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Midatlantic National Bank: The Supreme Court Abandons Creditors

I. INTRODUCTION

Quanta Resources processed waste oil at two facilities, one located in Long Island, New York and the other in Edgewater, New Jersey.1 In June of 1981 the New Jersey Department of Environmental Protection (NJDEP) found that Quanta had violated its permit by accepting oil contaminated with dangerous substances known as polychlorinated biphenyls (PCB's) at the Edgewater site.2 Shortly after the two parties began negotiations regarding cleanup of the Edgewater site, NJDEP ordered Quanta to cease operations at the New Jersey facility.3

Before the negotiations were completed, however, Quanta filed for reorganization under Chapter 11 of the United States Bankruptcy Code.4 Immediately thereafter, NJDEP ordered Quanta to cleanup the Edgewater site.5 The following month, still unable to overcome its financial difficulties, Quanta converted the bankruptcy action into a liquidation proceeding under Chapter 7 of the Code.6

2. In re Quanta Resources Corp., 739 F.2d at 928.
3. Id.
5. In re Quanta Resources Corp., 739 F.2d at 928.
6. Although the Court did not indicate what events had contributed to Quanta's financial ruin, it is possible that the costs of compliance with federal and state hazardous waste disposal
Subsequently, a New York investigation revealed that Quanta had accepted oil contaminated with dangerous chemicals at the Long Island site as well. The trustee in bankruptcy determined that proper disposal of the waste oil would render the property a waste to the estate and sought to sell the property at the Long Island site for the benefit of Quanta's creditors. Unable to sell the property, the trustee notified the creditors and the bankruptcy court that he intended to abandon the property pursuant to 11 U.S.C. § 554(a). The City and State of New York objected, claiming that abandonment would threaten the public health and safety and violate both federal and state environmental laws. Despite these objections, the bankruptcy court approved the petition for abandonment. The United States District Court for the District of New Jersey affirmed the decision of the bankruptcy court. Consequently, New York appealed to the Court of Appeals for the Third Circuit.

**Regulations may have contributed to the corporation's downfall.** *Id.* at 929. One author has noted that comprehensive federal regulation of the hazardous waste disposal industry has resulted in huge increases in the cost of hazardous waste disposal, driving some companies into bankruptcy. Note, *Belly Up Down in the Dumps: Bankruptcy and Hazardous Waste Cleanup*, 38 Vand. L. Rev. 1037, 1040 (1985); see also Rosenbaum, *Bankruptcy and Environmental Regulation: An Emerging Conflict*, 13 Envtl. L. Rep. (Envtl. L. Inst.) 10,099 (April 1983).

7. *Midatlantic Nat'l Bank*, 106 S. Ct. at 758. The investigation revealed that Quanta had accepted 70,000 gallons of PCB-contaminated oil stored in deteriorating and leaking containers at the site. *Id.*


9. *Id.*. The text of 11 U.S.C. § 554(a) provides: "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 to the estate." 11 U.S.C. § 554(a) (Supp. 1982).

10. *Midatlantic Nat'l Bank*, 106 S. Ct. at 758. Abandonment would have revested title in Quanta; therefore no solvent party would have been responsible for the cleanup. *In re Quanta Resources Corp.*, 739 F.2d 912, 914 (3d Cir. 1984), aff'd sub nom. *Midatlantic Nat'l Bank v. New Jersey Dep't Envtl. Protection*, 106 S. Ct. 755 (1986). Furthermore, abandonment would have resulted in a continuing violation of state and local hazardous waste storage laws. *In re Quanta Resources Corp.*, 739 F.2d at 914.


12. *In re Quanta Resources Corp.*, 55 Bankr. 696 (D.N.J. 1983). The court relied on a passage from the bankruptcy court's decision:

The City and State are in a better position in every respect than either the trustee or the debtor's creditors to do what needs to be done to protect the public against the dangers posed by the PCB-contaminated facility. But it is not the estate or the debtor's creditors who should finance the requisite cleanup, given the decision of the trustee to abandon the property.

*Id.* at 698 (citing Transcript of June 22, 1982 Proceedings at 6, *In re Quanta Resources Corp.*, No. 81-05967 (D.N.J. 1983)). One can infer that the bankruptcy court considered the interests of creditors and recognized the unfairness of imposing cleanup costs on innocent creditors. For a discussion of creditor's rights, see infra notes 102-11 and accompanying text.

While New York's appeal was pending, the trustee filed notice of his intention to abandon the contaminated waste oil at the Edgewater site. Once again, the bankruptcy court approved the petition for abandonment. Furthermore, the bankruptcy court did not require the trustee to take any precautions to reduce the danger that the toxic wastes at the two sites had created. Concerned with the health threat that the presence of PCB's created, New York decontaminated the Long Island facility at a cost of 2.5 million dollars.

As the New York and New Jersey cases presented identical issues, the parties in the New Jersey litigation consented to allow NJDEP to take a direct appeal from the bankruptcy court to the Third Circuit pursuant to section 405(c)(1)(b) of the Bankruptcy Act of 1978. The Third Circuit reversed the orders, prohibiting the trustee from abandoning the property in both cases. The Supreme Court granted certiorari and consolidated the cases. Affirming the decision of the court of appeals, the Supreme Court held: Because a trustee in bankruptcy's abandonment power is subject to exceptions of a police nature, the states could require the trustee to cleanup the

16. Id. In Midatlantic Nat'l Bank, the Supreme Court noted that the bankruptcy court did not require the trustee to take even relatively minor steps to reduce the health dangers that Quanta's facility created. Moreover, abandonment would have halted security measures at both sites, aggravating the already existing danger from chemical wastes. Midatlantic Nat'l Bank, 106 S. Ct. at 758 n.3.
17. New York's concern is not surprising. PCB's pose a serious health threat to the public and, as the Court of Appeals for the Third Circuit noted in Quanta, are highly toxic. In re Quanta Resources Corp., 739 F.2d at 913 n.1. The chemical collects readily in human fat, remaining in the human system for years. See M. BROWN, LAYING WASTE 246-47(1986). PCB's cause severe skin rashes and are linked to birth defects in babies. See id. (discussing Japanese study of pregnant women exposed to PCB's).

Moreover, the 2.5 million dollars that the State of New York spent in the cleanup of the Long Island facility represents a minute fraction of the funds required to cleanup all the hazardous waste dumpsites that currently pose potential threats to the public health. One estimate of the costs needed for cleanup is somewhat between 26.2 and 44.1 billion dollars. See Hazardous and Toxic Waste Disposal: Joint Hearings Before the Subcomms. on Environmental Pollution and Resource Protection of the Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess. pt.4, at 38 (1979) [hereinafter cited as Hearings].


This note examines the conflict between the policies that underly the abandonment power under the Bankruptcy Code and the policies embodied in environmental protection statutes. The note will then examine the Supreme Court's analysis in the *Midatlantic National Bank* decision and its attempt to reconcile the conflicts between a trustee in bankruptcy's abandonment power and environmental protection concerns. Finally, this note suggests a test for future courts that attempts to reconcile the trustee's power to abandon estate assets and the public health concerns unique to toxic wastes. This test weighs creditors' desire to be free from unduly burdensome duties against the ever urgent need to protect the public's health and welfare.

II. THE CONFLICT IN *Midatlantic National Bank*

*Midatlantic National Bank* is representative of the conflict between the policies implicit in the Bankruptcy Code and those in the environmental protection laws.\(^{21}\) Congress drafted the abandonment provision of the Bankruptcy Code to facilitate the efficient distribution of assets to creditors in a liquidation proceeding.\(^{22}\) Environmental protection laws, on the other hand, function to protect the public health regardless of cost. Thus, the trustee's attempt to abandon toxic waste sites in *Midatlantic National Bank* forced the Court to reconcile the competing policies underlying the abandonment provision in the Bankruptcy Code and environmental protection statutes.\(^{23}\)

In recent years, toxic waste disposal has become a topic of increasing public concern.\(^{24}\) In 1978, the Love Canal incident

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22. *See infra* notes 34-36 and accompanying text.


24. S. REP. No. 848, 96th Cong., 2d sess. 8-10 (1980).
brought the toxic waste problem into the national spotlight.\textsuperscript{25} Residents of Love Canal, New York, became victims of chemical wastes that seeped into their basements from a neighboring landfill.\textsuperscript{26} The incidence of cancer in the Love Canal population rose significantly,\textsuperscript{27} and as a result, the government relocated the residents at its own expense.\textsuperscript{28} Today, eight years after the Love Canal episode was first reported, the toxic wastes that originally caused the government to evacuate and relocate the Love Canal residents are still threatening the public health.\textsuperscript{29} Thus, Love Canal remains continuing testimony to the gravity of the toxic waste problem.

Love Canal, however, is just one example of toxic waste threat to public health.\textsuperscript{30} Not surprisingly, the federal government has responded by enacting various regulatory legislation to confront the toxic waste problem. The two major statutes are the Resource Conservation and Recovery Act,\textsuperscript{31} and the Comprehensive Environmental Response Compensation and Liability Act.\textsuperscript{32} In addition, numerous states have enacted statutory provisions to control the use and disposal of dangerous chemicals such as PCB's.\textsuperscript{33}

While environmental statutes protect the public health, the abandonment provision of the Bankruptcy Code protects creditors. The abandonment power permits a trustee in bankruptcy to abandon

\textsuperscript{25} Id. at 9.
\textsuperscript{26} Among these were birth defects, miscarriages, epilepsy, liver abnormalities, sores, rectal bleeding, and headaches. Id. at 9.
\textsuperscript{27} Id. at 10.
\textsuperscript{28} Although moved to a new containment site, the toxic wastes have continued to migrate and are now threatening a nearby residential neighborhood. See \textit{E.P.A. Draft Report Says Love Canal Wastes Dumped in Leaking Landfill Disposal Facility}, 15 Envtl. L. Rep. (Envtl. L. Inst.) 1149-50 (Nov. 1984).
\textsuperscript{29} See \textit{generally} M. \textit{BROWN}, supra note 17.
\textsuperscript{30} See \textit{generally} M. \textit{BROWN}, supra note 17 (discussing hazardous waste in the United States); \textit{EPSTEIN, \textit{BROWN} \& \textit{POPE, HAZARDOUS WASTE IN AMERICA} 81-87 (noting waste disposal trouble spots in California, Connecticut, Massachusetts, New York and New Jersey).
\textsuperscript{31} 42 U.S.C. § 6901-6987 (1982). The RCRA regulates the treatment, storage, and disposal of hazardous waste. As one author has noted, the statute established a "cradle-to-grave" system designed to monitor hazardous wastes from creation to permanent disposal. See \textit{Note}, supra note 6, at 1037.
\textsuperscript{32} 42 U.S.C. § 9601-9657 (1982). This statute established the "Superfund," a pool from which state and federal agencies can draw to defray the cost of toxic waste cleanup. The statute also provides for recovery of costs from the parties responsible for the hazardous wastes. Id.
property that is either worthless or burdensome to the bankruptcy estate. This power permits the trustee to avoid spending the estate's assets on the administration of worthless property. Thus, the power protects creditors by allowing the trustee to reduce "the debtor's property to money as expeditiously as practicable so as to secure funds for distribution."36

Given the gravity of the toxic waste threat, however, one might question whether courts should ever consider creditors' interests when environmental statutes and the abandonment provision conflict. While no one can dispute the importance of public health concerns, a failure to even address creditors' interests will ultimately affect industries manufacturing a variety of goods essential to our society. Hazardous waste is a by-product of chemical, primary metal, textile, plastic and petroleum production, and the blind subordination of creditor's interests to environmental legislation will force banks and other lenders to reevaluate the risk of lending to manufacturers of these products. Some lenders, fearful of becoming the insurers of toxic waste cleanup, will find the risk too high. Others will simply increase the cost of credit. A number of manufacturers will face bankruptcy as credit becomes less available. Moreover, all manufacturers will pass the increasing cost of credit on to consumers.

The conflict in Midatlantic National Bank, therefore, concerns more than just public health and the orderly administration of bankruptcy estates. The abandonment provision is designed to protect

34. Although codified in 11 U.S.C. §§ 554(a), the abandonment power was originally a judicially developed doctrine. See American File Co. v. Garret, 110 U.S. 288 (1884) (recognizing that assignees are not bound to accept property of onerous or unprofitable character); Federal Land Bank v. Nadler, 116 F.2d 1004, 1007 (10th Cir.) (a trustee may abandon property that is encumbered with liens in excess of its value), cert. denied, 313 U.S. 578 (1941); Life Ins. Co. v. Koplar Co., 80 F.2d 754, 757 (8th Cir. 1936) (holding that the bankruptcy court has the power to enter an order permitting a trustee to abandon encumbered property); see also 4 L. King, Collier on Bankruptcy § 70.42 (1978) (discussing the evolution of the abandonment power).

35. 4 L. King, Collier on Bankruptcy § 554.01 (1985).

36. Id. Efficient reduction of the debtor's estate is the paramount goal of a bankruptcy liquidation. See also Kothe v. R.C. Taylor Trust, 280 U.S. 224, 227 (1930) (noting that the bankruptcy laws are intended to bring about an equitable distribution of the debtor's estate).


38. For a discussion of the effects of subordinating the interests of creditors to public health and safety concerns expressed in the environmental statutes, see infra note 99 and accompanying text.

39. Id.

40. Id.

41. Id.
creditors' interest. Ignoring these interests could have long term negative effects on society.

III. ANALYSIS

A. The Majority Opinion

The Supreme Court affirmed the decision of the Third Circuit holding that the trustee in bankruptcy could not abandon the toxic waste sites in contravention of the environmental protection statutes. Writing for the majority, Justice Powell analyzed a series of prestatute cases limiting the trustee's power to abandon and determined that Congress had intended to codify these limitations when it drafted the abandonment provision. Accordingly, the majority concluded that the trustee's power to abandon was subject to certain police power exceptions.

The majority heavily relied on a line of prestatute cases beginning with *Ottenheimer v. Whitaker*. In *Ottenheimer*, the Fourth Circuit denied a trustee in bankruptcy permission to abandon several delapidated barges anchored in Baltimore harbor. Abandonment would have resulted in violation of a federal statute making it unlawful to obstruct the passage of vessels through a navigable channel. The *Ottenheimer* court noted that courts should not construe a judicial rule that was "not provided for by statute and rather built up by the courts for facilitating the administration and distribution of a bankrupt estate," to reach so unjust result as permitting the obstruction of a navigable channel in contravention of a federal statute.

The Midatlantic Court also approved the decision in *In re Chicago Rapid Transit Co.*, a Seventh Circuit case that followed *Ottenheimer*. In *Chicago Rapid Transit Co.*, the trustees in bankruptcy of a railroad company sought to abandon a burdensome branch line lease. State law, however, forbade ceasing the operations of an existing utility. Because abandonment of the lease would have brought operation of the line to a halt, the Seventh Circuit held that

42. For a discussion of the policies underlying the Bankruptcy Code, see *supra* notes 34-36 and accompanying text.
44. *Id.* at 759-60.
45. *Id.* at 762.
47. *Id.* at 290.
48. *Id.*
49. *Id.*
50. *In re Chicago Rapid Transit Co.*, 129 F.2d 1 (7th Cir. 1942).
51. *Id.*
the trustee could not abandon the lease.\textsuperscript{52}

The majority similarly relied on \textit{In re Lewis Jones, Inc}.\textsuperscript{53} In \textit{Lewis}, the trustees attempted to abandon underground steam pipes.\textsuperscript{54} Recognizing the importance of state safety regulations, the court held that the trustees should seal the pipes before abandoning them.\textsuperscript{55}

The Court concluded that these cases, decided prior to Congress's codification of the abandonment power in section 554(a) of the Bankruptcy Code, stood for the proposition that legitimate state or federal interests limited the trustee's abandonment power.\textsuperscript{56} The cases established a well-recognized exception to the trustee's abandonment power.\textsuperscript{57} Consequently, the Court concluded that in codifying the judicially developed rule of abandonment, Congress also presumably included the established corollary that a trustee could not exercise his power of abandonment in contravention of certain state and federal laws.\textsuperscript{58}

In support of its argument that the statute codified the prestatute limitations on the trustee's abandonment power, the majority looked first to general principles of statutory construction.\textsuperscript{59} The majority relied on \textit{Edmonds v. Compagnie Generale Transatlantique}\textsuperscript{60} for the proposition that if Congress "intends for legislation to change the interpretation of a judicially created concept, it makes that intent specific."\textsuperscript{61} Noting that courts had long held to this rule in the bankruptcy context, Justice Powell reasoned that if Congress had intended to abrogate the limitations on the trustee's abandonment power, it would have done so explicitly.\textsuperscript{62}

Although the Court rested its decision primarily on the conclusion that the \textit{Ottenheimer} exception was implicit in section 554(a), its analysis did not end with an examination of prestatute case law.

\begin{itemize}
\item \textsuperscript{52} \textit{Id.}
\item \textsuperscript{53} \textit{Midatlantic Nat'l Bank}, 106 S. Ct. at 759 (citing \textit{In re Lewis Jones, Inc.}, 1 Bankr. Ct. Dec. (CRR) 277 (E.D. Pa. 1974)).
\item \textsuperscript{54} \textit{In re Lewis Jones, Inc.}, 1 Bankr. Ct. Dec. at 277.
\item \textsuperscript{55} \textit{Id.} at 280.
\item \textsuperscript{56} \textit{Midatlantic Nat'l Bank}, 106 S. Ct. at 759.
\item \textsuperscript{57} \textit{Id.}
\item \textsuperscript{58} \textit{Id.}
\item \textsuperscript{59} \textit{Id.} at 760.
\item \textsuperscript{60} 443 U.S. 256 (1979). The \textit{Edmonds} Court addressed the question of whether the 1972 amendments to the Longshoremen's Act modified a judicial doctrine imposing liability on shipowners for injuries to employees not caused by the employee's own negligence. The Court held that the Longshoremen's Act did not modify the shipowner liability doctrine. \textit{Id.} at 266 (construing Longshoremen's Act, 33 U.S.C. §§ 901-950 (1986)).
\item \textsuperscript{61} \textit{Midatlantic Nat'l Bank}, 106 S. Ct. at 760.
\item \textsuperscript{62} \textit{Id.}
\end{itemize}
Rather, the Court examined its decision in Ohio v. Kovacs\(^{63}\) and other provisions of the Bankruptcy Code to conclude that "Congress did not intend for the Bankruptcy Code to pre-empt all state laws that otherwise constrain the exercise of a trustee's power."\(^{64}\)

The issue in Kovacs was whether an environmental cleanup judgment against the chief officer of a corporation that had violated environmental protection laws of the State of Ohio constituted a debt dischargeable in bankruptcy under 11 U.S.C. § 101(11).\(^{65}\) The Court held that the cleanup order was a liability to pay money and therefore dischargeable in bankruptcy.\(^{66}\) In Midatlantic National Bank, however, the Court relied on the following dictum from the case:

> Finally, we do not question that anyone in possession of the site—whether it is [the debtor], or the bankruptcy trustee—must comply with the environmental laws of the state of Ohio. Plainly, that person may not maintain a nuisance, pollute the waters of the state, or refuse to remove the source of such conditions.\(^{67}\)

Accordingly, the Court concluded that Kovacs supported its interpretation of the Bankruptcy Code: a trustee is not entitled to abandon property in contravention of state or local laws designed to protect the public health and safety.\(^{68}\)

The Court next turned to the automatic stay provision of the Bankruptcy Code.\(^{69}\) This section of the Code operates to stay the commencement or continuation of actions against entities filing a peti-

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64. Midatlantic Nat'l Bank, 106 S. Ct. at 760.
65. Id. The procedural history of the case is long and complicated. Kovacs, the chief executive officer of a company responsible for a hazardous waste disposal site, failed to comply with an order requiring clean up of the site. The State of Ohio appointed a receiver to implement the order. Kovacs subsequently filed a personal bankruptcy petition and the State of Ohio responded by filing a motion in state court seeking discovery of Kovacs’s income and assets. The state also filed a complaint in bankruptcy court asking for a declaration deeming the clean up order not dischargeable in bankruptcy. Upon Kovacs's request, however, the bankruptcy court stayed the state court proceedings. The district court affirmed the decision of the bankruptcy court and Ohio appealed to the Sixth Circuit. The Sixth Circuit also affirmed the bankruptcy court's decision. On appeal, the Supreme Court vacated and remanded the case to the Sixth Circuit to determine whether Ohio's complaint for declaratory relief rendered the state court issues moot. In re Kovacs, 681 F.2d 454 (6th Cir. 1982), vacated and remanded, 103 S. Ct. 810 (1983). On remand, the bankruptcy court held that the cleanup order constituted a debt dischargeable in bankruptcy and both the district court and the Sixth Circuit affirmed. Ohio v. Kovacs, 717 F.2d 984 (6th Cir. 1983).
66. Kovacs, 105 S. Ct. at 711.
67. Midatlantic Nat'l Bank, 106 S. Ct. at 760 (citing Ohio v. Kovacs, 105 S. Ct. 705, 711-12 (1985)). This passage, however, merely suggests that the individual occupying the property may not violate state environmental laws; it does not cast light on whether a trustee may abandon property during bankruptcy proceedings.
68. Midatlantic Nat'l Bank, 106 S. Ct. at 760.
tion for bankruptcy.\footnote{11 U.S.C. \textsection 362(a) (1982). The statute provides: (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of - (1) the commencement or continuation, including the issuance or employment of process, of judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title; (2) the enforcement against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title.}

Congress, however, carved certain police and regulatory power exceptions out of the operation of the automatic stay.\footnote{11 U.S.C. \textsection 362(b) of the Bankruptcy Code contains an exception to the automatic stay provision: government actions are not stayed by the filing of a bankruptcy petition. 11 U.S.C. \textsection 362 (1982).} The Court interpreted the automatic stay provisions to support its position that Congress did not intend to allow the trustee to ignore nonbankruptcy law.\footnote{Midatlantic Nat'l Bank, 106 S. Ct. at 760. The Court found evidence of Congress's intent to protect the public health, at the expense of code provisions, in the government action exception to the automatic stay section and supported its conclusion with a quote from the legislative history of that section: [W]here a governmental unit is suing a debtor to prevent or stop violation of fraud, \textit{environmental protection}, consumer protection, \textit{safety}, or similar \textit{police or regulatory laws}, or attempting to fix damages for violation of such a law, the action or proceeding is not stayed under the automatic stay. \textit{Id.} at 761 (citing H.R. REP. NO. 595, 95th Cong., 1st Sess. 340 (1977), reprinted in 1978 U.S. CODE CONG. \& ADMIN. NEWS 5838; S. REP. NO. 989, 95th Cong., 2nd Sess. 54 (1978), reprinted in 1978 U.S. CODE CONG. \& ADMIN. NEWS 6299) (emphasis in court's opinion).}

This analysis, however, faced the Court with the task of explaining why Congress carved express exceptions into the automatic stay provisions of the Bankruptcy Code, but remained silent with respect to the abandonment power. At this point, the Court turned to the history of the abandonment and automatic stay powers.\footnote{Midatlantic Nat'l Bank, 106 S. Ct. at 761.} The Court explained that the exceptions to the abandonment power were well-settled when Congress enacted 28 U.S.C. \textsection 362, broadening the scope of the automatic stay provisions.\footnote{The court stated that: the exceptions to the judicially created abandonment rule were well established [when Congress enacted the automatic stay provision]. . . . [I]n enacting section 362 in 1978, Congress significantly broadened the scope of the automatic stay . . . [and] in the face of the greatly increased scope of section 362 it was necessary for Congress to limit this new power expressly. \textit{Id.}} Noting that "[i]n the face of the greatly increased scope of section 362, it was necessary for Congress
to limit [the automatic stay] power expressly," the Court concluded that the express limitations in other sections of the Code did not indicate a Congressional intent to grant unlimited abandonment power.

The Court also directed its attention to 28 U.S.C. § 959(b), the statute governing management of the bankruptcy estate. Section 959(b) requires that the trustee manage and operate the estate property in his possession according to the requirements of state law. Although the Court conceded that the statute might not be directly applicable in the liquidation context, it cited the provision to support its conclusion "that Congress did not intend for the Bankruptcy Code to preempt all state laws that otherwise constrain the exercise of a trustee's powers."

Finally, the Court noted that the Resource Conservation and Recovery Act and the Comprehensive Environmental Response Compensation and Liability Act reflected congressional concern for the environment and public health. Justice Powell observed that this concern precluded the Court from presuming that the enactment of the abandonment provision abrogated the limitations on the trustee's abandonment power.

The majority's opinion concluded that Congress did not intend for the abandonment provision to preempt all state and local laws. Noting that Congress did not empower the bankruptcy court to authorize an abandonment without taking precautions to protect the public health and safety, Justice Powell's holding stated:

Accordingly, without reaching the question of whether certain

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75. Id.
76. 28 U.S.C. § 959(b) (1982).
77. The text of 28 U.S.C. § 959(b) provides:
   Except as provided in section 1166 of title 11, 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.
   28 U.S.C. § 959(b) (1982). For a discussion of whether section 959(b) is applicable in a liquidation proceeding, see infra note 100 and accompanying text.
78. Midatlantic Nat'l Bank, 106 S. Ct. at 762. The Court's position is not without supporters. One bankruptcy court suggested that the automatic stay provision and section 959(b) form a "smooth continuum" where the environmental protection laws temper the bankruptcy powers. In re Kennise Diversified Corp., 34 Bankr. 237, 243 (S.D.N.Y. 1983); see also In re Canarico Quarries, Inc., 466 F. Supp. 1333 (D.P.R. 1979) (noting that Congress intended for public interest regulations to outweigh bankruptcy laws and regulations).
79. For a discussion of the purposes of the act, see supra note 32.
80. Id.
82. Id.
state laws imposing conditions on abandonment may be so onerous as to interfere with the bankruptcy adjudication itself, we hold that 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.\(^8\)

The Court added a footnote noting that the abandonment power was "not to be fettered by laws not reasonably calculated to protect the public health or safety from imminent and identifiable harm."\(^8\)

Although this footnote suggests that abandonment will be permitted unless there is an imminent and identifiable threat to the public health or safety,\(^8\) the Court's holding does not provide a guideline for determining the threshold of such a threat. Accordingly, any threat to the public health might constitute a sufficient reason to deny a petition for abandonment.\(^8\)

B. The Dissent

Justice Rehnquist's dissent sternly criticized the majority's reliance on the *Ottenheimer* line of cases.\(^8\) Justice Rehnquist distinguished *Ottenheimer* as merely standing for the proposition that a judge-made rule must give way to the demands of a federal statute when the two conflict.\(^8\) The dissent further noted that *In re Lewis Jones, Inc.* was inapposite because the court in that case found itself free to protect the public interest only because of the judicial nature of the abandonment rule.\(^8\) Furthermore, Justice Rehnquist dismissed the *In re Chicago Rapid Transit Co.* language relied on by the majority as dicta.\(^8\) Finally, Justice Rehnquist stated that even assuming arguendo that the prestatute cases were applicable, these cases "do not constitute the sort of settled law that . . . Congress intended to codify absent some expression of its intent to do so."\(^8\)

Although Justice Rehnquist questioned the persuasiveness of the prestatute cases, his dispute with the majority boiled down to a question of statutory construction. The majority found that, in enacting section 554(a), Congress sought to codify the judge-made limits on the trustee's abandonment power. In contrast, the crux of Justice

\(^8\) Id. at 762-63.
\(^8\) Id. at 762 n.9.
\(^8\) Id.
\(^8\) Id.
\(^8\) For discussion of a test that balances the interests of creditors against the threat to the public health or safety, see infra notes 102-11 and accompanying text.
\(^8\) *Midatlantic Nat'l Bank*, 106 S. Ct. at 764 (Rehnquist, J., dissenting).
\(^8\) Id. (Rehnquist, J., dissenting).
\(^8\) Id. at 765 (Rehnquist, J., dissenting).
\(^8\) Id. (Rehnquist, J., dissenting).
\(^8\) Id. (Rehnquist, J., dissenting).
Rehnquist's position was that the abandonment power should not be "limited by conditions that the Congress never contemplated." He argued that courts should not read an exception into the statute because the language of 28 U.S.C. § 54(a) is absolute. In support of his position, Justice Rehnquist reasoned that if Congress had intended to limit the trustee's power, then it would have expressly done so. In fact, section 362 of the Bankruptcy Code contains such express limitations.

Stripped to its essentials, Justice Rehnquist's approach invoked a canon of statutory construction that commands a court to abide by the plain meaning of a statute. While there is abundant precedent for the plain meaning rule, recent decisions have cast doubt on its viability. Courts have read exceptions into the absolute language of...
statutes in the past, and there is no reason to believe that they will not continue to do so in the future.

Justice Rehnquist additionally questioned the majority's reliance on 28 U.S.C. § 959(b). As Justice Rehnquist indicated, there is substantial authority for the proposition that 28 U.S.C. § 959(b) should not apply in a liquidation proceeding. Nevertheless, numerous cases support the majority's argument that certain limits should be placed on the trustee's power to abandon.

It is here that a flaw in Justice Rehnquist's dissent emerges. Each of the majority's arguments, taken individually, might not suffice to support a police power limitation on the trustee's abandonment power. In the aggregate, however, the points that the majority raised tend to support limits on the trustee's power to abandon. Although these arguments are quite compelling, Justice Rehnquist's dissent failed to account for them.

IV. THE INTERESTS OF CREDITORS

In Midatlantic National Bank, the Court established a rule of law that limits the trustee's power to abandon "in contravention of a state statute or regulation that is designed to protect the public health or safety from identified hazards." In arriving at the rule, however, the Court did not consider the interests of Quanta's creditors. Because creditors are innocent parties who stand to suffer from the

99. Midatlantic Nat'l Bank, 106 S. Ct. at 76 (Rehnquist, J., dissenting). Justice Rehnquist objected:
I find the Court's discussion of 28 U.S.C. § 959(b) somewhat difficult to fathom. After suggesting that § 959(b) "provides additional evidence" for the self-evident proposition "that Congress did not intend for the Bankruptcy Code to preempt all state laws," . . . the Court concedes that the provision "does not directly apply to an abandonment under section 554(a) of the Bankruptcy Code . . . . The precise nature of its indirect application, however, is left unclear.

Id.

100. Paige, In re Quanta Resources Corp.: Bankruptcy Policy v. Environmental Interests, A Polluted Theory, 99 AM. BANKR. L.J., 357, 368 (quoting J. MOORE, J. LUCAS & K. SINCLAIR, MOORE'S FEDERAL PRACTICE § 66.04 [4], at 1913 (2d ed. 1986)) ("But section 959(b) applies only to a receiver in his operation of the property in his possession. It does not apply to the distribution of the estate . . . . "). See also Missouri v. United States Bankr. Ct., 647 F.2d 768, 778 n.18 (8th Cir. 1981), cert. denied, 454 U.S. 1162 (1982) (trustee in chapter 7 proceeding did not need to obtain license that state law required); In re Adelphi Hosp. Corp., 579 F.2d 726, 729 n.6 (2d Cir. 1978) ("[A] trustee in bankruptcy is in no sense a manager of an institution's operations . . . . ").
101. See supra notes 46-78 and accompanying text.
high cost of toxic cleanup, a more logical approach would examine both public health and safety concerns and creditor interests.103

A simple two-pronged inquiry would leave the courts with a more equitable rule of law to apply. The first inquiry should be whether there is an imminent threat to the public health or safety. Courts have interpreted imminent threat standards in the context of injunctive relief broadly, finding the threshold met by an uncertain risk of harm.104 A similar interpretation under this first prong will afford maximum protection to the public health and safety. If there is no imminent threat, the trustee should be permitted to abandon. If an imminent threat is found, however, courts should make an additional inquiry that is sympathetic to the interests of creditors: Is there an alternative means of enforcing or financing toxic waste cleanup?

Although the Midatlantic National Bank Court ignored the purpose and policies underlying the Bankruptcy Code, a more sound approach gives weight to the interests of the creditors. Justice Gibbons suggested such an approach in his dissent to the Third Circuit’s


104. The Comprehensive Environmental Response Compensation and Liability Act provides for injunctive relief in the face of an imminent threat to public health:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

42 U.S.C. § 9606(a) (1982). Although the phrase “imminent and substantial endangerment” lacks specific definition in the Act, courts have construed this standard broadly. In United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100 (D. Minn. 1982) for example, the government alleged that the defendant disposed of carcinogenic wastes that contaminated ground water near City of St. Louis Park. Unless preventive measures were taken, the contaminants would have continued to migrate into the ground water of the surrounding metropolitan area. The court held that “[t]he facts alleged in the complaints are sufficient to establish an imminent and substantial endangerment to the health or environment.” Id. at 1110; see also United States v. Outboard Marine Corp., 556 F. Supp. 54 (N.D. Ill. 1982) (dismissing defendant’s motion to dismiss government’s suit for injunctive relief against company releasing PCB’s into navigable waters); cf. United States v. Northeastern Pharmaceutical & Chem. Co., 579 F. Supp. 823 (W.D. Mo. 1984) (standard requires a case by case assessment of the relationship between the magnitude of risk and harm arising from the presence of hazardous waste).
decision in *Quanta*.

Because creditors are not defined as culpable parties by the Comprehensive Environmental Response Compensation and Liability Act, courts that consider the interests of creditors do not undermine the purposes underlying environmental protection legislation. More importantly, a test that fails to consider creditor interests will exacerbate the hazardous waste problem as lenders will be wary of lending money to companies generating hazardous wastes. As Justice O'Connor suggested in her concurring opinion in *Kovacs*, other methods of enforcing the environmental protection laws are available.

Where do creditors' rights fit into the calculus? There are two competing concerns—the economic interests of creditors and the more general interest in public health and safety. One solution would be to subordinate the rights of creditors only in situations where

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105. *In re Quanta Resources Corp.*, 739 F.2d 912 (3rd Cir. 1984) (Gibbons, J., dissenting), aff'd *sub nom.* Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755 (1986). See also *Reilly*, 546 F. Supp. at 1112 (stating in accord with Justice Gibbons that "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created").

106. See H.R. REP. No. 1016, 96th Cong., 2d Sess. 33, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 6119, 6136. The legislative history of 42 U.S.C. § 9607 indicates that section 3071 is designed to provide a mechanism for toxic waste cleanup. The statute is also structured to encourage potentially liable persons to take voluntary action in response to hazardous wastes. One court noted,

"It is clear from the discussions which preceded the passage of CERCLA that the statute is designed to achieve one key objective—to facilitate the prompt clean up of hazardous dumpsites by providing a means of financing both governmental and private responses and by placing the ultimate financial burden upon those responsible for the danger.


107. Suggesting a flaw in an approach that does not consider creditor interests, one commentator has written:

"Generally, the interests of creditors and debtors in these cases are solely economic in nature. The major problem with subordinating the economic interests of creditors and debtors to public health and safety interests is that creditors would have no incentive to make loans to companies that engage in hazardous waste disposal.

Note, supra note 6, at 1037. This would seem to magnify the hazardous waste problem as debtors would not be able to comply with hazardous waste legislation unless they received financing from their creditors. Although insurance against large environmental judgments affords protection to creditors and counterbalances their disincentive to lend to industries creating toxic waste by-products, insurers have become increasingly unwilling to provide environmental liability insurance. See Angelo & Bergeson, *The Expanding Scope of Liability for Environmental Damage and Its Impact on Business Transactions*, 8 CORP. L. REV. 101, 116-17 (1985) (noting the diminishing number of firms willing to provide environmental liability insurance).

108. Justice O'Connor noted that "a state may protect its interest in the enforcement of its environmental laws by giving cleanup judgments the status of statutory liens or secured claims." *Ohio v. Kovacs*, 105 S. Ct. 705, 712 (1985) (O'Connor, J., concurring).
there is no other means of efficiently enforcing a "cleanup" judgment. Courts should first ask whether the judgment against the debtor can be efficiently enforced without endangering the creditors' interests. If the judgment cannot be enforced against the debtor without endangering the interests of creditors, the government should attempt to utilize the Comprehensive Environmental Response Compensation and Liability Act "Superfund." Only when the "Superfund" is unavailable should the courts require innocent creditors to pay the costs of cleanup. The virtue in this approach is that the rights of creditors are insured without making them the insurers of the public health and safety.

V. CONCLUSION

The Bankruptcy Code, which Congress intended to protect both debtors and creditors, was never meant to address a problem as complex as toxic waste. Nonetheless, in Midatlantic National Bank, the Supreme Court addressed an issue that is sure to reoccur in bankruptcy cases—companies, faced with the staggering expense of complying with environmental legislation, file for bankruptcy and leave no solvent, culpable party responsible for toxic waste cleanup. The Court's decision in Midatlantic National Bank is consistent with earlier cases that refused to subordinate public health concerns to policies underlying the Bankruptcy Code.

The Court, however, has left open an important question for later decisions: What are the parameters of a trustee's abandonment power when toxic wastes are involved? This note suggests that the

109. In Quanta, as in most cases of this nature, this would not have been possible because the costs of complying with a cleanup order frequently exceed the value of the property to the estate. In re Quanta Resources Corp., 739 F.2d 912, 914 (3rd Cir. 1985), aff'd sub nom. Midatlantic Nat'l Bank v. New Jersey Dep't of Envtl. Protection, 106 S. Ct. 755 (1986).

110. There are, however, restrictions on the use of the money in the fund. The federal funds available for cleanup are inadequate. See Developments in the Law—Toxic Waste Litigation, 99 Harv. L. Rev. 1459, 1503 (1986). Because the amount of money in the fund is limited, the fund can finance cleanup of only the sites on the EPA's national priority list. Second, the fund generally may be used only if no responsible parties are able to take appropriate remedial actions." Note, supra note 6, at 1037. Because creditors are not responsible parties within the meaning of CERCLA, however, there would not seem to be any statutory basis for limiting the use of the fund in the situation involving Quanta. Nevertheless, practical constraints exist.

111. One commentator proposed balancing the competing interests of creditors and public health and safety. Note, supra note 6, at 1037. This commentator suggested a balancing of the equities akin to the test employed in NLRB v. Bildisco & Bildisco, where the Court balanced the policies underlying the federal labor laws and the Bankruptcy Code. 465 U.S. 513 (1984). In Bildisco, however, the Court was balancing the economic interests of debtors and creditors against the economic interests of employees. It might be more difficult for a court to balance the economic goals of the Bankruptcy Code with the noneconomic goals of environmental protection legislation.
answer to that question must consider the creditors' rights. While the simpler equation balances only public health with the trustee's administrative ease, a more equitable and realistic calculus incorporates creditors' interests. Furthermore, courts should not operate in a vacuum when determining responsibility for toxic cleanup. In reality, governmental programs designed to encourage toxic waste cleanup exist. These programs are evidence that Congress recognizes toxic cleanup as a national, not an individual, problem.

The Ottenheimer progeny, when examined with other provisions of the Bankruptcy Code, suggest that certain limits should be placed on a trustee's power to abandon property. These limitations, however, should only apply when (1) there is an imminent threat to the public health or safety, (2) there is no efficient means of enforcing the judgment against the debtor, and (3) no "Superfund" moneys are available for cleanup. Otherwise, the interests of creditors dictate that the trustee be entitled to abandon property within the provisions of 11 U.S.C. § 554(a).

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