*, 102 F.3d at 135–36. Sometimes the courts use both rationales. *See, e.g.*, *Callihan*, 178 F.3d at 802–03; *Jackson*, 102 F.3d at 135. For additional cases using each method of analysis, see Genetin, *supra* note 4, at 701–03 nn.121–27.

later-promulgated Federal Rule to supersede existing federal statutes to the extent that there was an irreconcilable conflict between the two.[44] I have referred to this traditionally used method of analyzing statute-Rule conflicts as the "implied repeal" analysis because the courts have typically incorporated or analogized to the principles of the canon of statutory construction disfavoring implied repeal of statutes, thus treating statute and Rule as though they were statutes of the same lawgiver and ignoring issues of conflicting Court and congressional rulemaking power.[45] Occasionally, but not as a general rule, a court would inquire into whether a Federal Rule violated the substantive rights limitation of the Rules Enabling Act before or after addressing the implied repeal analysis.[46]

The implied repeal canon emphasizes that implied repeals (as opposed to express repeals) are disfavored.[47] Because implied repeals are

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[44] *See* Genetin, *supra* note 4, at 704. *See also Crawford Fitting Co.*, 482 U.S. at 445; *Microsoft*, 165 F.3d at 958–60; *Callihan*, 178 F.3d at 802–03; Floyd v. U.S. Postal Serv., 105 F.3d 274, 278 (6th Cir. 1997), *superseded by Rule*, FED. R. APP. P. 24, *as recognized in Callihan*, 178 F.3d at 801; *Baugh*, 117 F.3d at 200–01; *Jackson*, 102 F.3d at 136; Autoskill Inc. v. Nat'l Educ. Support Sys., Inc., 994 F.2d 1476, 1485 (10th Cir. 1993); Grossman v. Johnson, 674 F.2d 115, 122–23 (1st Cir. 1982); *see also* 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 1.06 (Daniel R. Coquillett et al. eds., 3d ed. 2001); 13 *id.* § 68.08[4][c]; 4 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1030 (3d ed. 2002). Of course, Congress does not need to create an irreconcilable conflict to supersede a Federal Rule. Congress can also (1) establish clear intent to supersede or (2) create a pervasive statutory scheme that would be impaired by otherwise applicable Federal Rules. *See, e.g.*, Robbins v. Pepsi-Cola Metro. Bottling Co., 800 F.2d 641, 642–43 (7th Cir. 1986) (per curiam).

[45] *See* Genetin, *supra* note 4, at 701–05, 737–38. Occasionally, courts have analyzed a potential statute-Rule conflict primarily as a matter of allocation of rulemaking authority and appropriate exercise of that authority, as I advocate in the rulemaking authority analysis. For notable exceptions to the traditional implied repeal analysis in which courts examined at least the substantive rights limitation of the Rules Enabling Act, see Durant v. Husband, 28 F.3d 12, 15 (3d Cir. 1994); *Autoskill, Inc.*, 994 F.2d at 1482–85; Chesny v. Marek, 720 F.2d 474, 478–79 (7th Cir. 1983) (Posner, J.), *rev'd* 473 U.S. 1 (1985). *See also* 1 MOORE ET AL., *supra* note 44, at § 1.05[2][a], [b], [c] (The Supreme Court's Rules are invalid as exceeding rulemaking authority if the Rules "abridge, enlarge, or modify substantive rights" or impermissibly extend or limit jurisdiction or venue); 4 WRIGHT & MILLER, *supra* note 44, at § 1030.

[46] *See, e.g.*, *Durant*, 28 F.3d at 15; *Autoskill, Inc.*, 994 F.2d at 1482–85; *Marek*, 720 F.2d at 478–79; *see also Crawford Fitting Co.*, 482 U.S. at 440–42 (stating that the Rule at issue "embodie[d] Congress's considered choice" and interpreting the Federal Rule to incorporate the statute).

[47] *See, e.g.*, Radzanower v. Touche Ross & Co., 426 U.S. 148, 154 (1976) (quoting United States v. United Cont'l Tuna Corp., 425 U.S. 164, 168 (1976)); Morton v. Mancari, 417 U.S. 535, 549–50 (1974) (citing Posadas v. Nat'l City Bank, 296 U.S. 497, 503 (1936)); *see also* Karen

disfavored, the implied repeal canon requires that courts should harmonize two apparently conflicting provisions unless (1) there is clear intent to repeal;[48] or (2) the conflict between the two provisions is "irreconcilable," i.e., the two provisions, even under a strained interpretation, cannot coexist.[49] If two statutes are capable of coexisting (and there is no clear congressional intent to repeal), courts must give effect to both provisions even if the harmonization creates a strained interpretation of the provisions.[50] Only if the conflict is irreconcilable does the later provision impliedly repeal the earlier and, then, only to the extent necessary to avoid the irreconcilable conflict.[51]

The "rulemaking authority" analysis, by contrast, emphasizes that focusing first on time of promulgation or enactment of apparently conflicting statute and Rule and applying or analogizing to the canon of statutory interpretation disfavoring implied repeal, is inappropriate because the potentially conflicting laws are created by different lawmakers which have differing authority. Congress's authority in enacting procedural law to govern the federal courts is virtually unqualified, yielding only if Congress's standard alters a constitutional requirement or diminishes core judicial powers in violation of separation of powers.[52] The authority of the Supreme Court, which is the lead rulemaker, however, is more constrained. The Supreme Court may not, for example, create Rules that violate the substantive rights prohibition of the Rules Enabling Act,[53] may not create

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Petroski, Comment, *Retheorizing the Presumption Against Implied Repeals*, 92 CAL. L. REV. 487, 488–89 (2004).

[48] *See, e.g.*, *Morton*, 417 U.S. at 550–51.

[49] *Radzanower*, 426 U.S. at 154–55; *Posadas*, 296 U.S. at 503–05; *see generally* SINGER, *supra* note 38, § 23.9, at 457–80. The following cases also illustrate the general preference of courts to choose a harmonizing construction when a statute and Federal Rule conflict. *See, e.g.*, *Crawford Fitting Co.*, 482 U.S. at 442; *Baugh*, 117 F.3d at 200–01; United States v. Gustin-Bacon Div., Certainteed Prods. Corp., 426 F.2d 539, 542 (10th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970).

[50] *See* SINGER, *supra* note 38, § 23.9, at 457–80; *accord* Nelson, *supra* note 20, at 255 (2000) (discussing preemption analysis and the Supremacy Clause as incorporating the canon disfavoring implied repeal).

[51] *Morton*, 417 U.S. at 551; *Radzanower*, 426 U.S. at 155; *accord* SINGER, *supra* note 38, § 23.9, at 457–80.

[52] Burbank, *supra* note 17, at 1688, 1706; Genetin, *supra* note 4, at 685–88.

[53] *See, e.g.*, Bone, *supra* note 19, at 892–93; Burbank, *supra* note 4, at 1113–16; *accord* 1 MOORE ET AL., *supra* note 44, at § 1.05[2][a], [b]; 4 WRIGHT & MILLER, *supra* note 44, at § 1030.

rules that violate separation of powers principles and intrude in areas committed to exclusive congressional procedural rulemaking,[54] and may not create Rules that impact in an area in which Congress has partially or wholly removed Court rulemaking authority.[55]

Because of the differing rulemaking authority of Congress and the Supreme Court, the rulemaking authority analysis focuses first on whether the apparently conflicting federal statute and Federal Rule are within the rulemaking competence of Congress and the Supreme Court.[56] The initial question becomes *whose* standard should apply–Congress's statute or the Supreme Court's Rule—rather than which standard of conflicting provisions of the same lawgiver should control.[57] Under the rulemaking

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[54] *See, e.g.*, Whitten, *supra* note 4, *passim*; Genetin, *supra* note 4, at 739–41; *accord* 1 MOORE ET AL., *supra* note 44, at § 1.05[2][c].

[55] *See, e.g.*, Genetin, *supra* note 4, at 741–46.

[56] If the provisions do not conflict, both survive. *See, e.g.*, Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 542 (1984); United States v. Microsoft Corp., 165 F.3d 952, 958–60 (D.C. Cir. 1999); Baugh v. Taylor, 117 F.3d 197, 200–02 (5th Cir. 1997) (the congressional relocation of a provision to new subsection of statute did not create conflict with Federal Rule of Appellate Procedure 24(a)); Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995) (CERCLA and Rule 17(b) do not conflict); Benjamin v. Jacobson, 935 F. Supp. 332, 343–44 (S.D.N.Y. 1996), *aff'd in part and rev'd in part*, 124 F.3d 162 (2d Cir. 1997), *vacated on reh'g en banc*, 172 F.3d 144 (2d Cir. 1999), *cert denied*, Benjamin v. Kerik, 528 U.S. 824 (1999). If there is a conflict, and if one of the rulemakers also lacked rulemaking authority in the specific context, then only the provision of the rulemaker with competence would survive. In such cases, the provision of one rulemaker must yield to a conflicting provision of the other because of a lack of rulemaking power. *See, e.g.*, Durant v. Husband, 28 F.3d 12, 14–15 (3d Cir. 1994); Chesny v. Marek, 720 F.2d 474, 479–50 (7th Cir. 1983), *rev'd*, 473 U.S. 1 (1985).

[57] *See, e.g.*, Genetin, *supra* note 4, at 726–28. When courts use the canon disfavoring implied repeals, however, the issues of allocation and exercise of the shared procedural rulemaking power, which should be the focus in determining whether a conflicting congressional statute or Supreme Court Rule controls, are often subordinated or omitted altogether. The potential for subordination of issues of rulemaking authority when using an implied repeals analysis is especially critical today since the Supreme Court remains the lead procedural rulemaker, but Congress has increased its use of its procedural rulemaking authority and has certainly reestablished its authority in the area. *See, e.g.*, Burbank, *supra* note 17, at 1695–1706 (discussing congressional power in rulemaking). Commentators have generally criticized congressional involvement in procedural rulemaking on prudential, rather than power, grounds, including Congress's inattention to neutrality, thoroughness, or coherence of the Federal Rules as a whole and ignoring of federal court expertise. *See, e.g.*, Edward D. Cavanagh, *The Civil Justice Reform Act of 1990: Requiescat in Pace*, 173 F.R.D. 565, 599–600 (1997); Geyh, *supra* note 19, at 1184; McCabe, *supra* note 19, at 1684–87; Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WIS. L. REV. 993, 1023–33 (1998); Jeffrey W. Stempel, *New*

authority analysis, moreover, courts should determine whether there is a clash of congressional and Court rulemaking authority without the obligation to attempt to harmonize the provision that is the touchstone of implied repeal construction.[58]

Harmonization is not appropriate because the presumption to harmonize, if two provisions can coexist, or choose the latter if the provisions cannot coexist, was not created to "achieve an appropriate allocation of the shared procedural rulemaking authority between Congress and the Supreme Court,"[59] but to provide an accommodation between conflicting laws of the same lawgiver. Thus, as Professor Caleb Nelson has noted in the preemption context, a presumption to harmonize is not entitled to the same force when the potentially conflicting laws are created by different lawgivers.[60] Instead, courts should carefully examine the

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Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 BROOK. L. REV. 659, 731 (1993); Tobias, *supra* note 19, at 77–78. Thus, it is generally perceived as prudent for the Supreme Court to pay attention to its limitations in rulemaking, and there is evidence that the Court is doing just that. *See, e.g.*, Burbank, *supra* note 17, at 1713–14, 1736–37; Kelleher, *supra* note 17, at 442. Further, calls for congressional-Court cooperation in rulemaking or shared rulemaking abound. *See, e.g.*, Bone, *supra* note 19, at 890; Burbank, *supra* note 19, at 516–17; Burbank, *supra* note 17, at 1737–43; Geyh, *supra* note 19, at 1234–36, 1247–48.

[58] Indeed, if a presumption is applicable at all, it would be a presumption to construe the provisions so as not to find that one of the rulemakers lacked power. This would mean that the courts might use differing presumptions or background assumptions based on the nature of the potential conflict of rulemaking authority. For instance, when a statute that conflicts with a Rule could be construed to impair constitutional requirements included in a Rule or to diminish core judicial powers in violation of separation of powers, a court might, in accord with the canon of constitutional doubt, interpret the statutory provision to avoid such a construction if possible. *See* Miller v. French, 530 U.S. 327, 336–41 (2000). Similarly, if the Federal Rule that clashes with a federal statute appears to abridge substantive rights in violation of the Rules Enabling Act, the court might, if consistent with the context of statute and Rule, prefer a construction in which the Federal Rule would not impermissibly impact substantive rights. *See, e.g.*, Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 503–04 (2001) (citing Ortiz v. Fibreboard Corp., 527 U.S. 815, 842 (1999)); Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 96–97 (1991); *Fox*, 464 U.S. at 544 n.2 (Stevens, J., concurring). Additionally, when a congressional statute might be construed to remove wholly or partially the Supreme Court's rulemaking authority under the Rules Enabling Act, a court might interpret the intersection of statute and Rule to preserve Court rulemaking authority if possible. *See* Genetin, *supra* note 4, at 741–46.

[59] *See* Genetin, *supra* note 4, at 722–26.

[60] *See* Nelson, *supra* note 20, at 255. The reduced force of the presumption to harmonize is important in the statute-Rule conflict scenario, in which Congress has questioned the Supreme

provisions of Congress and the Supreme Court to determine the intent of each rulemaker. An analysis, like that of implied repeal, which is based solely or primarily on time of enactment, necessarily obscures issues regarding whether either Congress or the Supreme Court lacked rulemaking power or whether either rulemaker intended to create a conflict: The provisions are harmonized, or if harmonization is not possible, the provision that is later in time prevails.

From the beginning, the metaphor of implied repeal was questioned when applied to conflicting provisions of the Supreme Court and Congress. How, legislators wondered, could enacted statutes of Congress be repealed by a Supreme Court Rule that was not subject to the constitutionally required bicameralism and presentment requisites for federal legislation? Ultimately, the legislators accepted an analysis that Congress was, by enactment of the Rules Enabling Act, which itself was subject to bicameralism and presentment, pre-authorizing the Supreme Court to take subsequent action to repeal congressional legislation regarding procedure.[61] This analysis resolved the issues of bicameralism and presentment, but it did not address the issue of potential conflict in rulemaking power. Indeed, because the analysis of implied repeal was imported into the Rules Enabling Act at a time when the Court and Congress shared a view of the Court's broad rulemaking authority and its superiority in rulemaking, the issue of power was, for nearly forty years, simply unimportant.[62] Since 1973 and the clash over enactment of the Rules of Evidence, however, Congress has reestablished its role as a procedural rulemaker or at least its authority in procedural rulemaking.[63] The rulemaking authority analysis, thus, serves two important roles. First, it requires issues of rulemaking authority to be addressed first and fully. Second, the rulemaking authority analysis returns to time of enactment the same function it serves in resolving conflicts between two statutes of Congress: when there is a conflict of statute and Rule that does not involve issues of power, e.g., both lawgivers have rulemaking authority, then the provision that is later in time will control.[64]

Court's adherence to the substantive-procedural dividing line between Court and congressional authority.

[61] *See, e.g.*, Burbank, *supra* note 4, at 1052–54; Whitten, *supra* note 4, at 66–68; *see also* Clinton v. City of New York, 524 U.S. 417, 446 n.40 (1998).

[62] *See* Genetin, *supra* note 4, at 751.

[63] *See supra* text accompanying note 35.

[64] *See* Genetin, *supra* note 4, at 727.

This analysis does not necessarily change the results in previous cases addressing statute-Rule conflicts. When both Congress and the Court acted within their rulemaking competence, the result should be the same.[65]

As subpart I.B reveals, this rulemaking authority analysis, rather than a preemption analysis, applies to apparent conflicts between a congressional statute and a Federal Rule that incorporates state law.

B. The Rulemaking Authority Analysis Should Apply to Apparent Clashes Between a Statute and a Federal Rule that Incorporates State Law

The same rulemaking authority analysis, which focuses first on the allocation of power between Congress and the Supreme Court, should apply when a federal statute clashes with a Federal Rule that incorporates state law. Statute-Rule conflicts in which the Federal Rule incorporates state law are simply a subset of the general category of statute-Rule conflicts. They do not create conflicts of federal and state law.

Although courts often consider applying a preemption analysis to determine whether the federal statute preempts the state law incorporated into the Federal Rule, a preemption analysis is inappropriate. No principle of federalism requires the Supreme Court to incorporate state law as the governing procedural law in the Federal Rules of Civil Procedure.[66] Instead, the Supreme Court has held that Congress's authority to create procedural law governing the federal courts derives from a combination of Congress's Article III power to create lower federal courts and Congress's

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[65] Other factors, however, may change and thus impact the result. In the CERCLA-Rule 17(b) conflict, for example, I conclude that there is no issue of lack of rulemaking authority. The increasing restrictions on the federal courts' ability to construe a statute or to create federal common law absent textual direction of Congress, however, leads to the conclusion that the CERCLA statute, while controlling, should not be construed in as expansive a manner as the majority of courts have done previously. *See infra* text accompanying notes 241–268 and 306–345.

[66] The doctrine of *Erie R.R. Co. v. Tompkins* will require that, in some diversity cases, state law will control over the contrary federal standard. 304 U.S. 64, 72–73 (1938). When a state law conflicts with a Federal Rule in a diversity case, however, the inquiry under *Hanna v. Plumer* is much less searching than when state law conflicts with a federal practice or federal common law. 380 U.S. 460, 471–74 (1965). *Erie* issues, moreover, will not arise in instances of statute-Rule conflict discussed in this Article. In this Article, I posit a Federal Rule promulgated by the Supreme Court that appears to conflict with a congressional statute, not with a state law. These statute-Rule conflicts will arise in the context of the federal courts' federal question jurisdiction.

Article I authority under the Necessary and Proper Clause to do all that is necessary to effectuate express powers.[67] The Supreme Court further emphasized that its procedural rulemaking authority (although augmented by the Court's inherent rulemaking authority) derives primarily from Congress's delegation to the Supreme Court of Congress's legislative authority to make procedural rules.[68] Thus, the Supreme Court's authority to promulgate Rules regarding procedure to be followed in the federal courts also derives, by delegation, from Congress's authority under the United States Constitution to make procedural law governing the federal courts or from the Court's inherent authority.[69]

Before the Rules Enabling Act, Congress required, under the Conformity Act,[70] that each federal district court conform its procedure "as near as may be" to the procedure of the state in which the district court was located except when there existed a contrary federal statute.[71] The Conformity Act was ultimately expansively construed to permit federal court nonconformity to state procedural law in many instances.[72] Congress was not, however, required by the Constitution or other authority to direct federal courts to conform their procedure to state practice.[73] Indeed, one of the primary purposes of the Rules Enabling Act and the original Federal Rules was to end the requirement of the Conformity Act that a federal court

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[67] *See supra* text accompanying notes 27–29.

[68] Mistretta v. United States, 488 U.S. 361, 386–88 (1989); *Hanna*, 380 U.S. at 472–73; Sibbach v. Wilson & Co., 312 U.S. 1, 9–10 (1941); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41–43 (1825).

[69] *See, e.g.*, Burbank, *supra* note 17, at 1681–89.

[70] Act of June 1, 1872, ch. 255, §§ 5 & 6, 17 Stat. 196 (1872). The Conformity Act, which required a federal district court to conform procedure in the district court "'as near as may be'" to the procedure of the state in which the district court sat, was originally intended to create "intra-state uniformity *in legal procedure*." Jaffin, *supra* note 7, at 507 & n.7 (quoting Indianapolis & St. Louis R.R. v. Horst, 93 U.S. 291, 301(1876)) (emphasis added).

[71] *See* Jaffin, *supra* note 7, at 507; *see also* Burbank, *supra* note 4, at 1041.

[72] Ultimately, courts permitted different federal procedure if state procedure "'would unwisely incumber the administration of the law, or tend to defeat the ends of justice in their tribunals.'" Jaffin, *supra* note 7, at 507–08 (quoting Indianapolis & St. Louis R.R. v. Horst, 93 U.S. 291, 301(1876)); *accord* Burbank, *supra* note 4, at 1041.

[73] *See supra* text accompanying notes 66–68. Indeed, Professor Burbank relates that Thomas Shelton suggested, during the campaign to enact the Rules Enabling Act, that "the Conformity Act was 'a sop thrown to state pride,' the product of misguided social 'politeness' any basis for which no longer obtained." Burbank, *supra* note 4, at 1111 (citing Thomas W. Shelton, *Uniform Judicial Procedure—Let Congress Set the Supreme Court Free*, 73 CENT. L.J. 319, 319 (1911)).

use the procedural law of the state in which it was located, and to create in its stead a uniform procedure for the federal courts.[74]

Because no principle of federalism requires Congress or the Supreme Court to create procedural law for the federal courts that incorporates state law, no principle of federalism, and correspondingly no preemption analysis, should control when a congressional statute conflicts with a Federal Rule that incorporates state law.[75] Thus, if the Supreme Court incorporates state law into a Federal Rule by reference—as the Supreme Court has done, for example, in portions of Rule 4 of the Federal Rules of Civil Procedure, regarding service of process;[76] in portions of Rule 17(b), regarding capacity of persons to sue;[77] and in Rules 64 and 69, regarding provisional and final remedies[78]—the incorporated state law does not operate of its own force as state law.[79] Instead, as Professor Hart concluded, "[T]he state law has been absorbed, as it were, as the governing federal rule . . . ."[80] Professor Hart also stated as follows:

> Even more significant because much more pervasive are the situations in which Congress adopts state law as its

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[74] The purposes underlying the Rules Enabling Act were to allow the Supreme Court to create uniform, simple, and predictable Rules to govern the procedure in the federal courts. Burbank, *supra* note 4, at 1024–25; Genetin, *supra* note 4, at 690–91 & nn.67–68.

[75] *See, e.g.*, Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 529 (1954). When Congress or, here, the Supreme Court, adopts state law to govern in an area of "inescapable or assumed federal responsibility," state law does not operate of its own force, but operates, instead, as the governing federal law. *Id.*

[76] FED. R. CIV. P. 4(e). This Rule provides that, unless otherwise provided by federal law, service upon an individual other than an infant or an incompetent or an individual who has waived service, shall be in the manner prescribed by state law in the state in which the district court is located, the state law in the state in which service is effected, or in the manner set forth in Rule 4(e)(2). *Id.*

[77] FED. R. CIV. P. 17(b). This Rule provides that capacity to sue shall in some cases be determined by the law of the suing party's domicile or organization and in other cases by the law of the state in which the district court is located. *Id.*

[78] Federal Rule of Civil Procedure 64 governs procedure for seizing property to ensure enforcement of a final judgment. FED. R. CIV. P. 64. Federal Rule of Civil Procedure 69 governs the procedure for execution on a final judgment. FED. R. CIV. P. 69; *see also* Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291, 1331–32 (2000).

[79] *See also* Burbank, supra note 78, at 1331–32 (2000).

[80] Hart, *supra* note 75, at 529 (quoting Justice Frankfurter in Bd. of County Comm'rs v. United States, 308 U.S. 343, 351–52 (1939)).

> own, incorporating it by reference so to speak, for the solution of problems arising in an area of inescapable or assumed federal responsibility. Not infrequently the adoption is express. Thus procedure in actions at law in the lower federal courts was for years regulated in large part by a direction to "conform, as nearly as may be" to the practice prevailing in the courts of the state in which the federal court was sitting. The new rules of federal civil procedure are still replete with references to state law in relation to particular matters . . . .
>
> In an accurate analysis, it seems, state law cannot be said to operate of its own force in such situations. The case is rather one in which "the state law has been absorbed, as it were, as the governing federal rule"—a rule which "does not owe its authority to the law-making agencies of" any state, but is "ultimately attributable to the Constitution, treaties or statutes of the United States." But there is illumination, again, in the fact that Congress should choose to make the reference, by absorption or otherwise.[81]

Because the state law incorporated by the Supreme Court into particular Federal Rules operates as federal law, the issue, when a federal statute conflicts with a Federal Rule that incorporates state law, is not one governed by the Supremacy Clause and preemption analysis. The Supremacy Clause is appropriately viewed as a choice of law provision, set forth in the United States Constitution, which instructs courts to choose federal law when there is a conflict between federal and state law.[82] When, as here, the potential conflict is between two federal laws, the issue remains, as in other instances of statute-Rule conflict, one of separation or allocation of powers between the Congress and the Supreme Court. Thus, a "preemption" analysis is misplaced in analyzing conflicts between federal statutes and Federal Rules that incorporate state law.

This does not mean that federalism interests are nonexistent when federal statutes and Federal Rules collide. Instead, federalism interests are served by the Rules Enabling Act's allocation of power between the Supreme Court and Congress, though, as a "probable effect, rather than the

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[81] *Id.* (citations omitted).

[82] *See* Nelson, *supra* note 20, at 231, 234–35, 245–60; Dinh, *supra* note 20, at 2088.

primary purpose, of the allocation scheme established by the [Rules Enabling] Act."[83] To the extent that the Supreme Court has not been allocated the power to make Rules in a particular area, such as in the substantive-procedural carve-out in the Rules Enabling Act, and to the further extent that Congress has not legislated in the area, state law, if any, will govern. Additionally, complex federal-state issues may also arise in instances in which the federal statute or Federal Rule at issue may be augmented by federal common law, as is the case with the CERCLA-Rule 17(b) conflict that is examined in Parts III and IV of this Article.

One might legitimately wonder why the Federal Rules, a primary purpose of which was to introduce uniformity, simplicity, and predictability to federal procedure and to end conformity to local state law, would sometimes incorporate state law and its inherent interstate variances.[84] Professor Burbank indicated that the answer lies, at least in some instances, in the limitation of the Supreme Court's rulemaking power under the Rules Enabling Act to the procedural, rather than substantive.[85]

Though reporting that the Advisory Committee for the original Federal Rules followed no coherent definition of "procedure" and "substance" in promulgating the original Federal Rules, Professor Burbank noted that, from the first meeting, the Advisory Committee "determined that the Act permitted Federal Rules providing that state practice be followed . . . [and] seem[ed] to have taken the view that Federal Rules were permissible, even

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[83] Burbank, *supra* note 4, at 1025–26. Burbank stated as follows:

> The relevant substantive rights under the [Rules Enabling] Act, however, are not . . . those that reflect existing state substantive policy choices on the same subject covered by a Federal Rule. The purpose of the procedure/substance dichotomy is not to protect state or federal policy choices on such matters, although it may have that effect. Its purpose is rather, to *allocate* policy choices—to determine which federal lawmaking body, the Court or Congress, shall decide whether there will be federally enforceable rights regarding the matter in question and the content of those rights.

Id. at 1113 (emphasis added); *accord* Clark, *supra* note 18, at 1324. Professor Clark contends that bicameralism and presentment requirements serve federalism interests: federal lawmaking procedures preserve federalism interests "both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism." *Id.*

[84] *See* Werner Ilsen, *The Preliminary Draft of Federal Rules of Civil Procedure*, 11 ST. JOHN'S L. REV. 212, 264–66 (1937) (questioning continued conformity to state law in proposed Rules dealing with provisional and final remedies).

[85] *See* Burbank, *supra* note 4, at 1145–48 & n.573.

if substantive under the Act, so long as they perpetuated existing federal law."[86] In areas in which the original Advisory Committee felt that promulgation of a Federal Rule might approach the boundaries of the substantive rights limitation of the Rules Enabling Act, the Advisory Committee might incorporate state law directly or adopt existing federal law, which, in turn, sometimes incorporated state law.[87]

Professor Burbank has observed that "perhaps only an academic would object to a rule requiring the federal courts to follow state law."[88] The objection would be that, if the proposed rulemaking truly encroached on an area of substantive policy implications, the substantive-procedural limitation in the Rules Enabling Act required either that Congress make the relevant policy choices or that no choice be made, meaning that state law, if any, would control.[89] To the extent that the Supreme Court promulgated rules in an area that was "substantive" under the Rules Enabling Act, the "categorical choice between federal and state law was, in theory at least, as much for Congress as would have been the formulation of discrete Federal Rules regulating [the substantive issue]."[90] By incorporating state law or existing federal law, the Court refrained from engaging in the policy choices that might be forbidden under the Rules Enabling Act or the Constitution, but it did select the policy choices of the various states or as

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[86] Burbank, *supra* note 4, at 1147.

[87] *See, e.g.*, Burbank, *supra* note 4, at 1145–47; Burbank, *supra* note 78, at 1331–32 (discussing Federal Rules regarding provisional and final remedies). With respect to Rule 17(b), see John E. Kennedy, *Federal Civil Rule 17(b) and (c): Qualifying to Litigate in Federal Court*, 43 NOTRE DAME L. REV. 273, 273, 275–79 (1968). Professor Kennedy noted that capacity to sue, which is dealt with in Rule 17(b), has some substantive attributes. For instance, when the plaintiff is a minor, incompetent, or artificial entity, a "host of state regulatory policies . . . . aimed at protecting multiple interests" are involved. *Id.* at 273.

[88] Burbank, *supra* note 78, at 1335; *see also* Burbank, *supra* note 4, at 1147.

[89] *See, e.g.*, Burbank, *supra* note 4, at 1147. Professor Burbank noted the following regarding Rules 64 and 69:

> In one respect the rulemakers might be said to have exceeded their power in the Rules regulating provisional and final remedies. Under the scheme of allocation emerging from the pre-1934 history, the categorical choice between federal and state law was, in theory at least, as much for Congress as would have been the formulation of discrete Federal Rules regulating the seizure of person or property.

Id.

[90] Burbank, *supra* note 4, at 1147.

set forth in existing federal law to fill the gaps.[91] The central power issue when the Court incorporated state law in a Federal Rule was not a federalism issue, but a separation of powers issue or, more precisely, an issue of allocation of power under the Rules Enabling Act.[92] Did the Rules Enabling Act, with its substantive-procedural limitation on the Supreme Court's rulemaking, enable the Court to promulgate any Rule in the area?

In many ways, using the rulemaking authority analysis to resolve potential conflicts between federal statutes and Federal Rules maintains the Supreme Court's incorporation of state law into Federal Rules as an "academic" issue. First, refocusing the inquiry on whether the intersection of statute and Rule creates a conflict, instead of harmonizing statute and Rule, may reduce the number of instances in which courts must resolve such conflicts. If there is no conflict, a court need not proceed to a resolution of the conflict, unlike in the implied repeal analysis in which a court typically harmonizes the statute and Rule. Second, when Congress acts last, Congress's statute will continue, in the vast majority of cases, to control, thus rendering unnecessary resolution of difficult issues regarding whether the Supreme Court's Rule is substantive or whether the Supreme Court has otherwise exceeded its rulemaking authority.[93] When Congress acts last, the potential for Congress to exceed its rulemaking authority is minimal—essentially limited to inquiries into whether Congress diminished core judicial powers in violation of separation of powers or whether the congressional statute impaired constitutional requirements embedded in a Federal Rule.[94] These minimal restrictions on congressional rulemaking have led one commentator to state that "[a]s a practical matter, the only restraints on Congress are self-imposed."[95] Third, the Supreme Court has

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[91] Burbank, *supra* note 4, at 1147–48. "With the changes in thinking about the appropriate scope of federal common law wrought by *Erie*, the incorporation of federal decisional law in Federal Rules has proved troublesome." *Id.*

[92] The Rules Enabling Act allocates rulemaking authority between the Supreme Court and Congress in a way that differs from the limitations imposed by separation of powers analysis. Burbank, *supra* note 4, at 1114–15; Whitten, *supra* note 4, at 44–46 (noting that the restrictions imposed on Court rulemaking by the Rules Enabling Act and separation of powers doctrine differ).

[93] This is because Congress's legislation will control unless Congress exceeds its broad rulemaking authority and impairs a constitutional right or impairs the ability of the courts to act as courts. Genetin, *supra* note 4, at 684–88; Burbank, *supra* note 17, at 1688.

[94] *See, e.g.*, Genetin, *supra* note 4, at 684–88; Burbank, *supra* note 17, at 1686–88.

[95] McCabe, *supra* note 19, at 1686.

said that it will interpret the Rules narrowly to avoid exceeding rulemaking authority, and there is some evidence of this.[96] Finally, the rulemaking authority analysis also underscores that, while federalism interests may be served as an indirect or secondary result of the allocation of authority under the Rules Enabling Act, such interests are not directly at issue when there is a conflict between statute and Rule that incorporates state law. Thus, preemption analysis is inapplicable.

In summary, statute-Rule conflicts involving a Federal Rule that incorporates a state law are merely a subset of the general category of statute-Rule conflicts. They raise separation or allocation of power, not preemption, issues and should be analyzed in the same manner as any other statute-Rule conflict—under a rulemaking authority analysis.

III. THE CONFLICT BETWEEN THE CERCLA STATUTE AND FED. R. CIV. P. 17(b): THE FEDERAL COURTS DISAGREE

The remainder of this Article applies the rulemaking authority analysis in the context of the apparent conflict between provisions of the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[97] and Rule 17(b). This apparent statute-Rule conflict focuses on the length of time after corporate dissolution that a corporation remains subject to suit under the CERCLA statute. Although the CERCLA statute does not directly address the duration of a dissolved corporation's amenability to suit, it has frequently been construed to create expanded amenability to suit for dissolved corporations—extending the capacity of the dissolved corporation to be sued either until all assets have been distributed or forever.[98] Federal Rule 17(b), by contrast, would define capacity to be sued as that the period allowed under state law—typically two to five years after dissolution.[99]

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[96] *See supra* text accompanying note 17.

[97] 42 U.S.C.A. §§ 9601–9628 (2000 & Supp. II 2002).

[98] *See infra* text accompanying notes 175–176.

[99] All states have statutory provisions that permit voluntary dissolution of a corporation, among other ways, by the approval of its shareholders. 16A WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS, § 8006 (perm. ed., rev. vol. 2003). At common law, a corporation ceased to exist at the moment of dissolution and could thereafter neither sue nor be sued. *Id.* § 8142. Most states have ameliorated the common law rule, permitting the dissolved corporation to exist for a period of time after dissolution and to both sue and be sued in this time period. *Id.* § 8144. Typical dissolution statutes permit a survival period

Scholars have suggested that current Supreme Court jurisprudence has restricted federal court decision-making not only in the high profile constitutional cases but also in ordinary instances of application of federal law because current jurisprudence has, among other things, reduced the ability of federal courts to construe a federal statute absent fairly explicit textual direction.[100] The apparent CERCLA-Rule 17(b) conflict is more appropriately categorized as one of these ordinary issues, rather than a high-profile issue.[101] The issue, however, has important consequences on two levels. First, on a practical level, if state law capacity statutes govern the length of time a corporation remains amenable to suit for cleanup of hazardous substances under CERCLA, then a corporation may dissolve, wait the statutorily designated period of time prescribed under the relevant state corporate capacity statute, and, if not sued in the interim, avoid liability for the disposal of those hazardous substances. If, on the other hand, the CERCLA statute controls and also extends the period of a corporation's capacity to be sued either indefinitely or until the corporation has distributed all assets, then corporations will remain amenable to suits for CERCLA cleanup costs for much longer periods of time. Thus, in the ordinary, work-a-day world of CERCLA cleanup litigation, the issue matters very much to the parties. Second, on the level of the "struggle over the norms and boundaries of federal judicial authority," the resolution of this issue under current norms for statutory construction and federal common lawmaking illustrates a continuing narrowing of the federal courts' authority to construe federal statutes to reach issues not expressly addressed in the statute, a narrowing that is not similarly evidenced in the Court's preemption jurisprudence.[102] Application of the current, narrower role for federal courts in statutory construction and federal common law jurisprudence would, moreover, overturn the holdings of the majority of courts that have examined the apparent CERCLA-Rule 17(b) conflict.

Subpart III.A examines the provisions of CERCLA and Rule 17(b) that are in apparent conflict. Subpart III.B details the varying analyses that courts have used in resolving the CERCLA-Rule 17(b) conflict. It notes that the majority of courts have applied both a federal common law analysis

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ranging from two to five years, although some statutes are open-ended. *Id.* The Revised Model Business Code was amended in 2000 to reduce from five years to three years the time period in which claims may be made against a dissolved corporation. *Id.*

[100] *See, e.g.*, Meltzer, *supra* note 24, at 343; Resnik, *supra* note 24, at 224.

[101] Resnik, *supra* note 24, at 224.

[102] *Id.*; *see* Meltzer, *supra* note 24, at 345.

under the supersession clause and a preemption analysis. Because current jurisprudence permits federal courts only narrow ability to create federal common law and because preemption doctrine is inapplicable, the majority analysis must be reassessed. Part IV undertakes that reassessment, concluding that, under current federal common law analysis, CERCLA will not be construed to provide for longer amenability to suit than traditional corporate law. Because both federal common lawmaking and federal preemption are part of the continuum of doctrines under which federal courts may displace state law,[103] Part IV also questions why current jurisprudence requires a narrower, textual approach to statutory construction and federal common lawmaking while simultaneously allowing a broader purposive approach to statutory construction in preemption cases.[104]

A. The Apparent Conflict: Corporate Capacity Under CERCLA and Rule 17(b)

1. Capacity of a Dissolved Corporation Under CERCLA

CERCLA is the federal statute governing cleanup of property and other "facilit[ies]"[105] that have been contaminated by the "release"[106] of a

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[103] Dinh, *supra* note 20, at 2097–100.

[104] *See, e.g.*, Meltzer, *supra* note 24, at 371–78 (suggesting both that the Justices may approach preemption in a result-oriented manner and that Congress's inability to "resolve all issues relating to a statutory scheme" may be clearer in the preemption context); Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 480, 518–25, 538 (2002) (suggesting that the Court may want to impose national norms in certain areas of tort law); Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 43 (The court may be attempting "to achieve a version of tort reform through the vehicle of judicial preemption."); *see also* Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1192 (1998). A purposive approach is desirable in preemption cases because it "permits courts to assess more accurately congressional purpose, and promotes policies implicated in the preemption context, such as the appropriate accommodation of federal and state authority to regulate." *Id.*

[105] "Facility" is defined expansively in CERCLA:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been

"hazardous substance."[107] Section 9607(a) of CERCLA provides that certain covered "persons" are responsible for cleanup of contaminated property "[n]otwithstanding any other provision or rule of law"[108] and subject only to three narrow statutory defenses.[109]

Covered "persons" are liable for cleanup costs under the CERCLA statute if they are within one of the following four categories: (1) the current owner and operator of the real property or other facility, (2) any prior owner or operator of the property or other facility at a time of disposal of hazardous substances, (3) certain persons who arranged for disposal of hazardous substances, and (4) certain transporters of hazardous substances.[110] Although the CERCLA statute does not expressly address the duration of a dissolved corporation's capacity to be sued, the CERCLA statute does provide, as set forth above, that a covered "person" is liable "[n]otwithstanding any other provision or rule of law," and subject only to the three statutory defenses.[111] The CERCLA statute also provides that a "person" includes a "corporation," but CERCLA does not further define the term "corporation."[112] Thus, CERCLA does not explicitly limit a covered "corporation" to one existing under the laws of a state. Nor does the statute explicitly provide for expanded corporate liability. Liability under the CERCLA statute has, however, been construed expansively to impose strict and retroactive liability and to permit courts to impose joint and several

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deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

42 U.S.C. § 9601(9) (2000).

[106] CERCLA defines a "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." *Id.* § 9601(22).

[107] CERCLA also defines the term "hazardous substance." *Id.* § 9601(14).

[108] *Id.* § 9607(a).

[109] CERCLA defines the three statutory defenses to CERCLA liability as follows: "(1) an act of God; (2) an act of war; (3) an act or omission of a third party other than an employee or agent of the defendant." *Id.* § 9607(b).

[110] *Id.* § 9607(a)(1)–(4).

[111] *Id.* § 9607(a)–(b).

[112] CERCLA defines "person" as follows: "The term 'person' means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body." *Id.* § 9601(21). The term "corporation" is not further defined in the CERCLA statute.

liability on the preceding classes of covered "persons" that are determined to be responsible parties under CERCLA, subject only to three limited defenses—an act of God, an act of war, or an act of a third person.[113]

Because the CERCLA statute does not address explicitly whether a corporation remains subject to suit for CERCLA liability after dissolution or the length of any such continuing capacity to be sued, virtually every court that has addressed the issue has used statutory interpretation or federal common lawmaking to determine the duration of corporate capacity under CERCLA.[114] Few, however, have acknowledged the role of federal common law. [115]

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[113] *See supra* note 109.

[114] The line between statutory interpretation and federal common lawmaking is indistinct, *see infra* note 227, but it is not necessary to categorize precisely whether expanded amenability to suit for a dissolved corporation under CERCLA would fall within the definition of statutory interpretation or federal common lawmaking, since current jurisprudence limits both, absent textual clarity. The Supreme Court defined "'federal common law' in the strictest sense [as] . . . a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision." Atherton v. FDIC, 519 U.S. 213, 218 (1997). The creation of a period of liability for a dissolved corporation under the CERCLA statute would probably fall within *Atherton*'s definition of federal common lawmaking. If, however, the issue is viewed as one of statutory interpretation, similar limits on federal court authority to interpret a statute broadly in the face of statutory silence or ambiguity also apply. *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 64–67 (1998).

[115] The following courts are among the few that have acknowledged the role of federal common law: Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995) (noting, in dicta, that if CERCLA and Rule 17(b) clashed, a court would need to use federal common law to determine the duration of a dissolved corporation's capacity under CERCLA); Hillsborough County v. A & e Road Oiling Serv., Inc., 877 F. Supp. 618, 621 (M.D. Fla. 1995) (noting that the metaphor regarding whether a corporation was dead or dead and buried "provides the basis for the federal common law surrounding this particular CERCLA issue"). *See also* Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1150–51 & n.14 (N.D. Fla. 1994). The court follows a preemption approach in general, but notes in a footnote:

> Tying the resolution of this question to the law of fifty different states would create uncertainty in the law and lead to inconsistency in the application of CERCLA liability.
>
> Such uncertainty is avoided, however, if CERCLA is held to preempt state statutes of repose in general. Rather than depending on divergent state laws, federal courts can apply the federal common law to resolve this issue. Under this approach, courts can continue to develop a uniform, national rule to apply in cases where a defendant corporation is dissolved.

Id. at 1151 n.14. A minority of cases construing the CERCLA statute to impose indefinite liability

2. Capacity of a Dissolved Corporation Under Rule 17(b)

Unlike the CERCLA statute, Rule 17(b) explicitly addresses the capacity of dissolved corporations to sue and be sued by incorporating state corporate capacity law. Rule 17(b) provides that the capacity of a corporate person to sue and be sued "shall" be determined by the law of the state of its incorporation.[116] State corporate codes, in turn, generally provide that a corporation remains subject to suit for only a limited period of time after it dissolves, typically two to five years.[117] The temporal limitation on the ability of a corporation to sue and be sued after it has dissolved, which is imposed by the majority of state corporate capacity statutes incorporated into Rule 17(b), arises from the states' balancing of various interests, including the goals of protecting the business entity, protecting the availability of capital while at the same time protecting creditors' rights, and imposing certainty and finality in corporate matters.[118]

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on a dissolved corporation have relied simply on the language of CERCLA that a corporation is liable "notwithstanding any other provision or rule of law." *See, e.g.*, United States v. SCA Servs. of Ind., Inc., 837 F. Supp. 946, 953 (N.D. Ind. 1993); Allied Corp. v. Acme Solvents Reclaiming, Inc., No. 86 C 20377, 1990 WL 322940, at *4 (N.D. Ill. July 6, 1990).

[116] FED. R. CIV. P. 17(b). Rule 17(b) provides, in full, as follows:

> The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of the individual's domicile. *The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized.* In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

Id. (emphasis added).

[117] *See supra* note 99; *see also* Bradford C. Mank, *Should State Corporate Law Define Successor Liability?: The Demise of CERCLA's Federal Common Law*, 68 U. CIN. L. REV. 1157, 1163–64 (2000). Many state statutes limit the term of corporate liability after dissolution to between one and five years. *Id.* (citing Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845, 880 nn.202–04 (1999); Michael D. Green, *Successors and CERCLA: The Imperfect Analogy to Products Liability and an Alternative Proposal*, 87 NW. U. L. REV. 897, 905–06 (1993)).

[118] *See, e.g.*, Kennedy, *supra* note 87, at 276; John Copeland Nagle, *CERCLA's Mistakes*, 38 WM. & MARY L. REV. 1405, 1441 n.176 (1997) (citing Audrey J. Anderson, *Corporate Life After*

The original Advisory Committee on the Federal Rules derived the principle of reliance on the law of the state of incorporation to determine corporate capacity by referring to existing federal common law regarding capacity of corporations to sue and be sued.[119] Federal common law regarding a corporation's capacity after dissolution, at the time of adoption of the Federal Rules, had incorporated state law (although it had typically incorporated the law of the state in which the district court sat, rather than the law of the state of incorporation).[120] Recall that the drafters of the original Federal Rules generally concluded that Rules were acceptable, even

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Death: CERCLA Preemption of State Corporate Dissolution Law, 88 MICH. L. REV. 131, 160 (1989)).

[119] Charles E. Clark & James Wm. Moore, *A New Federal Civil Procedure: II. Pleadings and Parties*, 44 YALE L. J. 1291, 1312–13 (1935). The article states the following:

> On the whole the federal courts at law have followed the state rule as to the capacity of an individual, a foreign executor, administrator, or state officer to sue or to be sued . . . . We suggest that the law of the domicile should settle the capacity to sue and defend, and that such capacity should then be recognized by all federal courts. The principle of the rule has already received some recognition.

Id. (citations omitted); *see also* Kennedy, *supra* note 87, at 280 ("In the federal courts, under the combination of the Rules of Decision Act and the Conformity Act . . . state provisions generally controlled in actions both at law and in equity. . . . [T]he Supreme Court drafted Rule 17(b) to reflect the overall existing federal policy of deferring to state law." (citations omitted)). *But see* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 500–01, 506–08 (2001) (noting that prior case law was not dispositive because the case was decided under the now-repealed Conformity Act, which required adherence to state law, and was decided before the "watershed" decision in *Erie*); *see also* Burbank, *supra* note 4, at 1147–48 ("With the changes in thinking about the appropriate scope of federal common law wrought by *Erie*, the incorporation of federal decisional law in Federal Rules has proved troublesome.").

[120] 3 J. MOORE, MOORE'S FEDERAL PRACTICE, ¶ 17.17, at 17-144 to 17-145; ¶ 17.18, at 17-149; ¶ 17.19, at 17-150 to 17-161; ¶ 17.21, at 17-168 to 17-175 (2d ed. 1967) (noting that prior federal case law had looked to the law of the state of incorporation). Professors Charles E. Clark and James William Moore, both members of the original Advisory Committee on the Federal Rules, suggested that, in order to create uniform capacity nationwide, the capacity of all persons to sue and be sued should be based on the law of the person's domicile or incorporation. Clark & Moore, *supra* note 119, at 1312–13; Kennedy, *supra* note 87, at 280. Professors Clark and Moore stated that "[s]uch recognition would not affect substantive rights," Clark & Moore, *supra* note 119, at 1313 n.96, and noted that a change to the state of domicile "ha[d] already received some recognition," *Id.* at 1313 & n.97 (citing Coppedge v. Clinton, 72 F.2d 531 (10th Cir. 1934)). *See also, e.g.*, 6A WRIGHT & MILLER, *supra* note 44, § 1561, at 449; *accord* Burlington N. & Santa Fe Ry. v. Consol. Fibers, Inc., 7 F. Supp. 2d 822, 825 (N.D. Tex. 1998); *see also*, Monica Conyngham, Comment, *Robbing the Corporate Grave: CERCLA Liability, Rule 17(b), and Post-Dissolution Capacity to Be Sued*, 17 B.C. ENVTL. AFF. L. REV. 855, 867–70 (1990).

if "substantive," as long as they incorporated state law or existing federal law.[121] That is, in fact, what Rule 17(b)'s incorporation of state law was intended to accomplish–the incorporation of existing federal common law.

Rule 17(b), thus, controls corporate capacity in federal litigation unless Congress repeals Rule 17(b) in full, which it has not done, or in part in the context of particular federal statutes, such as CERCLA.[122]

3. Does the CERCLA Statute Extend the Period of Amenability to Suit for a Dissolved Corporation?

Despite the apparent command of Rule 17(b) that state law *shall* control qualification of a corporation to sue or be sued in federal court, federal statutes may supersede the state law capacity requirements that were incorporated into Rule 17(b).[123]

In an article focusing on Rule 17(b) and (c), Professor John E. Kennedy concluded that federal courts defer to state capacity law under Rule 17(b)

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[121] *See supra* notes 86–87 and accompanying text.

[122] *See, e.g.*, Kennedy, *supra* note 87, at 279 (indicating instances, including federal statutory rights, in which federal courts might not defer to state law under Rule 17(b)); Conyngham, *supra* note 120, at 867–70 (arguing that Congress has not changed Rule 17(b)'s incorporation of state law corporate capacity codes, except in dissimilar cases); *see also* United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1497 n.10 (D. Utah 1987) ("[T]he power of Congress to define the scope of federal rights and duties is beyond peradventure.").

[123] *See, e.g.*, Kennedy, *supra* note 87, at 279; Philip Marcus, *Suability of Dissolved Corporations–A Study in Interstate and Federal-State Relationships*, 58 HARV. L. REV. 675, 698–701 (1945). Professor Marcus emphasized Congress's ability to define corporate capacity as follows:

> The federal courts are not bound by the state law in determining whether a cause of action given by a federal statute survives. . . .
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> . . . There are certain federal statutes, however, which, by virtue of the language used and the public policy underlying the statute, could be construed to authorize civil or criminal suit against the corporation as long as the corporation exists in a state for any purpose.

Id. at 700-01; *see also* Almond v. Kent, 459 F.2d 200, 203 (4th Cir. 1972); Burlington N. & Santa Fe Ry. v. Consol. Fibers, Inc., 7 F. Supp. 2d 822, 826 (N.D. Tex. 1998); Allied Corp. v. Acme Solvents Reclaiming, Inc., No. 86 C 20377, 1990 WL 322940, at *3 (N.D. Ill. July 6, 1990); *Sharon Steel*, 681 F. Supp. at 1497 n.10. Thus, when Congress creates a statutory cause of action, it can establish the extent and scope of the action, including corporate capacity to sue and be sued.

except in the following situations in which federal policy may require a different rule: (1) in determining diversity of citizenship; (2) in regulating situations in which there is need for uniform federal procedure; (3) in regulating representatives appearing before the court; and (4) in regulating instances in which the claim arises from a substantive federal right.[124] Professor Kennedy further concluded that, in each of these categories of potential "exceptions" to federal court deferral to state law, federal courts might nevertheless defer to state law based on the relative strength of the state and federal policies at issue.[125] A determination by Congress to expand the amenability to suit of a dissolved corporation under CERCLA might fit into the second or fourth of these exceptions.

The purported conflict between the CERCLA statute and Rule 17(b), thus, centers on whether Congress has, without explicitly so stating in the text of the CERCLA statute, exercised its authority to create corporate capacity under the CERCLA statute that is at variance with the capacity otherwise controlling under Rule 17(b) and, if so, the extent of that expanded liability. This issue has led to a split in federal court decisions[126] and disunity among commentators regarding whether the state-law capacity requirements of Rule 17(b) or an expanded capacity requirement under the CERCLA statute control the capacity of a corporation to be sued after dissolution for cleanup of hazardous substances.[127] This raises an issue of

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[124] *See* Kennedy, *supra* note 87, at 279.

[125] *Id.*

[126] *See infra* notes 129, 170–176, 178–179 and accompanying text.

[127] Many commentators are reluctant to take a strong position on the issue, again indicating that this is an issue that only Congress or the Supreme Court can truly decide. *See, e.g.*, Nagle, *supra* note 118, at 1432–45 (Although there are a "variety of textual, structural, purposive, and policy arguments in favor of reading CERCLA to impose liability on dissolved corporations notwithstanding Rule 17(b)," there are "good reasons for insisting that even CERCLA has its limits" and "[s]tate corporation law provides a clear and reasonable delineation of what those limits are."); Joel R. Burcat & Craig P. Wilson, *Post-Dissolution Liability of Corporations and Their Shareholders Under CERCLA*, 50 BUS. LAW 1273, 1273–74 (1995) (analyzing the divergent court opinions on the issue and concluding that legal planners should advise of the strong potential for corporate liability after the time period set forth in state corporate dissolution statutes); Troy A. Stremming, Note, *Corporate Reincarnation—CERCLA Liability After Corporate Dissolution*, 33 WASHBURN L.J. 874, 895 (1994). Others have indicated that CERCLA should control and supersede Rule 17(b). *See, e.g.*, Robin Kundis Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105, 193–98 (1999); Anderson, *supra* note 118, at 162–65. Congress should resolve the issue legislatively by providing that corporations that dissolved

the power of the federal courts that is different in kind from the power typically implicated by the rulemaking authority analysis. In the rulemaking authority analysis, the typical power issue is whether Congress and the Court abided by their rulemaking authority. In the CERCLA-Rule 17(b) conflict, an additional issue of power must be addressed: What is the authority of the federal courts to construe the CERCLA statute to reach results not directly indicated by Congress in the text of CERCLA? In subpart III.B, I discuss the results reached by the various federal courts in attempting to resolve the apparent conflict between the CERCLA statute and Rule 17(b).

B. The Federal Courts Take on the Apparent CERCLA-Rule 17(b) Conflict and Reach Conflicting Results

Professor Nagle summed up the obstacles to consistently construing the CERCLA statute, in general, and the apparent CERCLA-Rule 17(b) conflict, in particular, as follows:

> The circumstances of CERCLA's enactment present formidable challenges to any theory of statutory interpretation. You favor a textualist theory that examines the statutory language alone? "CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage." You rely on canons of construction from which to glean statutory meaning? "Because of the inartful crafting of CERCLA . . . reliance solely upon general canons of statutory construction must

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before the enactment of CERCLA have no post-dissolution liability, but those dissolving after CERCLA's enactment do. Unless and until Congress does provide a legislative solution, federal courts should hold that CERCLA preempts state law. *Id.* Some have concluded that state corporate law under Rule 17(b) should control. *See, e.g.*, Mustafa P. Ostrander, Comment, *Suing Dissolved Corporations Under CERCLA: Does State or Federal Capacity Law Apply?*, 16 TUL. ENVTL L.J. 471, 485–89 (2003) (analyzing diverging federal court opinions on the CERCLA-Rule 17(b) issue and concluding that courts should follow a federal common law analysis, and, under recent Supreme Court federal common law decisions, should conclude that Rule 17(b) controls). "Although the *Sharon Steel* holding [that CERCLA supersedes and preempts state law] is desirable from an environmental perspective . . . the weight of legal authority supports *Levin Metals* [which concluded that state corporate capacity laws would govern]." Conyngham, *supra* note 120, at 886. The Comment also concludes that Congress should amend the CERCLA statute to extend liability of dissolved corporations under CERCLA. *Id.* at 890.

> be more tempered than usual." You prefer to rely on the legislative history of a statute's enactment? "[T]he legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature." You seek to implement congressional intent? "[C]ongressional intent may be particularly difficult to discern with precision in CERCLA." You try to interpret statutes to promote good public policy? "CERCLA 'can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute.'" You consider the current attitude toward a statute? "CERCLA is now viewed nearly universally as a failure." Those who emphasize the purpose of a statute have found CERCLA more to their liking, but there is an increasing awareness that purpose alone cannot solve all of CERCLA's riddles.[128]

Perhaps the clearest conclusion one can draw about the CERCLA-Rule 17(b) conflict is that it will take action by either the Supreme Court or Congress to unify the split in court decisions over the issue. The CERCLA-Rule 17(b) issue, however, does permit a comprehensive examination of the method of analyzing federal statutes that conflict with Federal Rules incorporating state law.

1. The Majority Analysis–CERCLA Both Supersedes Rule 17(b) and Preempts State Law Incorporated into Rule 17(b)

a. The Influential Sharon Steel *Analysis*

The substantial majority of courts to reach the issue, all of which are district courts, have concluded that CERCLA supersedes Rule 17(b), that CERCLA preempts state law incorporated into Rule 17(b), or that it both supersedes Rule 17(b) and preempts the incorporated state law.[129] These courts primarily follow the reasoning of the United States District Court for

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[128] Nagle, *supra* note 118, at 1406–07 (citations omitted).

[129] *See infra* notes 170–174 and accompanying text.

the District of Utah in its 1987 decision in *United States v. Sharon Steel Corporation*.[130] The *Sharon Steel* court held that CERCLA both superseded Rule 17(b) under a statute-Rule conflict analysis and preempted the state law on which Rule 17(b) is premised under a Supremacy Clause analysis.[131] In each analysis the *Sharon Steel* court considered the goals and purposes of the CERCLA statute in determining the duration of a dissolved corporation's amenability to suit.[132]

The *Sharon Steel* court began its analysis of the apparent CERCLA-Rule 17(b) conflict by examining the issue as one of conflicting federal laws, i.e., conflicting federal statute and Federal Rule, governed by the

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[130] 681 F. Supp. at 1492 (D. Utah 1987).

[131] *Id.* at 1495–99.

[132] *Id.* One commentator has stated:

> [M]ost district courts had read CERCLA's 'notwithstanding' clause to override Rule 17(b). Indeed, they deployed a variety of textual, structural, purposive, and policy arguments in favor of reading CERCLA to impose liability on dissolved corporations notwithstanding Rule 17(b). . . .
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> . . . .
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> . . . CERCLA does not include a list of its purposes. Nonetheless, courts have gleaned multiple purposes from the structure and legislative history of CERCLA. Congress, say the courts, intended for CERCLA to achieve the cleanup of contaminated sites, to encourage quick responses to releases of hazardous substances, to promote settlements, and to discourage parties involved with a contaminated site from remaining idle. Perhaps most importantly, Congress wanted those who are responsible for hazardous waste contamination to pay the cost of cleaning up such contamination. That goal seemingly would be frustrated by applying state corporate dissolution law to insulate polluters from suit. Accordingly, absent a clear statutory text and lacking definite indication of congressional intent on this issue, many judges have relied on CERCLA's purposes to read the 'notwithstanding' clause to override Rule 17(b).

Nagle, *supra* note 118, at 1432–38 (citations omitted). Professor Craig stated the following:

> [I]n the only environmental context where courts have been willing to let an environmental statute supersede the Federal Rules of Civil Procedure, congressional intent and the statute's purposes have clearly and forcefully been forefront in their analyses. Moreover, these courts found that CERCLA supersedes Rule 17 specifically to effectuate the Act's purposes . . . .

Craig, *supra* note 127, at 198.

supersession clause of the Rules Enabling Act.[133] The court, first, recited and applied the principles of the canon disfavoring implied repeal that federal courts have traditionally incorporated into the supersession clause analysis to resolve statute-Rule conflicts.[134] Under this canon, the court observed that Congress has "plenary power to supersede" the Federal Rules by statutory enactment.[135] Despite this plenary power, however, the court noted that apparently conflicting statutes and Federal Rules should, under the implied repeals canon, be harmonized if at all possible *unless* there is clear congressional intent to supersede the Federal Rule.[136] Although acknowledging the preference for harmonization of federal statute and Federal Rule, the *Sharon Steel* court nevertheless concluded that, in the CERCLA statute, Congress had evinced clear intent to supersede Rule 17(b).[137] Thus, the *Sharon Steel* court rejected the typical harmonization of the implied repeals doctrine and looked, instead, to congressional intent. The court's avoidance of the harmonization requirement of implied repeal and use of the clear congressional intent analysis is a major reason why the implied repeal and rulemaking authority analyses are parallel in the CERCLA-Rule 17(b) context.

The *Sharon Steel* court based its conclusion that CERCLA superseded Rule 17(b) both on a purposive approach to statutory construction, indicating that the CERCLA statute is to be broadly and liberally construed[138] and on a textual approach to construction of the CERCLA statute.[139] The court began its analysis of "clear" intent to supersede Rule 17(b) by citing the broadly worded "notwithstanding" language of CERCLA, which provides that listed covered "persons" are liable for cleanup of hazardous substances "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in [the CERCLA statute]."[140] The court also relied on Congress's silence in defining a covered "person" to include a "corporation," but not limiting the definition

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[133] *Sharon Steel*, 681 F. Supp. at 1495–96.

[134] *Id.* at 1495; *see also supra* notes 43–51 and accompanying text.

[135] *Sharon Steel*, 681 F. Supp. at 1495 (citing United States v. Gustin-Bacon Div., Certainteed Prods. Corp., 426 F.2d 539, 542 (10th Cir. 1970), *cert. denied*, 400 U.S. 832 (1970)).

[136] *Id.*

[137] *Id.* at 1495–96.

[138] *Id.*; *see also supra* note 132.

[139] *Sharon Steel*, 681 F. Supp. at 1495–96; *see also* Nagle, *supra* note 118, at 1429–33.

[140] *Sharon Steel*, 681 F. Supp. at 1495–96.

of "corporation" to an existing corporation as defined by state law.[141] The court reasoned that, if Congress had intended to limit corporations to those corporations that retained capacity under state law, it would have explicitly so stated in the CERCLA statute, as Congress had done in the Sherman Act.[142] Thus, the *Sharon Steel* court's resolution of the CERCLA-Rule 17(b) conflict was based in part on resolution of the appropriate default rule regarding application of state corporate law in instances of congressional silence under CERCLA–to limit corporate liability under CERCLA, Congress must speak clearly. The Supreme Court, however, has, in *United States v. Bestfoods*, subsequently narrowed the ability to interpret CERCLA expansively to displace state corporate law in instances of congressional silence.[143]

The *Sharon Steel* court also relied on congressional goals and purposes as set forth primarily in case law interpreting the CERCLA statute.[144] The court relied principally on court cases that had held CERCLA to be remedial and had, furthermore, indicated that expansive interpretation of the CERCLA's liability provisions was appropriate.[145] The court, thus, emphasized that (1) the Delaware District Court had held that "[w]herever possible . . . CERCLA places the ultimate financial burden of toxic waste cleanup on those responsible for creating the harmful conditions;"[146] (2) the Eighth Circuit had similarly concluded that CERCLA should be construed to be both "remedial and retroactive;"[147] and (3) the Minnesota District

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[141] *Id.* at 1496 nn.7–8.

[142] *Id.*

[143] 524 U.S. 51, 61–64 (1998); *cf.* Cooper Indus., Inc. v. Aviall Servs., Inc., 125 S.Ct. 577, 581 (2004) (characterizing as debatable the conclusion of a number district courts that, although CERCLA did not mention "contribution," contribution rights nevertheless arose under CERCLA "either impliedly from provisions of the statute, or as a matter of federal common law"); *see also infra* notes 241–268 and accompanying text.

[144] *Sharon Steel*, 681 F. Supp. at 1495 (citing Artesian Water Co. v. Gov't of New Castle County, 659 F. Supp. 1269, 1276 (D. Del. 1987); United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 733 (8th Cir. 1986); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982)). The *Sharon Steel* court also reviewed legislative history and the structure and text of the statute. 681 F. Supp. at 1495.

[145] *Sharon Steel*, 681 F. Supp. at 1495.

[146] *Id.* (quoting *Artesian Water Co.*, 659 F. Supp. at 1276).

[147] *Id.* (citing *Ne. Pharm. & Chem. Co.*, 810 F.2d at 733).

Court had determined that CERCLA must be "construed broadly to effect its purposes."[148]

This reading of statutory purpose, along with the previous textual arguments, led the court to conclude that the undefined term "corporation" should be broadly construed to create corporate capacity under CERCLA beyond the capacity established under state corporate law.[149] As Professor Nagle has observed, however, although the lower federal courts have frequently invoked the broad and remedial purposes of CERCLA in construing the statute, the Supreme Court has never done so.[150]

After concluding that Congress clearly intended to supersede Rule 17(b), the *Sharon Steel* court assessed whether the duration of amenability to suit of a dissolved corporation under CERCLA would differ from that under Rule 17(b). Because Congress had not expressly addressed the issue in the CERCLA statute, the *Sharon Steel* court, in line with its conclusion that the CERCLA statute should be construed broadly to impose liability on those responsible for release of hazardous substances, created federal common law by analogizing corporate liability after dissolution to the death

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[148] *Id.* (citing *Reilly Tar & Chem. Corp.*, 546 F. Supp. at 1112).

[149] *Id.* at 1498.

[150] Nagle, *supra* note 118, at 1439–40 (noting that Judge Easterbrook, in deciding *Citizens Elec. Corp. v. Bituminous Coal & Marine Ins. Co.*, did not rely on the general remedial purposes of CERCLA and noting further that this distinguished Judge Easterbrook from judges in every circuit, but "place[d] him in the company of the Supreme Court, which has yet to invoke CERCLA's remedial purposes"). The Nagle article was written in 1997. *See supra* note 118. The Supreme Court has yet to rely on general remedial purposes of CERCLA in deciding cases under that statute. Most strikingly, in deciding the issues of parent corporate liability and piercing of the corporate veil under CERCLA in *United States v. Bestfoods*, the Court did mention that "CERCLA was enacted in response to the serious environmental and health risks posed by industrial pollution," 524 U.S. 1, 55 (1998) (citing Exxon Corp. v. Hunt, 475 U.S. 355, 358–59 (1986)), and that "[a]s its name implies, CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites," *Id.* (citing Key Tronic Corp. v. United States, 511 U.S. 809, 814 (1994)). It did not, however, rely on CERCLA's remedial purposes in determining the corporate liability issues on which the CERCLA statute was silent. *Id.* at 61–64; *cf.* Cooper Indus., Inc. v. Aviall Servs., Inc., 125 S.Ct. 577, 584 (2004).

> Each side insists that the purpose of CERCLA bolsters its reading of § 113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. As we have said: "[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

Id. (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

of a natural person.[151] The court concluded that, for purposes of CERCLA, the amenability to suit of a dissolved corporation would persist at least until the corporation is both "dead [and] buried," i.e., at least until the corporation has dissolved and its assets have been fully distributed.[152] In this analysis, the *Sharon Steel* court did not state that it was creating federal common law, nor did it rely on federal case law regarding the creation of federal common law. Moreover, two of the Supreme Court cases emphasizing the restricted nature of the federal courts' federal common lawmaking ability had not yet been decided at the time of the *Sharon Steel* decision.[153]

Having completed its analysis of the statute-Rule conflict, the court turned to the task of distinguishing a prior decision of the United States Court of Appeals for the Ninth Circuit in *Levin Metals Corp. v. Parr-Richmond Terminal Co.*[154] In *Levin Metals*, the Ninth Circuit had held that state law corporate capacity requirements incorporated into Rule 17(b), rather than a CERCLA-specific standard, determined the duration of a dissolved corporation's capacity under CERCLA.[155] The Ninth Circuit had not examined the issue as a statute-Rule conflict involving two species of federal law and governed by the supersession clause of the Rules Enabling Act. Instead, it had viewed the issue as a conflict between federal and state law and concluded that CERCLA did not preempt the state law incorporated into Rule 17(b).[156] The Ninth Circuit held, in particular, that, through CERCLA's "notwithstanding" language, Congress had preempted only state laws regarding "liability," but not state laws regarding "capacity" to sue.[157] In disagreeing with the Ninth Circuit, the *Sharon Steel* court also took up a preemption analysis. The rulemaking authority analysis, by contrast, reveals that a statute-Rule conflict in which the Federal Rule

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[151] *Sharon Steel*, 681 F. Supp. at 1496 n.7, 1498–99. The court did not refer to the issue as one of federal common lawmaking, and the court might have seen the issue as falling within the indistinct area at which federal common lawmaking and statutory interpretation meet or simply as an issue of statutory construction. *See infra* note 227 (indicating that the line between federal common lawmaking and statutory construction is imprecise).

[152] *Id.*

[153] *See generally* Atherton v. FDIC, 519 U.S. 213 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994).

[154] 817 F.2d 1448 (9th Cir. 1987).

[155] *Id.* at 1451.

[156] *Id.*

[157] *Id.* at 1450–51.

incorporates state law presents only a horizontal question of allocation of rulemaking authority between Congress and the Supreme Court, not a vertical federal-state issue. Thus, the preemption doctrine is inapplicable.[158]

In its preemption analysis, the *Sharon Steel* court rejected the Ninth Circuit's distinction in *Levin Metals* between liability and capacity.[159] In so doing, the *Sharon Steel* court relied on an obstacle preemption analysis, which is a category of implied preemption.[160] The *Sharon Steel* court emphasized that, under the Supreme Court's doctrine of obstacle preemption, "'state law is preempted *whenever* it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[161] The *Sharon Steel* court, then, concluded that each statute limiting capacity to be sued also limited liability; thus, the Ninth Circuit's distinction between "liability" and "capacity" was a "distinction without a difference."[162] Emphasizing that the liability-capacity distinction adopted by the Ninth Circuit would impair Congress's intent to hold liable those responsible for hazardous waste disposal, and would, thus, "frustrate Congressional intent,"[163] the *Sharon Steel* court concluded that "if the effect of a state capacity statute is to limit the liability of a party Congress meant to hold liable for cleanup costs, Congress intended CERCLA to preempt it."[164]

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[158] *See supra* notes 66–82 and accompanying text.

[159] United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1496–98 (D. Utah 1987).

[160] *Id.* at 1497. Preemption issues are generally categorized as express preemption, field preemption, and implied preemption. These labels may be convenient, but they are not mutually exclusive. *See, e.g.*, Nelson, *supra* note 20, at 226–30. Preemption is "express" if the congressional statute contains a preemption provision. *Id.* at 226. It is categorized as "field preemption" if Congress has, by pervasive statutory scheme, precluded any supplementary state regulation in an area. *Id.* at 227. Preemption is termed conflict preemption in one of two instances: (1) when it is physically impossible to comply with both the federal and the state regulation, which is relatively rare or (2) when, though it would be physically possible to comply with both federal and state standards, compliance with the state standard would "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 462, 469 (1984) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). *See* Nelson, *supra* note 20, at 226–30; Meltzer, *supra* note 24, at 362–66; Jordan, *supra* note 104, at 1152–53, 1156–65.

[161] *Sharon Steel*, 681 F. Supp. at 1497 (quoting *Mich. Canners & Freezers*, 467 U.S. at 469 (emphasis added in *Sharon Steel*)).

[162] *Id.*

[163] *Id.* at 1498.

[164] *Id.*

In its obstacle preemption analysis and its statute-Rule analysis (both of which can be viewed as permitting the federal courts to create federal common law),[165] the *Sharon Steel* court used a purposive approach to construction of CERCLA that allowed it to consider goals and purposes unexpressed in the text of Congress's legislation.[166] Thus, the *Sharon Steel* court ultimately concluded that (1) Congress had superseded Rule 17(b) under an implied repeal analysis based on the supersession clause of the Rules Enabling Act[167] and (2) Congress had preempted underlying state law incorporated into Rule 17(b) under a Supremacy Clause analysis.[168] Preemption analysis is inapplicable,[169] however, and the Supreme Court has restricted the authority of federal courts to use a purposive approach in creating federal common law. Thus, the preemption basis for the decision must be abandoned, and the federal common law basis must be reexamined.

b. *The Majority of Courts Agree with* Sharon Steel—*CERCLA Establishes Expanded Capacity for Dissolved Corporations*

The majority of courts to address the CERCLA-Rule 17(b) conflict have, like the *Sharon Steel* court, concluded that the CERCLA statute supersedes Rule 17(b) or preempts state law incorporated by reference into Rule 17(b). Some of these courts have simply followed the trend of cases holding that CERCLA supersedes Rule 17(b) or preempts underlying state law[170] or have simply concluded that these cases are more well reasoned.[171]

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[165] *See, e.g.*, Nelson, *supra* note 20, at 278; Meltzer, *supra* note 24, at 366–67 & n.104 (noting that, although there are differences between federal common lawmaking and preemption, "in both kinds of cases the federal courts are engaged in a kind of policymaking analysis rather than in textual interpretation, and in both cases the judgments they reach may be quite debatable"); *see also infra* note 303.

[166] *Sharon Steel*, 681 F. Supp. at 1495–98.

[167] *Id.* at 1495–96. The *Sharon Steel* court, however, relied on the lesser used doctrine that Congress had expressed clear intent to repeal Federal Rule of Civil Procedure 17(b), rather than on an irreconcilable conflict analysis. *Id.*

[168] *Id.* at 1496–98.

[169] *See supra* notes 66–82 and accompanying text.

[170] *See, e.g.*, BASF Corp. v. Cent. Transp. Inc., 830 F. Supp. 1011, 1012–13 (E.D. Mich. 1993) (noting that "the clear trend is towards construing CERCLA to supersede Rule 17(b) and to preempt state law").

[171] *See, e.g.*, Town of Oyster Bay v. Occidental Chem. Corp., 987 F. Supp. 182, 198–200 (E.D.N.Y. 1997); Idylwoods Assocs. v. Mader Capital, Inc., 915 F. Supp. 1290, 1303–04

Other courts, which have concluded that the CERCLA statute controls, have set forth an analysis that coincides with the *Sharon Steel* analysis, either as to the implied repeal analysis of conflicting statute and Rule under the Rules Enabling Act,[172] or as to federal preemption of underlying state law,[173] or as to both bases for the decision.[174]

(W.D.N.Y. 1996) ("This court finds the reasoning employed in the *BASF Corp.*, and other similar holdings, to be more persuasive, and concludes that the holdings of the majority of the courts should be followed, and that state statutes governing the capacity of a dissolved corporation to be sued are preempted by the overall purposes of CERCLA."); City & County of Denver v. Adolph Coors Co., 813 F. Supp. 1471, 1473–75 (D. Colo. 1992) (The court was unclear as to whether it relied on a supersession analysis, a preemption analysis, or both, but clearly rejected the "less sound" approach of the Levin Metals court, which gave "deference" to state capacity law.); United States v. Distler, 741 F. Supp. 643, 645–46 (W.D. Ky. 1990) (determining that "[t]he court follows *Sharon Steel* and declines to follow the *Levin Metals* court in this regard"); *see also* Waste Mgmt. of Wisconsin, Inc. v. Uniroyal Holding, Inc., No. 91-C-1020-S, 1992 U.S. Dist. LEXIS 12003, at *17–*18 (W.D. Wisc. June 2, 1992) (unclear on method of analysis but emphasizing that *Sharon Steel* provides a "sound approach").

[172] *See, e.g.*, Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc., No. 90-2325-V, 1992 WL 81983, at *3 (D. Kan. Mar. 12, 1992) (citing Traverse Bay Area Intermediate. Sch. Dist. v. Hitco, Inc., 762 F. Supp. 1298, 1301 (W.D. Mich. 1991)); Allied Corp. v. Acme Solvents Reclaiming, Inc., No. 86 C 20377, 1990 WL 322940, at *4 (N.D. Ill. July 6, 1990).

[173] *See, e.g.*, Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1150–53 (N.D. Fla. 1994); AM Props. Corp. v. GTE Prods. Corp., 844 F. Supp. 1007, 1011–12 (D.N.J. 1994) (holding that state capacity statutes "are preempted by the overall purposes of CERCLA"); *Sharon Steel*, 681 F. Supp. at 1496–98; *see also* Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1450–53 (W.D. Wash. 1990) (concluding that CERCLA should be interpreted to preempt state law incorporated into Rule 17(b), but that the court is constrained to follow binding Ninth Circuit precedent). *But see* Levin Metals Corp v. Parr-Richmond Terminal Co., 817 F.2d 1448, 1451 (9th Cir. 1987) (CERCLA does not preempt state corporate capacity statutes incorporated into Rule 17(b).).

[174] *See, e.g.*, Canadyne-Ga. Corp. v. Cleveland, 72 F. Supp. 2d 1373, 1383 (M.D. Ga. 1999); Burlington N. & Santa Fe Ry. v. Consol. Fibers, Inc., 7 F. Supp. 2d 822, 828 (N.D. Tex. 1998); State v. Panex Indus., Inc., No. 94-CV-0400E(H), 1996 WL 378172, at *5 (W.D.N.Y. June 24, 1996) (relying on statutory provisions of CERCLA that (1) § 107(a) provides that any person shall be liable under CERCLA "notwithstanding any other provision or rule of law" and (2) § 101(21) includes a corporation as a person without limiting the term to an existing corporation). The *Panex* court also concluded that CERCLA preempts state law incorporated into Rule 17(b). *Id.*; *see also* Barton Solvents, Inc. v. Sw. Petro-Chem., Inc., 836 F. Supp. 757, 760–61 (D. Kan. 1993); *BASF Corp.*, 830 F. Supp. at 1013 (clear trend of courts to hold that CERCLA preempts state law); *Traverse Bay*, 762 F. Supp. at 1301 ("[T]he *Sharon Steel* approach is "most sound. . . . Because Congressional intent is clear, Rule 17(b) is superseded and CERCLA actions against dissolved corporations must be permitted to proceed.").

The primary source of disagreement among the courts that conclude that CERCLA supersedes Rule 17(b) and/or preempts state capacity law is the length of the dissolved corporation's continuing capacity to be sued under CERCLA. Having held that CERCLA overrides Rule 17(b), the courts have nevertheless recognized that CERCLA does not directly address the issue of duration of the dissolved corporation's amenability to suit. The majority of these courts have relied on a federal common law created by analogizing a corporation to a deceased natural person to conclude that a corporation remains amenable to suit after dissolution under CERCLA either (1) until all assets have been distributed–while the corporation is "dead," but not yet "dead and buried;"[175] or (2) indefinitely—even after the corporation is both "dead and buried."[176] Most courts have not identified the issue of the duration of corporate capacity following dissolution as one of creating federal common law[177] and have not decided the issue by relying on the increasingly restrictive analysis developed by the Supreme Court for educing federal common law.

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[175] *See, e.g., Consol. Fibers, Inc.*, 7 F. Supp. 2d at 828–29; *Idylwoods Assocs.*, 915 F. Supp. at 1304; Hillsborough County v. A & e Rd. Oiling Serv., Inc., 877 F. Supp. 618, 621–22 (M.D. Fla. 1995) (noting, unlike the other courts relying on a "dead" or "dead and buried" analysis, that this "terminology . . . provides the basis for the federal common law surrounding this particular CERCLA issue"); *Chatham Steel*, 858 F. Supp. at 1150, 1152–53 (noting that the governing law is the federal common law and holding that under federal common law a corporation retains liability for cleanup of hazardous substances under CERCLA until both "dead and buried," i.e., until it has both dissolved and distributed all assets); *AM Props. Corp.*, 844 F. Supp. at 1012–15; *Barton Solvents*, 836 F. Supp. at 761–62; *BASF Corp.*, 830 F. Supp. at 1013 (clear trend of courts to hold that CERCLA preempts state law); *Adolph Coors Co.*, 813 F. Supp. at 1473–75; Stychno v. Ohio Edison Co., 806 F. Supp. 663, 670–72 (N.D. Ohio 1992); *Bancamerica Commercial Corp.*, No. 90-2325-V, 1992 WL 81983, at *3; *Traverse Bay*, 762 F. Supp. at 1301–02; *Distler*, 741 F. Supp. at 646–47 (stressing need for uniform national law); *Sharon Steel*, 681 F. Supp. at 1498–99 (leaving the issue of the amenability to suit of a "dead and buried" corporation "for another day"). *But see Town of Oyster Bay*, 987 F. Supp. at 200–02 (incorporating New York state law regarding a "dead and buried" corporation to conclude that, if a corporation is not dead and buried at the time of release of hazardous substances, it is subject to CERCLA liability, regardless of whether it is "dead and buried" at the time the CERCLA action is brought).

[176] *See, e.g., Canadyne-Ga. Corp.*, 72 F. Supp. at 1383–84; United States v. SCA Servs. of Ind., Inc., 837 F. Supp. 946, 953–56 (N.D. Ind. 1993); *Waste Mgmt.*, 1992 U.S. Dist. LEXIS 12003, at *15–*16; *Allied Corp.*, 1990 WL 322940, at *5. Significantly, these cases do not rely on an analogy to natural existence, but on the plain language of the CERCLA statute, which states that a person—which includes a corporation—shall be liable "notwithstanding any other provision or rule of law." 42 U.S.C. § 9607(a) (2000).

[177] *See supra* note 115.

2. The Minority View—CERCLA Does Not Override Rule 17(b)

Only a handful of cases have held that Fed. R. Civ. P. 17(b) controls in the apparent clash of the CERCLA statute and Rule 17(b).[178] Two of these courts, however, are the Seventh and Ninth Circuits—the only circuit courts to have reached the issue.[179] The Seventh Circuit, in *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*, viewed the issue solely as a conflict of two sources of federal law.[180] The Ninth Circuit, by contrast and as discussed above, used a preemption analysis and concluded that CERCLA does not override state law incorporated into Rule 17(b).[181]

In its 1995 decision in *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*,[182] the Seventh Circuit held that state law incorporated into Rule 17(b) controls the issue of corporate capacity in CERCLA actions because the CERCLA statute and Rule 17(b) do not conflict.[183] The Seventh Circuit held that CERCLA's "notwithstanding" language, which provides that CERCLA liability attaches to enumerated covered persons "notwithstanding any other provision or rule of law," applies only to "substantive liability," and does not displace the "many ancillary rules that influence how litigation proceeds . . . ."[184] The Seventh Circuit listed some of those "ancillary" rules of litigation that are not within the ambit of CERCLA's "notwithstanding" language–rules of preclusion,

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[178] *See, e.g.*, Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995); La.-Pac. Corp. v. ASARCO, Inc., 5 F.3d 431, 434 (9th Cir. 1993); *Levin Metals*, 817 F.2d at 1451; Global Landfill Agreement Group v. 280 Dev. Corp., 992 F. Supp. 692, 694–96 (D.N.J. 1998); *see also* Witco Corp. v. Beekhuis, 38 F.3d 682, 689–90 (3rd Cir. 1994) (concluding that CERCLA does not displace state probate non-claim statute).

[179] *Citizens Elec. Corp.*, 68 F.3d at 1019–20; *La.-Pac. Corp.*, 5 F.3d at 433–35; *Levin Metals*, 817 F.2d at 1451; *see also Witco*, 38 F.3d at 686–90 (discussing whether CERCLA displaces state probate non-claim statute).

[180] 68 F.3d at 1019.

[181] *Levin Metals*, 817 F.2d at 1451; *see also supra* notes 154–164 and accompanying text (discussing the *Levin Metals*' preemption rationale and of the *Sharon Steel* court's disagreement with that rationale); *see supra* notes 66–82 and accompanying text (explaining why preemption analysis is misplaced in the statute-Rule context).

[182] 68 F.3d at 1019–20.

[183] *Id.* In so holding, the Seventh Circuit did not cite any of the numerous district court cases that had already reached the issue and decided to the contrary. It also did not cite the Ninth Circuit opinion in *Levin Metals*, in which the Ninth Circuit used a preemption analysis to conclude that state law controls. *Levin Metals*, 817 F.2d at 1451.

[184] *Citizens Elec. Corp.*, 68 F.3d at 1019.

Rule 11 of the Federal Rules of Civil Procedure, summary judgment requirements, and discharges in bankruptcy.[185] In just the same way, the Seventh Circuit concluded, CERCLA "does not authorize litigation against a defunct corporation . . . ."[186] Thus, the Seventh Circuit held that the apparent conflict between CERCLA and Rule 17(b) is only that–apparent. Because CERCLA did not expand a dissolved corporation's amenability to suit, CERCLA and Rule 17(b) did not conflict. Thus, the state law capacity requirements incorporated into Rule 17(b) controlled.

Having determined that the provisions of the CERCLA statute and Rule 17(b) do not conflict, the Seventh Circuit could have ended its discussion. Instead, the court went on to consider the appropriate result if it were to have concluded, to the contrary, that Rule 17(b) were within the category of laws that could be displaced by CERCLA's "notwithstanding" language. The Seventh Circuit stated that, if Rule 17(b) were subject to potential displacement by the "notwithstanding" language, then the federal courts would have to use a federal common law analysis to determine whether the provisions of CERCLA and Rule 17(b) conflicted. The Seventh Circuit referenced Supreme Court cases regarding federal common law and concluded that, under current federal common law jurisprudence, state law corporate capacity requirements would still define the maximum length of time that a corporation would remain subject to liability under CERCLA.[187]

The Seventh Circuit reasoned that one of two situations would result under a federal common law analysis: First, the courts might conclude that the CERCLA statute did not permit the courts to create federal common law,[188] thus triggering the traditional federal common law rule that a corporation loses capacity to sue or be sued at the moment of dissolution, i.e., *before* the time set forth in state law statutes.[189] Second, if the federal

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[185] *Id.*

[186] *Id.*

[187] *Id.* The Seventh Circuit stated that under a federal common law approach, either courts would follow the traditional common law rule that corporations lose capacity to be sued at the moment of dissolution, as in *Chicago Title & Trust Co. v. Forty-One Thirty-Six Wilcox Building Corp.*, 302 U.S. 120, 125 (1937), or courts would incorporate state corporate law as the federal rule of decision, as in *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 89 (1994), and *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979). *Citizens Elec. Corp.*, 68 F.3d at 1019.

[188] For background on the debate regarding whether CERCLA permits creation of federal common law, see Nagle, *supra* note 118, at 1443–44; Rosenberg, *supra* note 23, at 459.

[189] *Citizens Elec. Corp.*, 68 F.3d at 1019 (7th Cir. 1995) (citing *Chi. Title & Trust*, 302 U.S. 120, 125 (1937)).

courts could create federal common law under the CERCLA statute, the Supreme Court decisions in *O'Melveny & Myers v. FDIC*[190] and *United States v. Kimbell Foods, Inc.*,[191] would control.[192] Under these decisions, federal common law would be construed to incorporate state corporate law.[193] Accordingly, the maximum duration of a corporation's capacity to sue or be sued under the CERCLA statute would be the time permitted under state corporate codes, and CERCLA and Rule 17(b) would not conflict. Thus, the Seventh Circuit became one of a small number of courts to acknowledge that any issue of conflicting statute and Rule would require an analysis of federal common law,[194] to acknowledge that Supreme Court decisions restricting federal common lawmaking should govern that analysis, and to conclude that, if federal common law could be created under the CERCLA statute, federal common law would incorporate state law. Accordingly, the CERCLA and Rule 17(b) would not conflict,[195] and both would survive. The Seventh Circuit did not consider preemption analysis.

3. Summary of Court Analyses of the CERCLA-Rule 17(b) Conflict

In summary, the majority of federal courts to address the issue of the apparent conflict between CERCLA and Rule 17(b) have concluded that CERCLA overrides Rule 17(b). These courts have used an implied repeal,

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[190] 512 U.S. 79 (1994).

[191] 440 U.S. 715 (1979).

[192] *Citizens Elec. Corp.*, 68 F.3d at 1019.

[193] *Id.* If the federal common law were construed to incorporate state corporate law of corporate capacity, there would be no need to consider whether Rule 17(b) were within the procedural limitation of the Rules Enabling Act.

[194] *See supra* note 115.

[195] The Seventh Circuit also stated that, according to one view of federal common lawmaking under CERCLA, there could be a conflict between CERCLA and Rule 17(b). If the CERCLA statute does not permit creation of federal common law, then prior federal common law would control. That prior federal common law provided that the amenability to suit of a dissolved corporation terminated at the moment of dissolution. *Citizens Elec. Corp.*, 68 F.3d at 1019 (citing *Chi. Title & Trust*, 302 U.S. at 125). Thus, if CERCLA incorporates prior federal common law, there is a conflict between CERCLA and Federal Rule Civil Procedure 17(b), but CERCLA would create a diminished duration of amenability to suit, terminating corporate liability at the moment of dissolution and before the time set forth in state corporate codes.

an obstacle preemption analysis, or both.[196] Many of these cases, and certainly the influential *Sharon Steel* decision,[197] were decided before the Supreme Court narrowed the interpretation of the CERCLA statute in its decision in *United States v. Bestfoods*[198] and before the Supreme Court cases that emphasize the increasingly restricted ability of federal courts to create federal common law.[199] The Seventh Circuit, by contrast, reached the issue in 1995 and concluded that CERCLA and Rule 17(b) do not conflict because the "notwithstanding" language of CERCLA does not include "procedural" issues such as amenability to suit of a dissolved corporation.[200] Even if the language could extend to such issues, the Seventh Circuit concluded that, under an analysis based on recent Supreme Court cases regarding federal common law, the maximum time a corporation could be subject to CERCLA liability would be that set forth in state corporate capacity codes.[201] Courts on both sides of the divide regarding this issue have relied on a preemption analysis, [202] but preemption is inapplicable in the statute-Rule context.[203]

In Part IV, I analyze the perceived CERCLA-Rule 17(b) conflict under the rulemaking authority analysis. I conclude that, whether a court uses the rulemaking authority analysis or an implied repeal analysis, the court must

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[196] *See supra* notes 170–174 and accompanying text.

[197] *See generally* United States v. Sharon Steel Corp., 681 F. Supp. 1492 (D. Utah 1987).

[198] 524 U.S. 51, 63–64 (1998).

[199] *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 228 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 87–88 (1994); United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979).

[200] *Citizens Elec. Corp.*, 68 F.3d at 1019.

[201] *Id.*

[202] The Ninth Circuit has held that CERCLA did not preempt state corporate law incorporated into Rule 17(b). *See, e.g.*, La.-Pac. Corp. v. ASARCO, Inc., 5 F.3d 431, 433–34 (9th Cir. 1993); Levin Metals Corp. v. Parr-Richmond Terminal Co., 817 F.2d 1448, 1451 (9th Cir. 1987). A number of courts, however, have held that CERCLA does preempt state corporate law. *See, e.g.*, Canadyne-Ga. Corp. v. Cleveland, 72 F. Supp. 2d 1373, 1383 (M.D. Ga. 1999); Burlington N. & Santa Fe Ry. v. Consol. Fibers, Inc., 7 F. Supp. 2d 822, 828 (N.D. Tex. 1998); New York v. Panex Indus., Inc., No. 94-CV-0400E(H), 1996 WL 378172, at *4–*5 (W.D.N.Y. June 24, 1996); Chatham Steel Corp. v. Brown, 858 F. Supp. 1130, 1150–52 (N.D. Fla. 1994); AM Props. Corp. v. GTE Prods. Corp., 844 F. Supp. 1007, 1011–12 (D.N.J. 1994); Barton Solvents, Inc. v. Sw. Petro-Chem., Inc. 836 F. Supp. 757, 760–61 (D. Kan. 1993); BASF Corp. v. Cent. Transp., Inc., 830 F. Supp. 1011, 1012–13 (E.D. Mich. 1993); Traverse Bay Area Intermediate Sch. Dist. v. Hitco, Inc. 762 F. Supp. 1298, 1301 (W.D. Mich. 1991); *Sharon Steel*, 681 F. Supp. at 1496–98; *see also* Columbia River Serv. Corp. v. Gilman, 751 F. Supp. 1448, 1450–53 (W.D. Wash. 1990).

[203] *See supra* notes 66–82 and accompanying text.

undertake an analysis of congressional silence or ambiguity regarding corporate liability in the CERCLA statute. Because current Supreme Court jurisprudence restricts federal courts both in statutory interpretation and federal common lawmaking, the courts should conclude that CERCLA does not displace state corporate capacity statutes. The courts' prior, erroneous use of preemption doctrine in the statute-Rule context, however, illustrates in sharp relief the contrast between the Supreme Court's current preemption jurisprudence, which permits federal courts more expansive authority to construe ambiguous federal statutes to displace state law, and the Supreme Court's current restriction of federal court authority in statutory interpretation and federal common lawmaking, which generally requires courts to rely on statutory text.

IV. ONE LAST TIME INTO THE BREACH: APPLICATION OF THE RULEMAKING AUTHORITY ANALYSIS TO THE CERCLA-RULE 17(b) CONFLICT

In this Part IV, I apply the rulemaking authority analysis to the apparent conflict between the CERCLA statute and Rule 17(b). The rulemaking authority analysis posits that clashes between congressional statutes and Supreme Court Rules pose potential horizontal federal power conflicts, rather than vertical federal-state conflicts. This has several implications. First, the traditionally used implied repeal analysis will be insufficient on several levels: (1) implied repeal encourages courts to treat federal statutes and Federal Rules as though the same lawmaker created both, thus, omitting inquiry into whether any conflict raises an issue of a deficit in the rulemaking authority of Congress or the Supreme Court[204] and (2) again, because the implied repeal analysis treats statutes and Rules as if the same lawgiver created both, it allows a resolution of potential statute-Rule conflicts by harmonizing the provisions without determining if there is, in fact, a conflict. Additionally, because statute-Rule conflicts present clashes between two sources of federal law, preemption analysis is not applicable.

The inapplicability of preemption analysis matters because current preemption cases permit federal courts more readily to use a purposive approach to statutory construction and, thus, to consider goals and purposes of a federal statute that are not set forth in the statutory text, while current statutory construction and federal common law analysis requires closer

[204] *See* Genetin, *supra* note 4, at 726–29.

adherence to statutory text. Indeed, despite the Supreme Court's recurring invocation of the presumption against preemption of state law in preemption cases,[205] many scholars have concluded that current preemption jurisprudence, particularly "obstacle" preemption jurisprudence, allows federal courts to interpret federal statutes to acknowledge unexpressed goals and purposes of Congress, and based on those judicially recognized goals and purposes, to displace state law.[206] These commentators conclude that preemption analysis provides inadequate protection of state interests.[207] Some, in fact, purport to detect a presumption *in favor of* preemption of state law at least in certain cases, even in areas traditionally subject to state control, such as state corporate law, in which the presumption against preemption is generally stated to have the greatest force.[208]

In light of the Court's oft-stated presumption *against* preemption of state law in its preemption doctrine, the broader authority of the federal courts to determine statutory purposes and displace state law in preemption

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[205] *See, e.g.*, Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963)); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

[206] *See, e.g.*, Massey, *Federalism*, *supra* note 25, at 436, 438, 502–12; Davis, *Unmasking the Presumption*, *supra* note 25, at 970; Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 2, 15–25, 33. *But see* Nelson, *supra* note 20, at 231–32, 290–98 (noting that "[t]he Court itself has applied the presumption only half-heartedly" and concluding that the non obstante provision in the Supremacy Clause, in fact, argues against such a presumption by providing "that the general presumption against implied repeals does not apply in preemption cases"); Dinh, *supra* note 20, at 2086–87, 2092 (noting that "[t]he actual strength of that presumption is a matter of considerable doubt," but concluding that "the constitutional structure of federalism does not admit to a general presumption against federal preemption of state law").

[207] *See, e.g.*, Massey, *Federalism*, *supra* note 25, at 502–12; Grey, *supra* note 104, at 503–06, 509–10. "The Court favors the value of certainty and predictability that results from a uniform federal rule over the value of preserving traditional state authority in our federal system at least as those values are implicated in preemption cases." Davis, *Unmasking the Presumption*, *supra* note 25, at 1017.

[208] *See, e.g.*, Ausness, *supra* note 25, at 967 ("During the past decade, the Court has referred to the presumption against preemption in some cases and ignored it completely in others."); Davis, *Unmasking the Presumption*, *supra* note 25, at 968, 971 ("It is inescapable: there is a presumption in favor of preemption. Historically, the Supreme Court has said differently—that, rather, there is a presumption against preemption. There is no such presumption any longer, if, indeed, there ever really was one."). "Despite the presumption's appearance in several Supreme Court cases post-*Geier*, its viability remains an open question. Indeed, obstacle implied preemption may effectively constitute a presumption that prevails in the opposite direction, that is in favor of federal law." Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 44.

cases is counter-intuitive.[209] Given the preemption doctrine's presumption against preemption, one might expect that the federal courts' ability to interpret a federal statute or to create federal common law regarding a federal statute (and hence to "displace" state law) would be broader in the determination of the scope of rights and prohibitions of a federal statute than it would be when the courts interpret a statute to determine its preemptive reach when state and federal law conflict. (Alternatively, one might expect the statute to have the same construction in both instances.) The opposite is currently true, particularly in instances of state common law causes of action.[210] One scholar has concluded that, if Paul Simon were to reduce preemption jurisprudence to song, he might ask rhetorically, to the tune of "Mrs. Robinson," "Where have you gone presumption against preemption?"[211] Pragmatically, though not lyrically, the answer to the question may be that the presumption against displacement of state law is alive and well, and living at least in the Court's doctrines of statutory construction and federal common lawmaking.[212] The result is that, under

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[209] *See, e.g.*, *Medtronic*, 518 U.S. at 485 (quoting *Santa Fe Elevator*, 331 U.S. at 230; *Schermerhorn*, 375 U.S. at 103); *Liggett Group*, 505 U.S. at 516.

[210] *See, e.g.*, Grey, *supra* note 104, at 505–06; Davis, *Unmasking the Presumption*, *supra* note 25, at 971, 1014; Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 33–43; *see also infra* note 240.

[211] Massey, *Vanishing Presumption*, *supra* note 25, at 759.

[212] *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 63–64 (1998); Atherton v. FDIC, 519 U.S. 213, 228 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994); *see also* Lund, *supra* note 18, at 901–02, 954–57, 981–88 (noting that Supreme Court decisions counsel against federal courts' creating federal common law that will displace state law and also provide that, when federal courts may create federal common law, there is a strong presumption that the federal common law will incorporate state law). Professor Lund emphasized the presumption that federal common law will incorporate state law, as follows:

> In *Kamen v. Kemper Financial Services*, the Court for the first time stated that there is a "presumption" that federal common law will incorporate the state law rule, indicating further that this presumption is "particularly strong" in certain areas, such as corporate law. In *O'Melveny* the Court appears to have made the presumption favoring incorporation of state law virtually irrebuttable.

Lund, *supra* note 18 (citations omitted); *see also* Meltzer, *supra* note 24, at 344–46 (noting that the Supreme Court has articulated a role of "judicial passivity" for federal judges, constricting their ability to interpret statutes or "flesh out federal enactments in service of statutory . . . purposes," absent textual authority). Professor Rosbenberg concurs in this analysis: "Originating in the *Kimbell Foods* case decided in 1979 and concluding with the *Bestfoods* decision in 1998, the unmistakable policy is one of judicial restraint and presumptive reliance on

current jurisprudence, the courts could more readily use preemption doctrine to displace the more restrictive state corporate capacity statutes incorporated into Rule 17(b) than they could use statutory construction or federal common law to construe CERCLA to create broader capacity for dissolved corporations. Because a statute-Rule conflict presents a conflict of two sources of federal law, however, the preemption door is closed.

The CERCLA-Rule 17(b) conflict, thus, provides a vivid example of the divergent or "selective" nature of the Supreme Court's emphasis on the necessity of textual clarity in statutory construction and federal common lawmaking. In the majority of cases to address the CERCLA-Rule 17(b) issue, most courts either applied a statutory interpretation or federal common law analysis that resulted in the conclusion that a dissolved corporation has expanded liability under CERCLA and also erroneously applied a preemption analysis,[213] or they relied solely on preemption.[214] Under this majority analysis, both of these doctrines regarding displacement of state law pointed in the same direction: furtherance of the purposes of Congress in enacting the federal CERCLA statute required an expansive interpretation of CERCLA and also required, many courts held, national uniformity.[215] Hence, under either analysis, the majority recognized an

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state law in the absence of an alternate federal statutory direction or a significant conflict with federal law." Rosenberg, *supra* note 23, at 502.

[213] *See supra* notes 172–174 and accompanying text.

[214] *See supra* note 173.

[215] *See, e.g.*, Burlington N. & Santa Fe Ry. v. Consol. Fibers, Inc., 7 F. Supp. 2d 822, 828 (N.D. Tex. 1998); Town of Oyster Bay v. Occidental Chem. Corp., 987 F. Supp. 182, 201 (E.D.N.Y. 1997) (stating, in part, that federal common law "is implicated under CERCLA because of the need for uniform federal rules of decision in assessing CERCLA liability"); New York v. Panex Indus., Inc., No. 94-CV-0400E(H), 1996 WL 378172, *4–*5 (W.D.N.Y. June 24, 1996); AM Props. Corp. v. GTE Prods. Corp, 844 F. Supp. 1007, 1012 (D.N.J. 1994); United States v. Distler, 741 F. Supp. 643, 646–47 (W.D. Ky. 1990) (stressing need for uniform national law).

In Chatham Steel Corp. v. Brown, the court follows a preemption approach in general, but notes the following:

> Tying the resolution of this question to the law of fifty different states would create uncertainty in the law and lead to inconsistency in the application of CERCLA.
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> Such uncertainty is avoided, however, if CERCLA is held to preempt state statutes of repose in general. Rather than depending on divergent state laws, federal courts can apply the federal common law to resolve this issue. Under this approach, courts can continue to develop a uniform, national rule to apply in cases where a defendant corporation is dissolved.

expanded amenability to suit of dissolved corporations for purposes of the CERCLA statute. Sometimes the courts construed CERCLA to extend corporate capacity until all corporate assets had been distributed and sometimes indefinitely, but in the substantial majority of cases, courts concluded that CERCLA expanded corporate capacity. Although a preemption analysis might still yield the same result, an analysis premised on statutory construction or federal common lawmaking will not.

Subpart IV.A, first, underscores that in the rulemaking authority analysis, courts must determine whether the federal statute and Rule are, in fact, in conflict. Since CERCLA is silent as to the duration of corporate capacity of a dissolved corporation, courts must examine statutory interpretation and federal common lawmaking to determine the scope of the CERCLA statute and, correspondingly, whether CERCLA and Rule 17(b) conflict. Subpart IV.A, therefore, examines current jurisprudence regarding interpretation of the CERCLA statute and regarding federal common lawmaking. The subpart concludes that, under the narrower role for statutory interpretation and federal common lawmaking, courts should not determine that the CERCLA statute enlarges the time periods established under traditional corporate law for suing a dissolved corporation. Indeed, federal courts, in using the narrower scope for statutory interpretation and federal common lawmaking chartered by the Supreme Court, have already begun rolling back their previous, more expansive interpretations of corporate successor liability under the CERCLA statute.[216] Subpart IV.A predicts a similar resolution of the CERCLA-Rule 17(b) issue. Subpart IV.B shows that the preemption doctrine, under which the majority of courts had previously concluded that CERCLA preempted state law incorporated into Rule 17(b) based on an "obstacle preemption" analysis, does not similarly constrain federal judges to following the intent of Congress as set forth in the text of the congressional statute.

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858 F. Supp. 1130, 1151 & n.14 (N.D. Fla. 1994).

[216] "Successor liability," in this instance, refers to the liability of a corporation (the successor corporation) that purchases the assets of another corporation (the predecessor corporation). In an asset purchase, the general rule is that the asset purchaser—the successor corporation—will not be liable for the debts of the predecessor corporation except in four narrow instances. Federal courts had previously expanded the instances in which, under CERCLA, an asset purchaser would be liable for the debts of its predecessor corporation based on the general remedial purposes of CERCLA. *See, e.g.*, B.F. Goodrich v. Betkoski, 99 F.3d 505, 578 (2d Cir. 1996), *overruled by* New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682 (2d Cir. 2003). Given that the Supreme Court has held that CERCLA should not be construed broadly to abrogate traditional corporate law, some circuit courts have begun to change these holdings. *See Bestfoods*, 524 U.S. at 70.

A. Applying Rulemaking Power: The CERCLA-Rule 17(b) Conflict and the Rulemaking Authority Analysis

The rulemaking authority analysis requires that the courts consider two issues—a power issue and a supersession clause issue.[217] There are, under this analysis, three broad categories of possible results. Under the power issue, a court considers two sub-issues: (1) whether the congressional statute and Supreme Court Rule conflict and (2) if the provisions conflict, whether one provision must yield because of a lack of rulemaking authority by one rulemaker in the particular context.[218] The courts, moreover, make this determination without a general presumption to harmonize the provisions of the federal statute and Federal Rule.[219] If, under the first portion of the analysis, the statute and Rule do not conflict, then, under the first category of results, both statute and Rule survive.[220] If there is a conflict and one of the provisions must yield because of a lack of rulemaking authority, then, under the second category of results, the analysis begins and ends with the inquiry into rulemaking authority—only the provision of the rulemaker with authority survives.[221] Finally, if the

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[217] *See* Genetin, *supra* note 4, at 726–33.

[218] *Id.* at 726–27.

[219] *Id.* at 721–26, 731–33. Under the traditional "implied repeal" analysis of conflicting federal statute and Federal Rule, by contrast, the court's typical task is to harmonize the statute and Rule, i.e., to construe the statute and Rule not to conflict, if such a construction is at all possible, even if the construction leads to a strained interpretation of the provisions.

[220] *Id.* at 730–36. In some limited instances, the court will determine that, even absent a conflict of statute and Rule, Congress intended to repeal the Rule. When a court determines that Congress intended to repeal, it need not find that the two provisions conflict since Congress need not create a conflict in order to repeal a prior Rule. That, in fact, was the determination of the majority of courts to examine the CERCLA-Rule 17(b) conflict. *See, e.g.*, United States v. Sharon Steel Corp., 681 F. Supp. 1492, 1496–98 (D. Utah 1987). Furthermore, Congress can also, by pervasive statutory scheme, supersede a Federal Rule. *See, e.g.*, Robbins v. Pepsi-Cola Metro., Bottling Co., 800 F.2d 641, 643 (7th Cir. 1986) (per curiam). These categories are similar to the preemption categories. *See supra* note 160.

[221] *See, e.g.*, Genetin, *supra* note 4, at 736–48. If the analysis yields a conclusion that there is a deficit in the rulemaking authority of either Congress or the Court, then only the provision of the rulemaker with superior procedural authority can survive. As noted above, Court Rules can exceed the Court's rulemaking authority if the rules are "substantive" in violation of the Rules Enabling Act, if they intrude into an area of exclusive congressional authority, or if Congress has removed rulemaking authority on an issue, *see id.* at 736–46, while Congress can exceed its rulemaking authority if it enacts rules that impair a constitutional requirement or impair the federal courts' ability to act as courts, *id.* at 746–48. In resolving statute-Rule conflicts, courts

statute and Rule conflict, but both Congress and the Supreme Court had authority to create the clashing provisions, then under the third category of results, the supersession clause of the Rules Enabling Act controls, and the provision that is later-in-time governs.[222]

The following parts will establish that, given the narrower role for federal courts in statutory interpretation and federal common lawmaking, the first step of this analysis resolves the CERCLA-Rule 17(b) issue: CERCLA does not enlarge state corporate dissolution law, and hence, CERCLA and Rule 17(b) do not conflict.[223] Because CERCLA does not directly address the duration of a dissolved corporation's amenability to suit, the issue of whether CERCLA and Rule 17(b) conflict requires interpretation of the CERCLA statute and examination of the courts' federal common lawmaking power.

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have rarely addressed issues of power. Occasionally, but not often, however, courts have considered the substantive rights limitation of the Rules Enabling Act. *See, e.g.*, Durant v. Husband, 28 F.3d 12, 14 (3d Cir. 1994); Chesny v. Marek, 720 F.2d 474, 479–80 (7th Cir. 1983), *rev'd*, 473 U.S. 1, 3 (1985).

[222] *See, e.g.*, Genetin, *supra* note 4, at 749–51.

[223] The statute-Rule conflict analysis will, thus, end with a determination of no conflict. It is important to understand, however, that regardless of what standard Congress had enacted regarding the duration of a dissolved corporation's amenability to suit under CERCLA, Congress would not have exceeded its authority to create procedure governing the federal courts. As discussed earlier, Congress's authority to enact procedures governing the federal courts is virtually unlimited, yielding only when Congress's statute abrogates a constitutional requirement or unconstitutionally restricts the power of the federal courts to act as courts. *See supra* note 52 and accompanying text. No congressional statute regarding corporate capacity of a dissolved corporation under CERCLA would contravene either limit on Congress's rulemaking authority. That is, whether Congress enacted, in CERCLA, a special provision expanding or contracting the liability of a dissolved corporation under CERCLA or incorporated existing state law corporate capacity standards, Congress would neither abrogate a constitutional provision included in Rule 17 nor restrict impermissibly the authority of the federal courts.

Thus, because Congress acted last and within its rulemaking authority, Congress's decision regarding corporate capacity of a dissolved corporation under CERCLA will control. The question then becomes solely an issue of whether CERCLA and Rule 17(b) conflict, i.e., what standard did Congress create in CERCLA regarding the duration of amenability of a dissolved corporation to suit?

1. Applying Rulemaking Power: Do CERCLA and Rule 17(b) Conflict and Create a Clash of Rulemaking Authority in Which One Provision Must Yield Because of a Lack of Authority?

In applying the power prong of the rulemaking authority analysis to the CERCLA-Rule 17(b) clash, it is important to emphasize that the numerous courts following the implied repeal analysis in the CERCLA-Rule 17(b) conflict issue did not apply the harmonization requirement of the implied repeal canon.[224] Instead, these courts followed the second, less frequently used branch of the implied repeal doctrine and held that the CERCLA statute revealed "clear" congressional intent to supersede Rule 17(b).[225] Thus, in the CERCLA-Rule 17(b) conflict, the federal courts, though following the principles of the implied repeal canon, in fact used an analysis that parallels portions of the rulemaking authority analysis: the courts first examined the intent of Congress in enacting the CERCLA statute, although not to determine if Congress and the Supreme Court had stayed within appropriate procedural rulemaking spheres.[226]

This subpart reassesses the interpretation of the CERCLA statute to determine if CERCLA and Rule 17(b) conflict. This reassessment defers to the continued narrowing of the authority of federal courts to interpret silence in federal statutes and to create federal common law. It is difficult,

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[224] *See, e.g.*, Bancamerica Commercial Corp. v. Mosher Steel of Kan., Inc., No. 90-2325-V, 1992 WL 81983, at *3 (D. Kan. March 12, 1992); Allied Corp. v. Acme Solvents Reclaiming, Inc., No. 86 C 20377, 1990 WL 322940, at *4 (N.D. Ill. July 6, 1990); United States v. Sharon Steel, Corp., 681 F. Supp. 1492, 1495–96 (D. Utah 1987); *see also supra* notes 134–137 and accompanying text.

[225] *See, e.g.*, *Bancamerica Commercial Corp.*, No. 90-2325-V, 1992 WL 81983, at *3; *Allied Corp.*, No. 86 C 20377, 1990 WL 322940, at *4; *Sharon Steel*, 681 F. Supp. at 1495–96; *see also supra* notes 134–142 and accompanying text. Those courts using a preemption analysis held that the state capacity statutes would stand as an obstacle to CERCLA's goals and objectives and, thus, Congress impliedly intended to preempt the underlying state statute. *See supra* notes 173–174 and cases cited therein; *see also supra* notes 66–82 and accompanying text (explaining that preemption is not implicated because collisions of federal statutes and Federal Rules create horizontal congressional-Court conflicts, not vertical federal-state conflicts).

[226] The rulemaking authority analysis, thus, shifts the "in conflict" decision from whether there is a conflict between two statutes of the same lawgiver or between two provisions of lawgivers with coextensive lawmaking authority, to whether there is a clash of statute and Rule and either Congress or the Supreme Court lacked rulemaking authority for its standard. In such a case, only the provision of the rulemaker with authority can survive. *See* Genetin, *supra* note 4, at 730 n.242.

if not impossible, to set a precise boundary dividing a court's statutory interpretation and its creation of federal common law.[227] Most commentators acknowledge that the line separating federal common law and statutory interpretation is indistinct or simply a matter of degree.[228] In *Atherton v. FDIC*, the Supreme Court stated that "federal common law" in the "strictest sense" is "a rule of decision that amounts, not simply to an interpretation of a federal statute or a properly promulgated administrative rule, but, rather, to the judicial 'creation' of a special federal rule of decision."[229] Under the *Atherton* view, a determination that CERCLA expands the capacity of a dissolved corporation beyond the capacity established under state law would probably be viewed as creation of a special federal rule of decision, i.e., the creation of federal common law. In fact, the Supreme Court and various circuit courts have tended to refer to interpretations of the CERCLA statute that broaden corporate liability as creating "CERCLA-specific rules of law."[230]

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[227] *See, e.g.*, Meltzer, *supra* note 24, at 379 & n.99 (noting that the line between statutory interpretation and creation of federal common law is indistinct); Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 536–39 & nn.116–17 (2002) [hereinafter Meltzer, *Customary International Law*]; Kermit Roosevelt III, *Light from Dead Stars: The Procedural Adequate and Independent State Ground Reconsidered*, 103 COLUM. L. REV. 1888, 1906 n.82 (2003) (noting that the difference between statutory interpretation and federal common lawmaking is one of degree rather than kind). Professor Hoffstadt has also noted the difficulty of drawing a precise boundary demarking statutory interpretation and federal common law:

> The line between statutory interpretation and judicial lawmaking is . . . difficult to discern. It may be more helpful, therefore, to treat all acts of judicial review as a form of common lawmaking, but to acknowledge that those acts lie along a spectrum that runs from the clearly to the dubiously constitutional.

Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U.L. REV. 1413, 1420–21 & nn.39–41 (2002); *see also* Nw. Airlines, Inc. v. Transp. Workers Union of Am., 451 U.S. 77, 97 (1981).

[228] *See supra* note 227.

[229] 519 U.S. 213, 218 (1997) (citing Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640–43 (1981)).

[230] *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 70 (1998) (noting that the district court's incorrect focus on relation between parent and subsidiary to determine parent company liability under CERCLA would allow "a relaxed, CERCLA-specific rule of derivative liability"); *accord* New York v. Nat'l Servs. Indus. Inc., 352 F.3d 682, 685 (2d Cir. 2003) (finding that federal courts, after *Bestfoods*, should not create CERCLA-specific rules).

The categorization of the issue as one of federal common lawmaking or one of statutory interpretation, however, is ultimately irrelevant. Since the date of the influential 1987 *Sharon Steel* decision in the CERCLA-Rule 17(b) context,[231] the Supreme Court has narrowed both the scope of interpretation of CERCLA in instances of congressional silence[232] and the scope of permissible federal common lawmaking.[233] These factors combine to suggest that, regardless of whether a court classifies its analysis as statutory interpretation or as federal common lawmaking, the court would reach a result that differs from the majority of courts to address the issue, which held that CERCLA extended the duration of a dissolved corporation's liability under CERCLA. The narrowed adjudicatory authority in statutory interpretation and federal common lawmaking also requires that the courts would today reach a different conclusion about the scope of the CERCLA statute in the CERCLA-Rule 17(b) context.[234] That

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[231] 681 F. Supp. 1492 (D. Utah 1987).

[232] *Bestfoods*, 524 U.S. at 61–70.

[233] *See infra* notes 290–345 and accompanying text; *see also* Mank, *supra* note 117, at 1158 (discussing the use by some federal courts of federal common law to impose a broader successor liability than under state successor liability principles and the subsequent retreat from this position by some courts following the United States Supreme Court decisions in *O'Melveny & Myers v. FDIC* and *Atherton v. FDIC*); Meltzer, *Customary International Law*, *supra* note 227, at 536–39 & n.116; Meltzer, *supra* note 24, at 343–56; Resnik, *supra* note 24, at 236–42; Rosenberg, *supra* note 23, at 426–30; *accord* Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019–20 (7th Cir. 1995). Professor Lund, however, disparages the narrowing of federal common lawmaking authority:

> When federal law governs, there is simply no occasion to "displace" state law. In some instances, the Court has chosen to incorporate a state rule as the federal common law rule for reasons of convenience or for other discretionary reasons, when the rule adequately accommodates federal interests. But before *Kamen*, the Court never suggested that there should be a "presumption" that governing federal common law incorporate state law, much less a "strong" presumption.

Lund, *supra* note 18, at 903.

[234] *But see* Rosenberg, *supra* note 23, at 425 (contending, in part, that federal courts may be defying the Supreme Court and declining to apply more restrictive federal common law analysis to the CERCLA statute). In this article, Professor Rosenberg acknowledges an increasingly restricted ability of the federal courts to "'find' federal common law," but contends, using the issue of corporate successor liability under the CERCLA statute, that "the Supreme Court's directives have *rarely* been followed in the CERCLA context." *Id.* at 427–30 (emphasis added). Contemporaneously with the publication of the Rosenberg article, however, the Second Circuit, relying principally on *United States v. Bestfoods*, overruled its prior case law, which had permitted

different conclusion is that the CERCLA statute does not extend capacity of a dissolved corporation to be sued beyond the time periods set forth in state law. Thus, there is no conflict between the CERCLA statute and Rule 17(b), and the inquiry ends under the first portion of the rulemaking authority analysis, with both CERCLA and Rule 17(b) surviving.[235]

If a court views the issue as one of statutory interpretation, the court will, in accord with the Supreme Court decision in *United States v. Bestfoods*, construe CERCLA to incorporate the requirements of fundamental corporate law.[236] According to the Seventh Circuit decision in *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Co.*, this would mean either that duration of corporate liability under CERCLA would track state corporate capacity law or that it would track the prior federal common law of corporate capacity in which a dissolved corporation's capacity to be sued expired at the moment of dissolution—before the time set forth in state corporate codes.[237]

If a court construes the issue to involve creation of federal common law, the court would, under current case law, conclude either that CERCLA does not permit creation of federal common law or, if it does permit creation of federal common law, that federal common law incorporates state law.[238]

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expanded successor liability under CERCLA and which the Second Circuit described as having "adopt[ed] a special rule for use in CERCLA cases that departed from [general common law] principles." *See* New York v. Nat'l Serv. Indus., Inc. 352 F.3d 682, 685–87 (2d Cir. 2003) (overruling B.F. Goodrich v. Betkoski, 99 F.3d 505 (2d Cir. 1996)). In *New York v. National Services. Industries, Inc.*, the Second Circuit also indicated that the analysis for determining federal common law, which is prescribed in *United States v. Kimbell Foods, Inc.*, "would likely come out differently" from the Second Circuit's 1996 decision in *Betkoski*. 352 F.3d. at 686 n.1. The court noted that "[i]n particular, a state's [traditional] 'mere continuity' rule [was] unlikely to 'frustrate specific objectives of the federal program[],' because it [was] likely to be the same as the federal rule." *Id.* (citations omitted) (quoting United States v. Kimbell Foods, Inc., 440 U.S. 715, 728–29 (1979)).

[235] *See also supra* note 223 (explaining also that, because there is no deficit in congressional rulemaking authority regarding duration of corporate capacity after dissolution, Congress's statute will control under the supersession clause).

[236] 524 U.S. at 61–64; *accord Nat'l Servs. Indus.*, 352 F.3d at 684–87 (citing *Bestfoods* in the context of liability of a successor corporation under CERCLA and concluding that *Bestfoods* precludes reading CERCLA to expand traditional corporate capacity law).

[237] 68 F.3d at 1019.

[238] *See, e.g., Bestfoods*, 524 U.S. at 63 n.9; Atherton v. FDIC, 519 U.S. 213, 218 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 83–87 (1994); *accord Citizens Elec. Corp.*, 68 F.3d at 1019–20 (concluding that, if the courts may create federal common law under CERCLA, CERCLA should be construed to incorporate state corporate law regarding amenability to suit

These narrowed constructions are contrary to the conclusions of the majority of federal courts to address the CERCLA-Rule 17(b) conflict over the past two decades and give diminished weight to remedial purposes underlying the CERCLA statute. The constructions do, however, illustrate what Professors Meltzer and Resnick have recognized as a narrowed "role for federal adjudication" that shades into a creation of a "judicial passivity" or "judicial disability" in some, but not all, areas of subconstitutional decision-making.[239] Further, the narrowed authority of the federal courts in construing federal statutes and in creating federal common law is at odds with a continuing broader ability of federal courts to interpret federal statutes expansively in the preemption context, which will be explored in subpart IV.B below.[240] Thus, it becomes critical that potential conflicts

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after dissolution); *see also* Ostrander, *supra* note 127, at 485–89 (applying the Supreme Court decisions in *O'Melveny & Myers* and *Atherton* to the CERCLA-Rule 17(b) issue and stating that the decisions had been "overlooked—at least as far as CERCLA is concerned," but failing to distinguish between the courts' federal common law and preemption approaches); *Nat'l Servs. Indus.*, 352 F.3d at 686 n.1 (indicating, in context of determining corporate successor liability under CERCLA, that a federal common law analysis under *Kimbell Foods* and its progeny would probably yield a determination that state law defines federal common law). *But see* United States v. Gen. Battery Corp., 423 F.3d 294, 298–305 (3d Cir. 2005) (creating a federal common law of successor liability under CERCLA that relies on the corporate law in the majority of states).

[239] *See, e.g.*, Meltzer, *supra*, note 24, at 343–45. Meltzer states:

> In the subconstitutional arena, it is striking, on the one hand, how the [Supreme] Court has sought, across a broad range of subject matters, to reduce the role of judicial lawmaking and to refuse to take responsibility for shaping a workable legal system in the everyday disputes that come before the judiciary without great fanfare.

Id. at 343; *see also* Resnick, *supra*, note 24, at 224 (noting that recent Supreme Court cases instruct federal courts "not to craft remedies without express congressional permission, and, when such permission has been granted, to read it narrowly") Professor Resnick also emphasizes that the majority of the Supreme Court "has crafted a narrow role for judicial adjudication." *Id.* at 226; *see also* Rosenberg, *supra* note 23, at 429–30 (recognizing the increasingly restricted ability of federal courts to create federal common law, and characterizing federal judges as "more restrained judicial actors," but suggesting that the lower federal courts may be "defying" the Supreme Court and exercising greater federal common lawmaking authority in the CERCLA context).

[240] *See, e.g.*, Meltzer, *supra* note 24, at 344, 368–78; Resnik, *supra* note 24, at 246; Grey, *supra* note 104, at 475 (preempting state law seems out of place with other court doctrine); Ausness, *supra* note 25, at 968 ("[T]he Court's recent preemption decisions have been neither clear nor consistent. Additionally, many of these decisions have encroached upon the historic police powers of the states." (footnote omitted)). Professor Davis concludes similarly, as follows:

> In the case of federal preemption of common law damages actions, the Court, until recently, presumed that Congress would not displace state law in areas of the states'

between federal statutes and Federal Rules do not implicate preemption analysis.

a. *Applying Adjudicatory Power*—Bestfoods *In Perspective: No Displacement of Traditional Corporate Law Under CERCLA Absent Congressional Indication*

The Supreme Court's 1997 decision in *United States v. Bestfoods* undercuts the notion that courts should construe the CERCLA statute broadly to expand traditional norms regarding corporate capacity after dissolution in order to serve general remedial purposes of the CERCLA statute.[241] As detailed above, the majority of courts to reach the CERCLA-

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> 'historic police powers'–those involving health and safety matters. . . . The Court has backed away from this presumption against preemption and moved to an application of the Supremacy Clause which incorporates an assessment of legislative purposes without the use of any presumptions, coupled with a default to federal law in the case of an actual conflict.

Davis, *On Preemption*, *supra* note 25, at 200; Massey, *Federalism*, *supra* note 25, at 503 ("[W]hile the Court may be creating one brand of process federalism when the scope of the commerce clause is at issue it is engaged in a distinctly different brand when preemption is afoot."); Jeffrey A. Berger, Comment, *Phoenix Grounded: The Impact of the Supreme Court's Changing Preemption Doctrine on State and Local Impediments to Airport Expansion*, 97 Nw U.L. Rev. 941, 951 (2003) (noting that it is odd that at same time as Supreme Court is decreasing federal court powers and giving it to states, it is decreasing the presumption against preemption). Professor Raeker-Jordan also emphasizes that the Court uses a more expansive analysis in preemption cases:

> Apart from the anomalous *Sprietsma*, what emerges from these post-*Geier* cases is the sense that the Court will acknowledge the presumption against preemption when the presumption can be said to be inapplicable or when it ultimately can be overcome by something else in the statute. . . . Perhaps the most one can say is that the presumption [against preemption] exists in name only; otherwise, its applicability and even the acknowledgment of its existence are dependent on the whims of the Court and the Court's desired outcome in any particular case.

Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 42–43; *see also* Davis, *supra* note 25, at 1013–29. *But see* Eggen, *supra* note 25, at 155 (stating that the Court's decisions in *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), and *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001), signal "that the Court intends to limit the use of implied preemption along some of the same principles that have pervaded earlier preemption decisions").

[241] *Id.* at 61–70. The Second Circuit, in fact, similarly limited its analysis of corporate successor liability after *Bestfoods*:

Rule 17(b) issue relied on a textual approach to interpretation of the CERCLA statute, fortified by reference to the broad goals and purposes of CERCLA. They concluded that Congress intended the CERCLA statute to provide a broader amenability to suit than a dissolved corporation would ordinarily have under state corporate law.[242] Briefly, this analysis provided that, under CERCLA, certain persons, which term includes corporations, were amenable to suit "notwithstanding any other provision or rule of law."[243] Because the CERCLA statute did not further define a "corporation" to limit it to a corporation existing under state law, and because of the goals of CERCLA to hold liable those responsible for disposal of hazardous substances, the majority of courts interpreted CERCLA to enlarge the amenability to suit of a dissolved corporation beyond the time period set forth in state law corporate capacity statutes.[244]

As Professor Nagle observed in 1997, however, although the lower federal courts have frequently invoked the broad purposes of CERCLA, the Supreme Court had never done so.[245] Indeed, Professor Bradford Mank has subsequently concluded that the Supreme Court decision in *Bestfoods* provides strong evidence that "courts should not use CERCLA's general

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> In considering the substantial continuity test [for corporate successor liability], 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* departs from the common law rules of successor liability, *Betkoski* is no longer good law.

New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 685 (2d Cir. 2003); United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) ("Recent Supreme Court precedent . . . applied state corporation law in a recent CERCLA case involving the potential liability of a parent corporation for its subsidiary and left little room for the creation of a federal rule of liability under the statute.").

[242] *See supra* notes 129, 170–176 and accompanying text.

[243] *See supra* notes 105–114 and accompanying text.

[244] *See supra* notes 175–176 and accompanying text. The courts' holdings thereby concluded that the default rule of CERCLA liability is that a dissolved corporation retains liability, absent clear congressional limitation of liability. In *Bestfoods*, the Supreme Court seems to create a contrary default rule—that corporate liability will be the same under CERCLA as under fundamental corporate law, absent clear congressional expansion of liability. *See infra* notes 251–268 and accompanying text.

[245] Nagle, *supra* note 118, at 1439–40; *see also supra* note 150; *accord* Rosenberg, *supra* note 23, at 455 (*Bestfoods* "suggests that CERCLA's broad remedial purposes alone do not justify displacing fundamental corporate law principles and imposing new, federal common law rules for corporations assessing liability for response costs.").

remedial purposes as a basis for rejecting traditional corporate law principles."[246] Even more recently, Professor Ronald Rosenburg has stated that the Supreme Court in *Bestfoods* indicated that statutory gaps in the CERCLA statute do not authorize courts to abandon fundamental principles of common law:

> The Court did not expressly decide the issue of whether federal courts should use new federal common law or state law to determine CERCLA liability for parent corporations, but it clearly indicated a preference that courts should not use statutory gaps as a basis for rejecting fundamental corporate law principles and creating federal common law.[247]

Thus, a broad construction of the CERCLA statute to expand the duration of a dissolved corporation's amenability to suit under CERCLA is certainly possible.[248] The *Bestfoods*[249] case and subsequent lower court

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[246] Mank, *supra* note 117, at 1190–91. Professor Mank also recognized, however, that the Supreme Court's statements in *Bestfoods* could also be reconciled with either a requirement to follow state corporate law or to follow a "narrow federal common law" based on the corporate law applicable in most states. Mank, *supra* at 1191; Rosenberg, *supra* note 23, at 432, 503–09 (noting that "[t]he *Bestfoods* holding has potential significance in many other CERCLA contexts").

[247] Rosenberg, *supra* note 23, at 454.

[248] It could certainly be, and, in fact, has been argued that, unlike the issue of parent liability addressed in *Bestfoods* or successor liability addressed by the Second Circuit in *New York v. National Services. Industries, Inc.*, the broad "notwithstanding" language of CERCLA § 9607(a), combined with the failure of Congress to specify expressly the period of liability of a dissolved corporation, indicates that Congress was not silent on the issue of corporate capacity of a dissolved corporation or that Congress intended the courts to create federal common law regarding the issue. Indeed, CERCLA § 9607(a) specifically provides that "notwithstanding any other provision or rule of law" a person, including a corporation, shall be liable for CERCLA response costs, subject only to the defenses of act of God, act of war, and act of a third party. 42 U.S.C. § 9607(a) (2000). A minority of the courts to reach the issue have relied on this plain language alone to conclude that corporations retain CERCLA liability indefinitely. *See, e.g.*, Canadyne-Ga. Corp. v. Cleveland, 72 F. Supp. 2d 1373, 1383–84 (M.D. Ga. 1999); United States v. SCA Servs. of Ind., Inc., 837 F. Supp. 946, 953–56 (N.D. Ind. 1993); Allied Corp. v. Acme Solvents Reclaiming, Inc., No. 86 C 20377, 1990 WL 322940, at *5, (N.D. Ill. July 6, 1990). The *Bestfoods* case and circuit cases construing *Bestfoods*, however, indicate that something more than the general and broad statement regarding liability under § 9607(a) would be necessary to expand corporate liability beyond that set forth in state corporate law. *See, e.g.*, *Bestfoods*, 524 U.S. at 51; Atherton v. FDIC, 519 U.S. 213, 231 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 89 (1994).

decisions construing *Bestfoods*[250] in the context of corporate successor liability, as well as current, increasingly restrictive Supreme Court jurisprudence regarding creation of federal common law, however, suggest a contrary result.[251] These cases support a conclusion that the silence in CERCLA regarding the liability of a dissolved corporation should be resolved by reference to "traditional" or "fundamental" corporate law, rather than by creation of a "relaxed, CERCLA-specific rule of . . . liability that would banish traditional standards and expectations from the law of CERCLA liability."[252] This narrower construction also illustrates a readjustment of the norms of judicial decision-making to narrow the federal courts' ability to interpret a statute in accord with goals and purposes of Congress not set forth in the text of a statute—a readjustment that the Supreme Court does not require in the preemption context.[253]

In *United States v. Bestfoods*, the Supreme Court addressed several issues, including whether a parent corporation could be liable under CERCLA for the polluting activity of a facility operated by its subsidiary.[254]

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[249] 524 U.S. at 70.

[250] *See, e.g., Nat'l Servs. Indus.*, 352 F.3d at 684–85; United States v. Davis, 261 F.3d 1, 53–54 (1st Cir. 2001).

[251] *See, e.g., Bestfoods*, 524 U.S. at 51; *Atherton*, 519 U.S. at 231; *O'Melveny & Myers*, 512 U.S. at 89.

[252] *Bestfoods*, 524 U.S. at 70. The Supreme Court further emphasized that "relaxed, CERCLA-specific rule[s] of derivative liability . . . [do] not arise from congressional silence." *Id.* Instead, "CERCLA's silence is dispositive." *Id.* at 53.

[253] *See, e.g., id.* at 63 (noting in broad dicta 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 a plaintiff's cause of action is based upon a federal statute" (emphasis added)). The *Bestfoods* case thus suggests that a federal statute must give some textual indication that traditional law is to be replaced. *See also O'Melveny & Myers*, 512 U.S. at 89 (emphasizing that federal common law must not be "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy"); *accord* Meltzer, *supra* note 24, at 344–46 (noting that the Supreme Court has articulated a role of "judicial passivity" for federal judges, constricting their ability to interpret statutes or "flesh out federal enactments in service of statutory . . . purposes[,]" absent textual authority). "Originating in the *Kimbell Foods* case decided in 1979 and concluding with the *Bestfoods* decision of 1998, the unmistakable policy is one of judicial restraint and presumptive reliance on state law theory in the absence of an alternate federal statutory direction or a significant conflict with federal law." Rosenberg, *supra* note 23, at 502. In the preemption context, by contrast, the Court has backed away from its traditional presumption against preemption of state law. *See supra* note 240.

[254] 524 U.S. at 55. The Supreme Court identified the issue posed in the case as "whether a parent corporation that actively participated in, and exercised control over, the operations of a

The Supreme Court broadly indicated in *Bestfoods* that CERCLA does not displace "bedrock" corporate law principles or "venerable" corporate common law unless the statute specifically addresses the issue and explicitly so states.[255] The *Bestfoods* Court thus held that traditional corporate law principles regarding parent-subsidiary liability prevented a parent company from being held liable under CERCLA simply because the parent company exerted the type of control over a subsidiary that is typical of a parent that has a majority or controlling interest in the subsidiary.[256] More specifically, CERCLA did not override traditional corporate law principles providing for nonliability when a parent corporation has control over election of directors and creation of by-laws and also has some of its officers and directors serving as officers and directors of the subsidiary corporation.[257] The Supreme Court recognized that respect for the corporate form, which ordinarily insulates a parent from liability in these types of circumstances, had been "severely criticized in the literature" when the subsidiary was alleged to have engaged in polluting activities.[258] Nevertheless, the Court held that nothing in CERCLA indicated intent by Congress to abrogate the "bedrock" principles of parent corporation liability, "and against this venerable common-law backdrop, the congressional silence [was] audible."[259] The Court's emphasis was that the federal statute must provide some textual indication that Congress intended to displace state law: broad and unexpressed congressional purposes would not suffice.

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subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary." *Id.* The Supreme Court also addressed the issue of when the parent's corporate veil could be pierced and the corporation could be held derivatively liable for the subsidiary's actions. *Id.* at 61–64 & n.9. The Supreme Court did not decide, however, whether a federal common law of veil piercing would apply or whether a court should borrow state common law. *Id.* at 63 n.9.

[255] *Id.* at 61–64.

[256] *Id.* at 61–62.

[257] *Id.*

[258] *Id.* at 62 (citing Note, *Liability of Parent Corporations for Hazardous Waste Cleanup and Damages*, 99 HARV. L. REV. 986 (1986)).

[259] *Id.* at 61–62. The Court emphasized that "nothing in CERCLA" rejects the general corporate principle, which the Court described as "'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries." *Id.* (quoting William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporation*, 39 YALE L. J. 193 (1929)).

In addressing a second issue—when the corporate veil could be pierced in a CERCLA case—the *Bestfoods* Court also indicated that "fundamental" principles of corporate liability controlled, rather than an expanded, CERCLA-specific standard.[260] With respect to this issue, the Court stated that nothing in CERCLA purported to "rewrite" the "well-settled rule" of corporate law that the corporate veil could be pierced only as provided in the fundamental law of piercing the corporate veil.[261] Thus, the *Bestfoods* Court also rejected the proffered broader rule that would have permitted an expanded law of corporate veil-piercing under the CERCLA statute.[262]

Much of the opinion in *Bestfoods* emphasized that, unless CERCLA expressly provides otherwise, nothing in CERCLA abrogates traditional or fundamental *common law* corporate principles.[263] The Supreme Court did indicate, however, that its discussion could apply to all corporate issues, particularly corporate liability issues, unless Congress directly addressed the issue of displacement of state corporate law:

> 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."[264]

Not referring once to the "broad remedial purposes" of CERCLA that numerous courts have used to extend liability under the CERCLA statute, the *Bestfoods* Court held that "against this venerable common-law backdrop [regarding the scope of parent liability]," Congress's "silence" in CERCLA was "audible."[265] Thus, the Supreme Court did not fill in statutory silence

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[260] *Id.* at 62–64.

[261] *Id.* at 62–63. The Supreme Court expressly declined to determine whether state common law principles regarding piercing the corporate veil, or a federal common law principle, would be applicable under the CERCLA statute. *Id.* at 63 n.9.

[262] *Id.* at 62–63.

[263] *Id.* at 61–64.

[264] *Id.* at 63 (citations omitted).

[265] *Id.* at 62.

or gaps regarding the application of state corporate principles by creating a uniform and expanded federal standard of liability based on broad remedial purposes of CERCLA. Nor did the Court assert that CERCLA requires uniform standards nationwide, rather than application of traditional corporate standards, to effectuate its purposes.[266]

Through the *Bestfoods* decision, the Supreme Court has thus narrowed the ability of federal courts to construe the CERCLA statute to expand traditional corporate law liability, based on silence in the CERCLA statute or based solely on CERCLA's remedial purposes. It also stated that CERCLA is like "many another congressional enactment," thus suggesting, in dicta, that federal courts should similarly construe other federal statutes not to displace state corporate law, absent textual clarity of Congress.[267] Courts following *Bestfoods*, then, will conclude that ambiguity or gaps in the CERCLA statute (and perhaps in "many another congressional enactment") regarding the amenability to suit of a dissolved corporation should not be resolved through broad and "remedial" interpretation of the CERCLA statute. Instead, the "default" principle of interpretation becomes that, absent textual direction of Congress, fundamental corporate law controls, including the corporate law regarding capacity of a dissolved corporation.[268] This construction would be contrary to the holdings of the substantial majority of federal courts to consider the CERCLA-Rule 17(b) issue.

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[266] The Court, though, expressly declined to address whether the common law principles governing veil piercing would be those of state common law or based on a uniform federal common law of veil piercing. *See id.* at 63 n.9.

[267] *Id.* at 63; *see, e.g.*, Meltzer, *supra* note 24, at 345–46 (noting that, in addition to narrowly construing the federal courts' adjudicatory authority in particular cases, the Court uses expansive dicta indicating that other statutes or cases should be similarly construed).

[268] In the CERCLA-Rule 17(b) context, the Seventh Circuit applied just such an analysis in *Citizens Electric. Corp. v. Bituminous Fire & Marine Insurance Co.*, 68 F.3d 1016, 1019–20 (7th Cir. 1995). It determined that under a federal common law analysis, either (1) a federal court could create common law under CERCLA and would, in accord with recent Supreme Court decisions, incorporate state law corporate capacity decisions or (2) a federal court may not create federal law under CERCLA, thus, requiring application of the traditional federal common law that a corporation lost capacity to be sued at the moment of dissolution and before the time set forth in corporate capacity statutes. *Id.* at 1019; *see also supra* notes 187–193 and accompanying text.

b. Applying Adjudicatory Power—Bestfoods *in Action: "Traditional," Not Expanded, Successor Corporation Liability Under CERCLA Absent Textual Clarity*

The federal courts have, since the *Bestfoods* decision, begun to narrow constructions of the CERCLA statute, under which the courts had previously expanded corporate liability. Indeed, the Second Circuit has recently, in reliance on *Bestfoods*, vacated a prior decision in which it had created expanded corporate successor liability under CERCLA in the context of an "asset purchase."[269] In so doing, the Second Circuit, in *New York v. National Services Industries, Inc.*, emphasized that courts, in determining "whether liability under CERCLA passes from one corporation to another, . . . must apply common law rules and not create CERCLA-specific rules." [270] The Second Circuit, therefore, held that the relaxed, CERCLA-specific, "substantial continuity" rule of successor liability that it had previously adopted in *B.F. Goodrich v. Betkoski*, could no longer remain good law after *Bestfoods*.[271] In just the same way, courts applying *Bestfoods* in the CERCLA-Rule 17(b) context will be constrained to conclude that traditional or fundamental corporate law, rather than a "CERCLA-specific" rule, governs amenability to suit of a dissolved corporation.

"Successor liability," in an asset purchase context, refers to the situation in which one corporation (the predecessor corporation) contracts to sell its assets to another corporation (the successor corporation). In a sale of assets, the successor corporation, under traditional common law principles, does not assume the liabilities of the predecessor corporation, except in the following four scenarios: "the successor expressly or impliedly agree[d] to assume [additional liabilities]; the transaction may be viewed as a de facto merger or consolidation; the successor is the 'mere continuation' of the predecessor; or the transaction is fraudulent."[272] Thus, the general rule in a sale of assets is one of nonliability: the successor corporation is not liable

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[269] New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 685–87 (2d Cir. 2003) (overruling *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996), which had expanded the "mere continuation" exception to limited successor corporation liability to the broader "substantial continuation" test, and had, thus, broadened corporate liability under CERCLA).

[270] *Id.* at 685.

[271] *Id.* at 684.

[272] *Id.* at 685 (quoting *Betkoski*, 99 F.3d at 519); *see also* Mank, *supra* note 117, at 1162–65; Rosenberg, *supra* note 23, at 464.

for the debts of the predecessor corporation except in four fairly narrow exceptions.

The Second Circuit, in its 1996 decision in *B.F. Goodrich v. Betkoski*, had adopted an expanded version of the "mere continuation" exception for purposes of successor corporate liability under CERCLA.[273] It had found successor liability under CERCLA if a successor corporation constituted a "substantial continuation," rather than a "mere continuation," of the predecessor corporation.[274] In so doing, the Second Circuit noted that it was joining other circuit courts that had ruled similarly.[275] The traditional "mere continuation" exception to the general rule of a successor corporation's nonliability in an asset sale would require that the predecessor and successor corporations be the same, focusing on whether there is an identity of stock, stockholders, and directors in the two corporations. This standard would seldom be met. By contrast, the more expansive "substantial continuation" exception previously adopted by the Second Circuit in *Betkoski*[276] would enlarge situations in which an asset purchaser would be liable by focusing, instead, on whether the corporation continues in the same business, keying in on factors, such as "[w]hether the 'successor maintains the same business, with the same employees doing the same jobs, under the same supervisors, working conditions, and production processes, and produces the same products for the same customers.'"[277]

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[273] 99 F.3d at 518–20.

[274] *Id.*

[275] *Id.* at 519 (citing United States v. Carolina Transformer Co., 978 F.2d 832, 838, 840 (4th Cir. 1992); United States v. Mex. Feed & Seed Co., 980 F.2d 478, 487–89 (8th Cir. 1992)).

[276] 99 F.3d at 518–20. Since the *Bestfoods* decision, however, no court has adopted that approach, and several have backed away from the approach. *See, e.g.*, Rosenberg, *supra* note 23, at 456 (noting that "[t]he four circuit courts which have addressed the issue of asset purchaser liability under CERCLA after the *Bestfoods* decision have deferred to state corporation law as the rule of decision"); *see also* United States v. Gen. Battery Corp., 423 F.3d 294, 302–05, 309 (3d Cir. 2005) (rejecting the "substantial continuation" standard of liability for successor corporations, but doing so because the "general rule of corporate successorship accepted in most states" does not encompass the substantial continuation exception); *Nat'l Servs. Indus.*, 352 F.3d at 685–87 (vacating its prior creation of a relaxed, CERCLA-specific rule in light of *Bestfoods*).

[277] *Nat'l Servs. Indus.*, 352 F.3d at 685 (quoting *Betkoski*, 99 F.3d at 519); *see generally* Mank, *supra* note 117, at 1166–69 (discussing the substantial continuity of enterprise and product-line exceptions to the nonliability of a successor corporation in a purchase of assets); Rosenberg, *supra* note 23, at 465–67 (characterizing the United States Environmental Protection Agency's promotion of the substantial continuity exception as promoting an "aggressive, non-mainstream view of successor corporation liability").

This would often be the case in an asset purchase, thus, significantly enlarging successor corporation liability for purposes of the CERCLA statute.

In *National Services Industries*, the Second Circuit repudiated its adoption of enlarged successor corporation liability under CERCLA.[278] The Second Circuit stated that it had previously adopted the CERCLA-specific principle of expanded successor liability to "advance [CERCLA's] primary goals."[279] The court concluded, however, that, following the *Bestfoods* decision, the expanded "substantial continuity" test for successor liability was not a "sufficiently well established part of the common law of corporate liability to satisfy *Bestfoods*' dictate that common law must govern."[280] The Second Circuit further stated that the substantial continuity test also was "not a part of general federal common law and, following *Bestfoods*, should not be used to determine whether a corporation takes on CERCLA liability as the result of an asset purchase."[281] Similarly, other circuit courts have indicated that, after *Bestfoods*, CERCLA should not be construed broadly to expand the liability of a purchasing corporation in an asset purchase beyond the liability in traditional common law.[282]

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[278] 352 F.3d at 685–87.

[279] *Id.* at 685–86 (citing *Betkoski*, 99 F.3d at 519).

[280] *Id.* at 686.

[281] *Id.* at 687 (citing United States v. Davis, 261 F.3d 1, 54 (1st Cir. 2001) ("noting that *Bestfoods* 'left little room for the creation of a federal rule of liability under the [CERCLA] statute'").

[282] *See, e.g.*, United States v. Gen. Battery Corp., 423 F.3d 294, 309 (3d Cir. 2005); *Davis*, 261 F.3d at 52–54. In Davis, the court applied state law regarding successor liability, rather than a federal common law rule that would have expanded corporate successor liability under CERCLA because the following factors indicated that a federal common law rule of expanded liability is not warranted under CERCLA: (1) the Supreme Court decision in *United States v Bestfoods*; (2) the Supreme Court's decision regarding the scope of federal common law in *O'Melveny & Myers v. FDIC*; and (3) prior First Circuit case law. *Id.*; *see also* Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 363–64 (9th Cir. 1998) (doubting that concerns expressed in a former Ninth Circuit case provided sufficient grounds for creating a federal common law rule expanding successor liability under CERCLA for corporations and citing and quoting extensively from *O'Melveny* and *Atherton*, but declining to reach the issue because the court would reach the same result under an application of state law or federal common law).

c. *Applying Adjudicatory Power*—Bestfoods *in the Future: "Traditional," Not Expanded, Amenability to Suit for Dissolved Corporations*

The CERCLA-Rule 17(b) issue regarding the liability of a corporation for CERCLA clean up costs after dissolution is, in some respects, similar to the issues resolved in *Bestfoods* regarding parent liability for polluting activities of subsidiaries and piercing the corporate veil and to the issue of successor liability confronting the federal appellate courts. Each issue addresses the scope of corporate liability in the context of the federal CERCLA statute that is silent regarding that issue of potentially expanded corporate liability.[283] Moreover, the duration of the dissolved corporation's amenability to suit, like the issues of parent corporation liability, the ability to pierce the corporate veil, and successor liability, also is "ingrained in our economic and legal systems," and it represents a balancing of the interests of the corporation and of creditors of the corporation.[284]

The standards for determining the duration of corporate capacity after dissolution, however, are no longer part of the "bedrock" common law of state corporate law. Instead, state legislatures, recognizing the harshness of the prior common law principle that corporate liability ended at the moment of dissolution, extended the common law rule by statute so that corporations remained amenable to suit for a period of time after dissolution, typically two to five years. [285] Thus, current state standards

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[283] *See, e.g., Atchison,* 159 F.3d at 363 ("The formation of corporations and the dissolution and continuing liability of corporations are traditional areas of state law."); *see also* Rosenberg, *supra* note 23, at 461 (not addressing the issue of dissolved corporation liability, but stating that "[t]here is no indication . . . that Congress intended 'corporation' to mean anything other than a business entity defined by state corporation law" (citing Gregory C. Sisk & Jerry L. Anderson, *The Sun Sets on Federal Common Law: Corporate Successor Liability Under CERCLA After* O'Melveny & Myers, 16 VA. ENVTL L.J. 505, 511–12 (1997)).

[284] *See supra* note 118 and accompanying text.

[285] For example, in *Oklahoma Natural Gas Co. v. Oklahoma*, the Court states:

> It is well settled that at common law and in the federal jurisdiction a corporation which has been dissolved is as if it did not exist, and the result of the dissolution cannot be distinguished from the death of a natural person . . . . It follows, therefore, that, as the death of the natural person abates all pending litigation to which such a person is a party, dissolution of a corporation at common law abates all litigation in which the corporation is appearing either as plaintiff or defendant. . . . But corporations exist for specific purposes, and only by legislative act, so that if the life of the corporation is to

regarding capacity of a dissolved corporation are found in state statutory law, rather than in long-established common law. The Supreme Court's reliance, in *Bestfoods*, on "fundamental" or "traditional" corporate liability principles, rather than on CERCLA-specific rules of corporate liability, however, suggests that the Court likely would find irrelevant that the source of fundamental or traditional corporate principles is statutory, rather than common law.[286]

Indeed, the federal appellate courts have begun to read *Bestfoods* not only to narrow permissible statutory construction of CERCLA, but also to foreclose most creation of a federal common law under CERCLA.[287] The First Circuit, in *United States v. Davis*, stated that *Bestfoods* has "left little room for the creation of federal rule of liability under the [CERCLA] statute."[288] Further, as discussed in the following subpart IV.A.1.d, the Supreme Court's narrower interpretation of the instances in which federal common law may be created, and of the extent of any such federal common law that may be created by the federal courts, indicates that even if the courts were to turn to federal common law, the courts would conclude that a

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continue even only for litigating purposes it is necessary that there should be some statutory authority for the prolongation.

273 U.S. 257, 259–60 (1927) (citations omitted).

[286] It could certainly be argued that, unlike the issue of parent liability addressed in *Bestfoods* or successor liability addressed by the Second Circuit in *National Services Industries*, the broad "notwithstanding" language of CERCLA § 9607(a), combined with the failure of Congress to specify expressly the period of liability of a dissolved corporation, indicates that Congress was not silent on the issue of corporate capacity of a dissolved corporation or that Congress intended the courts to create federal common law regarding the issue. *See supra* note 248. The *Bestfoods* case and circuit cases construing *Bestfoods*, however, indicate that something more than the general and broad statement regarding liability under § 9607(a) would be necessary to expand corporate liability beyond that set forth in "fundamental" corporate law. *See* discussion *infra* Part IV.A.1.d.

[287] *See, e.g.*, New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 685–87 & n.1 (2d Cir. 2003); United States v. Davis, 261 F.3d 1, 52–54 (1st Cir. 2001); *accord* Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995) (decided before the *Bestfoods* decision, but relying, in dicta, on Supreme Court federal common law cases). *But see Gen. Battery Corp.*, 423 F.3d at 298–305 (applying a uniform federal common law based on the "general rule of corporate succesorship accepted in most states" and determining that *Bestfoods* and other Supreme Court cases "cut[] in favor of a uniform federal standard"); *Atchison*, 159 F.3d at 363 (citing and quoting extensively from *O'Melveny* and *Atherton*, but declining to decide whether federal common law or state law would govern).

[288] 261 F.3d at 54; *accord Nat'l Servs. Indus., Inc.*, 352 F.3d at 687 (quoting *Davis*, 261 F.3d at 54); *see also Atchison*, 159 F.3d at 363–64.

dissolved corporation's liability under the CERCLA statute would be subject to state law capacity requirements.[289]

d. *Applying Adjudicatory Power—Federal Common Law in Action: A Narrower Role for Judicial Decision-making*

The narrowed ability of federal courts to construe federal statutes to create federal common law,[290] in contrast to their continuing expansive ability to construe federal statutes when determining if the statute preempts state law,[291] also militates against a conclusion that federal courts may

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[289] *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 61–64 (1998); Atherton v. FDIC, 519 U.S. 213, 217–26 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 83–89 (1994); *accord Citizens Elec. Corp.*, 68 F.3d at 1019. *But see Gen. Battery Corp.*, 423 F.3d at 298–305 (concluding that CERCLA permits a uniform federal common law of corporate liability based on the corporate norms of the majority of states).

[290] *See, e.g.*, *Bestfoods*, 524 U.S. at 51; *Atherton*, 519 U.S. at 213; *O'Melveny &Myers*, 512 U.S. at 79; *cf.* Cooper Indus., Inc. v. Aviall Servs., Inc., 125 S.Ct. 577, 581 (2004) (characterizing as debatable the conclusion of a number of district courts that although CERCLA did not mention "contribution," contribution rights arose under CERCLA "either impliedly from provisions of the statute, or as a matter of federal common law"); *see also* Lund, *supra* note 18, at 899–900; Meltzer, *supra* note 24, at 343, 345–57.

The Supreme Court has, since its 1979 decision in *United States v. Kimbell Foods, Inc.*, continually narrowed the ability of federal courts to create federal common law to fill the interstices in federal court legislation; this narrowing has had three principal results:

> 1) to reinforce the primary function of legislation as the original source of federal, non-constitutional law, 2) to emphasize the primacy of state law as the rule of decision in the absence of an explicit federal statutory provision, and 3) to limit the power of federal judges to "improvise" federal common law solutions to problems presented by federal statutes and programs.

Rosenberg, *supra* note 23, at 429–30 (citations omitted).

[291] *See, e.g.*, Davis, *On Preemption*, *supra* note 25, at 199 (Use of implied 'obstacle' preemption doctrine presents the greatest challenge to courts because the intent of Congress is so clearly not in issue. Obstacle implied preemption calls for an *ex post facto* judicial assessment of congressional objectives and is . . . quite far removed from a search for congressional intent to preempt."); Davis, *Unmasking the Presumption*, *supra* note 25, at 1005–13 (noting that by focusing on implied preemption doctrines, in particular obstacle preemption, "[t]he Court has returned preemption doctrine to its early focus on federal exclusivity and turned away from any meaningful attempt at discerning congressional intent that has been 'the ultimate touchstone' of preemption analysis since the 1940s"); Grey, *supra* note 104, at 502–10; Meltzer, *supra* note 24, at 362–78; Nelson, *supra* note 20, at 277–82 (noting that "[o]ne could view obstacle preemption either as a doctrine of statutory interpretation or as a doctrine of federal common law, under which judges seek to identify and fill 'gaps' in statutory schemes" and concluding that (1) courts must

construe expansively the CERCLA statute to extend the capacity of a dissolved corporation through creation of interstitial federal common law. Most courts that have recognized an expanded capacity to sue dissolved corporations under CERCLA have relied on federal common law,[292] but not on the Supreme Court's recent case law restricting the ability of federal courts to create federal common law.[293] Instead, these courts have analogized to a natural person's existence.[294] In analogizing to the existence of a natural person to determine the extent of corporate "life" after dissolution under CERCLA, most courts held that the corporation's ability to sue and be sued under CERCLA terminates only when the corporation is both "dead and buried," i.e., after the corporation dissolves and all corporate assets have been distributed, regardless of state law, which generally specifies an earlier termination of amenability to suit.[295]

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engage in "'imaginative reconstruction'" to discern Congress's preemptive intent or its full purposes; and (2) the fact that Congress enacts a statute does not automatically mean, as obstacle preemption presumes, that Congress wants "to displace all state law that gets in the way of [its] . . . purposes"); Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 33 ("[T]he Supreme Court will ignore the presumption [against preemption of state law] when it suits its purposes and will employ obstruction-of-purposes conflict preemption to impliedly preempt state law that it wishes to neutralize."); *see also supra* note 240.

[292] *See supra* notes 114–115, 173–176 and accompanying text.

[293] Most courts that have relied on the analogy to a natural person to create federal common law regarding the amenability to suit of a dissolved corporation under CERCLA have not even indicated that they were creating federal common law. The few cases to state that they were creating federal common law include the following: *Citizens Electric Corp.*, 68 F.3d at 1019, and *Hillsborough County v. A & e Rd. Oiling Serv., Inc.*, 877 F. Supp. 618, 621–22 (M.D. Fla. 1995). *See also supra* note 115. Professor Rosenberg notes a similar failure of many federal courts creating a federal common law of corporate successor liability under CERCLA to indicate that the issue was one of creating federal common law or to follow the Supreme Court's federal common law analysis. *See* Rosenberg, *supra* note 23, at 433, 507–09.

[294] *See supra* note 175 and accompanying text. The Supreme Court also relied on the analogy of the dissolved corporation to a deceased natural person in *Oklahoma Natural Gas Co. v. Oklahoma*. 273 U.S. 257, 259–60 (1927). In *Oklahoma Natural Gas*, however, the Supreme Court held that analogy to the existence of a natural person yielded a conclusion that the corporation's ability to sue and be sued must expire at the time of the corporation's dissolution. *Id.* at 259.

[295] *See supra* note 175. The remainder and minority of the federal courts, which have created an expanded rule of a dissolved corporation's amenability to suit under CERCLA, have not looked to federal common law. *See supra* note 248. These courts have held, instead, that the CERCLA statute, which states solely that a "person" includes a "corporation," and that a person "shall" be liable "notwithstanding any other provision or rule of law," provides in a textually explicit manner that corporations shall retain the ability to be sued indefinitely for liability under the CERCLA

Recent Supreme Court decisions, however, significantly narrow the instances in which federal courts may create federal common law under a federal statute that would, as here, displace state law.[296] Thus, in applying the Supreme Court's recent cases regarding federal common law to determine the scope of the CERCLA statute (again, to determine the initial statute-Rule conflict issue of whether CERCLA and Rule 17(b) are in conflict), the courts would probably hold either that the federal courts lacked the ability to create federal common law on the issue or, if the courts could create federal common law, that federal common law would incorporate state standards.[297] This is, in fact, the alternative reasoning of the Seventh Circuit in *Citizens Electric Corp. v. Bituminous Fire & Marine Insurance Corp.*, the only appellate court to both reach the issue and

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statute. 42 U.S.C. §§ 9601(21), 9607(a) (2000). Although this is a potential reading of the CERCLA statute, the Supreme Court decision in *Bestfoods*, which emphasized that the CERCLA statute must expressly address an issue to expand corporate liability beyond traditional or fundamental corporate law liability, *Bestfoods* seems to foreclose this interpretation. 524 U.S. at 61–64; *see generally supra* notes 241–268 and accompanying text; *accord* Mank, *supra* note 117, at 1191. "While the Court did not directly address the issue, *Bestfoods* suggests that CERCLA's implicit remedial purposes are an insufficient justification to reject fundamental corporate law principles because only explicit statutory language is enough to preempt such basic legal doctrines." *Id.*

The Seventh Circuit is also an exception. In *Citizens Electric Corp.*, the Seventh Circuit noted that, if it were to reach the issue of the capacity of a dissolved corporation under CERCLA, it would be examining an issue of federal common law. 68 F.3d at 1019. The Seventh Circuit also indicated that, if it were to reach the issue, it would conclude either (1) that CERCLA does not permit creation of federal common law and, hence, corporate liability terminates at the time of dissolution or (2) that current Supreme Court case law regarding federal common law requires that CERCLA incorporate state law capacity requirements. *Id.*

[296] Professor Lund argues that it makes no sense to talk of federal common law displacing state law in the context of construing a federal statute, as opposed to the diversity context. *See* Lund, *supra* note 18, at 903–04, 968–82, 995–96. The contrary argument is that Congress legislates against the backdrop of state law, assuming that in instances in which the federal statute does not control, state law will govern. *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 218 (1997).

[297] *See, e.g.*, *Bestfoods*, 524 U.S. at 61–64; *Atherton*, 519 U.S. at 218–26; *O'Melveny & Myers*, 512 U.S. at 83–89; *accord Citizens Elec. Corp.*, 68 F.3d at 1019; *see also* Ostrander, *supra* note 127, at 487–89. *But see* United States v. Gen. Battery Corp., 423 F.3d 294, 298–305 (3d Cir. 2005) (concluding, in the context of successor liability under CERCLA, that CERCLA permitted creation of a uniform federal common law based on the corporate law accepted in the majority of states); *see also id.* at 309–18 (Rendell, J., concurring in part and dissenting in part) (arguing that there is no need to create uniform federal common law and that CERCLA should incorporate the local state law regarding successor liability).

reference Supreme Court case law regarding federal common law.[298] Some circuit courts have also concluded that the *Bestfoods* case restricts a federal court's ability to create federal common law under CERCLA.[299] It therefore becomes critical that the rulemaking authority analysis reveals that use of preemption doctrine is inapplicable in resolving a statute-Rule clash.[300]

Professor Viet Dinh recently undertook a reassessment of preemption doctrine in which he established a continuum of the different doctrines through which federal law may displace state law.[301] Professor Dinh placed the various doctrines along a continuum based on the "relative presence or

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[298] 68 F.3d at 1019.

[299] *See, e.g.*, New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 684–87 (2d Cir. 2003); United States v. Davis, 261 F.3d 1, 52–54 (1st Cir. 2001); *see also* Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 361–64 (9th Cir. 1998). *But see Gen. Battery Corp.*, 423 F.3d at 298–305 (adopting federal common law under CERCLA based on the prevailing rule in the majority of states). If the courts were to create a uniform federal common law regarding liability of a dissolved corporation under CERLCA under the *General Battery Corp.* rationale, the result would likely be that the dissolved corporation's liability would be limited to several years, since the majority of states limit the liability of a dissolved corporation to between two and five years after dissolution.

[300] *See supra* notes 66–82 and accompanying text; *see also supra* notes 173–174 and accompanying text (revealing that most district courts relied on an obstacle preemption analysis alone or in conjunction with a supersession clause analysis to conclude that state law incorporated into Rule 17(b) was preempted because it created an obstacle to the realization of the full goals and purposes of the CERCLA statute). At the same time that the Court has been narrowing the permissible role of federal courts in construing federal statutes in statutory interpretation and in federal common lawmaking, however, it has recognized in the sister doctrine of preemption (in which federal courts similarly decide whether and to what extent an ambiguous federal statute will displace state law) a broader authority of federal courts to use a purposive approach to statutory interpretation, in which the federal courts can formulate rules "that are not tied to statutory text." Meltzer, *supra* note 24, at 344, 362–76. The Court also seems more comfortable in the preemption, rather than the federal common lawmaking, context, in finding that a uniform national law is needed and supports displacement of state law. *See, e.g.*, Davis, *On Preemption*, *supra* note 25, at 230; Davis, *Unmasking the Presumption*, *supra* note 25, at 1016–17; Grey, *supra* note 104, at 509. As the Supreme Court has begun to recognize the need for national uniformity in preemption cases, it has taken steps to significantly narrow "mere" uniformity as a basis for creating federal common law in other contexts. *See, e.g.*, *Atherton*, 519 U.S. at 219–20; O'Melveny & Myers v. FDIC, 512 U.S. 79, 87–89 (1994). Thus, it matters that, when a federal rule incorporates a state law, that state law operates as federal, rather than state, law.

[301] Dinh, *supra* note 20, at 2098; *see also* Jordan, *supra* note 104, at 1152–53, 1154–82 (noting that the preemption doctrines no longer should be viewed as discrete categories, but are more appropriately viewed as overlapping).

absence of congressional action" needed to displace state law.[302] He ranked six doctrines that federal courts use to displace state law according to the amount of congressional action required before a federal court may displace state law. Professor Dinh ranked the doctrines, in order of greatest amount of congressional action required to displace state law to least amount of congressional action required, as follows: express preemption, conflict preemption, obstacle preemption, field preemption, federal common law, and dormant commerce clause.[303] Based on the Supreme Court's current case law regarding federal common law, however, federal common law, like preemption, should no longer be viewed as a discrete point on this spectrum. Further, it should not be understood to require less congressional action before a federal court may displace state law than all forms of preemption.[304] Instead, as detailed below, in many instances, such as the

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[302] Dinh, *supra* note 20, at 2097–98.

[303] *Id.* at 2098. Others have also noted the similarity between federal common lawmaking and preemption. Professor Henry Monaghan, for example, recognized the similarity as follows:

> Since judicial power to create federal common law admittedly exists where authorized by statute, concern usually centers upon the appropriate criteria for determining whether federal common law is to be fashioned when a congressional determination to displace state law is a possible, but not unmistakable construction. Although the cases are somewhat ad hoc . . . the analysis is usually framed in terms of whether the congressional purpose embodied in, or indicated by, a statute requires state law to be subordinated. Congressional purpose is divined by the normal common law techniques of looking to the words of the statute, the problem it was meant to solve, the legislative history, the structure of the statute, its place among other federal statutes, and the need for a uniform national rule of law. Where the inquiry indicates that application of state law would frustrate congressional policy, state law is subordinated. *This is the usual mode of preemption analysis.* The more difficult question is the propriety of developing federal common law in circumstances where no substantial conflict between federal and state law is readily apparent—especially where the principal reason for creating a federal law is a postulated need for national uniformity.

Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 12–13 (1975) (citations omitted) (emphasis added); *accord* Meltzer, *supra* note 24, at 366; Nelson, *supra* note 20, at 278 ("One could view obstacle preemption either as a doctrine of statutory interpretation or as a doctrine of federal common law, under which judges seek to identify and fill 'gaps' in statutory schemes."); *see also id.* at nn.68–69 (collecting articles of other scholars who also discussed the similarity of federal common law and preemption doctrines in their effect to displace state law).

[304] *See, e.g.*, Hoffstadt, *supra* note 227, at 1420–32. Professor Hoffstadt contends that typical analyses of the propriety of federal common lawmaking "tend to conflate all types of common lawmaking together and consequently gloss over the fact that the constitutional affront potentially

CERCLA-Rule 17(b) issue, which involves filling the interstices of federal legislation, current Supreme Court case law requires more (or more explicit) congressional action to create federal common law than would be required to find that CERCLA impliedly preempts state corporate law under an obstacle preemption analysis. [305]

e. *Analyzing Adjudicatory Power—A Waning Authority to Create Federal Common Law*

In *United States v. Kimbell Foods, Inc.*, the Supreme Court supplied guidelines for federal courts to follow in determining whether to create federal common law and also to determine the content of federal common law.[306] These guidelines, as augmented by later Supreme Court decisions in

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raised by common lawmaking varies on the particulars of what exactly the judiciary is doing." *Id.* at 1420. Professor Hoffstadt concludes that not all instances of federal common lawmaking are the same; instead, the different forms of common lawmaking "lie along a spectrum that runs from the clearly to the dubiously constitutional." *Id.* at 1421. He proposes a "new theoretical paradigm" to appraise the appropriateness of common lawmaking by the federal courts, which focuses on "the degree to which the common law initially governed the subject matter area, the degree to which the newly crafted federal common law displaces state law, and the nature of the law being crafted." *Id.* at 1420, 1432–51; *see also* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1251–52 (1996) (also noting that not all federal common law issues raise similar issue and proposing that those issues that meet the following two criteria are appropriate areas for federal judge-made law: (1) "the transactions governed by the rule must fall beyond the legislative competence of the states," thus rendering federalism concerns, if any, negligible and (2) "the rule must operate to further some basic aspect of the constitutional scheme," thus mitigating separation of powers concerns associated with federal common lawmaking).

[305] The Supreme Court's preemption doctrine, particularly obstacle preemption, permits the courts to engage in a more purposive construction of congressional statutes to determine whether Congress intended the statute to have preemptive effect. *See, e.g.*, Meltzer, *supra* note 24, at 362–78; Nelson, *supra* note 20, at 277–82; Davis, *On Preemption*, *supra* note 25, at 219; Davis, *Unmasking the Presumption*, *supra* note 25, at 1005–13; Raeker-Jordan, *The Pre-Emption Presumption that Never Was*, *supra* note 25, at 1468; *see also* Jordan, *supra* note 104, at 1191–92 (advocating use of a more purposive approach to statutory construction in preemption cases, rather than a textual approach). By contrast, the Court's current approach to federal common lawmaking requires that courts adhere closely to the text of the statute. *See generally* Atherton v. FDIC, 519 U.S. 213 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79 (1994); *see also* Meltzer, *supra* note 24, at 368–78; Rosenberg, *supra* note 23, at 427–28; Lund, *supra* note 18, at 899–900, 902–03, 954–57.

[306] 440 U.S. 715, 726–29 (1979).

Atherton and *O'Melveny & Myers*, have reduced the ability of federal courts to create federal common law to fill gaps in congressional legislation.[307]

The *Kimbell Foods* Court initially determined that, when Congress has not spoken directly to an issue, federal law, rather than state law, determines "the rights of the United States arising under nationwide federal programs."[308] The Court, therefore, stated in *Kimbell Foods* that the priority of certain liens held by the Small Business Administration (SBA) and the Farmers Home Administration (FHA), each of which acquired authority to make loans from authority granted under specific congressional legislation, would be governed by federal law.[309] The *Kimbell Foods* Court held, however, that although federal law applied, federal law did "not inevitably require resort to uniform federal rules."[310] Instead, the courts were to determine whether to create a uniform national rule or to adopt state law based on the following factors: (1) whether there was a need for a uniform national law;[311] (2) whether use of state law "would frustrate specific objectives of . . . federal programs;"[312] and (3) whether "application of a federal rule would disrupt commercial relationships predicated on state law."[313] In applying these factors, the *Kimbell Foods* Court concluded that there was no need for a uniform national rule of priority for either the SBA or the FHA.[314] Federal common law would, thus, incorporate state law principles in these instances.[315]

Professor Mank suggested, in discussing successor liability under CERCLA, that, through *Kimbell Foods*, the Supreme Court probably intended to reduce the circumstances in which the federal courts could create federal common law.[316] He further posited that because courts

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[307] *Atherton*, 519 U.S. at 217–19; *O'Melveny & Myers*, 512 U.S. at 87–89.

[308] 440 U.S. at 726.

[309] *Id.* at 726–27.

[310] *Id.* at 727–28.

[311] *Id.* at 728.

[312] *Id.* ("If so, [a court] must fashion special rules solicitous of those federal interests.").

[313] *Id.* at 729. Professor Mank has stated that "most federal courts [in considering the substantial continuity doctrine under CERCLA] placed more emphasis on the need for national uniformity and achieving CERCLA's remedial goals" and ignored the third element. Mank, *supra* note 117, at 1158.

[314] 440 U.S at 729.

[315] *Id.*

[316] Mank, *supra* note 117, at 1170 (citing Sisk & Anderson, *supra* note 283, at 519).

virtually ignored the third prong of the *Kimbell Foods* test—whether the creation of federal common law would "disrupt existing commercial relationships"—this result did not materialize.[317]

In two cases decided after *Kimbell Foods*—*Atherton v. FDIC* and *O'Melveny & Myers v. FDIC*—the Supreme Court clarified the narrower ability of federal courts to make federal common law.[318] The *Atherton* Court held in 1997 that the instances "'in which judicial creation of a special federal rule would be justified . . . are . . . 'few and restricted.'"[319] In its 1994 decision in *O'Melveny*, the Court had, likewise, emphasized that cases in which the federal courts may appropriately create a special federal rule of decision are "'few and restricted;'"[320] indeed, "extraordinary."[321]

The Court's narrowing of the authority of federal courts to create federal common law stems from a structural vision of the appropriate roles of Congress and the federal courts in displacing existing state law, which has both separation of power and federalism dimensions.[322] In fact, the Court

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The "principle" of *Kimbell Foods* and Supreme Court cases decided between 1979 and 1991 may be stated as follows:

> With the exception of the relatively few cases in which a federal common law rule of decision is mandated by the federal statute or right at issue, the general presumption has been that in the absence of a statutorily provided rule, if state law may be applied to resolve a dispute, there would be no need for federal courts to fashion a different common law rule.

Rosenberg, *supra* note 23, at 444–45 (citations omitted).

[317] Mank, *supra* note 117, at 1170.

[318] *Atherton*, 519 U.S. at 217–19; *O'Melveny & Myers*, 512 U.S. at 87–89.

[319] 519 U.S. at 218 (quoting *O'Melveny & Myers*, 512 U.S. at 87).

[320] 512 U.S. at 87 (quoting Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963)).

[321] *Id.* at 89.

[322] The separation of powers concerns that animate a restricted ability of federal courts to create federal common law to supplement federal statutes acknowledge that Congress has the primary authority to enact federal legislation and view court statutory interpretation or federal common lawmaking as creating the potential for intrusion in the congressional sphere. *See, e.g.*, *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.").

> 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,'"—including, for example, the creation of incentives for careful work, provision of fair treatment to third parties, assurance of adequate recovery by the

has begun its recent federal common law decisions regarding the ability of federal courts to create federal common law to supplement federal statutes, i.e., in nondiversity cases, with the statement from *Erie Railroad v. Tompkins*, that "[t]here is no federal general common law."[323] These decisions emphasize that, while Congress undoubtedly has the power to displace existing state law, the federal judiciary's power to displace state law is more limited and generally must be explicitly directed by Congress.[324] For example, in *Atherton*, the Supreme Court emphasized that the instances in which federal judges can appropriately create federal common law are "few and restricted" because the decision to exercise federal power to displace state law is "primarily a decision for Congress," rather than for judicial actors.[325] The Court further stressed that the mere

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> federal deposit insurance fund, and enablement of reasonably priced services. 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.'"

O'Melveny & Myers, 512 U.S. at 89 (citations omitted).

The federalism concerns arise from the notion that, absent governing federal law, state law, if any, applies. Thus, when federal courts create federal common law, they displace state law that would otherwise govern. *See, e.g.*, *O'Melveny & Myers*, at 85. ("[W]e of course would not contradict an explicit federal statutory provision. Nor would we adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed; matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law."); *see also* Meltzer, *supra* note 24, at 375 ("The deepest concerns about federal common lawmaking, or about a broad judicial role in statutory interpretation, relate not to federal question jurisdiction but rather to the allocation of lawmaking authority and its possible impact on state autonomy."); Lund, *supra* note 18, at 903; Clark, *supra* note 18, at 1324–26, 1415–19.

[323] 304 U.S. 64, 78 (1938); *see Atherton*, 519 U.S. at 218; *O'Melveny & Myers*, 512 U.S. at 83; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 726, (2004); Rosenberg, *supra* note 23, at 426 (noting that the Supreme Court has increasingly applied the limited view of federal court authority to create federal common law in nondiversity cases brought under federal statutes as well as in diversity); Meltzer, *supra* note 24, at 343–45 (noting that the Supreme Court's cases demonstrate a belief that Congress has the primary responsibility for "fleshing out the operation of schemes of federal regulation," at least in the area of federal common lawmaking, but the Supreme Court permits federal courts much greater authority in construing congressional statutes to determine whether they preempt state law); Lund, *supra* note 18, at 902–03 (concluding that the Court is misguided in deferring to state law when construing federal statutes).

[324] *Atherton*, 519 U.S. at 218–19; *O'Melveny & Myers*, 512 U.S. at 89; Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 92 (1991) ("declin[ing] to displace state law with a uniform rule abolishing the futility exception in federal derivative actions").

[325] 519 U.S. at 218 (citing Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

existence of a federal statute in the area does not establish that Congress intended the federal courts to create federal common law rules, since Congress legislates with an understanding that, if it does not address an issue, state law will control.[326]

In *O'Melveny*, the Court also adverted to both separation of powers and federalism concerns, noting that federal courts would not "contradict an explicit federal statutory provision."[327] Nor should federal courts "adopt a court-made rule to supplement federal statutory regulation that is comprehensive and detailed," because, in this scenario, Congress presumably intended that state law should control.[328] Instead, in the "few and restricted" instances in which creation of federal common law would be warranted, a "significant conflict between some federal policy or interest and the use of state law"[329] is a precondition to both the creation of the special federal rule and the determination of the scope of any such special federal rule.[330] Further, the Court indicated that creation of federal common law should be based on express congressional policy.[331] The Court explicitly disparaged the "runaway tendencies of 'federal common law' untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."[332] Thus, the cases reflect the Court's belief that separation of powers concerns arise when federal courts create federal common law and, thus, require restricted resort to federal common lawmaking. This restricted federal common lawmaking, in turn, produces federalism dividends as federal courts may less often use their adjudicatory role to

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[326] *Id.* (noting that "'Congress . . . acts against the background of the total *corpus juris* of the states'").

[327] 512 U.S. at 85.

[328] *Id.* (citing Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 97 (1981); Milwaukee v. Illinois, 451 U.S. 304, 319 (1981)).

[329] *Id.* at 87 (citing *Wallis*, 384 U.S. at 68).

[330] *Id.* at 87–88 (citing Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991); Boyle v. United Corp., Inc., 487 U.S. 500, 508 (1988); United States v. Kimbell Foods, Inc. 440 U.S. 715, 728 (1979)).

[331] *Id.* at 88–89.

[332] *Id.* at 89. The Court also emphasized that the question at issue in *O'Melveny*—the nature of tort liability of lawyers and accountants who work for financial institutions insured by the FDIC—involved the weighing of numerous factors, which, at least in the "federal system . . . 'is more appropriate[] for those who write the laws, rather than for those who interpret them,'" again sounding a separation of powers theme. *Id.* (quoting Nw. Airlines, Inc. v. Transp. Workers, 451 U.S. 77, 98 n.41 (1981)).

create federal common law that displaces state law. The restriction, however, presupposes an omniscient legislature and also reduces the federal courts' traditionally broader role in interpreting federal statutes.[333]

In furtherance of these separation of powers and federalism concerns, recent Supreme Court decisions have also reduced the likelihood that arguments about the need for "uniformity" or the need for the United States to prevail to avoid depletion of federal funds, such as the federal deposit insurance fund, will suffice to establish the requisite "significant conflict" between a federal policy or interest and otherwise applicable state law that would permit a federal court to create federal common law.[334] Furthermore, if the courts do identify a significant conflict that would, under current jurisprudence, warrant the creation of federal common law, the courts should consider the scope of the resultant federal common law against a heavy presumption that the federal common law will incorporate state law.[335]

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[333] *See, e.g.*, Meltzer, *supra* note 24, at 378–90; Resnik, *supra* note 24, at 226, 230, 232–34, 236–37; Rosenberg, *supra* note 23, at 429–30 (noting that the Court's recent federal common law decisions represent a "substantial narrowing" of the situations in which federal courts may "fashion a truly 'federal' common law" and concluding that the federal courts will be "more restrained judicial actors"); Lund, *supra* note 18, at 905 ("The role of federal common law long has been to fill the gaps in federal law in accordance with the federal purposes Congress sought to achieve. The Court now seems intent that state law fill those gaps, whether or not it makes sense . . . in the particular case.").

[334] Atherton v. FDIC, 519 U.S. 213, 220 (1997) (stating that "[t]o invoke the concept of 'uniformity,' however, is not to prove its need").

> There is not even at stake that most generic (and lightly invoked) of alleged federal interests, the interest in uniformity. . . . Uniformity of law might facilitate the FDIC's nationwide litigation of these suits, eliminating state-by-state research and reducing uncertainty—but if the avoidance of those ordinary consequences qualified as an identifiable federal interest, we would be awash in "federal common law" rules.

O'Melveny & Myers, 512 U.S. at 88 (citations omitted); *see also Kimbell Foods*, 440 U.S. at 727–29.

[335] *See, e.g.*, United States v. Bestfoods, 524 U.S. 51, 61–64 (1998); *O'Melveny & Myers*, 512 U.S. at 85–86. In *Kamen v. Kemper Fin. Servs., Inc.*, the Court stated:

> Our cases indicate that a court should endeavor to fill the interstices of federal remedial schemes with uniform federal rules only when the scheme in question evidences a distinct need for nationwide legal standards, or when express provisions in analogous statutory schemes embody congressional policy choices readily applicable to the matter at hand. Otherwise, we have indicated that the federal courts should "incorporat[e] [state law] as the federal rule of decision," unless "application of [the particular] state

In light of these cases, the decisions of many federal courts to create federal common law by analogy to the existence of a natural person in the CERCLA-Rule 17(b) context must be reexamined, and probably will not withstand analysis.[336] First, as set forth above, if the issue is examined as an issue of interpretation of statutory ambiguity, the decisions in *Bestfoods*[337] and circuit cases construing *Bestfoods*[338] indicate that courts should construe the CERCLA statute to incorporate traditional or fundamental law regarding corporate capacity, since nothing in CERCLA indicates an intent to abrogate traditional corporate law or to create CERCLA-specific rules of corporate liability.[339]

If the issue is viewed as falling on the federal common law portion of the indistinct line between statutory construction and federal common lawmaking, the *Atherton*, *O'Melveny*, and *Bestfoods* cases similarly indicate that CERCLA would not expand the duration that dissolved corporations remain amenable to suit under state law.[340] Instead, the cases in which the

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> law [in question] would frustrate specific objectives of federal programs." *The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.*

500 U.S. at 98 (citations omitted) (emphasis added); *see also supra* note 212.

[336] The *Atherton* Court noted that courts may not "substitute analogy . . . for the controlling legal requirement" that there must be a need for the creation of federal common law "arising out of a significant conflict or threat to a federal interest." 519 U.S. 213, 224 (citing *O'Melveny & Myers*, 512 U.S. at 85, 87). Courts applying the Supreme Court's federal common law jurisprudence, then, are likely to conclude that state corporate law incorporated into Rule 17(b) governs the issues. *See, e.g.*, Citizens Elec. Corp. v. Bituminous Fire & Marine Ins. Co., 68 F.3d 1016, 1019 (7th Cir. 1995) (citing *O'Melveny & Myers*, 512 U.S. at 79; *Kimbell Foods*, 440 U.S. at 740); *accord* Ofstrander, *supra* note 127, at 487–89. Even under the view of the Third Circuit in *United States v. General Battery Corp.* that CERCLA permits uniform federal common law regarding corporate liability in the asset purchase context based on the liability standards in the majority of states, liability of dissolved corporations would probably not be expanded significantly. 423 F.3d 294, 298–305 (3d. Cir. 2005). This is because the majority of states limit liability of a dissolved corporation to two to five years after dissolution.

[337] 524 U.S. 51, 70–73 (1998).

[338] *See, e.g.*, New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 684–87 (2d Cir. 2003); United States v. Davis, 261 F.3d 1, 52–54 (1st Cir. 2001); *see also* Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 364 (9th Cir. 1998).

[339] *Bestfoods*, 524 U.S. at 61–64, 70.

[340] *See, e.g., Id.*; *Atherton*, 519 U.S. at 218; *O'Melveny & Myers*, 512 U.S. at 87–88.

courts appropriately create federal common law will be "few and restricted," and there must be a "significant conflict" between state law and a federal policy or interest, justifying creation of federal common law.[341] These cases similarly instruct that a simple reference to a need for uniformity is insufficient.[342] Further, basing creation of federal common law on the broad and remedial goals of CERCLA—as courts have done both when viewing the CERCLA-Rule 17(b) issue as an issue of statutory interpretation or federal common lawmaking and as an issue of preemption—may be viewed as an attempt to create federal common law "untethered to a genuinely identifiable (as opposed to judicially constructed) federal policy."[343] Based on these principles, most federal circuit courts have concluded that a uniform, CERCLA-specific law of successor liability is not warranted.[344] Combined with the *Bestfoods* implication that corporate law issues, and corporate liability issues in particular, are to be determined by reference to traditional corporate law, the federal common law cases portend a similar conclusion that federal courts should not create a uniform CERCLA-specific rule regarding the capacity of dissolved corporations. Further, if the courts were to create federal common law, that rule would be subject to the heavy presumption that federal common law should incorporate state law.[345]

The conclusion, based on a narrowed role for federal courts in statutory interpretation and federal common lawmaking, that CERCLA and Rule 17(b) do not conflict goes against two decades of jurisprudence in which federal courts, in large numbers, held to the contrary.[346] It means that CERCLA and Rule 17(b) do not conflict; thus, both the standard of the

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[341] *See, e.g.*, *Bestfoods*, 524 U.S. at 61–64, 70; *Atherton*, 519 U.S. at 218; *O'Melveny & Myers*, 512 U.S. at 87–88.

[342] *Atherton*, 519 U.S. at 219–20; *O'Melveny & Myers*, 512 U.S. at 88–89.

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

[344] *See, e.g.*, New York v. Nat'l Servs. Indus., Inc., 352 F.3d 682, 685 (2d Cir. 2003); United States v. Davis, 261 F.3d 1, 52–54 (1st Cir. 2001); *see also* Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, Inc., 159 F.3d 358, 362–64 (9th Cir. 1998). *But see* United States v. Gen. Battery Corp., 423 F.3d 294, 298–305 (3d. Cir. 2005).

[345] *See, e.g.*, *O'Melveny & Myers*, 512 U.S. at 85; Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 98 (1991); *see also supra* notes 212, 335 and accompanying text. *But see Gen. Battery Corp.*, 423 F.3d at 298–305 (creating a uniform federal common law regarding corporate liability in the asset purchase context, in part, because state successor liability standards were variable and uncertain).

[346] *See supra* notes 170–176 and accompanying text.

CERCLA statute and Rule 17(b) govern. Further, Congress, the later rulemaker in this instance, did not exceed its authority in determining the duration of a dissolved corporation's amenability to suit. Since CERCLA was enacted later than Rule 17(b), and since Congress neither impermissibly alters a constitutional standard nor impermissibly limits the ability of courts to act as courts, in determining the duration of a dissolved corporation's amenability to suit, Congress has not exceeded its rulemaking authority.[347]

The conclusion that CERCLA incorporates state-law amenability to suit standards, rather than enlarges the duration of corporate amenability to suit, also reflects a deference to state law in the course of statutory construction and federal common lawmaking that is not reflected in a sister doctrine in which the federal courts must similarly construe federal statutes to determine whether they displace state law—preemption doctrine.[348] This deference to state law in cases of statutory construction and federal common lawmaking is so strong that it creates a presumption against preemption of state law at a time when preemption scholars are noting (and some are disparaging) the disappearance of the presumption against preemption of state law in federal preemption cases.[349]

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[347] *See supra* note 223 and accompanying text.

[348] In its federal common lawmaking jurisprudence, the Supreme Court emphasized that, in the few and restricted instances in which a federal court may create federal common law, it should generally incorporate state law. *See, e.g.*, *O'Melveny & Myers*, 512 U.S. at 85–87; *Kamen*, 500 U.S. at 98; *accord* United States v. Bestfoods, 524 U.S. 51, 61–64 (1998); *see also* Lund, *supra* note 18, at 901–02, 954–57, 981–88, 994–95 (disparaging the virtual presumption that federal common law will incorporate state law and concluding that it gives inadequate weight to federal interests). By contrast, in the preemption context, many scholars are observing, and some are lamenting, the decline of the presumption against preemption of state law. *See, e.g.*, Ausness, *supra* note 25, at 971–74; Davis, *Unmasking the Presumption*, *supra* note 25, at 967; Massey, *Vanishing Presumption*, *supra* note 25, at 759; Owen, *supra* note 25, at 417–18; Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 1; Raeker-Jordan, *The Pre-Emption Presumption that Never Was*, *supra* note 25, at 1379. *But see* Nelson, *supra* note 20, at 290–303 (contending that a general presumption against preemption of state law is unfounded in preemption doctrine); Dinh, *supra* note 20, at 2088, 2092–97 (contending that "the constitutional structure of federalism does not support a general, systematic presumption against preemption").

[349] Professor Massey is among those who believe that the presumption against preemption is important in maintaining a proper federal-state balance:

> Federalism is more than a slogan, a mantra to be repeated at the constitutional shrine—it is an end in itself, a structural device to diffuse power to better secure individual and collective autonomy. . . . The presumption against preemption is a modest star in the firmament of federalism; our political heavens are dimmer for its loss.

B. *Applying Obstacle Preemption–Congressional Purposes "Untethered" to Specific Congressional Text May Override State Law*

Subpart IV.B briefly reviews the difference between the Court's current statutory interpretation/federal common law cases and its preemption cases. Current federal common law jurisprudence emphasizes that courts must adhere closely to congressional text, should avoid resort to positing a uniform national purpose to federal legislation and as a reason for creating federal common law, and should generally incorporate state law as the governing federal common law. By contrast, the Court's current preemption jurisprudence, particularly obstacle preemption jurisprudence, permits a federal court to resort to congressional purposes "untethered" to the text of the congressional statute, to accord significant weight to a court's perception of a need for uniformity, and to give less deference to state law. As Professor Dinh has noted, federal common lawmaking and preemption doctrines are part of the same continuum of doctrines under which federal law may displace state law.[350] Furthermore, in both federal common lawmaking and obstacle preemption analysis, federal courts must intuit

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See Massey, *Vanishing Presumption*, *supra* note 25, at 764; *see also* Berger, *supra* note 240, at 948–62 (discussing how the Supreme Court, "after years of mentioning the presumption [against preemption] without giving it any teeth, has finally disregarded it across a spectrum of cases"). Davis, *Unmasking the Presumption*, *supra* note 25, at 968 ("It is inescapable: there is a presumption in favor of preemption. Historically, the Supreme Court has said differently—that, rather, there is a presumption against preemption. There is no such presumption any longer, if, indeed, there ever really was one.").

> The five-member majority [in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000)] accomplished its apparent goal of preemption in the case by abandoning the long-standing presumption against preemption and the concomitant requirement that Congress's intent to preempt be clear, and it thereby removed any protections the presumption provided to federalism principles, state tort law, and Congress's own preemptive intentions. In fact, in numerous statements that reveal its approach, the Court evidences a predisposition toward preemption rather than against it and employs obstacle preemption to effectuate that predisposition.

Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 2–3 (citations omitted).

[350] Dinh, *supra* note 20, at 2097–100; *accord* Meltzer, *supra* note 24, at 377–78. ("Preemption cases . . . do not uniquely call for a robust judicial role; they are continuous with the problems that arise in other areas. What is not continuous is the Court's approach to lawmaking across different areas.").

unexpressed purposes of Congress.[351] The existence of an obstacle preemption doctrine in which the federal courts may use a less textual approach to statutory construction, along with the inevitable inability of congressional legislation to be free of gaps and ambiguity, counsels against the approach to federal common lawmaking that presumes that all or most ambiguity and gaps in federal legislation are to be resolved by application of state law.[352]

Although the Supreme Court has traditionally relied on four categories of preemption, including express preemption and three types of implied preemption,[353] the Court's preemption cases have recently blurred the distinction between those categories.[354] Further, the traditional presumption against preemption of state law that has figured prominently in prior preemption cases has lost its strength.[355] Indeed, some scholars have found

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[351] *See, e.g.*, Dinh, *supra* note 20, at 2098; Meltzer, *supra* note 24, at 366; Monaghan, *supra* note 303, at 12–13; Nelson, *supra* note 20, at 278.

[352] *See, e.g.*, Meltzer, *supra* note 24, at 378–83.

[353] *See supra* note 160 (discussing express preemption, field preemption, actual conflict preemption, and obstacle preemption); *see also* Nelson, *supra* note 20, at 226–30; Dinh, *supra* note 20, at 2100–06; Jordan, *supra* note 104, at 1150–52.

[354] *See, e.g.*, Dinh, *supra* note 20, at 2097 (noting that the preemption doctrines and other mechanisms which permit displacement of state law are properly viewed as creating a spectrum, rather than "discrete and distinctive doctrines"); Jordan, *supra* note 104, at 1154–82; Nelson, *supra* note 20, at 262–64. Other scholars have also noted that the Court's traditional "categorical" approach to preemption analysis is changing. *See, e.g.*, Davis, *Unmasking the Presumption*, *supra* note 25, at 1005–06 (noting that the "Court will [not] continue to focus on express language in an effort to discern congressional intent . . . after *Geier*" and concluding that "implied obstacle preemption void of any effort to discern congressional intent . . . has returned"). Professor Raeker-Jordan concludes:

> [The traditional preemption categories] distract[] observers from what the Court is really doing in pre-emption cases and . . . pre-emption decisions ultimately turn[] on an "obstruction of purposes" analysis . . . . First, in acknowledging that the categories often blend together, the Court arguably conceded that the category framework is deceptive in its apparent perspicuity. Second, by suggesting that even field pre-emption can be recast as a form of obstruction of purposes conflict pre-emption, the Court acknowledged that the kind of "conflict" pre-emption that looks to obstruction of purposes is the bottom line.

Raeker-Jordan, *The Pre-Emption Presumption that Never Was*, *supra* note 25, at 1397.

[355] *See, e.g.*, Davis, *Unmasking the Presumption*, *supra* note 25, at 971; Massey, *Federalism*, *supra* note 25, at 502–13; Massey, *Vanishing Presumption*, *supra* note 25, at 762–64; Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 2–3, 43–44; *see also* Dinh, *supra* note 20, at 2092–97

the Court's cases to create a presumption in favor of preempting state law.[356] This more flexible preemption framework permits courts to more easily conclude that a particular preemption issue should be analyzed under "frustration of congressional purpose" or "obstacle" preemption and, under the obstacle preemption analysis, to conclude, based on a purposive, rather than textual analysis, that application of the conflicting state law would frustrate congressional purposes.

Further, a need for national uniformity typically animates the Court when it determines to preempt state law under implied obstacle preemption,[357] while in its federal common lawmaking jurisprudence, the Supreme Court has disavowed a frequent resort to the need for national uniformity.[358] Thus, courts are creating a species of federal common law under the rubric of implied obstacle preemption that is broader than and unconstrained by the limits the Court places on most federal common lawmaking—the presumption against federal common lawmaking, the presumption that if the courts may create federal common law the courts should use a strong presumption that state law defines federal common law, and the virtual inapplicability of a need for national uniformity.

Because the Supremacy Clause[359] constitutes a Constitution-based choice of law provision that tells the courts to choose federal law when there is a conflict between federal and state law, preemption doctrine is inapplicable to statute-Rule conflicts.[360] This is because statute-Rule

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(contending that there should be no general presumption against preemption); Nelson, *supra* note 20, at 235–64 (contending that there should be no presumption against preemption of state law, but that the Court should also do away with its broad notions of obstacle preemption).

[356] *See, e.g.*, Raeker-Jordan, *Sleight of Hand*, *supra* note 25, at 44 ("Despite the presumption's appearance in several Supreme Court cases post-*Geier*, its viability remains an open question. Indeed, obstacle implied preemption may effectively constitute a presumption that prevails in the opposite direction, that is in favor of federal law."); Davis, *Unmasking the Presumption*, *supra* note 25, at 1013–14 (concluding that there is no meaningful presumption against preemption, but appears instead to be an implied "presumption in favor of preemption").

[357] *See, e.g.*, Davis, *Unmasking the Presumption*, *supra* note 25, at 1014–17; Jordan, *supra* note 104, at 1174–76.

[358] *See, e.g.*, Atherton v. FDIC, 519 U.S. 213, 219–20 (1997); O'Melveny & Myers v. FDIC, 512 U.S. 79, 87–88 (1994); *accord* United States v. Bestfoods, 524 U.S. 51, 61–64 (1998) (encouraging resort to state law, absent textual direction to create a Federal Rule specific to the federal statute).

[359] U.S. CONST. art. VI.

[360] Nelson, *supra* note 20, at 231, 234–35, 245–60; Dinh, *supra* note 20, at 2088; Meltzer, *supra* note 24, at 367.

conflicts create potential conflicts between two federal laws–a federal statute and a Federal Rule. Many courts examining the CERCLA-Rule 17(b) conflict, however, erroneously used both a federal common law and an obstacle preemption analysis. Under each, these courts considered statutory purpose and concluded that the remedial purposes underlying CERCLA required an expanded duration of amenability to liability for dissolved corporations. Since the late 1980s, the Supreme Court has continued to narrow the basis for creating federal common law untethered to congressional text but has expanded the use of obstacle preemption in which it permits federal courts to freely consider statutory purposes not set forth in the statutory text.[361] Indeed, Professor Meltzer has emphasized that, in implied obstacle preemption cases, the conflicting federal law is not part of the statutory text, but is "essentially fashioned by the court as a matter of federal common law."[362] Although federal common lawmaking analysis and obstacle preemption analysis have similar attributes, the ability of the courts to create federal common law has diminished (and would no longer permit finding an expanded amenability to suit for dissolved corporations under CERCLA), while obstacle preemption has expanded (and might still permit courts to conclude that dissolved corporations have an expanded amenability to suit under CERCLA if the courts could consider statutory purposes). This divergence in lawmaking ability of the federal courts highlights the "selective judicial passivity" in the Court's federal common law and preemption doctrines.[363]

V. CONCLUSION

This Article has placed conflicts between federal statutes and Federal Rules that incorporate state law in the same conceptual framework as other statute-Rule conflicts. The Article does so by emphasizing that state law incorporated into a Federal Rule operates as the governing federal law rather than as state law. Thus, the statute-Rule conflicts create horizontal power issues regarding the separation or allocation of federal rulemaking power, not vertical conflicts of federal and state power.

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[361] *See, e.g.*, Meltzer, *supra* note 24, at 364–68; Davis, *Unmasking the Presumption*, *supra* note 25, at 971 ("[T]he Court's preemption doctrine has reverted to its early-twentieth century focus on federal exclusivity, but, this time, in the guise of implied obstacle preemption."); *see also supra* note 240.

[362] Meltzer, *supra* note 24, at 367.

[363] *See, e.g.*, Meltzer, *supra* note 24, at 343, 345–57.

This Article also establishes that correct analysis matters. As a theoretic matter, application of the rulemaking authority analysis prevents flaws in a court's reasoning. First, correct analysis reveals that preemption analysis is only implicated when federal and state law conflict. Preemption principles are, thus, inapplicable in the CERCLA-Rule 17(b) context because CERCLA and Rule 17(b) constitute two types of federal law. Second, use of correct analysis in analyzing statute-Rule conflicts eliminates errors occasioned by incorrect or shorthand analysis, including (1) not determining when one rulemaker lacks rulemaking authority; (2) not determining that both the CERCLA statute and Rule 17(b) constitute types of federal law, thus, rendering preemption analysis inapposite; and (3) not determining that federal common lawmaking is implicated and, hence, not referencing the Supreme Court's federal common law jurisprudence. Third, use of correct analysis underscores the divergent, lesser adjudicatory power of federal courts when they use their federal common lawmaking authority as opposed to when they use an implied obstacle preemption analysis. Many of the courts that have examined the CERCLA-Rule 17(b) conflict have used preemption analysis or preemption *and* federal common lawmaking analysis. Under both the preemption and federal common law analyses, these courts, in construing the CERCLA statute, considered unexpressed congressional purposes and the need for national uniformity, attaching less importance to whether state law (that would put limits on corporate liability) would be displaced. While that analysis would once have been appropriate under either a federal common lawmaking or a preemption framework, the Supreme Court's federal common lawmaking cases now restrict the authority of the federal courts in creating federal common law.[364]

As a pragmatic matter, application of the rulemaking authority analysis to the CERCLA-Rule 17(b) issue leads to the conclusion that the decisions of the majority of federal courts to reach the issue should be overturned. In resolving the CERCLA-Rule 17(b) conflict under the rulemaking authority analysis, it becomes clear that, under current Supreme Court case law, the ability of the federal courts to create federal common law is increasingly dependent on textual congressional authorization. Further, silence in the CERCLA statute regarding the scope of corporate liability implicates the federal courts' reduced authority in a sphere that is not legislative, but is

[364] *See supra* note 24 and accompanying text.

within the federal courts' adjudicatory function of determining cases and controversies.

Application of the rulemaking authority analysis, thus, results in the following changes in analysis: (1) courts must treat CERCLA and Rule 17(b) as two types of federal law; (2) courts must determine the scope of the CERCLA statute under the current, more restrictive Supreme Court jurisprudence regarding interpretation of the CERCLA statute and regarding federal common lawmaking; and (3) courts must abandon the more purposive adjudicatory approach permitted under an obstacle preemption analysis. The practical result is the overturning of the decisions of the majority of the federal courts to address the CERCLA-Rule 17(b) issue. The broader result is to highlight the selective nature of current jurisprudence, which requires federal courts to adhere closely to statutory text in statutory interpretation and in federal common lawmaking to fill the interstices of a federal statute but does not similarly require textual clarity in obstacle preemption analysis, which scholars have begun to recognize as a species of federal common lawmaking.