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Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38WR6T
Abandoning Hazardous Waste Sites in Bankruptcy: *Midlantic National Bank v. New Jersey Department of Environmental Protection*

106 S. Ct. 755 (1986)

**INTRODUCTION**

The Bankruptcy Reform Act of 1978\(^1\) codified a common law rule that authorized a trustee in bankruptcy to abandon property of inconsequential value to the estate.\(^2\) Title to the abandoned property would revert to the debtor or any party with a possessory interest.\(^3\) For the typical estate, the abandonment rule made sense: one purpose of the bankruptcy process is to gather the assets of the bankrupt and distribute them according to a set of rules.\(^4\) If an asset had no value, abandonment

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\(^2\) The rule reads: “After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. § 554(a) (1982 & Supp. II 1984).

\(^3\) Abandoned property generally reverts to the debtor. See 2 D. Cowans, *Bankruptcy Law and Practice* § 9.9 at 67 (1986); Annot., 19 A.L.R.2d 890, 892 (1951). Ohio v. Kovacs, 105 S. Ct. 705, 711 n.12 (1985), assumes that property is abandoned to the debtor. Abandonment to the debtor is possible only when a debtor exists; in fact, the property may revert to any party with a possessory interest. H.R. Rep. No. 595, 95th Cong., 2d Sess. 377, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6333; S. Rep. No. 989, 95th Cong., 2d Sess. 92, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5878. Parties with such a possessory interest might be, for example, tenants of the property or trespassers asserting an adverse possession claim. Abandonment is essentially an act to divest the trustee in bankruptcy of title to the property. Divesting the trustee of title, however, does not necessarily confer title upon another party. Thus, competing claimants to the property may seek title to the property; but the resolution of that battle, however, is not the subject of the trustee’s duties. If a property’s liabilities outweigh its value, prudent claimants are unlikely to wage a pitched battle to gain title to the property.

would benefit the estate and serve bankruptcy policy. The advent of hazardous waste sites on the property of debtors in bankruptcy in recent years, however, appeared to create a flaw in the logic behind abandonment. If the trustee in bankruptcy were allowed to abandon a hazardous waste site, so the argument goes, companies could, through the bankruptcy mechanism, avoid their obligation to clean up hazardous waste sites. The trustee would abandon the property to the debtor; the debtor would lack the resources to clean up the site; thus, the government by default would be left to clean up the site.

Last Term, in Ohio v. Kovacs, the United States Supreme Court first addressed the propriety of abandonment by bankrupt estates of hazard-

5. In the typical abandonment case, the trustee could not economically collect, preserve, and dispose of the property. B. WEINTRAUB & A. RESNICK, BANKRUPTCY LAW MANUAL ¶ 4.06 (1986). For example, the bankrupt may have owned a parcel of land whose value is trivial. If no claims are secured by that parcel, the proceeds from the sale of the parcel would be used to satisfy the general creditors. If, however, the costs of selling the parcel would equal or exceed the revenues generated by the sale, the creditors would benefit from abandonment, and no party to the bankruptcy process (or anyone else) is harmed by the abandonment. See also infra notes 108-09 and accompanying text.

6. This assumes that a debtor exists. In a chapter 7 liquidation, the debtor corporation dissolves, and there may be no financially responsible party with a possessory interest in the property. See infra notes 112-17 and accompanying text.

7. The concern that abandonment would shift the burden of cleanup of the hazardous waste site entirely to the state was reflected in the court of appeals decision in the Midlantic litigation, In re Quanta Resources, 739 F.2d 912, 921 (3d Cir. 1984), aff’d sub nom. Midlantic Nat’l Bank v. New Jersey Dep’t Envtl. Protection, 106 S. Ct. 755 (1986). See infra note 56 and accompanying text. See also Lockett, Environmental Liability Enforcement and the Bankruptcy Act of 1978: A Study of H.R. 2767, the “Superlien” Provision, 19 REAL PROP. PROB. & TR. J. 859, 861-62 (1984) (“the lower courts have uniformly ruled in favor of hazardous waste law violators and against the government, thus frustrating its efforts to compel clean-up or to recoup its costs”); Note, Hazardous Waste Removal, State Court Injunctions, and the Bankruptcy Code: Ohio v. Kovacs, 105 S. Ct. 705 (1985), 54 U. Cin. L. REV. 1101, 1110 (“By seeing the situation strictly as a bankruptcy question . . . the Court may have set a standard for approaching other situations where this conflict exists. This would be disastrous [sic] because . . . allowing bankrupt debtors to escape the responsibility for hazardous waste disposal through use of the Bankruptcy Code will result in government funding and implementation of cleanups”); Note, The Bankruptcy Code and Hazardous Waste Cleanup: An Examination of the Policy Conflict, 27 WM. & MARY L. REV. 165, 167 (1985) [hereinafter cited as Policy Conflict] (“The Code’s abandonment provision is another means by which toxic waste site owners may avoid environmental cleanup costs”); Note, Cleaning Up in Bankruptcy: Curbing Abuse of the Federal Bankruptcy Code by Industrial Polluters, 85 COLUM. L. REV. 870, 883-84 (1985) [hereinafter cited as Cleaning Up in Bankruptcy] (“The inability of courts to prevent polluters from abandoning burdensome properties without contravening the clear language of section 554 may seriously undermine the enforcement of laws designed to protect the environment and the public from hazardous substances.”). This view is not universally held. See Drabkin, Moorman & Kirsch, Bankruptcy and the Cleanup of Hazardous Waste: Caveat Creditor, 15 ENVTL. L. REP. (ENVT L. INST.) 10,168, 10,181 (“[A]bandonment may do nothing to alter the bankrupt estate’s cleanup liability for the property sought to be abandoned because [the federal Superfund statute] could be used to hold the estate liable even after abandonment.”); Brief for Amicus Curiae Thomas H. Jackson at 6, Midlantic (characterizing the focus on the abandonment issue as a “red herring”).
ous waste sites. In *Kovacs*, the Supreme Court examined the dischargeability of injunctions ordering cleanup of hazardous waste sites in bankruptcy. In dicta, the Court discussed a trustee’s abandonment options:

If the property was worth more than the costs of bringing it into compliance with state law, the trustee would undoubtedly sell it for its net value, and the buyer would clean up the property, in which event whatever obligation [the debtor] might have had to clean up the property would have been satisfied. If the property were worth less than the cost of cleanup, the trustee would likely abandon it to its prior owner, who would have to comply with the state environmental law to the extent of his or its ability.

Commentators interpreted this language in *Kovacs* as implying that a trustee in bankruptcy could abandon hazardous waste sites, thus frustrating state hazardous waste laws. The quoted language implied that abandonment discharged the estate’s liability and assumed that a prior owner would exist. These are both questionable propositions. Commentators criticized the opinion because, even if a debtor were to exist, few debtors would have the financial resources to clean up a toxic waste site.

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9. The section of the opinion containing this language begins, “It is well to emphasize what we have not decided,” but appeared to presage the Supreme Court’s interpretation of abandonment in *Midlantic*. See Drabkin, Moorman & Kirsch, *supra* note 7, at 10,181; *Cleaning up in Bankruptcy*, *supra* note 7, at 883.
10. 105 S. Ct. 705, 711 n.12.
11. *See* sources cited *supra* note 7. The Ohio Hazardous Waste Management Regulations address this potential problem by requiring that the owner and operator of each hazardous waste treatment, storage, or disposal facility provide specified assurances of financial responsibility for closing the facility. *Ohio Admin. Code* §§ 3745-55-43 (1985) (for existing facilities), 3745-66-43 (1985) (for new facilities). By requiring such assurances, the state is not left without financial resources to clean up the site of a bankrupt owner or operator.
12. Abandonment does not discharge the estate’s liability. It transforms the estate’s liability from an equitable liability of specific performance into a legal liability for monetary damages. For example, in the context of a contract, the trustee “may refuse to accept or assume [the contract] leaving the other party to his remedy for the breach.” 4 H. REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 1411 (4th ed. 1935). *See also* Drabkin, Moorman & Kirsch, *supra* note 7, at 10,181.
13. *See* *supra* note 6. The dictum may have created less stir had it explicitly been restricted to the facts in *Kovacs*. In *Kovacs*, there was a debtor to whom the property could be abandoned. *See* discussion *infra* note 14.
14. *See* *Cleaning up in Bankruptcy*, *supra* note 7, at 871-73; *see also* Note, *Trustee in Bankruptcy May Not Abandon Burdensome Property of Debtor’s Estate in Contravention of State and Local Environmental Protection Laws*, 15 SETON HALL L. REV. 967, 989 (1985); Drabkin, Moorman & Kirsch, *supra* note 7 at 10,180. The Court’s dictum contains a misleading doctrinal implication. The Court states that the prior owner—in most cases the debtor in bankruptcy—would be obligated to bring the site into compliance with state law when the cost of doing so outweighs the value of the property; the Court thus implies that the abandonment provisions may override the fresh start policy of the bankruptcy laws. That is subject to question. Generally, property is abandoned to the debtor because it is worthless to the bankrupt estate. Abandonment is not a mechanism to shift liability from the estate to the debtor. The
This term, in *Midlantic National Bank v. New Jersey Department of Environmental Protection*, the Supreme Court addressed whether a trustee in bankruptcy could abandon a hazardous waste site in contravention of state laws designed to protect public health and safety. In a split decision, the Court held that section 554 of the Bankruptcy Code is not intended to authorize such an abandonment. The decision has been described as a victory for hazardous waste cleanup efforts and environmentalists. The abandonment question, however, is not a zero sum game, and the Supreme Court, by characterizing it as a head-on conflict between bankruptcy law and state hazardous waste law, created an exception that may spawn more problems for hazardous waste cleanup efforts than it restrains.

This Note examines *Midlantic* and the abandonment issue. The first Section will describe the factual background of the case and the court of appeals decision. Section II will describe the Supreme Court opinion. Section III will argue that the Court’s decision was fundamentally flawed and that authorizing abandonment of hazardous waste sites will work less mischief on state interests than forbidding abandonment.

## BACKGROUND OF THE CASE


17.  Id. at 762.
21.  Brief of Respondent New Jersey Department of Environmental Protection at 2 [hereinafter cited as New Jersey Brief]. The court of appeals decided the appeals regarding Quanta's proposed abandonment of sites in New York and New Jersey as companion cases. The decision regarding the New York site, 739 F.2d 912, contains the reasoning of the opinion and is cited hereinafter as *Quanta* (New York); the decision regarding the New Jersey site, 739 F.2d 927, stated the facts of the New Jersey case and then concluded that because no principled distinctions existed between the New York case and the New Jersey case, "the analysis and reasoning of [the New York case] apply equally to [the New Jersey case]." *Id.* at 928. See
portion of which were contaminated with polychlorinated biphenyls (PCB’s). The New Jersey site also contained PCB-contaminated oil, even though Quanta’s operating permit specifically prohibited Quanta from accepting such oil. When the New Jersey Department of Environmental Protection discovered the contaminated oil, in June 1981, Quanta agreed to cease operating its New Jersey site, and began to negotiate its cleanup obligation with the state. Subsequently, in October 1981, Quanta filed a petition in bankruptcy. On the day following Quanta’s filing, the New Jersey Department of Environmental Protection issued an administrative order requiring Quanta to cease operations, close the facility within one year, and clean up all hazardous materials. In November 1981, the bankruptcy proceeding was converted from a reorganization proceeding to a liquidation proceeding.

In May 1982, the trustee filed a notice of intention to abandon the New York site. The trustee announced his intention to abandon the New Jersey site in October 1982 and, again, in April 1983. Both New York and New Jersey objected to the abandonment during the bankruptcy proceedings of the sites in their respective states. New York asserted that abandonment of the property would constitute a disposal of hazardous wastes and would constitute a danger to public health. It requested that permission to abandon the New York site be denied until all hazardous wastes were removed from the property and lawfully disposed of. The bankruptcy court rejected New York’s arguments and issued an order permitting abandonment.

infra text accompanying note 39. The decision regarding the New Jersey case is hereinafter cited as Quanta (New Jersey).

22. New York Brief at 2. Polychlorinated biphenyls are a hazardous substance and oxidize when exposed to sunlight. The products of oxidation of PCB’s include potent carcinogens, teratogens, and liver toxins. Id. at 2 n.2.

23. Quanta acquired the New Jersey site from Edgewater Terminals, Inc. In the acquisition agreement, Edgewater assigned its temporary operating authorization from the New Jersey Department of Environmental Protection, under which the facility was specifically prohibited from accepting PCB’s, to Quanta. New Jersey Brief at 3. Subsequently, Quanta agreed to apply for an operating authorization in its own name; that authorization was granted and stipulated that “[t]his facility is not authorized to accept PCB waste.” Id. at 4 (emphasis in original).

24. Quanta (New Jersey), 739 F.2d at 928.
25. Id.
26. Id.
27. Id.
29. Quanta (New Jersey), 739 F.2d at 928.
30. New York Brief at 3; New Jersey Brief at 6.
32. Id.
33. In re Quanta Resources Corp., No. 81-05967 (Bankr. D.N.J. July 7, 1982), reprinted in O’Neill Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, app. J at 66a [hereinafter cited as O’Neill Petition]. The decision reasoned that “[t]he City and State of New York are the proper parties to safeguard the health and safety of their
decision to the District Court for the District of New Jersey, which affirmed the decision. New York then appealed the decision to the Court of Appeals for the Third Circuit.

The New Jersey Department of Environmental Protection opposed the abandonment of the New Jersey site on similar grounds. New Jersey argued abandonment would violate state law because PCB-contaminated oil must be stored in compliance with state regulations, and abandonment would pose a threat to the public because the oil was stored in leaking tanks. Again, however, the bankruptcy court rejected the state law argument and authorized the abandonment. The parties consented to New Jersey taking a direct appeal to the Court of Appeals for the Third Circuit. The New York and New Jersey cases were decided as companion cases by the court of appeals, which observed that the New Jersey case "presents us with the identical issue presented by [the New York case]."

In a split decision, the Third Circuit Court of Appeals reversed the decisions of the bankruptcy and district courts. The court analyzed the relationship between the abandonment power and state environmental laws. The court described the policy of bankruptcy law as providing "for an equitable settling of creditors' accounts by usurping from the debtor his power to control the distribution of his assets." The court was unable to reconcile this bankruptcy policy with state and local hazardous waste laws whose purpose is "to protect the public from the toxic effect of dangerous substances by preventing their uncontrolled discharge into the environment." The court reasoned that the abandonment provisions of the Bankruptcy Code were not intended to preempt state public health statutes, and therefore, abandonment should not be authorized.

The court began its analysis by addressing a problem of statutory construction: did Congress intend abandonment to displace state law? The court applied the rule of interpretation that if Congress intends to
“withdraw police power from a state, that intention must be unmistakable.” First, the court reviewed four cases in which courts discussed limits on the abandonment power. From these cases, it distilled the rule that “where important state law or general equitable principles protect some public interest, they should not be overridden by federal legislation unless they are inconsistent with explicit congressional intent such that the supremacy clause mandates their supersession by the abandonment power.”

The court then examined whether express federal law “grants superseding power or subjugates the abandonment power to state law even if that law would otherwise be inconsistent.” The court found three indications that bankruptcy laws were not intended to abrogate state police powers enforcement. First, section 362(b)(4) of the Bankruptcy Code creates an exception to the Bankruptcy Code’s automatic stay on actions against the debtor for actions government units institute to enforce police or regulatory powers. Second, section 959(b) of the Judicial Code provides that a trustee shall manage and operate property according to the requirements of state law. The court construed section 959(b) as “a clear indication that in general the congressional scheme was not intended to subjugate state and local regulatory laws.” Third, the statutory scheme and cases view bankruptcy courts as courts of equity, “authorized to prevent courses of conduct otherwise fraudulent, abusive or unfair.”

The opinion concluded that the cases and the code sections it reviewed evidenced an intent to accommodate environmental protection laws, and that the court must evaluate the relative importance of the state and

44. Id. at 916 (citing Penn Terra Ltd. v. Dep’t Envtl. Resources, 733 F.2d 267, 272-73 (3d Cir. 1984)).
45. Id. at 916-18. The cases were: (1) Ottenheimer v. Whitaker, 198 F.2d 289 (4th Cir. 1952) (abandonment of barges in a harbor would violate federal law, and although the cost of complying with the laws would be greater than the value of the barges, abandonment provision held inapplicable); (2) In re Lewis Jones, Inc., 1 BANKR. CT. DEC. (CRR) 277 (Bankr. E.D. Pa. 1974) (trustee could not abandon an underground network of pipes, vents, and manholes when abandonment would create health and safety hazards); (3) In re Chicago Rapid Transit Co., 129 F.2d 1 (7th Cir.), cert. denied, 317 U.S. 683 (1942) (trustees in reorganization for a railroad could not abandon service on a line, even though providing the service would burden the estate); and (4) In re Adelphi Hospital Corp., 579 F.2d 726 (2d Cir. 1978) (trustee allowed to abandon records). The Quanta court interpreted Adelphi narrowly as distinguishing state regulations on the basis of their relative importance to the public.
46. Quanta (New York), 739 F.2d at 918.
47. Id. at 918.
50. Quanta (New York), 739 F.2d at 919. See infra note 79.
52. Quanta (New York), 739 F.2d at 921 (quoting In re Multiponics, Inc., 622 F.2d 709, 721 (5th Cir. 1980)).
federal policies involved in abandonment of a hazardous waste site.\textsuperscript{53}

The court next balanced the importance of the state policy in protecting public health against the bankruptcy policy of preserving the estate for distribution to the creditors. The court reasoned that abandonment would contravene state law "with severely deleterious implications for the public safety."\textsuperscript{54} Because the abandonment doctrine in this context interferes with state regulations, the "expenditures necessary to dispose of the waste properly [do not by themselves] outweigh the public interest at stake here."\textsuperscript{55} The court reasoned that

[i]f trustees in bankruptcy are permitted to dispose of hazardous wastes under the cloak of the abandonment power, compliance with environmental protection laws will be transformed into governmental cleanup by default. It cannot be said that the bankruptcy laws were intended to work such a radical change in the nature of local public health and safety regulation—the substitution of governmental action for citizen compliance—without an indication that Congress so intended.\textsuperscript{56}

The court concluded that the trustee in bankruptcy could not abandon the sites.\textsuperscript{57}

In a vigorous dissent, Judge Gibbons criticized the majority for failing "to consider additional points of extreme relevance to this case."\textsuperscript{58} First, Judge Gibbons disagreed with the majority's statutory construction. The cases granting equitable exceptions to the abandonment rule were decided when abandonment was a judge-made rule. Once the abandonment rule was codified in the Bankruptcy Code, Judge Gibbons reasoned, its flexibility, absent explicit exceptions, vanished. Finding no explicit exceptions to the abandonment power, the dissent reasoned that the power was absolute.\textsuperscript{59} Next, Judge Gibbons found a fifth amendment taking problem in the majority opinion; he reasoned that transferring the cost of cleanup from the states to the secured and unsecured creditors is analogous to forcing creditors to operate a business at a loss. This practice effects a taking under the fifth amendment and was earlier disapproved by the Supreme Court.\textsuperscript{60} While the dissent presented a forceful

\textsuperscript{53} Quanta (New York), 739 F.2d at 921.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 921-22. The court preceded this statement with a portentous description of a contrary holding:

It is only recently that the public has learned of the magnitude of the dangers associated with toxic waste disposal; at the same time, the last few years have witnessed a rising tide of bankruptcies. Lurking in the shadows of these phenomena is the spectre of the changing fortunes of the nuclear power industry, with the concomitant potentiality for unusable facilities.

\textit{Id.} at 921.
\textsuperscript{57} Quanta (New York), 739 F.2d at 922-23; \textit{Quanta (New Jersey),} 739 F.2d at 928-29.
\textsuperscript{58} Quanta (New York), 739 F.2d at 923.
\textsuperscript{59} Id. at 923-24.
\textsuperscript{60} Id. at 924. The Supreme Court held that courts should "decline to construe the
point by point criticism of the majority opinion, rather than generating an alternative analysis, it pronounced only that it would affirm the opinions below.

In November 1984, Midlantic National Bank, which held a security interest in some of the debtor's property, and Thomas O'Neill, the trustee in bankruptcy for Quanta, filed petitions with the United States Supreme Court for a writ of certiorari. The Supreme Court granted certiorari and consolidated the cases.

II
THE SUPREME COURT OPINION
A. The Majority Opinion

In a split decision, the Supreme Court affirmed the decision of the Third Circuit Court of Appeals. Justice Powell wrote the opinion for the Court, and Justice Rehnquist filed a dissenting opinion, which was joined by three Justices. The Court's decision parallels the court of appeals' opinion, recognizing traditional limitations on the trustee's abandonment power. The dissent assailed the opinion for reordering, by fiat, the priorities given to a bankrupt's creditors.

In its opinion, the Court first construed the history of the abandonment doctrine. It observed that abandonment had been traditionally limited to protect legitimate state or federal interests. The Court reviewed three cases that applied the abandonment rule. First, in *Ottenheimer v. Whitaker*, the Fourth Circuit Court of Appeals reasoned that the abandonment power yields to avoid conflicts with a congressionally imposed statutory duty in the public interest. Thus, the abandonment rule accommodates competing federal interests. Next, in *In re Chicago Transit Co.* and *In re Lewis Jones, Inc.*, the courts accommodated local interests by requiring the trustee to comply with local laws. In light of these cases, the Supreme Court concluded that courts recognized restrictions on the abandonment power. The Court applied the rule of

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63. *Midlantic*, 106 S. Ct. at 767-78 (Rehnquist, J., dissenting); see infra note 101.
64. 106 S. Ct. at 759-60.
65. 198 F.2d 289, 290 (4th Cir. 1952).
66. 106 S. Ct. at 759.
69. 106 S. Ct. at 759-60.

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statutory construction that "if Congress intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific." The Court concluded that restrictions on the abandonment power were embodied in the statutory codification of the abandonment rule. The Court then explored policies underlying the Bankruptcy Code that might—even if Congress did not intend to codify limitations to the abandonment power—circumscribe a trustee's abandonment power. It first considered its statement in Ohio v. Kovacs that Congress intended to limit the trustee's ability to disregard nonbankruptcy law:

[W]e do not question that . . . the bankruptcy trustee . . . must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions.

The opinion next analyzed two congressional limitations on powers of the trustees. First, the Court reviewed the automatic stay provision of section 362 of the Bankruptcy Code, "one of the fundamental debtor protections provided by the bankruptcy laws." Despite the central importance of the stay provision to the bankruptcy laws, the stay provision is limited by several categories of exceptions. One exception permits the government to enforce nonmonetary judgments against a debtor's estate. The legislative history of section 362 indicated that a purpose of

70. Id. (citing Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 266-67 (1979)). In Edmonds, the Court considered whether an amendment to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 (1982 & Supp. II 1984), modified a traditional admiralty rule that arose from judge-made law. The Court reasoned that the amendment and statutory history's "silence is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely," and therefore not indicative of an intent to modify the earlier rule. Edmonds, 443 U.S. at 266-67.

71. 106 S. Ct. at 760.

72. Id. at 760 (quoting Ohio v. Kovacs, 105 S. Ct. 705, 711-12 (1985) (emphasis added by Court)). While the statement was dicta, Kovacs was a unanimous decision. By quoting from Kovacs, the opinion implies a contrary stance is disingenuous, as the entire Court earlier explicitly supported this proposition.

73. 11 U.S.C. § 362(a) (1982 & Supp. II 1984). Section 362 shields a debtor filing a bankruptcy petition protection from the creditors' immediate collection efforts. It imposes a stay on proceedings to collect claims or enforce liens against the debtor, thus enabling the trustee to collect the property of the estate. See id.


76. 11 U.S.C. § 362(b)(5) (1982). To support its reading of section 362(b)(5), the Court quoted the legislative history of section 362(b)(4) without identifying it as such. The court of appeals found support for the government exception to the stay provision in section 362(b)(4). See supra note 48 and accompanying text. Sections 362(b)(4) and 362(b)(5) are distinct, and the distinction militates against the Supreme Court's citation to section 362(b)(5) and its construction of the abandonment provision. Section 362(b)(4) allows the commencement of a government action to enforce its police or regulatory powers, but does not address the enforce-
The Court thus reasoned that the Bankruptcy Code is flexible to accommodate the needs of environmental protection. Second, the Court considered section 959(b) of the Judicial Code, which directs trustees to manage and operate property according to requirements of state law, to

ment of a judgment. Section 362(b)(5) "makes clear that the [362(b)(4)] exception extends to permit an injunction and enforcement of an injunction, and to permit the entry of a money judgment, but does not extend to permit enforcement of a money judgment." H.R. REP. No. 595, 95th Cong., 2d Sess. 343, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6299; S. REP. No. 989, 95th Cong., 2d Sess. 52, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5838. Thus, section 362(b)(5) restricts the government stay exception: the government may not use the exception to gain priority over other claims through its exception to the stay.

"[Section 362(b)(4)] is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate." 124 CONG. REc. 32,395 (1978) (statement of Rep. Edwards) (emphasis added), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6436, 6444-45; 124 CONG. REc. 33,995 (statement of Sen. DeConcini), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 6505, 6513.

77. 

78. Quanta (New York), 739 F.2d at 921.

79. 28 U.S.C. § 959(b) (1982). Section 959(b) provides that a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Id.

While the Court conceded that section 959(b) does not apply directly to abandonment, a persuasive argument was presented that section 959(b) provides the contours that delineate the boundaries between the provinces of bankruptcy and state law. The Solicitor General argued that "Section 959(b)'s use of the term 'manage,' evaluated on its face, includes the bankruptcy trustee's general administration of property in his possession . . ." Brief for the United States as Amicus Curiae Supporting Respondents at 11. "[Section 959(b)] was enacted to prevent federal receivers, and later trustees, from encroaching on general state prerogatives . . ." Id. at 12. That analysis affects the abandonment issue. To the extent that the state has a claim against the estate, it may attempt to satisfy that claim through the bankruptcy process. By abandoning the property, however, the trustee is not creating the sort of harm the statute is meant to prevent. The trustee is failing only to remedy a past act. An extension of the Solicitor General's logic leads to odd results: If a state law required a defendant to pay
be additional evidence "that Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's powers."\footnote{70}  

The Court stated that the factors outlined above were sufficient evidence that Congress did not intend the abandonment power to abrogate certain state and local laws. Nevertheless, to bolster its conclusion, the opinion cited federal legislation that reflected congressional "emphasis on its 'goal of protecting the environment against toxic pollution.'"\footnote{81}  

In light of the history of the abandonment provision and the congressional recognition of the importance of hazardous waste laws, the Court molded a narrow exception to the abandonment rule: "A trustee may not abandon property in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards."\footnote{82} The Court noted that it intended the exception to be narrow, and that the rule did not encompass speculative or indeterminate future violation of laws that may stem from abandonment.\footnote{83} Thus, without addressing the legal consequences of abandonment or considering why abandonment should not be permitted, the Court refused to authorize a trustee in bankruptcy from abandoning property that has an associated hazardous waste liability.  

B. The Dissent  

Justice Rehnquist wrote the dissent, which was joined by Chief Justice Burger, and Justices White and O'Connor.\footnote{84} Just as the majority opinion mirrored the court of appeals' decision, the dissent reflected the

\footnote{70. 106 S. Ct. at 762.}  

\footnote{81. \textit{id.} (quoting Chem. Mfrs. Ass'n, Inc. v. Natural Resources Defense Council, 105 S. Ct. 1102, 1117 (1985)). The Court also referred to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6987 (1982 & Supp. II 1984), and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund), 42 U.S.C. §§ 9601-9657 (1982 & Supp. II 1984). RCRA regulates treatment, storage, and disposal of hazardous wastes through monitoring, and "authorizes the United States to seek judicial or administrative restraint of activities involving hazardous wastes that 'may present an imminent and substantial endangerment to health or the environment.'" \textit{Midlantic}, 106 S. Ct. at 762 (quoting 42 U.S.C. § 6973 (1982)). The Superfund established a fund to finance cleanup of sites and empowered the federal government to secure such relief as may be necessary to abate an imminent and substantial endangerment to the public health or welfare or environment because of an actual or threatened release of a hazardous substance from a facility. 42 U.S.C. § 9606 (1982).}  

\footnote{82. 106 S. Ct. at 762.}  

\footnote{83. \textit{id.} n.9. This language is unclear. Perhaps the Court would not allow the state to require bankrupt owners of hazardous waste sites to create trust funds for potential future liabilities. As all harm that may result from a hazardous waste site is not immediately apparent, a law requiring a bankrupt corporation to establish a fund for potential future claimants is not unrealistic.}  

\footnote{84. \textit{id.} at 763 (Rehnquist, J., dissenting).}
criticisms in Judge Gibbons' dissent. Justice Rehnquist first parted from the majority's opinion on its choice of the proper rule of statutory construction. The dissent noted that the abandonment provision of the Bankruptcy Code is absolute in its terms, and therefore, the Court should not read limitations or exceptions into the provision absent legislative history that demonstrates with "extraordinary clarity that this was indeed the intent of Congress." This canon of statutory construction dictated the dissent's conclusion that the abandonment power was not limited by state law.

Nevertheless, Justice Rehnquist considered the sources the majority described as creating an exception to the abandonment rule. The dissent interpreted the cases narrowly. First, it read Ottenheimer's holding that a trustee could not abandon barges that obstructed navigable waters as unique to conflicts between federal statutes. The dissent argued that in

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85. Id. at 764. In 1950, Professor Karl N. Llewellyn observed that statutory construction arguments "unhappily require[e] discussion as if only one single correct meaning could exist. Hence there are two opposing canons on almost every point." Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed, 3 VAND. L. REV. 395, 401 (1950).

86. 106 S. Ct. at 764 (Rehnquist, J., dissenting). The legislative history of section 554 is scarcely more revealing of congressional intent than the statutory language. The Senate committee report states that

Under this section the court may authorize the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value to the estate. Abandonment may be to any party with a possessory interest in the property abandoned. In order to aid administration of the case, subsection (b) deems the court to have authorized abandonment of any property that is scheduled under section 521(1) and that is not administered before the case is closed. That property is deemed abandoned to the debtor. Subsection (c) specifies that if property is neither abandoned nor administered it remains property of the estate.


Llewellyn, supra note 85, categorized a series of contradictory canons under the labels "thrust" and "parry". (That terminology was especially appropriate because Columbia University, where Professor Llewellyn then taught, was a major collegiate fencing power in the 1950's). Llewellyn might have described the majority's canon as a thrust—"Statutes are to be read in the light of the common law, and a statute affirming a common law rule is to be construed in accordance with the common law." Id. at 401. He would describe the parry as "The common law gives way to a statute which is in consistent [sic] with it and when a statute is designed as a revision of a whole body of law applicable to a given subject, it supersedes the common law." Id. Following every good parry is a riposte, and the dissent's would be "A statute cannot go beyond its text," which the majority would foil with the counterparry: "To effect its purpose a statute may be implemented beyond its text." Id.

The dissent found its canon of statutory construction in Garcia v. United States, 105 S. Ct. 479, 482-83 (1984). Garcia involved the construction of the words within a statutory framework, but unlike Midlantic, did not involve the codification of a common law rule. While the dissent disputes the nature of exceptions to abandonment, it concedes abandonment's common law origins. Thus, the dissent's canon of statutory construction, which does not involve statutory codification of common law, is inapt.

87. 106 S. Ct. at 764-65. The dissent is correct in pointing out that Ottenheimer's holding is restricted to a conflict between a judge-made bankruptcy rule and a federal statute. The Court's decision relied upon Ottenheimer, however, for the proposition that the trustee's aban-
In re Lewis Jones, in which the bankruptcy court refused to allow abandonment, the judge-made nature of the abandonment rule was central to the decision. The dissent reasoned that the codification of the abandonment rule limited the applicability of In re Lewis Jones. Further, the dissent argued, “the isolated decision of a single bankruptcy court [does not rise] to the level of ‘established law’ that we can fairly assume Congress intended to incorporate.” Finally, the dissent noted that In re Chicago Rapid Transit Co. affirmed an abandonment, and therefore the language in the case limiting abandonment was not essential to the holding, but rather was dicta. The dissent concluded that “three rather isolated cases do not constitute the sort of settled law that we can fairly assume Congress intended to codify absent some expression of its intent to do so.” The dissent described the majority’s citations to secondary sources that existed when the abandonment provision was codified as “wholly unpersuasive” of congressional intent.

The dissent next parted company with the majority over its construction of section 959 of the Judicial Code. First, the dissent pointed out the majority’s concession that section 959(b) does not directly apply to abandonment. The dissent then asserted that a trustee’s decision to file a petition to abandon a site does not constitute management or operation contemplated by section 959 and, consequently, does not create an abandonment power was limited, not that state laws could override the bankruptcy laws. 106 S. Ct. at 759; see supra text accompanying notes 64-69.

88. Id. at 765.
89. Id. In re Lewis Jones is probably not good law since the codification of the abandonment rule because judge-made rules are more pliant to other policies than statutory rules. The codification removes any play from the abandonment rule.
90. Id. The dissent implies that the majority opinion is trying to bootstrap Ottenheimer into the development of exceptions for state laws. This implication is unfounded, and it is the dissent that is misleading. The dissent recognizes that the abandonment rule may be restricted by conflicting federal policies, even though no legislative history supports this conclusion. Yet, it fails to explain why such a restriction exists, or why the restriction might not also extend to accommodate state interests.
91. Id. The majority relied on In re Chicago Rapid Transit Co., 129 F.2d 1 (7th Cir.), cert. denied, 317 U.S. 683 (1942), to demonstrate that a court would regulate the trustee’s actions so that they would comply with state law. While Chicago's language restricting abandonment may be labelled dicta, the court’s holding did turn on the trustee’s compliance with state law. “[The bankruptcy court] may not . . . interfere with regulation by the state. Its trustees must comply with valid statutory regulation by the state.” Chicago, 129 F.2d at 5.
92. 106 S. Ct. at 765. When considered individually and read as narrowly as possible, the three cases might be isolated. But commentators have grouped them together. See, e.g., 4A Collier, supra note 2, 70.42 at 502-04 (14th ed. 1978) (“Recent cases illustrate, however, that the trustee in the exercise of the power to abandon is subject to the application of general regulations of a police nature.”); see also In re T.P. Long Chemical Inc., 45 Bankr. 278 (Bankr. N.D. Ohio 1985). Describing the cases as “isolated” seems strained. Further, the dissent just begs the question by playing a numbers game with its statement that three cases do not constitute settled law.
93. 105 S. Ct. at 765.
94. The majority observed that “[section] 959(b) does not directly apply to an abandonment under § 554(a) of the Bankruptcy Code.” Id. at 762.
implicit exception to the abandonment provision.\textsuperscript{95}

Finally, the dissent proposed its own interpretation of the abandonment provision. The dissent asserted that the government is in a far better position than the trustee to clean up hazardous waste sites and that the government's interest in public safety is protected by the notice requirement of abandonment.\textsuperscript{96} The dissent stated that it may have reserved a narrow exception to the abandonment power "such as where the trustee itself might create a genuine emergency that the trustee would be uniquely able to guard against,"\textsuperscript{97} but objected that the broader exception to the abandonment provision the Court upheld may force the trustee to expend all the assets of the estate on the cleanup before other debts are satisfied.\textsuperscript{98} Therefore, absent an expression of congressional intent to limit the abandonment power, the dissent would read abandonment power as nearly absolute.

\section*{III
DISCUSSION}

To the extent that the Third Circuit Court of Appeals and the Supreme Court reasoned that bankruptcy law should not act to defeat state and federal laws intended to protect public health, they were on firm ground. Their conclusion that a court should refuse to authorize a trustee's abandonment of a hazardous waste site, however, does not follow. The abandonment rule does not create a safe harbor for polluters. If the opinions were limited to a refusal to authorize the abandonment, the conflict the Court perceived between bankruptcy law and hazardous waste cleanup laws would have been left unresolved.\textsuperscript{99} But the Court implied that the estate must also satisfy its cleanup obligations under the

\textsuperscript{95} Id. at 766. Section 959(b) dictates a trustee's behavior in managing or operating property. See supra note 79.

\textsuperscript{96} Id. at 767.

\textsuperscript{97} Id.

\textsuperscript{98} The dissent would allow nonstatutory exceptions to abandonment; it states that the exceptions it would reserve would, for example, prohibit a trustee from abandoning dynamite sitting on a furnace in the basement of a schoolhouse. Id. But even that exception would be at odds with the dissent's stance that it is wrong to interpose a judicially created order of priority. See id. at 767-68 (Rehnquist, J., dissenting). If the cost of removing the dynamite exhausted the estate's resources, the result of the dissent's proposed exception would be subject to the same criticism as the majority's exception. The exception the dissent proposes, however, may be unnecessary. The dynamite hypothetical presents a situation in which the trustee would risk criminal liability by leaving the dynamite to explode. The criminal liability should act as a sufficient deterrent to prevent the trustee from seeking authorization to abandon. If the potential criminal liability were not sufficient, section 959(b) of the Judicial Code probably would restrain the court from authorizing an act with positive criminal effects. Leaving dynamite to explode is an illegal act with positive criminal effects (giving rise to new liability, as opposed to continuing liability).

\textsuperscript{99} Had the Court held solely that abandonment could not be authorized, the cleanup obligations of the trustee would have remained unclear, and may have been limited by other claims against the estate. Arguably, a simple refusal to authorize abandonment would lead to
state statute. By taking this extra step, the Court reordered the priorities scheme which orders the claims of creditors against the estate. The analysis that follows will suggest that state interests in hazardous waste cleanup are accommodated by the Bankruptcy Code, and that the holding in *Midlantic*, rather than aiding state hazardous waste cleanup efforts, might not only interfere with state cleanup efforts, but also frustrate other state policies.

A. The Effect of Abandonment

When an entity files a bankruptcy petition, an estate is created. With limited exceptions, the estate contains all of the debtor's property at the time of the filing of the petition. During the bankruptcy process, the estate is distributed to the creditors of the debtor. The creditors may be divided into two general classes: those with secured claims and those with unsecured claims. Secured claims are paid first. The remaining claims are paid according to their priority, which is set by the Bankruptcy Code.

Abandonment is a judge-made rule intended to aid bankruptcy trustees in the performance of one of their central functions, the collection of the estate. If the value of a property is less than the cost of

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100. 106 S. Ct. at 762, 763. "The Bankruptcy Court does not have the power to authorize an abandonment without formulating conditions that will adequately protect the public's health and safety." *Id.* at 762. *See also* Brief of Petitioner, Midlantic National Bank at 15; Brief for Petitioner Thomas J. O'Neill, Trustee at 11-12. The dissent also reads *Midlantic* as requiring the trustee to clean up the site. 106 S. Ct. at 767 (Rehnquist, J., dissenting).

101. The Bankruptcy Code gives unsecured claims levels of priority that determine the order in which they will be discharged. There are eight types of claims that are paid before the bankrupt's claim. Seven types of claims are given "priority." The highest priority is given to administrative expenses and the lowest priority is given to claims of government units for taxes. Following the seven types of claims that receive priority, general unsecured claims, those that do not have another specified priority, are discharged. *See* 11 U.S.C. §§ 507, 726 (1982 & Supp. II 1984).


103. *See id.*

104. *See id.* §§ 725, 726.

105. *See id.* § 725. Section 725 provides that the trustee shall dispose of property in which a party has an interest, such as a lien, before the distribution of property to unsecured creditors. *See id.* Liens are broadly defined in the Bankruptcy Code to include a "charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(31) (Supp. II 1984). *See also* 4 Collier, supra note 2, ¶ 725.01 (15th ed. 1983); 4 *Bankr. Serv. L. Ed.* § 32.22. A claim is secured only to the extent that the proceeds from the sale of the property securing the claim satisfy the claim, subject to a set-off for expenses. 11 U.S.C. § 506(a) (1982). The remainder of the claim is unsecured. *Id.*


Title to abandoned property shifts to a party with a possessory interest.\textsuperscript{111} If the bankrupt is an individual, the individual has an interest as the prior owner. If a corporation liquidates and abandons property, the possessory interest resides with either a party holding a secured interest in the property or the corporation's stockholders.\textsuperscript{112} Stockholders are the ultimate equitable owners of the corporation's assets.\textsuperscript{113} Stockholders are shielded, however, from liability for the corporation's debts under the common law.\textsuperscript{114} Some states preempt the common law and impose statutory liability upon stockholders.\textsuperscript{115} A stockholder's responsibility for cleanup of a hazardous waste site—of which she has become a tenant in common by virtue of the corporation's abandonment—is therefore limited.\textsuperscript{116} The common law, absent legislation to the contrary, limits a

\textsuperscript{108} For example, if a piece of property is valued at $50.00 and will cost $100.00 to sell, the estate would suffer a net loss of $50.00 if the trustee sells the property. Such property should be abandoned.

\textsuperscript{109} See, e.g., A. PASKAY, 1972 HANDBOOK FOR TRUSTEES AND RECEIVERS IN BANKRUPTCY § 14.016 at P-331 (1972).


\textsuperscript{111} See supra notes 2-3.

\textsuperscript{112} 12B W. FLETCHER, FLETCHER CYCLOPEDIA ON THE LAW OF PRIVATE CORPORATIONS § 5753 (1984).

\textsuperscript{113} Id.


\textsuperscript{115} See, e.g., N.J. STAT. ANN. tit. 13, §§ 13:1E-102, 13:1E103 (West Supp. 1985) (imposing joint and several liability on every owner and operator of a sanitary landfill for the proper operation and closure of the facility, and defining owner to include any person who owns a majority interest in a corporation that is the owner or operator of any sanitary landfill facility); MASS. GEN. LAWS ANN. ch. 156, §§ 35, 40 (West 1970) (imposing liability upon stockholders of a corporation that reduces its capital stock for the amount withdrawn for them); compare former CAL. CONST. art. 12, § 1 (West 1954) (empowering the legislature to prescribe liabilities of stockholders) with CAL. CORP. CODE § 102(c) (West compact ed. 1986) (continuing stockholder liability incurred before passage of new Corporations Code); 13A W. FLETCHER, supra note 112, § 6223 (1984). That shareholder liability generally may be enforced notwithstanding corporate dissolution. Id. § 6233.

\textsuperscript{116} Whether shareholder liability should be limited is beyond the scope of this Note. See generally Dodd, The Evolution of Limited Liability in American Industry: Massachusetts, 61 HARV. L. REV. 1351 (1948) (tracing history of legislative grants of limited liability to industry in Massachusetts and noting "the factory system of industrial organization can live and thrive under a legal system which denies to those who invest for profit the right to limit their risk taking to the amount of their investment"); Easterbrook & Fischel, Limited Liability and the
stockholder's liability for cleanup to the value of the property the stockholder received from the corporation.\textsuperscript{117}

While the title to the property may leave the estate, whether the liabilities that result from the bankrupt's operations of the hazardous waste site remain with the estate depends upon state law. They are not simply transferred to the party to whom title is transferred.\textsuperscript{118} In 	extit{In re T.P. Long Chemical, Inc.},\textsuperscript{119} the bankruptcy court observed that a trustee's abandonment of hazardous wastes "in no way affects the estate's liability under CERCLA."\textsuperscript{120} As several commentators have pointed

\textit{Corporation, 52 U. Chi. L. Rev. 89 (1985) (reviewing theories of limited liability and proposing that "[l]imited liability facilitates the efficient specialization of function in publicly held corporations"); Manne, \textit{Our Two Corporation Systems: Law and Economics, 53 Va. L. Rev. 259 (1967) (arguing that the possibility of unforeseen and unpredictable liability is probably too great a risk for large numbers of small investors); Radin, \textit{The Endless Problem of Corporate Personality, 32 Colum. L. Rev. 643 (1932) ("If this limitation [of liability] cannot be secured, large enterprises are impossible and joint adventures except on a small scale or for very wealthy persons simply will not take place."); Note, \textit{Inadequate Capitalization as a Basis for Shareholder Liability: The California Approach and a Recommendation, 45 S. Cal. L. Rev. 823 (1972) (asserting that inadequate capitalization of a corporation should be a sufficient basis for shareholder liability).}

\textsuperscript{117} See 15A W. FLETCHER, supra note 112, § 7417 (1981) ("Stockholders of an insolvent corporation cannot participate in the distribution of its assets until the claims of its creditors are paid. If the assets or capital are distributed . . . or if the stockholders are allowed to withdraw assets leaving creditors unpaid, they may be compelled to repay what they have received . . . although stockholders are liable only to the extent of the property received . . . "); see also 16A W. FLETCHER, supra note 112, § 8161 (1979).

\textsuperscript{118} See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607(a)(2) (1982) (imposing liability for response costs upon "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of"); N.Y. ENVTL. CONSERV. LAW § 27-1313 (McKinney 1984) (imposing liability for response costs on the owner of the site or "any person responsible for the disposal of hazardous wastes at such site"); OHIO REV. CODE ANN. §§ 3734.12, 3734.17 (Page Supp. 1985) (imposing liability for the costs of rectifying violations of the hazardous waste disposal rules upon any person violating the rules). Cf. Rogers, Bankruptcy and Environmental Liability, in SIXTH ANNUAL BANKRUPTCY LITIGATION INSTITUTE 553, 574 (1985) ("[A]bandonment may not eliminate the estate's cleanup liability under liability theories that do not depend on current ownership."). The practicalities of the matter may be different: if the state statute fails to take the step of securing its financial interest in the estate for the cleanup costs, it may find the estate without the resources to satisfy its cleanup obligation. See infra note 128.

\textsuperscript{119} 45 Bankr. 278 (Bankr. N.D. Ohio 1985).

\textsuperscript{120} Id. at 284. In 	extit{T.P. Long}, the court considered whether cleanup costs could be awarded to the United States Environmental Protection Agency as an administrative expense. Administrative expenses are given priority over other unsecured claims. 11 U.S.C. §§ 507, 726 (1982 & Supp. II 1984). In holding that the estate of a debtor chemical company was liable for costs incurred in removing hazardous chemicals on the estate's property, the court considered whether the trustee could abandon hazardous waste. It observed that "[t]he real issue is whether the trustee's authority to abandon burdensome property of the estate may be used in any way to avoid the estate's liability under CERCLA." 	extit{T.P. Long}, 45 Bankr. at 284. While the court ultimately concluded that the trustee could not abandon the hazardous waste, citing Ottenheimer, Lewis Jones, and Chicago Rapid Transit, see supra note 45, it recognized that the estate's liability was independent of abandonment.
out, the real issue in *Midlantic* is priority, not liability.\(^{121}\)

**B. The Priority Question**

A state's ability to recover the costs of cleaning up a hazardous waste site from a bankrupt party is a function of the priority of its claim.\(^{122}\) The *Midlantic* decision orders the trustee to satisfy the bankrupt's cleanup obligations before distributing the estate.\(^{123}\) Thus, the holding in *Midlantic* reorders priorities by giving cleanup expenses the status of an administrative expense; that is, by disallowing abandonment and requiring the trustee to clean up hazardous waste sites, the Court placed the state's claim above other unsecured claims.\(^{124}\)

The implications of reordering the priority scheme may be considerably harsher than the Court intended.\(^{125}\) The reordering may interfere with the relative importance a state attaches to its policies, and it may give one state's policies priority at the expense of another state.\(^{126}\) For

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121. Drabkin, Moorman & Kirsch, *supra* note 7, at 10,181; Brief for Amicus Curiae Thomas H. Jackson at 5. An Environmental Protection Agency (EPA) internal memorandum also reflects this conclusion. Memorandum from Courtney M. Price, Environmental Protection Agency Assistant Administrator for Enforcement and Compliance Monitoring to Regional Administrators (May 24, 1984) [hereinafter cited as EPA Memorandum]. The memorandum provides guidance regarding enforcement of hazardous waste liability against bankrupt parties. Much of its discussion centers on establishing priority for EPA claims. *Id.* at 12-18. The Assistant Administrator's concern regarding abandonment is not the government-cleanup-by-default concern, but rather a concern that a secured creditor may gain title to property the EPA has cleaned up, and that the EPA will have no recourse against the property or the new owner for cleanup costs. *Id.* at 20.

122. See *supra* note 101.

123. The Court held that the trustee must not abandon property in contravention of a state statute. 106 S. Ct. at 762-63. Thus, if the state statute prohibits abandonment, and if, as the Court held, section 959(b) of the Judicial Code requires the trustee to comply with state hazardous waste laws, the trustee must clean up the site, if the state law so specifies. While the Court's opinion reads section 959(b) as inapplicable in the liquidation context, *id.* at 761-62, its refusal to allow the code to "pre-empt" state statutes in the liquidation context can lead only to the conclusion that compliance must be complete. It would be anomalous for the Court to mean that abandonment is prohibited, but that the trustee may flout other provisions of the state laws regulating hazardous wastes. See also discussion of state laws, *supra* note 115.

124. See *supra* notes 99, 123.

125. In addition, it is arguably not within the Court's competence to fashion priorities. "[P]riorities are fixed by Congress, and courts are not free to fashion their own rules of super-priorities . . . . That course belongs to Congress." 3 COLLIER, *supra* note 2, ¶ 507.02 at 507-17 (15th ed. 1985).

126. A state's hazardous waste cleanup claim is not unique for the sympathy it may evoke. A bankrupt's creditors may be described as voluntary and involuntary. The voluntary creditors are those whose relationship with the bankrupt is contractual; they extended some form of credit to the bankrupt voluntarily. The involuntary creditors are those to whom the bankrupt became liable without accession; for example, to a person with a tort claim against the bankrupt. The state resembles both a voluntary and involuntary creditor. The state may be characterized as a voluntary creditor, because by granting permits to operate hazardous waste sites, it arguably tolerates the creation of a condition the site operator may be unable to rectify. The state may be described as an involuntary creditor because the debtor's liability often results from violation of the hazardous waste laws. Ironically, voluntary creditors, either by securing
example, imagine a state with a hazardous waste cleanup act. This state is willing to spread some cleanup costs among its industries and accords greater importance to tort claimants than hazardous waste claimants. *Midlantic* commands a bankruptcy court to prefer the state cleanup policy to the state compensation of tort victims policy, even though that would be contrary to the state's own view of the relative importance of its policies.127

Alternatively, a refusal to authorize abandonment might create conflict between two states' cleanup claims. If a company that generates toxic waste deposited half of its waste at a site it owned in New Jersey and half of its waste at a vacant lot in Pennsylvania, both states would have a claim against the company. If the company were bankrupt, though, the *Midlantic* decision would give New Jersey's claim an administrative priority, because the trustee would not be allowed to abandon the property. The estate's assets could be depleted cleaning up the New Jersey property. Pennsylvania's claim would be one of a general creditor, and the state would share the assets that remained after distribution to all other creditors with unsecured claims receiving priority. Pennsylvania's claim might be completely unsatisfied—solely because the company owned the waste site in New Jersey and did not own the waste site in Pennsylvania. The ownership distinction is not principled in this context.

C. An Alternate Approach

In *Midlantic*, the Court should have authorized the trustee to abandon the hazardous waste sites. The states' claims would then have been settled according to the priorities established in the Bankruptcy Code. Generally, the Code assigns state claims a low priority; the state stands at the back of the line of unsecured creditors, sharing its position with the other general creditors.128 States are able, however, to improve their their claims or through the priority scheme, generally receive priority over involuntary creditors. *Midlantic* creates another hierarchy by favoring one type of involuntary creditor over another type of involuntary creditor.  

127. This objection is not to federal court encroachment into the interpretation of state law or to general federal interference with state policies. First, *Midlantic* sought to interpret federal law, and if bankruptcy were not exclusively a federal question, state courts would be bound by the reordering of priority. Second, *Midlantic* sought to avoid intermeddling—it toiled to restrain a federal statute to accommodate state policies. The objection is to the lack of foresight the Court exercised in interpreting the federal statute.

If the state policy favors tort claimants over the hazardous waste claims, the state might realize its objectives by declining to pursue the hazardous waste claim. The political body that enacts laws, however, is different from the body that enforces laws. Thus, the executive branch might have an interest in pursuing hazardous waste claims, despite the legislative judgment that they should be secondary to tort claims.

128. 11 U.S.C. §§ 507, 726 (1982 & Supp. II 1984). The government's claims are among the general claims that are paid after all other claims that receive a priority under section 507. See supra note 101. Some commentators write that state cleanup claims receive seventh prior-
ability to recover cleanup expenses in two ways. First, they may assert a security interest in hazardous waste sites as a condition of granting a permit to operate the site. If a site is abandoned, title is likely to revert to a party without an obligation to clean up the site. By asserting a security interest, the state may receive the benefits as well as the burdens of the property. Second, the state may impose liability for the costs of hazardous waste cleanup upon all owners of the property. In Ohio v. Kovacs, the Supreme Court held that an obligation to clean up a hazardous waste site is a debt that is dischargeable under the bankruptcy laws. The facial implication of this holding is that states may not recover cleanup costs from a party to whom title to a hazardous waste site...
passes after the site is abandoned. However, hazardous waste site cleanup laws need not limit the imposition of liability to the present owner. For example, they may impose liability upon any past or present owner, or any party responsible for disposal of hazardous waste on the property.  

_Midlantic_ took from the states the authority to decide whether hazardous waste cleanup is the paramount concern in the context of bankruptcy creditors with unsecured claims. That policy decision could be made by the states in the form of state laws and regulations. For example, California requires that owners and operators of hazardous waste facilities be financially responsible for cleanup in a manner that transcends the operation of bankruptcy laws.  

A state that ranks hazardous waste cleanup above other policies is free to enact legislation that imposes a lien upon property, requires the posting of a bond to operate a hazardous waste site, or establishes some other form of guarantee that the state will be able to recover its cleanup costs regardless of the estate's resources.

Imposing the burden on the states to promulgate financial responsibility regulations, though, may have undesired side effects. Such laws may have a chilling effect on the growth of industry within a state. But, if that is so, imposing the burden of the Court's priority scheme upon industries in all states takes from the states the ability to decide

132. _See supra_ note 118.

133. California hazardous waste regulations impose financial responsibility requirements on owners and operators of hazardous waste sites. To open a site, the owner must provide assurance of financial ability to cover the cost of closure and subsequent maintenance of the facility. _Cal. Health & Safety Code_ §§ 25205, 25245 (West 1984). The owner may satisfy this requirement by: (1) establishing a closure trust fund; (2) obtaining a surety bond guaranteeing payment into a closure trust fund; (3) obtaining a surety bond guaranteeing performance of closure; (4) obtaining an irrevocable letter of credit that may be drawn on if the owner does not perform the closure plan; (5) obtaining closure insurance; or (6) establishing financial assurance through several other mechanisms approved by the administrators. _Cal. Admin. Code_ tit. 22, Rules 67004-67013 (1985). Other states impose similar requirements. _See, e.g._, _Del. Code Ann._ tit. 7, § 6307 (1983) (conditioning grant of permit to operate hazardous waste facility on showing of financial responsibility); _Del. Hazardous Waste Rules_ §§ 264.140-264.144 (1984) (setting forth financial responsibility requirements); _N.Y. Envtl. Conserv. Law_ § 27-0917 (McKinney 1984); _Conn. Gen. Stat. Ann._ § 22a-122 (West 1985).

134. Hazardous waste processors may find themselves unable to meet a state's financial responsibility regulations and therefore decide to locate in a different state where the regulations are less burdensome. The companies that generate hazardous wastes may then find that the transportation costs of disposing of their wastes are prohibitive, and may also choose to relocate their operations to a state with less strict regulations. Thus, the state with more stringent regulations might drive industry away. _Midlantic_ took that policy decision away from the states by requiring the trustee to satisfy the state hazardous waste cleanup laws, regardless of what priority the state wanted to give to cleanup over other state concerns. The state legislatures are the proper decisionmakers for such policy choices. Further, the effects upon industry are not easily predicted. _Midlantic_ 's reordering of priorities may lead creditors to charge a premium for the greater risk of nonpayment (due to their lower priority vis-a-vis the state) and that may affect industry as well. _See Note, supra note_ 114, at 990.
whether they wish to accommodate such industries or impose such regulations.

CONCLUSION

Allowing trustees in bankruptcy to abandon hazardous waste sites does not leave governments helpless to pursue remedies for violations of their hazardous waste laws. The effect of abandonment is to change the character of the bankrupt's liability from an affirmative obligation to clean up a site (if the state statute imposes such a duty) to a monetary liability. It would not, as many commentators and the Supreme Court imply, discharge the estate's liability.

The bankruptcy laws are designed to effect an equitable distribution of the debtor's assets to the debtor's creditors. The assets are gathered in the estate, and the estate is distributed according to rules of priority. The Bankruptcy Code establishes the general order of priorities, and that order accommodates state interests. Within the structure of priorities, a state may impose liens that gain priority over other claims. It is the state's role—not the role of the federal courts—to determine the priority of claims. *Midlantic*'s failure to consider alternative state remedies against hazardous waste generators and processors led it to make a determination best left to the legislature.

The *Midlantic* decision dictates that all unsecured creditors should accept financial responsibility for their debtors' hazardous waste cleanup obligations and sends a signal to states that the bankruptcy beast will not encroach on their hazardous waste policies. States that rely on *Midlantic* to force owners of hazardous waste sites to clean up the sites may confront unwelcome surprises from companies that have insufficient assets in bankruptcy to pay even administrative expenses. Had the Court allowed abandonment, it would have alerted the states to enact legislation assuring the hazardous waste site operator's financial ability to clean up the site. The Supreme Court was so occupied with parading the bankruptcy beast it claimed to have tamed that the beast was able to slip its chains, and, just as the states anticipate a respite, the beast promises to reappear in a new skin.

*Adam Sachs*