

Article

Cure Without a Disease: The Emerging Doctrine of Successor Liability in International Trade Regulation

Aaron Xavier Fellmeth*

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* Associate Professor, Arizona State University College of Law. J.D. 1997, Yale Law School; M.A. 1997, Yale University Graduate School of International Relations; A.B. 1993, University of California, Berkeley. The author thanks Stanley J. Marcuss, Daniel Fisher-Owens, and Sylvia A. Rhodes for comments and assistance on earlier drafts of this paper and owes a debt of gratitude to Beth DiFelice for her research assistance. The author alone is responsible for the opinions expressed herein.

Show me a sane man, and I will cure him for you.
— Popularly attributed to Carl Gustav Jung

I. INTRODUCTION

The application of “successor liability” theories is relatively new to international trade law and has exploded since the turn of the century. Successor liability is an equitable state law doctrine that allows a company’s creditors to seek damages from a different company that either acquired the assets of or merged with the debtor company.¹ Its first publicized appearance in international trade law came in October 2002, when an administrative law judge (ALJ) released an order determining that the U.S. Department of Commerce’s Bureau of Industry and Security (BIS) could impose liability under the Export Administration Regulations (EAR) on a company that acquired the assets or ownership interest of another company that had allegedly committed export violations.² A few months later, on March 4, 2003, the Boeing Company settled charges brought by the State Department’s Directorate of Defense Trade Controls (DDTC)³ based on violations of the Arms Export Control Act by a company that Boeing acquired four years after the last alleged violation.⁴ Other agencies regulating international trade, particularly the Treasury Department’s Office of Foreign Assets Controls (OFAC) and Department of Homeland Security’s (DHS) Bureau of Customs and Border Protection (CBP), have now followed suit.

I have attended several public conferences in the Washington beltway area in which various high-ranking government officials in the BIS, OFAC, DDTC, and CBP have announced “off the record”⁵ that asset purchasers will henceforth be held liable for any past violations of the export or import regulations by the asset seller.⁶ These federal agencies, charged with promulgating regulations for and enforcing the international trade statutes, have sought to justify their occasionally successful attempts to impose

1. See *Coffman v. Chugach Support Serv.*, 411 F.3d 1231, 1237 (11th Cir. 2005).

2. Order Denying Respondents’ Motions for Summary Decision, Sigma-Aldrich Bus. Holdings, Inc., 01-BXA-06, Sigma-Aldrich Corp., No. 01-BXA-07, Sigma-Aldrich Research Biochemicals, Inc. No. 01-BXA-11 (Dep’t of Commerce Bureau of Indus. & Sec. Aug. 29, 2002), available at http://www.bis.doc.gov/Enforcement/CaseSummaries/Sigma_Aldrich_ALJ_Decision_02.html [hereinafter *Sigma-Aldrich Order*]. The author was part of a team led by Stanley J. Marcuss representing Sigma-Aldrich Corporation and its subsidiaries.

3. Before 2004 the Directorate of Defense Trade Controls was named the Office of Defense Trade Controls (ODTC).

4. Christopher S. Rugaber, *Hughes and Boeing Accept \$32 Million Fine to Settle Export Control Violations*, 20 INT’L TRADE REP. (BNA) 476 (2003). The charging letter sent by the ODTC to Boeing and Hughes on December 26, 2002, is a public document on file with the author.

5. Which I hereby put “on the record.” Federal enforcement agencies have no business making secret policies to sanction any person without providing fair notice that the agencies consider the person’s conduct illegal.

6. E.g., Mark Menefee, Dexter Price, David Mills & David Trimble, Panel Discussion at the Bureau of Industry & Sec. and the Nat’l Council on Int’l Trade Dev. Conference: Managing Trade Compliance in Today’s Environment (June 10-11, 2002) [hereinafter *Trade Compliance Panel Discussion*]; David Trimble, Director of Compliance, Directorate of Defense Trade Controls, U.S. Dep’t of State, Presentation at the Soc’y for Int’l Affairs, Workshop: “Mergers, Acquisitions and Divestitures” (July 23, 2003) [hereinafter *Trimble, Workshop: “Mergers, Acquisitions, and Divestitures”*].

successor liability on diverse grounds, but none can point to a clear statutory authorization, and none has advanced a particularly cogent policy rationale for these more aggressive enforcement practices. They deserve more careful attention and consideration than they have so far received.

It is impossible to know with certainty why the enforcement agencies recently began importing successor liability into international trade regulation. Given the post-Cold War timing, one possible reason may be the increased public scrutiny of national security precautions against terrorism (or the lack thereof) taken by the Executive Branch. Terrorism is such a hot button issue that federal agencies dare not appear inactive in the face of export and import law violations that might superficially, if not actually, seem to threaten national security. The increased responsibility put on the agencies to detect and prevent such violations has not always been accompanied by a comparable increase in funding and human resources, so that the agencies must rely increasingly on industry self-regulation. CBP has adapted to its new responsibility by implementing programs designed to assist importers in self-policing and voluntarily disclosing violations of the import regulations.⁷ Others, such as the export regulatory agencies, continue to rely heavily on deterrence.⁸ Agency officials may believe that deterrence is most effective when they can publicly announce obtaining fines in high dollar amounts from alleged violators (ideally, well-known companies) of the export regulations. And successor liability may be seen as assisting such agencies in achieving more deterrence by expanding the pool of exemplars to include larger defendants with deeper pockets.

If the adoption of successor liability in international trade regulation was intended to enhance deterrence, it raises the question of whether such measures are effectively directed at the individuals and companies that risk violating the law. And beyond such practical questions, the legality and constitutionality of the practice merit closer scrutiny than they have received. To that end, this Article offers both an analysis of a specific issue of increasing importance and a case study of how federal regulatory agencies can use and are currently using their discretion to achieve what Laura Nader called “little injustices” that aggregate to form major systemic injustice.⁹ The specific focus of the present study is on the ways in which international trade regulatory agencies have recently begun incorporating the equitable principles of successor liability—or, more accurately, a perversion of those principles—into trade regulatory regimes to justify punishing innocent purchasers of corporate assets for international trade law violations committed by entirely different parties, the asset sellers.

Given the ubiquity of corporate reorganizations and asset purchases, every company that imports or exports goods, services, software or technology is affected by these new practices. And the importance to the

7. Such programs include the Customs-Trade Partnership Against Terrorism (C-TPAT), Importer Self-Assessment (ISA), and Free and Secure Trade (FAST).

8. Some agencies, such as BIS, also encourage self-disclosure by mitigating fines for violations revealed by the offender's voluntary disclosure. See 15 C.F.R. § 764.5 (2005).

9. LITTLE INJUSTICES: LAURA NADER LOOKS AT THE LAW (Public Broadcasting Associates 1981).

contemporary U.S. economy of international trade¹⁰—not to mention a healthy respect for the rule of law—strongly suggests that extralegal or unconstitutional regulation of international business transactions should be exposed and halted. Equally important, the practices of these agencies could be the proverbial “thin end of the wedge.” If more regulatory agencies follow suit, the nationwide liquidity of corporate capital could be seriously impaired.

Part II of this Article briefly discusses the historical development of and general policies underlying international trade regulation. Part III summarizes the law of successor liability and explains how federal courts have applied it in enforcement actions brought pursuant to federal statutes. Part IV describes attempts by the international trade law enforcement agencies to import successor liability into their respective regulatory regimes. Part V considers whether the addition of successor liability concepts to international trade regulation can be justified under the statutes administered by the enforcement agencies, then turns to the question of how agency practices reflect judicial notions of the appropriate role of successor liability in the enforcement of federal statutes. Part VI considers whether successor liability is reasonably compatible with international trade regulation from the various standpoints of doctrine, public policy, and constitutional law.

The Article concludes that, first, successor liability is not clearly authorized by the relevant statutes, and in any case is a poor doctrinal fit with international trade law; second, successor liability fails to advance any recognizable public policy when applied in international trade law and indeed operates to the detriment of some important public policies; and, third, the integration of successor liability into international trade regulation violates the Fifth Amendment guarantee of due process of law. Successor liability is, in short, a cure for a nonexistent disease, and like nearly all cures, it has undesirable side effects. Finally, the Article generalizes the lessons derived from this study to advance our understanding of the larger problem of administrative agency power and discretion.

II. INTERNATIONAL TRADE REGULATION IN PERSPECTIVE

The temptation to expand executive power in international trade regulation has many sources, but its most recent and radical incarnation resulted from the September 11, 2001 terrorist attacks. As in the case of immigration law, trends in geopolitics have changed the U.S. approach to international trade regulation by reorienting it away from its traditional roles and toward scoring the overarching priority of “homeland security” as currently conceived. While trade regulation has long been concerned with national security, security has now become the focus of the regulatory mission. This new emphasis on security has affected both import regulation

10. In 2002, imports constituted almost 14% of U.S. GDP, while exports made up over 9%. Compare U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL TRADE: CURRENT GOVERNMENT DATA PROVIDE LIMITED INSIGHT INTO OFFSHORING OF SERVICES, GAO-04-932, at 6 (2004) (in 2002, the United States imported \$1.4 trillion and exported \$974 billion of goods and services), with OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, HISTORICAL TABLES: BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2006, at 185 (2005) (U.S. GDP in 2002 was \$10.4 trillion).

and export regulation, two regimes that are sufficiently dissimilar to merit separate summaries.

Customs law is and always has been the principal vehicle for regulating the importation of goods into the United States. Immediately following the ratification of the Constitution, when Congress lacked an unquestioned power to impose income, wealth, or property taxes, trade regulation was synonymous with taxation. Alexander Hamilton, as the first Secretary of the Treasury, was charged with collecting duties on goods imported from other countries as the federal government's chief source of revenue.¹¹ The Treasury Department's main responsibility was accordingly the correct calculation of duties on imports and the enforcement of customs laws against smugglers through "revenue cutters," the forebears of the modern Coast Guard.¹² As income taxes displaced customs duties as sources of federal revenue, Congress increasingly began to define classes of goods and subject them to customs duties to protect domestic industries from foreign competition. The function of import regulation ultimately shifted from taxation to economic protection. The anti-smuggling component of customs law remains,¹³ but the primary objective has shifted from apprehending persons seeking to evade customs duties to apprehending persons seeking to import banned weapons, unlicensed pharmaceuticals, narcotics, counterfeit intellectual property, and weapons of mass destruction.¹⁴ Most of the U.S. Customs Service has now moved from the Treasury to the DHS and is called the Bureau of Customs and Border Protection (CBP).

Export regulation has an almost equally long history in this country, but the scope of export regulation has grown dramatically since its inception. Export law regulates the shipment or other transfer of goods, intangible assets, services and technology from the United States to other countries and foreign persons. Early export regulation was limited to wartime measures intended to preserve U.S. neutrality and noninvolvement in foreign wars.¹⁵ During the Cold War, however, export regulation became aimed mainly at denying advanced armaments and military technologies to the Soviet Union, its satellite states, and irregular forces they supported, such as the Viet Minh, Fidel Castro's government, and Nicaraguan Sandinistas.¹⁶ At the same time,

11. Excise taxes, such as liquor distillation taxes, provided a subsidiary source of revenue.

12. See RON CHERNOW, ALEXANDER HAMILTON 32, 292, 340 (2004); John J. Galluzzo, *1790-1915: That Others Might Live*, in THE COAST GUARD 174 (Tom Beard ed., 2004).

13. The Treasury Department continues significant enforcement activities against criminal evasion of customs duties, but mostly with respect to cigarettes, alcohol, and other high-duty goods.

14. For example, through enforcement by the CBP, the Food and Drug Administration regulates the importation of pharmaceuticals; the Department of Transportation regulates the importation of automobiles; the Department of Agriculture regulates the importation of foodstuffs, plants and animals; and the Environmental Protection Agency regulates the importation of hazardous materials.

15. See, e.g., An Act in Addition to the Act for the Punishment of Certain Crimes Against the United States, §§ 3-4, 1 Stat. 381 (1794); An Act More Effectually To Preserve the Neutral Relations of the United States, §§ 1, 4, 3 Stat. 370 (1817); An Act in Addition to the "Act for the Punishment of Certain Crimes Against the United States," and To Repeal the Acts Therein Mentioned, §§ 3, 5, 3 Stat. 447 (1818); Revised Statutes of 1874 §§ 5283, 5286, 18 Stat. 1029; An Act To Codify, Revise, and Amend the Penal Laws of the United States, §§ 11, 13, 35 Stat. 1088, 1090 (1909).

16. These concerns are reflected in the Senate debates over the 1979 Export Administration Act. See, e.g., 125 CONG. REC. 19,940 (1979) (statement of Sen. Jackson impugning the Department of

the country's economy began to rely increasingly on foreign trade, causing the anticommunist fervor to be moderated by significant industry lobbying for unimpeded international trade. With the demise of the Soviet Union, the largest counterbalance to the export lobby disappeared, leaving modern export regulation to concentrate primarily on denying destructive devices and skills to terrorists and antidemocratic irregular forces, discouraging the proliferation of weapons of mass destruction to non-allies, and encouraging regime change when oppressive dictatorships lose an administration's support.¹⁷ While export regulation served most of these functions during the Cold War, the enforcement agencies now devote their efforts mainly to achieving these goals.

Neither customary international law nor treaties require the maintenance in general of import duties on any country.¹⁸ Export regulation has a strong international component,¹⁹ but much of export regulation reflects not so much a fulfillment of international legal obligations *per se*²⁰ as a domestic policy, common to most major military powers, to control the distribution and transfer of arms and munitions both internally and externally for reasons of national security. The advent of automatic weapons, potent explosives and weapons of mass destruction, combined with the large number of violent irregular forces in both developing and developed countries and, more recently, the increasing sophistication and ruthlessness of terrorists, have radically heightened the need to control the international movement of arms, dangerous chemicals and biological organisms, and other items having actual or potential military uses. Pursuant to its treaty commitments to its allies, its

Commerce for taking inadequate measures to deny technology and dual-use items to the Soviet Union); *id.* at 19,942 (statement of Sen. Bayh stating concern about the effects of U.S. trade with Soviet Union).

17. To the charge that this statement is unduly cynical, it suffices to reply that many oppressive dictatorships that benefit from the current administration's favor, such as the People's Republic of China, Nigeria, or Saudi Arabia, are not currently the target of economic or trade sanctions or of significantly restrictive export controls.

18. The United States and many other countries are, however, parties to various treaties requiring regulation of certain specific types of imports, such as endangered species and products made thereof, hazardous wastes, or important foreign cultural artifacts. *See, e.g.*, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57 (regulating trade in hazardous wastes); Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (regulating trade in endangered species and products derived from them); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 17, 1970, 22 U.S.T. 19, 823 U.N.T.S. 231 (regulating trade in "cultural property").

19. U.S. commitments on international trade regulation of arms and related goods and technologies include the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies, <http://www.wassenaar.org> (last visited Dec. 18, 2005); the Australia Group, <http://www.australiagroup.net> (last visited Dec. 18, 2005); the Missile Technology Control Regime, <http://www.mtcr.info> (last visited Dec. 18, 2005); and the Nuclear Suppliers Group, <http://www.nuclearsuppliersgroup.org> (last visited Dec. 18, 2005).

20. Relatively little customary international law controls the international sale or other transfer of arms and munitions. Among the limited exceptions are the *jus in bello* relating to weapons sales by neutrals to belligerents during times of war and the sale of arms contrary to an embargo proclaimed by the United Nations Security Council under the U.N. Charter. *See* U.N. Charter ch. VII (affirming the authority of the Security Council to take actions to resolve international crises). Also, customary international law arguably forbids the transfer of weapons of mass destruction or components thereof to a state not a party to, or contrary to the terms of, the 1968 Treaty on Nonproliferation of Nuclear Weapons. As discussed below, however, international law is primarily implicated in various cooperative nonproliferation treaties to which the United States is a party.

own opinions about the relationship of arms control to national security, and the world public order more generally, the United States has long regulated the transfer of a wide variety of arms and items having military or paramilitary uses to foreign countries. While export regulation serves some other policy functions, such as providing statistical information about the U.S. trade balance and enforcing embargoes against foreign countries and persons, homeland security, international peace, and hostile foreign regime change are its dominant concerns.

At this point, an introduction to the alphabet soup that is contemporary international trade regulation will be helpful. Since 1977, the United States has had three basic systems of export control enforcement and three systems of import control enforcement. A unified trade regime under the Arms Export Control Act (AECA),²¹ administered by the Department of State's Directorate of Defense Trade Controls (DDTC) in consultation with the Department of Defense, controls the transfer of arms and military goods, services, and technology into and out of the United States. The DDTC has promulgated regulations codified in title 22 of the Code of Federal Regulations (CFR) known as the International Traffic in Arms Regulations (ITAR).

Another unified import and export regime, administered by the Treasury Department's OFAC, controls the transfer of goods, services, and technology into and out of the United States, as well as to and from embargoed countries and persons, pursuant to the Trading with the Enemy Act (TWEA),²² the 1977 International Emergency Economic Powers Act (IEEPA),²³ and various ad hoc statutes imposing economic or trade sanctions on foreign countries and persons.²⁴ OFAC also administers and enforces asset freezes and blocking orders relating to certain countries and persons. The economic and trade sanctions administered by OFAC are generally published in title 31 of the CFR.²⁵

The final category of export and import regimes are not administered by a single authority. This export regime, administered by the Department of Commerce's Bureau of Industry and Security (BIS), regulates the peacetime exportation of goods, technology, and software that have both civilian and military or proliferation uses (known as "dual use" items²⁶) where such exports present a threat to U.S. national security. BIS formerly had authority to promulgate, administer and enforce its Export Administration Regulations (EAR)²⁷ pursuant to the Export Administration Act (EAA),²⁸ but when the EAA's authority expired, BIS claimed authority under IEEPA.

21. Arms Export Control Act, 22 U.S.C. §§ 2751-2799aa-2 (2000). The AECA succeeded a 1940 law that authorized the President to prohibit or curtail exports of arms, munitions and related items. See Act of July 2, 1940, Pub. L. No. 76-703, § 6, 54 Stat. 714 (repealed 1956).

22. Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917).

23. International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-1707 (2000).

24. See, e.g., Cuban Democracy Act of 1992, 22 U.S.C. §§ 6001-6010 (2000); Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, 22 U.S.C. §§ 6021-6091 (2000).

25. OFAC sometimes administers Executive Orders directly without or before enacting regulations.

26. See 15 C.F.R. § 772.1 (2005).

27. The EAR are published in title 15 of the CFR.

28. Export Administration Act of 1979, 50 U.S.C. app. §§ 2401-2420 (2000).

The import regime, administered by the DHS's CBP, accounts for the general regulation of all imports for the purpose of tracking U.S. trade statistics, enforcing quotas, collecting customs duties, and enforcing various statutes regulating specific types of imports.²⁹ CBP may enforce a variety of statutes and regulations, including laws regulating the exportation and importation of dual-use items and military articles,³⁰ but its main authority and operations arise under the 1930 Tariff Act.³¹

Nearly all international trade regulation is committed to the control of these four agencies.³² Each agency adopts its own regulations pursuant to the Administrative Procedures Act and underlying substantive statutes, and each interprets and enforces its own regulations. Under the Supreme Court's decision in *Chevron U.S.A., Inc. v. National Resources Defense Council*, agency regulations are given controlling weight by courts unless they are arbitrary, capricious, or manifestly contrary to the statute if Congress has explicitly delegated regulatory power to an executive agency such that there is an "express delegation of authority to the agency to elucidate a specific [statutory] provision."³³ The regulatory agencies thus have great discretion and power in administering their respective statutes.

III. FEDERAL LAW OF SUCCESSOR LIABILITY

International trade regulation is a very technical field, with practitioners usually specializing either in export regulation or import regulation. Because of their technical nature, agency regulations and guidance play the predominant role in legal analysis in international trade law. In contrast, the federal law of successor liability is largely a creature of the courts. While some federal statutes authorize successor liability, they typically do not define the circumstances in which purchasers of assets or an ownership interest in a business entity may be held liable for the illegal acts of the seller or the purchased entity.³⁴ Courts have consequently been left to their own devices in elaborating standards of liability, and have accordingly developed a common law regime of successor liability based on equitable principles. These principles must generally be authorized by statute for a court to hold a person liable for the acts or delicts of another under federal law, unless the court can justify expanding liability with reference to an implied statutory authorization

29. The Customs Regulations and various trade remedies regulations occupy most of title 19 of the CFR.

30. See, e.g., 22 C.F.R. § 127.4 (2004).

31. Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. §§ 1304-1681b (2000)).

32. Other agencies, such as the Department of Transportation and Food and Drug Administration, promulgate regulations relating to the importation or exportation of goods within their jurisdictions, but these are generally enforced by CBP. In addition, there are other international trade regulatory and enforcement agencies, such as the Office of Antiboycott Compliance, but these have a relatively narrow scope of jurisdiction.

33. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

34. See e.g., *Coffman v. Chugach Support Serv.*, 411 F.3d 1231, 1236 (11th Cir. 2005) (noting that, although the Uniformed Services Employment and Reemployment Rights Act of 1994 authorizes successor liability for employers, it does not define the term "successor in interest").

or a policy that would be disserved by limiting liability to a specified culpable actor.

One might surmise, then, that the parameters of successor liability would differ according to the purposes of the statute authorizing such liability. While the federal common law of successor liability does tend to operate differentially, however, the variations tend to be less striking than the commonalties. Most principles of successor liability are applied more or less uniformly at the federal level regardless of what statute is being interpreted.

The venerable cornerstone of successor liability jurisprudence is just such a principle, which holds that, in general, a bona fide purchaser of assets for value takes the assets free and clear of any debts or liabilities.³⁵ In the 1880 case *Graham v. Railroad Company*, for example, the Supreme Court considered whether a sale of land purchased in good faith by an individual from a solvent corporation could be set aside for the benefit of the seller's subsequent creditors. The Court held that it was a "well settled rule of law" that such creditors had suffered no harm and consequently could claim no remedy against the purchaser.³⁶ In *Hoard v. Chesapeake & Ohio Railway*,³⁷ the C&O Railroad Company had undertaken certain contractual obligations to the plaintiff but allegedly reneged on some of them before selling all its assets under a mortgage foreclosure to purchasers, who then contributed the assets to a new company with a similar name. When the plaintiff brought an action in equity to enforce the contract against the asset purchasers, the Supreme Court noted the lack of a state statute or specific contract provision that would require the asset purchaser to assume the seller's contractual obligations as a matter of law. The Court equally could see no basis for an equitable recovery: "if, as such purchasers, they thereby became bound to pay all the debts and perform all the obligations of the corporation whose property they bought, it would put an end to purchases of railroads."³⁸ The Court's concerns were about unfairly surprising the asset purchaser with an unexpected and unbargained-for liability and unnecessarily discouraging asset purchases.³⁹

Successor nonliability is, however, only a general rule, and a general rule invites exceptions. Courts have varied their formulations of some of the exceptions depending on the statute at issue. The primary reason for the lack of complete uniformity across federal statutes is the general absence of a statutory basis for the elaboration of such exceptions. Lacking codified federal textual guidance, courts have turned to state law to define basic concepts of successor liability, which the courts then tailor to the structure and perceived policies the relevant federal law seeks to advance. This approach may result in a more complex jurisprudence dealing with successor liability, but it also tends to ensure that liability principles are narrowly tailored to the purposes of the relevant statute and do not ensnare parties for no clear policy goal.

35. See, e.g., *Hoard v. Chesapeake & Ohio Ry.*, 123 U.S. 222 (1887); *Graham v. R.R. Co.*, 102 U.S. 148 (1880).

36. *Graham*, 102 U.S. at 153.

37. *Hoard*, 123 U.S. at 223-25.

38. *Id.* at 225-27.

39. The Court is of course guilty of a bit of hyperbole. The more probable result of a contrary ruling is taken up in Part VI.B., *infra*.

A. *State Law Foundations of Successor Liability*

Courts initially developed the doctrine of successor liability as an equitable remedy against formalistic attempts to circumvent contractual or statutory liability rules. A general rule of nonliability of asset purchasers invites abuses by corporations attempting to shield their assets from legitimate creditors. Relatively relaxed state law rules allowing corporate restructuring and consolidation of debts and assets, as well as the diversity of forms that limited liability entities can employ under state law to engage in stock purchases, sales, swaps, and reorganizations, encourage creative lawyers to manipulate the intricacies of state corporate law to try to evade or deflect corporate liabilities to the detriment of legitimate creditors.

To avoid strategic behavior that might undermine normal liability rules, successor liability doctrine includes several exceptions to the general rule of nonliability. The applicability of these exceptions depends on the terms of any relevant contracts, as well as the manner in which business transactions are structured, and determines whether and to what extent the purchaser of a business or its assets inherits liability for the preexisting debts of the acquired entity or asset seller. The consequences of a merger are quite different from the consequences of a stock sale, which differ in turn from the consequences of an asset sale. The analysis of successor liability is complicated, moreover, by the possibility of sequential transactions, such as a stock sale followed by a merger or an asset sale followed by the dissolution of the seller. This Part summarizes the liability consequences under state law for the purchaser with respect to different forms of business transactions.

1. *Transaction Structure and Successor Liability*

The general rule under the law of every state is the one announced by the Supreme Court in *Graham* and *Hoard*: the purchaser of a business entity or business assets does not assume the purchased entity's or asset seller's liabilities in the absence of a statute or contractual agreement to the contrary.⁴⁰ The rationale with respect to the purchase of a business entity is straightforward. When a business entity is acquired by a new owner, it maintains its separate legal identity; it does not ipso facto unite with the purchaser. The legal consequence of separate personality has also been noted

40. 15 WILLIAM M. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7122 (perm. ed., rev. vol. 2005) [hereinafter FLETCHER, CYCLOPEDIA]; see, e.g., *FMC Fin. Corp. v. Murphree*, 632 F.2d 413, 422-23 (5th Cir. 1980) (applying Illinois law); *Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535 (D. Del. 1988); *United States v. Ataka Am., Inc.*, 826 F. Supp. 495 (Ct. Int'l Trade 1993); *A.R. Teeters & Assocs. v. Eastman Kodak Co.*, 836 P.2d 1034, 1039 (Ariz. Ct. App. 1992); *Phillips v. Cooper Labs., Inc.*, 264 Cal. Rptr. 311, 314 (Cal. Ct. App. 1989); *Ruiz v. ExCello Corp.*, 653 P.2d 415, 416 (Colo. Ct. App. 1982); *Gonzales v. Rock Wool Eng'g & Equip. Co.*, 453 N.E.2d 792, 795 (Ill. App. Ct. 1983); *DeLapp v. Xtraman, Inc.*, 417 N.W.2d 219, 220 (Iowa 1987); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 556 (Tex. 1981). The major exception occurs when a business entity acquires a general partnership interest in a partnership. There, while the business entity maintains separate personality, it assumes liability for the debts of the partnership. See UNIF. LTD. P'SHIP ACT § 404 (2001), 6A U.L.A. 57 (2002); 68 C.J.S. *Partnership* § 402 (2005). Beyond this exception, the treatment of partnerships does not differ from the treatment of corporations in successor liability analysis. See *RCM Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635 n.5 (S.D.N.Y. 1995); *Jackson v. N.J. Mfrs. Ins. Co.*, 400 A.2d 81, 84 (N.J. Super. Ct. App. Div. 1979).

by the Supreme Court: "It is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation . . . is not liable for the acts of its subsidiaries."⁴¹ Only where the facts justify piercing the corporate veil under state statute or common law rules may courts impute a subsidiary's liabilities to its parent company.⁴²

Where the purchase of a separate entity is merely one step in what will ultimately become a merger, the liability rules differ dramatically. In a merger, one entity is subsumed within the identity of the other.⁴³ This melding of identities is designed specifically *not* to maintain the separate personalities of the merging entities, and, consequently, the debts and assets of each entity are inherited by the merged entity.⁴⁴ State statutes commonly provide that both civil and criminal liabilities survive a merger and follow the merging entity,⁴⁵ even if the predecessor entity had no assets immediately prior to the merger.⁴⁶ Federal courts, relying on the state law authorizing the creation and operation of such corporations, tend to follow state law rules providing that merged entities retain liability for pre-merger acts.⁴⁷ Like the courts, international trade regulatory enforcement agencies have also retained liability with respect to civil damages and penalties as well as charges for criminal violations of the trade laws and regulations.⁴⁸

Asset sales differ substantially in nature from mergers and stock acquisitions. An asset sale is by itself neither the acquisition of a business entity per se nor a merger of the seller and buyer; it is merely a transfer of property, tangible or intangible. Unless the asset sale is but one step in a more

41. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998); *accord Potlatch Corp. v. Superior Ct.*, 201 Cal. Rptr. 750, 754-55 (Cal. Ct. App. 1984) (an entity that purchases a company does "not acquire any of its assets, it acquire[s] only its capital stock. . . . It is fundamental that a shareholder owns no part of the specific property of the corporation."); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666, 673 (Conn. 1991) (internal quotation omitted) ("[I]t is a fundamental principle of corporate law that [t]he parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all shares in the subsidiary and the two enterprises have identical directors and officers. . . . Furthermore, the separate corporate entities or personalities of affiliated corporations will be recognized, absent illegitimate purposes. . . .").

42. *See Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.*, 483 F.2d 1098, 1102 (5th Cir. 1973), *modified per curiam*, 490 F.2d 916 (5th Cir. 1974) ("[C]ourts do not hesitate to ignore the corporate form in those cases where the corporate device has been misused by its owners."); 1 FLETCHER CYCLOPEDIA, *supra* note 40, § 41.10. To pierce the corporate veil, courts generally apply a two-pronged test. First, the plaintiff must show "such unity of interest and ownership that the separate personalities of the corporation and the individual shareholders no longer exist." Second, the plaintiff must show that, if the corporate forms are respected, "an inequitable result will follow." *Automotriz del Golfo de Cal. v. Resnick*, 306 P.2d 1, 3 (Cal. 1957). *See generally Franklin A. Gevurtz, Piercing Piercing: An Attempt To Lift the Veil of Confusion Surrounding the Doctrine of Piercing the Corporate Veil*, 76 OR. L. REV. 853 (1997).

43. Depending on how the merger is structured, the subsumed entity may be the acquiring or acquired entity. The decision of structure is usually based on liability and tax considerations.

44. *See* 15 FLETCHER, CYCLOPEDIA, *supra* note 40, § 7117.

45. *See, e.g.*, CAL. CORP. CODE § 1107(a) (West 1990); DEL. CODE ANN. tit. 8, § 259(a) (2001); HAW. REV. STAT ANN. § 414-316(a)(3) (2004); N.Y. BUS. CORP. LAW, § 906(b)(3) (McKinney 2001); *see also* 15 FLETCHER, CYCLOPEDIA, *supra* note 40, § 7121, at 215.

46. *Petrini v. Mohasco Corp.*, 71 Cal. Rptr. 2d 910, 914-15 (Cal. Ct. App. 1998).

47. *See, e.g.*, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1424-26 (7th Cir. 1993); *Forest Labs. v. Pillsbury Co.*, 452 F.2d 621, 625 (7th Cir. 1971); *United States v. Bliss*, 108 F.R.D. 127, 132 (E.D. Mo. 1985); *Ladjevardian v. Laidlaw-Coggeshall, Inc.*, 431 F. Supp. 834, 838 (S.D.N.Y. 1977).

48. *See, e.g.*, *United States v. Stone*, 452 F.2d 42, 47 (8th Cir. 1971).

general reorganization, the selling entity retains its existence and identity after the sale. The debts of the selling entity remain with that entity. Usually, the asset purchaser acquires nothing but the assets for which it pays.⁴⁹

The rationale respecting liability consequent to the sale of business assets is related to but different from the rationale for limiting liability in transfers of ownership of an entity. When a purchaser acquires assets from a seller, the price paid for those assets is based on a certain understanding of their value. That understanding quantifies the positive value of the assets as well as any associated debts and liabilities. To burden the purchaser with risks or debts that it did not agree to assume and that the seller did not intend to pass on, would be inequitable to the purchaser, would confer a windfall on the seller and would undermine the principle of freedom of contract by negating the intent of the parties. Consequently, with relatively few exceptions, where a bona fide sale for value has occurred with no design to defraud the seller's creditors, state law will not permit the imputation of a transfer of liabilities not contemplated by the parties to the asset purchase agreement. In such circumstances, the seller maintains all liabilities not absorbed by the buyer under the terms of the contract.⁵⁰

These rules, which seem fairly clear when applied to simple acquisitions and mergers, become much more complex in the real world of corporate consolidations and reorganizations, where transaction structures are carefully designed to allocate liability optimally for tax purposes while avoiding the default statutory or common law rules regarding other kinds of liability. Complications tend to arise in multistage transactions, such as when an asset sale is followed by the dissolution of the seller.⁵¹ In such cases, assets remaining after the sale are used to pay any outstanding liabilities, with the remainder accruing to the owners of the dissolved company. The problem from a practical perspective is that a more or less complete asset sale followed by a dissolution, in which all debt is generally extinguished,⁵² is virtually indistinguishable in its ultimate result from a merger, in which debt does pass to the surviving entity. Indeed, tax consequences being equal, such a transaction structure might be chosen precisely because it allows the asset purchaser to avoid unknown or undisclosed liabilities associated with the selling business while nonetheless accomplishing a complete transfer of assets.

49. There are, as usual, exceptions. For example, many courts have held that civil product-line liability extends to an asset purchaser automatically. *See, e.g., Mettinger v. Globe Slicing Mach. Co.*, 709 A.2d 779, 784-85 (N.J. 1998). *See generally* Richard L. Cupp, Jr., *Redesigning Successor Liability*, 1999 U. ILL. L. REV. 845 (describing the major trend of recognizing a products line exception to the general rule of successor nonliability and advocating its continuation).

50. This rationale does not apply when the purchaser is aware of the existence and extent of the seller's liability (which is certainly not always the case). In such situations, a preexisting rule making the purchaser liable for the seller's debts will have precisely the same effect on the transaction incentives as a preexisting rule precluding such liability. However, the rules of successor liability are designed for the general, not the exceptional, case.

51. A dissolution is the winding up of a business's affairs and termination of its existence as a separate legal entity.

52. Generally, the dissolution of a business entity extinguishes its debts and liabilities under state law. This does not mean that the entity's creditors simply go without. Rather, the process of dissolution is designed to ensure the maximum recovery of such creditors to the extent consistent with the rule of limited liability, where applicable.

2. Successor Liability Exceptions

The law of successor liability has evolved exceptions to cope with the complex and increasingly canny transaction structures used by corporate and tax lawyers.⁵³ Asset purchaser nonliability is subject to a number of these equitable exceptions.⁵⁴ The most common exception applies when the asset purchaser agrees by contract to assume all or part of the seller's known or unknown liabilities, and the liabilities at issue fall within the scope of that assumption. In such cases, liability passes to the purchaser as a matter of contract law, but contract law typically provides no remedy to third party creditors, who may lack privity with the asset purchaser.⁵⁵ An equitable exception to successor nonliability is necessary to ensure that creditors of the asset seller maintain a remedy enforceable directly against the purchaser.⁵⁶

A second exception extends liability where the reorganization or asset sale at issue amounts to nothing more than an attempt to defraud creditors.⁵⁷ The fraud exception applies only when the sale forms part of an intentional scheme to defraud and may apply to a variety of transaction structures. In one sense, the fraud exception is at once the broadest, because it applies regardless of transaction structure, and most narrow, because it requires actual intent to defraud.

The third exception applies when the acquisition or reorganization is part of a de facto merger. For example, an asset seller might avoid its liabilities by selling its assets to a related company free and clear of all liabilities and then dissolving. As mentioned previously, a full asset sale followed by dissolution accomplishes the same thing as a merger, with one potentially important difference: a full asset sale transfers only those liabilities specified in the contract, while a merger transfers all liabilities of the merged entity. The fraud exception may not cover these situations, because it is common for businesses to choose a full asset sale followed by a dissolution for tax or other reasons. Courts have accordingly treated such transactions as comparable to a merger in order to forestall undermining legitimate debts through legal formalities.

53. These exceptions apply primarily in cases of asset transfer; where the transfer of ownership of a business entity is at issue, the corporate veil doctrine comes into play. *See supra* note 42 and accompanying text.

54. *See Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Belmont*, 920 F.2d 1323, 1326 (7th Cir. 1990); *Knapp v. N. Am. Rockwell Corp.*, 506 F.2d 361, 363-64 (3d Cir. 1974); *Fehl v. S.W.C. Corp.*, 433 F. Supp. 939, 945 (D. Del. 1977); *DeLapp v. Xtraman, Inc.*, 417 N.W.2d 219, 220 (Iowa 1987).

55. *See* RESTATEMENT (SECOND) OF CONTRACTS § 315 (1981); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS §§ 777, 779C (1952 & Supp. 1980).

56. An agreement to assume the asset seller's liabilities can be explicit or implicit. Many courts impose liability if the structure or terms of the agreement sufficiently indicates the parties' intent that all liabilities or specific liabilities will transfer to the purchaser even though the contract is not explicit in transferring such obligations. *See, e.g., Bouton v. Litton Indus., Inc.*, 423 F.2d 643, 652 (3d Cir. 1970).

57. *See* 1 FLETCHER, CYCLOPEDIA, *supra* note 40, § 41.32 ("Instances abound where fraudulent transfers to the hindrance of corporate creditors were set aside or invalidated, some to fabricated or controlling corporations, on the strength of this general principle."). Fraud may equally justify piercing the corporate veil in stock acquisition transactions. *See id.*

Because mergers transfer liability to the successor company, a “de facto merger or consolidation” basis for successor liability has been developed by the courts and codified in some state statutes (sometimes called a “statutory merger”).⁵⁸ The theoretical problem of de facto mergers releasing the seller from legitimate debt was formerly compounded by the common law rule precluding lawsuits against dissolved limited liability entities.⁵⁹ Modern state laws have come to provide remedies for injuries occurring after the dissolution of a business entity.⁶⁰ The continued necessity of the de facto merger doctrine, therefore, comes into question. Nonetheless, the doctrine remains alive and well, possibly because it may be difficult or impossible to recover against the dissolved company’s assets as a practical matter in some cases and courts do not like leaving creditors entirely without a remedy.

Finally, in many states, whether by common law or statute a fourth exception to successor nonliability has emerged.⁶¹ When the asset transfer results in the purchaser becoming merely a continuation of the seller, successor liability will attach to the purchaser regardless of the structure of the reorganization transaction or the absence of any intent to defraud creditors. The “mere continuation” exception is intended to fill in the gaps in state corporate law that would allow the use of other reorganization methods for the same purpose.⁶² In order to recover under this theory, the creditor must generally show not merely continuation of the business operations purchased but continuation of the corporate entity itself. Indeed, some courts have held that, to qualify as the “mere continuation” of an entity, the asset acquirer’s

58. Some states, however, limit the application of this exception, so that only when the parties to an asset sale violate the state law governing corporate reorganizations will a court consider whether the sale amounted to a de facto merger. In such states, the de facto merger exception is deployed primarily for “the protection of creditors or stockholders who have suffered by reason of failure to comply with the statute governing such sales.” *Alcott v. Hyman*, 184 A.2d 90 (Del. Ch. 1962), *aff’d*, 208 A.2d 501 (Del. 1965); *see also Hariton v. Arco Elec., Inc.*, 188 A.2d 123 (Del. 1963); *Heilbrunn v. Sun Chem. Corp.*, 150 A.2d 755, 758 (Del. 1959).

59. *See Coulter v. Robertson*, 24 Miss. 278 (1852); *Fox v. Horah*, 36 N.C. (1 Ired. Eq.) 358 (1841); *Bunkburnett Ref. Co. v. Ilseing*, 292 S.W. 179, 181 (Tex. 1927); MODEL BUS. CORP. ACT ANN. § 105 cmt. (1971).

60. For example, the Texas Business Organizations Code allows any person to bring an action against the dissolved corporation for a pre-dissolution claim within three years after the dissolution. TEX. BUS. ORGS. CODE ANN. § 11.356 (Vernon 2005). Where statutes failed to provide a remedy, state courts had created common law consistent with their conception of equity. For example, to prevent unjust enrichment, some courts had adopted a “trust fund theory” of liability that allows creditors to seek recovery for pre-dissolution claims against assets distributed to any third party, including shareholders, corporate directors and officers, and others, “so long as the assets are traceable and have not been acquired by a bona fide purchaser” for value. *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 550 (1981); *see also J.J. Norton, Relationship of Shareholders to Corporate Creditors upon Dissolution: Nature and Implications of the “Trust Fund” Doctrine of Corporate Assets*, 30 BUS. LAW. 1061, 1067, 1074 (1975). Courts have generally not interpreted this doctrine to apply, however, to post-dissolution claims when the legislature provided a remedy for pre-dissolution claims only. *See, e.g., Hunter*, 620 S.W.2d at 550; *see also Reconstruction Fin. Corp. v. Teter*, 117 F.2d 716, 725 (7th Cir. 1949); *Blankenship v. Demmler Mfg. Co.*, 411 N.E.2d 1153 (Ill. App. Ct. 1980).

61. Some states have adopted another exception to the rule of nonliability in products liability cases, *see, e.g., Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977); *Ramirez v. Amsted Indus.*, 431 A.2d 811 (N.J. 1981), but these have not proven relevant to federal causes of action.

62. *See Elmer v. Tenneco Resins, Inc.*, 698 F. Supp. 535, 542 (D. Del. 1988). For this reason, the fact that an asset sale was negotiated at arm’s length weighs against a finding of “mere continuation.”

business must be “identical to that of” the selling entity.⁶³ Continuity of ownership “is found where the purchaser corporation exchanges its own stock as consideration for the seller corporation’s assets so that the shareholders of the seller corporation become a constituent part of the purchaser corporation.”⁶⁴ There must be both a continuation of ownership and a continuation of management for a finding of “mere continuation.”⁶⁵ In addition, some states require that the purchaser provide insufficient consideration to the seller before the former can be called a mere continuation of the latter.⁶⁶

B. Federal Judicial Adoption of Successor Liability Theories

1. Conditions for the Application of Successor Liability in Federal Causes of Action

Because successor liability principles are equitable and originate in state court decisions, which vary from state to state, it is not immediately clear how courts should select the principles that apply in federal enforcement actions. This is not to say that federal courts are bound by state court decisions—to the extent authorized by statute and permissible under the Constitution, federal courts have discretion to alter traditional principles of successor liability.⁶⁷ The federal law of successor liability, when applied by federal courts, accordingly sometimes diverges from traditional state law principles.⁶⁸

In most cases in which federal courts have adopted a theory of successor liability, they have done so without explicit statutory authorization. Lacking such authorization (and any accompanying guidance as to which persons should qualify as “successors” under which circumstances), federal courts have fallen back on state law principles to invent a federal common law of

63. See, e.g., *Mitchell v. Suburban Propane Gas Corp.*, 182 A.D.2d 934, 935 (N.Y. App. Div. 1992).

64. *Dayton v. Peck, Stow & Wilcox Co.*, 739 F.2d 690, 693 (1st Cir. 1984) (citations omitted).

65. See *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985); *Travis v. Harris Corp.*, 565 F.2d 443, 447 (7th Cir. 1977).

66. See, e.g., *A.R. Teeters & Assocs. v. Eastman Kodak Co.*, 836 P.2d 1034, 1040-41 (Ariz. Ct. App. 1992); *Enos v. Picacho Gold Mining Co.*, 133 P.2d 663, 671 (Cal. 1943).

67. The Supreme Court has frequently held that obligations or rights created by the federal regulatory system are governed by federal law. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 726 (1979) (“This Court has consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs.”). In *Kimbell Foods*, the Court decided that, when federal guaranteed loans conflict with private loans, the question of priority is governed by federal law because the disbursement of funds is a constitutional function of the federal government. The federal regulatory agencies relating to international trade, like the loan agencies in *Kimbell Foods*, derive their regulatory authority “from specific Acts of Congress passed in the exercise of a ‘constitutional function or power.’” *Id.* (quoting *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366 (1943)).

68. See, e.g., *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996); *United States v. Carolina Transformer Co.*, 978 F.2d 832, 837-38 (4th Cir. 1992). But see the following cases, in each of which a federal court applies state law principles of successor liability: *United States v. Davis*, 261 F.3d 1, 53-54 (1st Cir. 2001); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1501-02 (11th Cir. 1996); *City Mgmt. Corp. v. U.S. Chem. Co.*, 43 F.3d 244, 252-53 n.12 (6th Cir. 1994).

successor liability. They have not, of course, created a federal corporate law,⁶⁹ but they have created principles of equity dealing with the specific issue of successor liability. In so doing, courts have faced at least three new challenges. First, lacking any legislative guidance as to what principles should govern, they must decide how much they should rely on state judicial decisions in fashioning the remedy of successor liability. Second, to the extent they rely on state decisions, they must choose which of any conflicting approaches to follow. Third, because different federal statutes may have diverse goals, courts face the possibility that the principles of successor liability should differ according to the statute under which such liability is invoked.

Federal courts have resolved the first two challenges by importing the most common state law principles into the federal law in their entirety. This should not be surprising. Because courts adopting rules of successor liability in applying federal statutes have typically done so by avoiding formalisms that threaten to undermine the purposes of the relevant statute, federal courts have come to use the same time-tested equitable principles as state courts. Federal courts have met the third challenge by adapting principles of successor liability on a more or less statute-by-statute basis (which naturally tends to undermine the uniformity of federal law across statutes).

Any objection to a lack of uniformity is answered by the relative dearth of statutory schemes under which federal courts have applied successor liability theories. The large majority of cases by far in which federal courts have adopted successor liability theories arise under environmental remediation statutes (particularly the Comprehensive Environmental Response, Compensation and Liability Act, or CERCLA) and labor statutes (particularly the National Labor Relations Act, or NLRA).⁷⁰ The enforcement of labor and environmental laws is the engine of the federal successor liability doctrine.

Because the CERCLA and NLRA make no express provision for successor liability, courts have been constrained to justify their adoption of successorship principles as effectuating legislative intent. The theories advanced in support of such approaches have sometimes been doctrinally flawed or hypersimplistic,⁷¹ but the usual justification is the prevention of

69. Most forms of business organizations and associations are creatures of state law; there is no such thing as a federal business organization in this country. Yet, because legal entities organized under state law are honored as "persons" under federal law, the federal government typically tracks state law to determine the implications of the collective form taken by the organization. If state law treats a corporate merger as collecting all assets and liabilities in the surviving corporation, then the federal government will act accordingly. If it did not, it would have to invent a federal law of corporations to deal with such situations.

70. 29 U.S.C. §§ 151-169 (2000); 42 U.S.C. § 9601-9675 (2000). In fact, a few employment law statutes, such as the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. §§ 4301-4333 (2000), provide explicitly for successor liability of employers. *E.g.*, 38 U.S.C. § 4303(4)(A)(iv) (2000).

71. *See, e.g.*, *Oner II, Inc. v. U.S. Envtl. Prot. Agency*, 597 F.2d 184, 186 (9th Cir. 1979) (holding that the EPA may hold an asset purchaser liable for the seller's alleged violations of the Federal Insecticide, Fungicide, and Rodenticide Act without explicit statutory authorization merely because "the agency may pursue the objectives of the Act . . . where it will facilitate enforcement of the Act"); *Cont'l Grain Co. v. Pullman Standard, Inc.*, 690 F. Supp. 628, 631-32 (N.D. Ill. 1988) (incorrectly citing for

reorganizations designed to exculpate the asset seller from liability unfairly. Of course, the prevention of reorganizations in general would be contrary to the very purpose of state corporate law and contract law, which is precisely to limit liability. But in CERCLA and NLRA cases, courts have construed the relevant statutes to further a perceived federal public policy of ensuring that private rather than public funds remedy statutory violations caused by private activity.⁷² Whenever federal courts, following a reasoned analysis,⁷³ have construed a statute to authorize successor liability, they have uniformly imposed such liability only for the remedial purpose of compensating or otherwise remedying some kind of tangible harm caused by the asset seller, as opposed to leaving the harm unrecompensed or calling upon the public treasury to remedy it. The underlying goal has uniformly been to effect remediation.

In one leading CERCLA case, for example, the Second Circuit justified the application of a liberal theory of successor liability because “CERCLA is a ‘broad remedial statute’ [T]he Act’s broad remedial purpose would be sharply curtailed if the Act did not encompass successor liability.”⁷⁴ Similarly, in a leading case brought under the NLRA, *Golden State Bottling Co. v. NLRB*, the Supreme Court held that the National Labor Relations Board’s “remedial powers” under the NLRA “include broad discretion to fashion and issue” an order imposing successor liability “as relief adequate to achieve the ends, and effectuate the policies, of the [NLRA].”⁷⁵ These policies are primarily to ensure that collective bargaining agreements are honored and to avoid “the hardships that Congress sought to stave off . . . where a predecessor employer is unable to fulfill its contribution obligations”⁷⁶ to compensate, insure, or otherwise provide benefits to the predecessor’s employees.

Victims of torts, breaches of contract, and other injuries must either bear the costs of the harm or burden the state with demands for redress through public funds whenever they lack a private remedy. Courts interpreting environmental and labor laws such as CERCLA and the NLRA have called upon the equitable principles of successor liability on the theory that both the “state compensation” and “no compensation” results should be avoided, even at the cost of imposing liability on an innocent party. Instead, where an asset purchase would otherwise result in the destruction of a plaintiff’s remedies, imposing the duty to effectuate a remedy on an innocent asset purchaser has

sole authority for imposing successor liability under the RICO Act a prior case that had found that successor liability was possible, when the precedent did not in fact address the issue).

72. See, e.g., *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 92 (3d Cir. 1988) (“Congressional intent [underlying CERCLA] supports the conclusion that, when choosing between the taxpayers or a successor corporation, the successor should bear the cost.”).

73. “Reasoned” is used here literally, in contradistinction to judicial decisions published without any explanation of the court’s reasoning or how applicable authority supports the court’s decision.

74. *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 514, 519 (2d Cir. 1996) (citation omitted).

75. *Golden State Bottling Co. v. Nat’l Labor Relations Bd.*, 414 U.S. 168, 176 (1973). The remedial and equitable nature of the NLRA has led the Supreme Court to permit the NLRB to adopt a theory of successor liability, called the “substantial continuity” test, which is broader than that applied in any state for cases arising under the NLRA. See *Fall River Dyeing & Finishing Corp. v. Nat’l Labor Relations Bd.*, 482 U.S. 27, 43-46 (1987).

76. See *Upholsterers’ Int’l Union Pension Fund v. Artistic Furniture of Belmont*, 920 F.2d 1323, 1329 (7th Cir. 1990).

been justified as serving an equitable function. It is sometimes said to spread the risk of nonpayment to the asset purchaser, thus offering a creditor more options for recovery.⁷⁷ The rationale for imposing the costs of labor and environmental law violations on successors does not appear to be the avoidance of fraud—at least not entirely—because courts have proved willing to impose liability even where the asset purchaser is innocent of any wrongdoing or ill intent.

While this justification for successor liability may not be particularly cogent,⁷⁸ it derives from the statute's remedial nature, which ensures the purportedly desirable result of maintaining a remedy to compensate some injury caused by the asset seller. When confronted with claims against an alleged successor brought under a statute having no significant remedial function, most courts have shown no inclination to impose successor liability of any kind. The First Circuit, for example, has upheld a district court's decision declining to apply the theory to claims brought pursuant to the Racketeer Influence and Corrupt Organizations Act (RICO).⁷⁹ In the handful of isolated cases⁸⁰ in which federal courts have imposed successor liability for punitive purposes, they have uniformly failed to back their decisions with any reasoned statutory or policy analysis, leaving potential justifications to the imagination.

In addition to limiting the application of successor liability to remedial statutes, federal courts have felt constrained by the equitable origins of the doctrine to impose liability only where the asset purchaser was aware of the administrative agency's charges and the seller's potential liability.⁸¹ Successor

77. See, e.g., *Ray v. Alad Corp.*, 560 P.2d 3, 10 (Cal. 1977); *Ramirez v. Amsted Indus., Inc.*, 431 A.2d 811, 820 (N.J. 1981).

78. The risk-spreading justification for successor liability is open to the criticism of being a strange claim to support an extrastatutory, equitable principle. The decision to spread risk is a quintessentially legislative function. Congress and the state legislatures have enacted many programs to spread risk, ranging from mandatory automobile insurance to Social Security, and from worker's compensation to, in some circumstances, statutory successor liability. Where the legislature has declined to spread risks, it presumably intended that the chips should fall where they may. For a court to create a new risk-spreading regime on its own authority steps over the line between interpretation of the law and wholesale legislation. Risk-spreading in products liability or similar cases may well be a worthy policy goal, but that is not a decision that a court is usually considered qualified to make. And if it is a worthy goal, there are presumably more effective or equitable means of risk-spreading, such as imposing the costs on the Treasury.

79. *Rodriguez v. Banco Central*, 777 F. Supp. 1043, 1064 (D.P.R. 1991), *aff'd*, 990 F.2d 7 (1st Cir. 1993) (holding that "successor liability should be found only sparingly and in extreme cases due to the requirement that RICO liability only attaches to knowing affirmatively willing participants"); see also *United States v. Carter*, 311 F.2d 934, 941 (6th Cir. 1963) (holding that an asset purchaser may not be charged with a crime committed by the seller in violation of the Taft-Hartley Act); *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 635 (S.D.N.Y. 1995) (holding that it is possible for a corporation to be found liable as a successor if there is a showing that the purchaser had knowledge of the RICO Act violation at the time of purchase). In *Melrose Distillers, Inc. v. United States*, 359 U.S. 271 (1959), the Supreme Court upheld a criminal indictment under the Sherman Act of an asset seller even after the seller's dissolution. There was no suggestion that the Department of Justice could have pursued the asset purchaser for the seller's alleged violations of the Act.

The Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. 941 (1970) (codified as amended at 18 U.S.C. §§ 1961-1968 (2000)), is designed to make unlawful various kinds of mafia- and gang-related activity, primarily by imposing criminal penalties for the prohibited acts. See H.R. REP. NO. 91-1549, at 56 (1970).

80. See *supra* note 71 and sources cited therein.

81. See *infra* note 260 and accompanying text.

liability as adopted by federal courts, then, is circumscribed by two important limitations: it applies only when the U.S. government or a private party seeks remediation of some injury and when the asset purchaser is aware of the seller's liability.⁸²

2. *The Rules of Construction*

Apart from the judicial elaboration of successor liability as an equitable doctrine, one statutory theory of successor liability that would justify its application to federal regulation in general should be considered as well. The ALJ in the *Sigma-Aldrich* enforcement action⁸³ justified his interpretation of the statute as authorizing successor liability on a textual reading. In his order, the ALJ noted that the statute prohibits violations by "any person." He continued as follows:

Under the federal rules of statutory construction, the term "person" includes "corporations, companies, association, firms, partnerships, societies and joint stock companies, as well as individuals." 1 U.S.C. § 1. The federal rules of statutory construction further inform us that when "company" or "association" are used in reference to a corporation, they shall be deemed to include successors and assigns. See 1 U.S.C. § 5. By implication, Congress must have considered the word "corporation" to include corporate successors.⁸⁴

The ALJ was citing title 1, chapter 1 of the U.S. Code (Rules of Construction), and relying in particular on section 5, the closest the federal legislature has come to adopting a general principle of successor liability that might apply to all federal law. The Rules of Construction, based on two pre-1872 statutes⁸⁵ and incorporated into the 1873 Revised Statutes,⁸⁶ were enacted as positive law in the U.S. Code in 1947.⁸⁷ Section 5 provides: "The word 'company' or 'association', when used in reference to a corporation, shall be deemed to embrace the words 'successors and assigns of such company or association,' in like manner as if these last-named words, or words of similar import, were expressed."⁸⁸

82. Even with these limitations, significant objections to successor liability remain. For example, parties accused of regulatory violations, particularly in sensitive areas such as environmental compliance and homeland security, may suffer social stigma and even accompanying economic harm (e.g., in the form of consumer avoidance of the purchaser) if identified as lawbreakers even though they were in fact innocent of wrongdoing. Thus, even where the financial harm resulting from successor liability is minimal, there are sound policy reasons to question its value. A thorough analysis of the merits of successor liability in a general regulatory setting unfortunately exceeds the scope of this Article.

83. See *supra* text accompanying note 2.

84. *Sigma-Aldrich* Order, *supra* note 2.

85. Section 1 derives from the Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (1871). Section 5 derives from the Act of July 25, 1866, ch. 242, § 9, 14 Stat. 241 (1868). See 1 REVISION OF THE UNITED STATES STATUTES AS DRAFTED BY THE COMMISSIONERS APPOINTED FOR THAT PURPOSE 19, 21 (1871) [hereinafter REVISION OF THE U.S. STATUTES].

86. An Act to Revise and Consolidate the Statutes of the United States, ch. 1, §§ 1, 5, 18 Stat. 1, 2 (1873).

87. Act of July 30, 1947, ch. 388, § 1, 61 Stat. 633, 633-34 (codified as amended at 1 U.S.C. § 1 (2000)).

88. 1 U.S.C. § 5 (2000). The fact that section 5 does not provide that the term "partnership" includes successors indicates a fatal flaw in the ALJ's highly textual argument. The ALJ was, of course,

The Rules of Construction in their modern form were drafted by a three-person commission appointed by Congress before 1873.⁸⁹ Section 1, originally known as the Dictionary Act, was likely copied from a Massachusetts statute and proposed as necessary to avoid the inconvenience of repeating definitions in each act of federal legislation and to avoid the vacuum of interpretive authority where such definitions are lacking.⁹⁰ The House and Senate bills, introduced in 1870, provided in relevant part: “[I]n all acts hereafter passed . . . the word ‘person’ may extend and be applied to bodies politic and corporate.”⁹¹ In the revised statutes of 1873, it was amended to read in relevant part: “[T]he word ‘person’ may extend and be applied to partnerships and corporations”⁹² The change was justified as necessary to make clear that the term “person” when used in federal legislation includes partnerships but does not normally encompass U.S. states or foreign governments.⁹³

The danger of enacting a general definition to apply to all future legislation is, of course, that the drafter of any given act may be unaware of the definition. At least some legislators must have recognized this danger, because in describing the Dictionary Act, they qualified the definition of “person” so it would *not* apply if “the context shows that such words were intended to be used in a more limited sense.”⁹⁴ For unknown reasons, this important qualification was never explicitly incorporated into the Dictionary Act. Congress may have thought the qualification implicit in the Act, or perhaps the Act was never amended because it points out the folly of the definition in the first place. If the context of a legislative act can resolve the question of whether the term “person” is intended to include corporations, then the definition is superfluous. If the context cannot resolve it, then there is a great risk that the default rule, where “person” includes corporations, might be interpreted to apply regardless of what the legislature intended in using that term. The purpose of section 5 is more obscure. The drafting commission never explained why it included this provision in the rules of construction, except to point to its origination in an 1866 law granting lands for railroad and telegraph construction.⁹⁵ The congressional committee discussions are devoid

fully aware of this weakness in his argument, which explains why he ignored the fact that the asset purchaser was a partnership in his order.

89. See 2 CONG. REC. 646 (1874) (statement of Mr. Poland).

90. See CONG. GLOBE, 41st Cong., 2d Sess. 2465-66 (1870) (statements of Mr. Poland, Mr. Hoar and Mr. Schenck); CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871) (statement of Mr. Trumbull).

91. H.R. 1351, 41st Cong. § 2 (2d Sess. 1870).

92. An Act to Revise and Consolidate the Statutes of the United States, ch. 1, § 1 (1873), 18 Stat. 1, 1 (1878).

93. See 1 REVISION OF THE U.S. STATUTES, *supra* note 85, at 19 (1872). The revision was justified as follows: “The reasons for the . . . change are that partnerships ought to be included; and that if the phrase ‘bodies politic’ is precisely equivalent to ‘corporations,’ it is redundant; but if, on the contrary, ‘body politic’ is somewhat broader, and should be understood to include a government, such as a State, while ‘corporation’ should be confined to an association of natural persons on whom government has conferred continuous succession, then the provision goes further than is convenient. It requires the draughtsman [sic], in the majority of cases of employing the word ‘person,’ to take care that States, Territories, foreign governments, &c., appear to be excluded.” *Id.*

94. CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871) (statement of Mr. Trumbull).

95. Act of July 25, 1866, ch. 242, § 9, 14 Stat. 239, 241 (1868); see 1 REVISION OF THE U.S. STATUTES, *supra* note 85, at 21 (1872).

of any reference to the rationale for adopting the specific rules of construction enacted.

Why the Commission would propose making the definitions universal, and why Congress would accept the proposal, are difficult questions to answer. Definitions make perfect sense when applied throughout a single act of Congress, when the act has been considered as a whole and the consequences of the definitions are present in the legislators' minds. But for universal definitions to apply to all *future* legislation (as the Dictionary Act was intended to do),⁹⁶ Congress must bear these definitions constantly in mind during all legislative activity to avoid unintended consequences. Unfortunately, Congress has paid virtually no heed to the Rules of Construction since their promulgation, making them far more a liability than an asset.

The concern that Congress might use the terms "company" and "association" without considering section 5 is borne out by the striking absence of references to it in the modern U.S. Code. The only cross-references to section 5 in contemporary federal legislation are three scattered sections of the code relating to the armed services.⁹⁷ Similarly, federal courts have relied on section 5 and its earlier incarnations in only a handful of cases since its enactment, all of them relatively recent.⁹⁸ That section 5 has been utterly ignored for over 130 years is unsurprising in light of its legislative history. The commission appointed by Congress to revise the assorted federal statutes added the Rules of Construction in the most tentative possible way. They were known to be flawed and incomplete and were intentionally not enacted at the time the revised statutes were drafted. According to the Commission's own explanation:

[The Rules of Construction are] a species of preface to the Revised Statutes, and as the preface cannot, ordinarily, be written till the book is finished, so the title "General Provisions" cannot be satisfactorily framed until the structure of the entire revision is determined. . . . [W]hen all the questions of method and expression have arisen and been decided . . . a much more definite and useful statement of the structure and proper mode of using the new system of legislation can be framed than is now practicable.

Such a description of the arrangement adopted, and of the rules of construction anticipated, must grow up with the progress of the work itself. Some provision framework must be adopted at the outset; it must be tried; its defects discovered and remedied; and thus the progress of the work develops a system for the work, which in turn promotes and controls the main undertaking.

*Hence the provisions of this Title are peculiarly provisional and experimental. They are put forward as questions, not as decisions.*⁹⁹

In spite of these cautionary words, the defects (among them, those described above) in the Rules of Construction were never remedied. Indeed, section 5 survives in precisely the same form in which it was adopted in the 1873 Revised Statutes. The provisions of the Rules of Construction remain

96. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, 431 (1871) ("*And be it further enacted, That in all acts hereafter passed . . .*").

97. 10 U.S.C. § 101(g) (2000); 32 U.S.C. § 101 (2000); 37 U.S.C. § 101 (2000).

98. See sources cited *infra* note 102.

99. 1 REVISION OF THE U.S. STATUTES, *supra* note 85, at 1 (emphasis added).

“questions” rather than “decisions.” Congress has simply neglected to answer the questions definitively or to allow the rules to “grow up with” the progress of legislation, resulting in their current moribund status. The likely reality is that Congress has used, and continues to use, the word “company” (or more rarely, “association”) in legislation without considering section 5 and the consequences of using that specific term. What is more surprising is that federal courts ever began to invoke section 5, giving it a vigor that it lacked even in the era of its enactment.

The antiquity of the Rules of Construction is reflected, and the well-justified insecurity of its drafters is borne out, in their terms. For example, if applied literally, section 5 is unconstitutional, as it would allow the imposition of criminal liability on a person (an asset purchaser) innocent of any violation of the law.¹⁰⁰ Of course, section 5 could be reinterpreted to apply only in civil cases, but this would contradict the approach of the international trade regulatory enforcement agencies, which have stated that successor liability applies in criminal as well as civil enforcement actions.

Section 5 requires further reinterpretation to avoid absurdity. Section 5 was enacted to apply successor liability in narrow circumstances—where Congress uses the term “company” or “association” in a statute and the reference pertains to a corporation only. There is no sound rationale for applying laws to successors of a corporation and not to those of a limited liability company or partnership. Much less logical is the notion of applying successor liability when Congress uses the term “company” to refer to a corporation but not the term “corporation” itself.

In spite of the many sound reasons for treating title I, section 5 as a dead letter, in recent practice, section 5 has been occasionally invoked in CERCLA cases. CERCLA regulates polluting activities of “any person,” which the Act defines to include, *inter alia*, a corporation, association, partnership, or “commercial entity.”¹⁰¹ Courts imposing successor liability under CERCLA typically reference the term “association” and hold that Congress intended corporate successors to be liable under CERCLA via section 5’s inclusion of “successors and assigns” in the definition of “association.”¹⁰² Several circuit courts have repeated this analysis. While Congress may well have intended successor liability to apply, it did not so state or imply in CERCLA. The common judicial reasoning with respect to section 5 is unconvincing, particularly in light of the fact that it remains a dead letter to Congress as well as the courts in nearly every other context.

Two additional observations are appropriate here. First, the courts relying on section 5 violate an important intrinsic canon of statutory construction in reading that section into CERCLA: Congress should not be presumed to use two different terms in the same statute to denote the same

100. See discussion *infra* Part VI.C.

101. See 42 U.S.C. § 9601(21) (2000).

102. See, e.g., *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 518-19 (2d Cir. 1996); *The Anspec Co. v. Johnson Controls*, 922 F.2d 1240, 1247 (6th Cir. 1991); *City Envtl., Inc. v. U.S. Chem. Co.*, 814 F. Supp. 624, 633 (E.D. Mich. 1993); see also *Washington v. United States*, 930 F. Supp. 474, 477 (W.D. Wash. 1996) (noting that the Third, Sixth, Eighth and Ninth Circuits agree on statutory basis for liability of corporate successors under CERCLA).

meaning if an alternative reading is reasonably possible.¹⁰³ Here, the CERCLA definition uses both the term “corporation” and the term “association,” leading to a strong presumption that Congress did *not* use the term “association” to refer to a corporation (a precondition for the application of title I, section 5). This presumption is strongly supported by the fact that Congress put the word “association” directly adjacent to the word “corporation” in CERCLA’s definition of “person.”

Second, if the courts’ reading is correct, then Congress intended CERCLA to apply to successors of “corporations,” but not to successors of other business entities, including sole proprietorships, partnerships, and limited liability companies. There is no sensible policy justification, however, for applying successor liability to corporations and not to these other entities under CERCLA. It is difficult to accept that Congress intended such a result. If Congress did intend for CERCLA to encompass a theory of successor liability, it would presumably have used more all-encompassing terms than those in section 5.

The continuing validity of these cases is now subject to some doubt, at least with respect to statutes other than CERCLA. In a recent case involving the Coal Industry Retiree Health Benefit Act (“Coal Act”),¹⁰⁴ a majority of the Supreme Court declined to apply a theory of successor liability where Congress indicated no intent to allow such a theory.¹⁰⁵ A dissenting minority opinion, authored by Justice Stevens, stretched even further than the Sixth Circuit in trying to import section 5 into an unrelated statute. In the case, Justice Stevens noted that the Coal Act defined a “signatory operator” as “a person which is or was a signatory to a coal wage agreement.” From here, he reasoned that a “person” should be defined under title I, section 1 to include “corporations, companies, associations,” etc.; under section 5, the latter two terms include “successors” when the terms “companies” or “associations” refer to corporations.¹⁰⁶ The Court’s majority opinion, which rejected Justice Stevens’s reasoning and effectively reversed this portion of *Anspec*, has now likely put to rest any possibility of relying on section 5 to import concepts of successor liability into a statute in which Congress has manifested no clear intent to impose such liability.

103. See 2A NORMAL J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46:06 (6th ed. 2005) (“[T]he courts do not construe different terms within a statute to embody the same meaning.”).

104. Coal Industry Retiree Health Benefit Act, Pub. L. 102-486, §§ 19141-43, 106 Stat. 2776, 3037-56 (1992) (codified at 26 U.S.C. §§ 9701-9722 (2000)).

105. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438 (2002).

106. *Id.* at 469-70 (Stevens, J., dissenting). Justice Stevens’s minority opinion shares some of the debilities of the Sixth Circuit’s reasoning in *Anspec*. Again, the Rules of Construction are justifiably a dead letter and, in any case, the fact that title I, section 1 refers to “corporations” and to “companies” and “associations” (again, adjacently) leads to the conclusion that Congress did not intend either the term “companies” or “associations” to refer to corporations, as required by section 5, under basic principles of statutory construction.

IV. ATTEMPTS TO IMPOSE SUCCESSOR LIABILITY IN INTERNATIONAL TRADE REGULATION

Until recently, successor liability played little role in international trade regulation. As will be discussed later,¹⁰⁷ the statutes authorizing international trade regulation do not speak to successorship issues, and the enforcement agencies apparently were formerly content to pursue fines against the violators themselves rather than seeking to penalize innocent parties. This is no longer the case. The four main enforcement agencies—BIS, OFAC, DDTC, and CBP—now insist that the equitable doctrine of successor liability applies to violations of the statutes and regulations they administer. This part will briefly describe each of the agencies and recount their attempts to impose successor liability for violations of international trade statutes and regulations.

A. *The Bureau of Industry and Security*

Within the U.S. Department of Commerce resides the Bureau of Industry and Security (BIS), formerly known as the Bureau of Export Administration (BXA), whose mission includes the promulgation of regulations and enforcement of sanctions for the unlicensed exportation of certain “dual-use” goods, software, and technology to certain listed countries and persons. The regulations, known as the Export Administration Regulations (EAR), are intended to ensure that goods, software, and technology with both civilian and military (or para-military) uses do not fall into the hands of those having a high likelihood of abusing them in a manner that would be prejudicial to U.S. national security interests.

BIS began the practice of charging asset purchasers with violations of the EAR committed by the sellers only five years ago. Until 2002, these cases had settled before coming to an ALJ, much less a court. BIS fired the opening volley in the public battle for successor liability when it issued a letter charging Sigma-Aldrich Corporation and several of its subsidiaries with violations of the EAR. In that case, BIS charged the respondents with repeatedly exporting small quantities of natural toxins to medical research institutes in Europe and Japan without obtaining the necessary export licenses. Most of the charged violations had been committed by an unrelated company, Research Biochemicals, Inc. (RBI) whose assets Sigma-Aldrich ultimately acquired. Sigma-Aldrich formed a new subsidiary to buy RBI’s assets, SARBI, and then continued RBI’s domestic and international biochemicals business, having replaced the company’s officers and some employees with new ones. However, Sigma-Aldrich’s due diligence, conducted in the course of the acquisition, had not uncovered the fact that RBI had committed numerous violations of the EAR by failing to obtain export licenses from BIS. RBI, a small company with no sophisticated international trade counsel, had apparently neglected to obtain competent export regulation advice. Complicating the case for RBI was the fact that some of the exported products

107. See discussion *infra* Part V.A.

(tetrodotoxin citrate) were not listed literally on the EAR's list of controlled items (the Commerce Control List, or CCL).

Following the asset acquisition and the continuation of most of RBI's business, Sigma-Aldrich's personnel became aware that some of SARBI's exports should have been licensed but were not. SARBI promptly began applying for export licenses for its future toxin exports. BIS granted the license requests, but eventually began investigating SARBI's past exports and discovered the unlicensed violations. SARBI's officers admitted liability for some of the unlicensed exports that occurred after the asset acquisition, but declined to assume responsibility for RBI's pre-acquisition violations of the EAR. BIS responded by seeking sanctions against Sigma-Aldrich (unaccountably) and SARBI, but, remarkably, not against the violator itself, RBI, nor against any of RBI's former officers or employees, even though RBI still continued to exist. BIS's rationale for this choice of respondents is telling: it claimed (without evidence) that RBI had no assets, so that a penalty against it could not be effective. BIS was seeking to obtain money from the deepest pocket rather than to hold the actual violator responsible for its violations.

At the hearing before an ALJ, Sigma-Aldrich objected to the charges, noting that it had not been involved in the pre-acquisition violations in any way. In response, BIS argued that successor liability should be read into the relevant statutes and regulations. It also claimed that Sigma-Aldrich should be held liable because it had failed to discover the violations during its pre-acquisition due diligence. Although asset purchasers have no such obligation under international trade laws and regulations, BIS apparently believed that the ALJ should interpret the law to convert asset purchasers into a proxy for BIS, discovering violations of the seller or suffering in their stead for not doing so. In October 2002, the ALJ signaled his agreement with BIS by publishing the first order stating that an innocent asset purchaser may be penalized for export violations committed by an unrelated seller.¹⁰⁸ As mentioned previously, the ALJ's order relied on title I, sections 1 and 5 of the U.S. Code to define persons subject to liability under IEEPA to include successors.¹⁰⁹

Although the ALJ's order had no force of law, the defeat took the wind out of Sigma-Aldrich's sails, leading it to pay a settlement of \$1.76 million. The Department of Commerce quickly declared a victory for the principle that a company "will be held accountable for violations of U.S. export control laws committed by companies that they acquire."¹¹⁰ Meanwhile, on June 11, 2002, the Director of BIS's Office of Export Enforcement (OEE) announced that an asset purchaser assumes both the civil and criminal liability of the seller for the seller's noncompliance with export regulations.¹¹¹ He further stated that it was the position of the BIS and the Department of Justice that private parties

108. *Sigma-Aldrich Order*, *supra* note 2.

109. The cogency *vel non* of this interpretation of the statutory Rules of Construction is discussed *supra* Part III.B.2.

110. Press Release, Bureau of Indus. & Sec., Sigma-Aldrich Pays \$1.76 Million Penalty To Settle Charges of Illegal Exports of Biological Toxins (Nov. 4, 2002) (internal quotation marks omitted), available at <http://www.bis.doc.gov/press/2002/SigmaAldrichPays4Acquisition.html> [hereinafter BIS Press Release].

111. Trade Compliance Panel Discussion, *supra* note 6.

could not contract around such liability.¹¹² In other words, even if the asset purchase agreement explicitly allocates liability to the asset seller for the seller's own regulatory violations, BIS will hold the purchaser liable for the seller's violations.

More recently, BIS has brought charges against and obtained settlements from numerous companies, some of which had purchased an ownership interest in the offending exporter, and others of which had merely purchased the assets of the exporter.¹¹³ In its press announcements, BIS officials have sometimes touted the risks of buying new assets or subsidiaries without conducting due diligence.¹¹⁴ BIS's apparent confidence arises from the dearth of judicial decisions dealing with successor liability in an international trade context. No Article III court has ever held that the purchaser of business assets of an unrelated company inherits liability for the seller's prior violations of the relevant statutes or the EAR. The issue to this day has not been litigated.

The reason for the dearth of litigation on successor liability in the international trade context is common to most regulatory enforcement regimes. It is not that persons accused of violating international trade regulations believe the enforcement agency has an airtight case against them as a matter of law; the case law in this area is unclear at best and unfavorable to the application of successor liability at worst. Nor yet is it a sign of repentance by guilt-wracked violators. The infrequency of litigation is instead a symptom of the peculiar configuration of administrative regulation in the federal government. The agencies often require a full trial before an ALJ who is employed by and whose decisions are subservient to the head of the relevant department before a charged party can appeal to an impartial court. This proceeding is often so time-consuming and expensive that the costs of representation surpass the amount of the proposed penalty. Moreover, any attempt to vindicate one's rights against the agency is likely to create rancor and, in light of the ongoing nature of most regulation, could lead to subsequent negative attention by the agency in retribution. The regulatory

112. *Id.*

113. *See, e.g., Sigma-Aldrich Order, supra* note 2; Press Release, Bureau of Indus. & Sec., Rockwell Automation Settles Charges of Unlicensed Exports (Mar. 14, 2005), *available at* <http://www.bis.doc.gov/News/2005/Rockwell.htm>; Press Release, Bureau of Indus. & Sec., Saint-Gobain Settles Charges of Unlicensed Exports (June 25, 2004), *available at* http://www.bis.doc.gov/news/2004/StGobainPerf_June04.htm; Press Release, Bureau of Indus. & Sec., Symmetricom, Inc. Settles Charges of Unlicensed Exports (Oct. 4, 2004), *available at* <http://www.bis.doc.gov/news/2004/SymmetricomOct04.htm>. In addition, in some cases BIS has obtained settlements from successor corporations without announcing that fact. In September 2003, for example, BIS obtained a settlement from Invitrogen, Inc., based on allegations that a company acquired by Invitrogen, Molecular Probes, Inc., had violated anti-boycott regulations prior to the acquisition. The BIS announcement does not, however, mention the fact that Invitrogen did not commit the violations for which it paid penalties. *See* Press Release, Bureau of Indus. & Sec., Maryland Company Settles Charges of Antiboycott Regulations (Apr. 14, 2004), *available at* http://www.bis.doc.gov/News/2004/MDCCompanySettles4_14.htm [hereinafter Symmetricom Press Release]. In addition, BIS has very recently obtained settlements of charges in another non-merger case based on a theory of successor liability. In that case, a South African company, ProChem Proprietary Ltd., agreed to pay a civil fine of \$1.54 million to settle charges of export controls violations by a different company whose assets it had acquired several years before. *See South African Firm Pays \$1.54 Million Fine Due to BIS Claim of Successor Liability*, EXPORT PRACTITIONER, Nov. 2005. In each of the cases described in this footnote, BIS has not published detailed descriptions of their facts.

114. *See, e.g., Symmetricom Press Release, supra* note 113.

deck is heavily stacked in favor of settling agency charges even when the charges may be completely groundless. As a result, very few companies charged with violations of international trade regulations dare to litigate even before an agency ALJ, much less an Article III court. This pattern applies not only to BIS charges, but to charges by all of the agencies discussed here.

B. *The Office of Foreign Assets Control*

From time to time, the United States imposes economic and trade sanctions against foreign countries and their nationals. These sanctions typically involve prohibitions on the importation or exportation of goods, services, and technology from or to the sanctioned country. Sanctions may also involve the freezing or blocking of financial assets and are accordingly administered and enforced by the Department of the Treasury's Office of Foreign Assets Control (OFAC). At BIS's June 2002 announcement that it would apply principles of successor liability, OFAC followed suit.¹¹⁵ Yet, because OFAC's operations are opaque, it is difficult to determine whether OFAC has ever in fact attempted to impose successor liability for a violation of economic and trade sanctions. To date, it has never done so in a public report or press release.

BIS, however, has recently applied successor liability with respect to violations of economic and trade sanctions. In October 2004, BIS charged GE Ultrasound and Primary Care Diagnostics LLC with violating trade sanctions against Iran. GE Ultrasound had "acquired a [foreign] company," Lunar Europe N.V., which had allegedly violated the economic and trade sanctions regulations by shipping a product defined as "U.S. origin" without prior OFAC authorization to Iran. "Under the principles of successor liability," BIS asserted in a press release, "corporations may be held liable for violations of export control laws committed by the businesses that they acquire."¹¹⁶ GE Ultrasound ultimately paid \$32,000 for acts committed by a foreign company at a time when the company was unrelated to GE Ultrasound.

C. *The Directorate of Defense Trade Controls*

The Directorate of Defense Trade Controls, formerly the Office of Defense Trade Controls, is a State Department agency that administers and enforces regulations concerning the manufacture of and international trade in arms and munitions. Unlike BIS, DDTC's jurisdiction applies to goods, services, and technology specifically designed or modified for military use. Unlike OFAC, DDTC does not enforce general embargoes and blocking orders; instead, its licensing jurisdiction extends to all items on the U.S. Munitions List exported to any destination.¹¹⁷

115. See Trade Compliance Panel Discussion, *supra* note 6.

116. Press Release, Bureau of Indus. & Sec., GE Ultrasound and Primary Care Diagnostics, LLC Settles Charges of Unlicensed Exports (Oct. 18, 2004), available at <http://www.bis.doc.gov/news/2004/GEUltrasound.htm>.

117. See 22 C.F.R. pt. 121 (2004).

Like BIS and OFAC, however, DDTC has recently and profitably punished innocent asset purchasers for violations of the arms export controls committed by asset sellers. On March 4, 2003, the Boeing Company paid \$32 million to settle charges brought by the DDTC based on a theory of successor liability. Hughes Space and Communications (HSC), while a subsidiary of Hughes Electronics Corporation, had provided several Chinese nationals with controlled technical data on the failed launches of two commercial communications satellites mounted on Chinese-origin rockets. Four years later, in October 2000, Hughes Electronics sold HSC to Boeing, while reserving liability for any pre-acquisition export violations. Notwithstanding this reservation, the DDTC sought civil penalties from Boeing as well as Hughes Electronics and HSC. Ultimately, Boeing agreed to assume joint responsibility for a \$20 million fine plus a \$12 million suspended penalty.

Soon thereafter, the DDTC Director of Compliance told a defense export industry group that DDTC has “consistently applied the doctrine of successor liability” in seeking defendants for alleged offenses under the Arms Export Control Act in order to deter fraudulent restructuring designed to escape liability for such offenses.¹¹⁸ The Director listed the traditional state law exemptions to the rule of nonliability for successors as the basis for the assertion that companies acquiring stock or assets will rarely escape successor liability for the violations of the seller.

In addition, because the ITAR requires registered munitions manufacturers, exporters, and importers to notify DDTC of any change in ownership, DDTC has now instituted an informal procedure of requiring asset and stock purchasers to conduct an investigation of the acquired company’s trade practices and to report any discovered violations to DDTC within ninety days of the acquisition date.¹¹⁹

D. *The Bureau of Customs and Border Protection*

The Bureau of Customs and Border Protection (CBP), formerly the U.S. Customs Service, administers and enforces a variety of import regulations, the most important of which are promulgated under the 1930 Tariff Act.¹²⁰ In only two published cases has a court accepted a theory of successor liability under the 1930 Tariff Act. In the first, *United States v. Shields Rubber Corp.*,¹²¹ the defendant and several individuals were charged by the CBP with criminal violations of the Customs Regulations for removing country-of-origin markings from imported rubber hoses in violation of the federal law.¹²² Shields Rubber did not remove any such markings; the violations were committed by a company that subsequently merged with Shields Rubber.

118. Trimble, Workshop: “Mergers, Acquisitions, and Divestitures,” *supra* note 6.

119. See *State Asks Firms To Assess ITAR Compliance of Acquired Companies; Report Violations*, EXPORT PRACTITIONER, July 2005, at 7. The author thanks Daniel Fisher-Owens for calling this practice to his attention.

120. Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. §§ 1202-1681b (2000)).

121. 732 F. Supp. 569 (W.D. Pa. 1989).

122. Specifically, the marking provisions created by section 304 of the Tariff Act of 1930, 19 U.S.C. § 1304 (2000).

Unfortunately, the *Shields Rubber* case has no precedential value for successor liability cases because it involved a merger, which, as discussed previously,¹²³ transmits the liabilities of the merging companies into the surviving company under the laws of every state.¹²⁴ There was, therefore, no call for the district court to consider whether an asset purchaser could be held liable for the import violations of an asset seller.

A few years after *Shields Rubber*, the Court of International Trade (CIT) confronted a true question of successor liability for penalties sought pursuant to customs laws. In *United States v. Ataka America, Inc.*, the defendant acquired the business assets of an importer that had underpaid antidumping duties upon the importation of certain shipments of wire rope.¹²⁵ After receiving a demand for the unpaid duties from CBP, the importer sold its business assets to a subsidiary. Ataka USA, Inc. then acquired that subsidiary by stock sale. Ataka USA in turn merged into Itochu International, Inc. In all cases, the various purchasers of the assets and stock were aware of the outstanding charges by CBP. Meanwhile, the government did not allege that the original importer ever ceased doing business, and the court recognized that the importer did retain some assets.¹²⁶

The government did not, however, seek the duties from the importer, but instead pursued the importer's surety—the most removed related party—Itochu International. The defendant, for reasons not clear from the opinion (but presumably based on liability assumption provisions of the asset and stock purchase agreements), admitted liability for the debts of the stock purchaser (Ataka USA, Inc.).¹²⁷ It denied liability, however, for the debts of the importer. The CIT accepted without comment that a federal common law of successor liability applied to the question of Itochu International's liability for unpaid duties. From there, it briefly evaluated the exceptions to the general rule of successor nonliability, focusing on whether Itochu International's indirect acquisition of the importer's assets was either a de facto merger or whether Itochu International was a mere continuation of the importer.¹²⁸ The court rejected CBP's contention that Ataka USA had inherited liability for the importer's debt by acquiring the stock of the importer's subsidiary because the conditions for piercing the corporate veil had not been met.¹²⁹

Turning to the conditions of successor liability under federal common law, the court found that CBP had failed to plead sufficient facts to prove de facto merger or "mere continuation" theories. In spite of this procedural defect, the court permitted the government to proceed to discovery to determine whether such facts could be proved.¹³⁰ The court never revealed the basis in the 1930 Tariff Act or any public policy for allowing CBP to proceed on a theory of successor liability. Because the case apparently settled before

123. See discussion *supra* Part III.A.1.

124. See *Shields Rubber*, 732 F. Supp. at 571-72 (citing Pennsylvania law, the current version of which is 15 PA. STAT. ANN. § 1929 (West 2005)).

125. 826 F. Supp. 495 (Ct. Int'l Trade 1993).

126. *Id.* at 497.

127. *Id.*

128. *Id.* at 498.

129. *Id.* at 499.

130. *Id.* at 500.

appeal to the U.S. Court of Appeals for the Federal Circuit, *Ataka America* stands as precedent upon which CBP may rely in the future to attempt to assert a theory of successor liability for unpaid import duties, including antidumping or countervailing duties. The CIT did not, however, consider or approve applying the theory in cases in which CBP seeks civil or criminal penalties against an asset purchaser.

Only in the customs arena, then, has a court ruled that an asset purchaser may be liable for the trade law violations of the seller, and in that case for unpaid duties only, not for penalties. Because this issue went uncontested at trial, there remains no ruling on the subject of penalties. Nonetheless, the federal enforcement agencies have not always proved squeamish about ignoring the legal niceties, and CBP may cite *Ataka America* as a precedent to support its contention that asset purchasers may acquire liability for civil or criminal penalties attributable to the conduct of the asset seller.¹³¹

V. DOES SUCCESSOR LIABILITY HAVE A PLACE IN INTERNATIONAL TRADE LAW?

What has emerged from the preceding discussion is that federal courts generally apply principles of successor liability only for remedial purposes (e.g., to ensure the remediation of pollution or to compensate employees deprived of contractual rights by a corporate reorganization), and even then they have generally declined to do so unless the asset purchaser was aware of the acquired liability. The discussion has also made clear that each of the administrative agencies charged with enforcing the international trade laws has claimed that it may exercise its enforcement powers against asset purchasers for violations committed by the sellers, and in several cases agencies have made good on their threat by exacting settlements from regulated companies. Unlike the federal courts, these agencies have not, in word or deed, limited successor liability to remedial provisions of the relevant statutes nor to cases in which the purchaser was aware of the liability. On the contrary, they have used the possibility of unforeseen liabilities to co-opt asset purchasers into assuming the role of proxy for the enforcement agencies, arguing that asset purchasers should take upon themselves the burden of identifying and disclosing the asset seller's violations of international trade statutes and regulations.

The first step in judging whether such impositions are legally permissible is to examine whether they are authorized by statute. The agencies have never clearly alleged a basis for this enforcement authority in the statutes they administer, but to the extent that this question has arisen, they have instead alluded to the discredited Rules of Construction theory.¹³² In any case, the most obvious place to begin is the language of the statutes themselves. Assuming the absence of a constitutional objection,¹³³ Congress certainly has the power to shift liability from a violator of a statute to a nonviolating person.

131. Trade Compliance Panel Discussion, *supra* note 6.

132. See *supra* discussion in Part III.B.2.

133. See *infra* discussion in Part VI.C.

The basic rule of statutory construction is that the plain meaning of the terms of the statute ordinarily governs the interpretation of those terms.¹³⁴ Part V.A will accordingly analyze whether the plain meaning of the various international trade regulatory statutes may authorize successor liability. To the extent that no clear authorization for successor liability appears in the statutes, the agencies can succeed in imposing such sanctions under existing judicial precedents only if they are remedial in the sense of compensating some roughly measurable loss.¹³⁵ Part V.B will consider whether the statutes' respective legislative histories and historical contexts support reading successor liability into them in order to enforce the public policies underlying the statutes.

A. *Statutory Bases for Successor Liability in Federal Trade Law*

The four main international trade statutes were mentioned earlier: the 1917 Trading with the Enemy Act (TWEA),¹³⁶ the 1930 Tariff Act,¹³⁷ the 1976 Arms Export Control Act (AECA),¹³⁸ and the 1977 International Emergency Economic Powers Act (IEEPA).¹³⁹ The 1979 Export Administration Act (1979 EAA)¹⁴⁰ is technically no longer relevant, as its authority expired in 2001 and has not been renewed by Congress.¹⁴¹

The great majority of prohibitions and obligations imposed by these statutes, as well as the civil and criminal penalties provisions of the statutes, apply either to a "person" who engages in the proscribed behavior¹⁴² or to "whoever" engages in the proscribed behavior.¹⁴³ While "whoever" is nowhere defined, the term "person" is variously defined by the statutes as including legal as well as natural persons. None of the main penalty or enforcement provisions of the four statutes explicitly or implicitly defines "person" to include asset purchasers or other successors,¹⁴⁴ creating a

134. See *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

135. See *supra* discussion in Part III.B.1.

136. Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917).

137. Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930) (codified as amended at 19 U.S.C. §§ 1202-1681b (2000)).

138. Arms Export Control Act, Pub. L. No. 90-629, § 38, 82 Stat. 1320, 1326 (1968) (codified as amended at 22 U.S.C. §§ 2751-2799aa-2 (2000)). The AECA succeeded a 1940 law that authorized the President to prohibit or curtail exports of arms, munitions and related items. See Act of July 2, 1940, § 6, 54 Stat. 712, 714 (1941).

139. International Emergency Economic Powers Act, Pub. L. No. 95-223, Tit. II, § 202, 91 Stat. 1625, 1626 (1977) (codified as amended at 50 U.S.C. § 1701-1707 (2000)).

140. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1981) (codified as amended at 50 U.S.C. app. §§ 2401-2420 (2000)).

141. The EAA has periodically lapsed and been reauthorized by Congress, which has also occasionally extended its authority for one-year intervals since 1990. The 1979 EAA lapsed most recently on August 20, 2001 and has not been reenacted since then, leaving a vacuum of authority that the Executive Branch has used IEEPA to fill.

142. See, e.g., 12 U.S.C. § 95a(1)(A)-(B) (2000); 19 U.S.C. §§ 1592, 1593a, 1595a (2000); 22 U.S.C. §§ 2778(c), 2780(b)(1) (2000); 50 U.S.C. § 1705(a) (2000); 50 U.S.C. app. § 5(b)(1) (2000); 50 U.S.C. app. §§ 2404(a)(4)(A), 2407(a)(1),(5), 2410(b)(2) (2000).

143. E.g., 50 U.S.C. § 1705(b) (2000); 50 U.S.C. app. §§ 16(a), 2410(a), (b)(1) (2000).

144. See, e.g., 12 U.S.C. § 95a(3) (2000) (defining "person" to mean "an individual, partnership, association, or corporation"); 19 U.S.C. § 1401(d) (2000) (defining "person" as including "partnerships, associations, and corporations"); 22 U.S.C. § 2780(l)(3)(B) (2000) (defining "United

presumption that Congress intended that the penalties should be imposed on the same person who violated a provision of the statute.

There are, however, a few narrow provisions in which international trade regulatory legislation could be read to authorize successor liability. Most prominently, the missile trade controls of the AECA, requiring a license from the State Department for the importation and exportation of missile equipment, define a "person" subject to the licensing requirements as including "a corporation, business association, partnership, society, trust, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise, and any successor of any such entity."¹⁴⁵ There are two possible interpretations of this ambiguously worded clause. Congress may have intended that the term "successor" apply to "any governmental entity" only, or it may have intended that the term reach back as far as "a corporation." If Congress intended the former, the provision is very narrow, as it applies only to the government (which cannot, in any case, be subjected to a penalty). If Congress intended the latter, then it has authorized sanctions against successors for violations of the missile controls only.

The latter interpretation seems improbable if for no other reason than that Congress did not provide for successor liability for any of the other arms trade controls. It is difficult to postulate a logical explanation for why Congress would authorize successor liability in the missile controls but not in the biological or chemical nonproliferation controls. The most reasonable deduction seems to be that the term "successor" is intended to apply only to "any governmental entity operating as a business enterprise."

More to the point, the civil punishment provision of section 2778 of the AECA reads in relevant part as follows:

(e) Enforcement powers of President

In carrying out functions under this section with respect to the export of defense articles and defense services . . . as prescribed in regulations issued under this section, the Secretary of State may assess civil penalties for violations of this chapter and regulations prescribed thereunder and further may commence a civil action to recover such penalties . . . Notwithstanding section 11(c) of the Export Administration Act of 1979, the civil penalty for each violation involving controls imposed on the export of defense articles and defense services under this section may not exceed \$500,000.¹⁴⁶

The authorization of the Secretary of State to assess civil penalties "for violations" of the AECA strongly implies that the penalties are to be levied against violators. It is possible, however, to read this paragraph as conferring a broad discretionary power on the Secretary of State to punish violations with penalties, without regard to the actual participation of the person subjected to

States person" to include any organization having its principal place of business in the United States or organized under the laws of a U.S. state); 50 U.S.C. app. § 2 (2000) (defining "person" as "an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic").

145. 22 U.S.C. § 2797c(8)(A) (2000).

146. 22 U.S.C. § 2778(e) (2000) (emphasis added); see also *id.* § 2780(j) (same silence on definition of violator).

punishment, so long as the violation is causally connected to the imposition of punishment.¹⁴⁷

For reasons discussed later in this Article, it cannot be conceded that Congress intended to vest the DDTC with discretion to impose liability on asset purchasers where the seller violated the AECA or its implementing regulations, the International Traffic in Arms Regulations (ITAR). Nonetheless, assuming again *arguendo* that this matter is committed by statute to DDTC's discretion, DDTC has not exercised it in the ITAR. Part 122 of the ITAR imposes registration requirements on "[a]ny person" who engages in the U.S. manufacture or exportation of defense articles,¹⁴⁸ and Part 123 also requires "[a]ny person who intends to export or to import temporarily a defense article" to obtain a license.¹⁴⁹ The violations provisions of the ITAR merely state either that "no person may"¹⁵⁰ engage in prohibited conduct or, in passive wording, that "[i]t is unlawful" to export, import, or conspire to export or import, defense articles or controlled technical data from or to the United States outside the parameters of a license granted by the State Department.¹⁵¹ The penalties sections, in contrast, are actively worded, but apply only to "[a]ny person who willfully" violates the provisions of the ITAR.¹⁵² Because the ITAR currently defines a "person" as "a natural person as well as a corporation, business association, partnership, society, trust, or any other entity, organization, or group, including governmental entities,"¹⁵³ the ITAR contains no clear authorization to impose liability against successors.

In a similar vein, IEEPA delegates to the President the power to issue regulations "as may be necessary" to exercise authority under IEEPA,¹⁵⁴ which could be read to permit BIS to define offenses to include the acquisition of the assets of a violator of IEEPA or its implementing regulations (the EAR). But IEEPA also strongly implies in several provisions that a successor may not be held liable for violations committed by its predecessor. Penalties are clearly limited to "persons" who themselves violate regulations or licenses issued pursuant to IEEPA.¹⁵⁵ Moreover, section 1702 of IEEPA explicitly provides that compliance with IEEPA and regulations issued under IEEPA constitutes a full defense against any enforcement action.¹⁵⁶ It follows that an asset purchaser that has itself fully complied with IEEPA and the relevant regulations cannot be held liable for violations committed by the asset seller or any other party, absent an express assumption of liability.

147. For example, assume Person A exports a defense article without a license, but Person A relies for his business on the good opinion of Person B. A literal reading of paragraph (e) would permit the Secretary of State to impose civil penalties on Person B "for violations" of the AECA by Person A if such penalties would deter Person A. The policy problems associated with this reading are addressed in Part V.B.1, *infra*, and more generally (along with associated constitutional problems) in Part VI, *infra*.

148. 22 C.F.R. § 122.1 (2004).

149. *Id.* § 123.1.

150. *Id.* § 127.1(d).

151. *Id.* § 127.1. The ITAR contains other prohibitions as well, all either worded passively (i.e., "[i]t is unlawful") or referring to "any person." *See, e.g., id.* § 127.2(a).

152. *See id.* § 127.3.

153. 22 C.F.R. § 120.14 (2004).

154. 50 U.S.C. § 1704 (2000).

155. *Id.* § 1705.

156. *Id.* § 1702(a)(3).

Only one other provision of an international trade statute arguably authorizes successor liability more or less explicitly. The Iran and Libya Sanctions Act of 1996 (ILSA) provides in section 5(c) for successor liability for violations of the prohibition on investments of \$40 million or greater in Libya as follows:

(c) PERSONS AGAINST WHICH THE SANCTIONS ARE TO BE IMPOSED—The sanctions described in subsections (a) and (b) shall be imposed on—

(1) any person the President determines has carried out the activities described in subsection (a) or (b); and

(2) any person the President determines—

(A) is a successor entity to the person referred to in paragraph (1);

(B) is a parent or subsidiary of the person referred to in paragraph (1) if that parent or subsidiary, with actual knowledge, engaged in the activities referred to in paragraph (1); or

(C) is an affiliate of the person referred to in paragraph (1) if that affiliate, with actual knowledge, engaged in the activities referred to in paragraph (1) and if that affiliate is controlled in fact by the person referred to in paragraph (1).

For purposes of this Act, any person or entity described in this subsection shall be referred to as a 'sanctioned person.'¹⁵⁷

The term "successor entity" was not defined in the statute and was, accordingly, left to the President's discretion.¹⁵⁸ The ILSA was extended in 2001 until 2006.¹⁵⁹ Presumably, Congress intended in ILSA to leave to the Secretary of the Treasury discretion to define the term "successor entity." However, no such definition has been published.

In summary, with the exceptions of the ILSA's investment prohibition and the AECA's missile controls, none of the currently effective international trade regulatory statutes clearly authorize the agencies to impose civil penalties, much less criminal ones, on asset purchasers by virtue of violations of the statutes or regulations committed by the sellers. To the extent that the statutes give the agencies the authority to define offenses and issue regulations imposing sanctions not explicitly authorized in the statute, no agency has exercised its rulemaking authority to define "persons" as including "successors."

B. *Are Civil Penalties in Trade Regulation "Remedial?"*

Given the absence of explicit authorization for imposing general principles of successor liability in the regulation of international trade, the next question is whether successor liability is consistent with judicial practices

157. Iran and Libya Sanctions Act (ILSA) of 1996, Pub. L. No. 104-172, § 5(c), 110 Stat. 1541, 1544 (1996), amended by Sudan Peace Act, 50 U.S.C. § 1701 (2000).

158. Section 14(14)(C) defines a "person" to include "any successor to any entity described in subparagraph (B)" (which includes corporations, business associations, partnerships, etc.).

159. ILSA Extension Act of 2001, Pub. L. No. 107-24, §§ 2(a), 3-5, 115 Stat. 199, 200 (codified at 50 U.S.C.A. § 1701 note).

in applying the doctrine. As discussed above,¹⁶⁰ no court in any reasoned opinion has imposed successor liability except in the case of a merger or to enforce a remedial statute. A remedial statute is one designed to rectify a past harm rather than punish such harm or deter a potential future harm. Criminal penalties authorized by the international trade statutes are not remedial, and so could not give rise to successor liability.

Less obvious is the fact that, although each of the international trade statutes authorizes “civil” penalties to be imposed on violators, these penalties are never remedial and always punitive. In fact, none of the international trade regulatory statutes discussed here, with the unique exception of certain provisions of the 1930 Tariff Act, are in any sense remedial. This subpart will review the four main statutes and explain how (with the noted exception) they are designed exclusively to deter, to punish, and in some cases, to incapacitate.

1. *Arms Export Controls*

The AECA authorizes the Executive Branch to regulate the export and import of “defense articles and services,” such as armaments, ordnance, spacecraft and space equipment, and technical data about articles and services that are “inherently military.”¹⁶¹ It also permits the Executive Branch to require the licensing of the manufacture and trans-border movement of the foregoing.¹⁶² The licensing scheme centers on the Munitions Control List (also known as the U.S. Munitions List, or USML), a cryptic enumeration of items that the Department of State has determined constitute defense articles, services and data, the exportation or importation of which must be duly licensed.¹⁶³

The purported goals of the AECA are to deter activities detrimental to U.S. homeland security and foreign policy. Congress has stated that the purposes of the AECA are the promotion of “a world which is free from the scourge of war and the dangers and burdens of armaments,” the subordination of the use of force to the rule of law, the assurance of peaceful adjustments in a changing world, the encouragement of regional arms control and disarmament agreements, and the discouragement of arms races.¹⁶⁴ To these ends, the AECA delegates to the Secretary of State the task of creating and maintaining the Munitions List and of supervising and regulating the sale of arms on the List to foreign countries.¹⁶⁵ The AECA also contains several provisions that encourage the Executive Branch to monitor and limit the foreign sale of weapons by the federal government and to enter into arms

160. See Part III.A.1, *supra*.

161. International Security Assistance and Arms Export Control Act of 1976, Pub. L. No. 94-329, tit. II, § 212(a)(1), 90 Stat. 729, 744 (1976). The AECA succeeded a 1940 law that authorized the President to prohibit or curtail exports of arms, munitions and related items. See Act of July 2, 1940, § 6, 54 Stat. 712, 714 (repealed 1956).

162. 22 U.S.C. § 2778 (2000).

163. 22 C.F.R. § 121.1 (2004).

164. 22 U.S.C. § 2751 (2000).

165. *Id.* § 2752.

control and disarmament agreements.¹⁶⁶ The provisions relating to presidential control of arms exports and imports are designed to authorize and encourage the President “to check and control the international sale and distribution of conventional weapons of death and destruction” to advance “world peace and the security and foreign policy of the United States.”¹⁶⁷

In developing regulations and licensing policies pursuant to the AECA, the Secretary of State is instructed to consider “whether the export of an article would contribute to an arms race, aid in the development of weapons of mass destruction, support international terrorism, increase the possibility of outbreak or escalation of conflict, or prejudice the development of bilateral or multilateral arms control or nonproliferation agreements or other arrangements.”¹⁶⁸ The AECA’s implementing regulations accordingly promulgate a policy of denying export licenses for defense articles, services, and technical data that would contribute to the military capabilities of embargoed states and countries that support terrorism, or that would otherwise interfere with the foreign policy objectives of the United States.¹⁶⁹ Pursuant to the AECA, the DDTC claims authority to deny or revoke licenses without prior notice whenever it would advance the causes of “world peace, the national security or the foreign policy of the United States, or is otherwise advisable.”¹⁷⁰ The AECA also contains provisions blocking transfers by the federal government or U.S. persons of defense items and technology to countries supporting international terrorism.¹⁷¹

The exclusively deterrent and punitive nature of the AECA is evident not only from congressional statements of intent, but from the sanctions that accompany violations of the Act. The AECA originally provided for criminal penalties only; the penalties now include fines up to \$1 million per violation and imprisonment up to ten years and apply to “[a]ny person who willfully violates any provision” of the AECA “or any rule or regulation issued” under it, as well as anyone who willfully misrepresents any material fact in a license application or required report.¹⁷² In addition, the AECA forbids certain exports and other transactions that support international terrorism. A willful violation of that provision subjects the violator to the same criminal penalty.

While criminal law has typically been considered opposed to civil law due to the latter’s prototypically remedial purposes, the major trend in federal legislation has been to broaden the scope of liability by the increased use of punishment designated as “civil.” Eliminating the mens rea requirements and attempting to preclude the possibility of constitutionally mandated enhanced procedural protections arising in criminal trials (e.g., the heightened burden of proof, prohibitions against ex post facto laws and punishments, the prohibition on double jeopardy, etc.) makes it easier to punish without observing

166. *See, e.g., id.* § 2754.

167. *Id.* § 2778(a)(1).

168. *Id.* § 2778(a)(2).

169. *See* 22 C.F.R. § 126.1 (2004).

170. *Id.* § 126.7 (2004).

171. 22 U.S.C. § 2780 (2000); *see also id.* § 2781(a) (requiring the denial of an export license to any country “not cooperating fully with the United States antiterrorism efforts” unless the President waives this prohibition).

172. *Id.* § 2778(c).

inconvenient constitutional guarantees.¹⁷³ Congress brought the AECA into conformity with this trend in 1986 by amending the statute to provide for nominally civil penalties.¹⁷⁴ Civil penalties under the AECA can be imposed in amounts up to \$500,000 per violation.¹⁷⁵ The AECA also provides additional nominally civil or administrative punishments, including forfeiture of unlawfully imported goods and temporary debarment from future arms exports.¹⁷⁶ Finally, the Assistant Secretary of State for Political-Military Affairs is authorized to debar temporarily any person who violates the ITAR from any future arms exports.

The arbitrary levels set in the AECA and ITAR for fines, forfeitures, and debarment are typical of punitive sanctions. There is no remedial purpose identified in the AECA's objectives and no sanction that evinces any effort to link the quantum of a penalty to any actual, compensable harm to the government. The primary purpose of the AECA is to deter and punish exports of arms that would undermine U.S. homeland security, foreign policy, or the more immediate objective of arms control. The AECA seeks to achieve these objectives by punishing "any person" who violates the law with heavy fines and, for willful violators, imprisonment. These sanctions promote the objectives of the statute on theories of specific and general deterrence and, in the case of debarment, incapacitation as well. There is no reason to believe that the AECA serves any non-punitive purpose.

2. *Economic and Trade Sanctions*

From time to time, the Legislative Branch or, pursuant to a general legislative authorization, the Executive Branch, determines that some or all U.S. trade with a particular country is contrary to the foreign policy of the United States. This determination might stem from an armed conflict with the country (as with Iraq); foreign sponsorship of terrorism (as with Sudan and Syria); hostility to a foreign government, usually due to the denial of basic human rights to the country's own citizens (as with Burma and Cuba); a decision to comply with a multilateral embargo mandated by the United Nations (as with Sierra Leone, UNITA and Liberia); or, as is usually the case, some combination of these reasons (as with Iran, Iraq, Libya, and the former Yugoslavia). Many of these sanctions rest upon the authority of IEEPA.¹⁷⁷ The President also often invokes other public laws, including the Trading with

173. See Aaron Xavier Fellmeth, *Challenges and Consequences of a Systemic Social Effect Theory*, 2005 U. ILL. L. REV. (forthcoming Nov. 2005) (manuscript at Part IV.A, on file with author).

174. 22 U.S.C. §§ 2780(k) (2000) (originally enacted as Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, § 509(a), 100 Stat. 853, 874 (1986)). The ITAR states that the Assistant Secretary of State for Political-Military Affairs "is authorized to impose a civil penalty" in the amounts set forth in the relevant statutes. 22 C.F.R. § 127.10 (2005).

175. 22 U.S.C. § 2778(e) (2000).

176. 22 C.F.R. § 127.7 (2005).

177. See, e.g., Exec. Order No. 12,724, 55 Fed. Reg. 33,089 (Aug. 9, 1990) (blocking Iraqi government property and imposing an embargo against Iraq); Exec. Order No. 12,722, 55 Fed. Reg. 31,803 (Aug. 2, 1990) (same); Exec. Order No. 12,544, 51 Fed. Reg. 1235 (Jan. 8, 1986) (blocking Libyan property); Exec. Order No. 12,543, 51 Fed. Reg. 875 (Jan. 7, 1986) (imposing an embargo against Libya); Exec. Order No. 12,205, 45 Fed. Reg. 24,099 (Apr. 7, 1980) (imposing an embargo against Iran); Exec. Order No. 12,170, 44 Fed. Reg. 5729 (Nov. 14, 1979) (blocking Iranian property).

the Enemy Act,¹⁷⁸ or statutes, such as ILSA, specifically tailored to a country of concern. This subpart will focus on TWEA because of its general applicability and because IEEPA is discussed in the next subpart.

TWEA, like AECA, is essentially a criminal statute including nominally civil penalties for enhanced effectiveness. Its purposes, like those of AECA, are to deter and punish violations of the law, not to compensate or otherwise remedy a past harm. TWEA was adopted in 1917 to “define, regulate, and punish trading with the enemy”¹⁷⁹ or an “ally of the enemy”¹⁸⁰ during time of war. TWEA is intended to accomplish this purpose by prohibiting any U.S. citizen or any person within the United States from buying from, selling to, paying, or entering into or performing contracts with any individual, entity or government with knowledge or reason to believe that the trading partner is an “enemy” or ally of an enemy. An “enemy” was originally defined as a state with which the United States is at war, but the statute was amended in 1933 to accommodate peacetime national emergencies.¹⁸¹ TWEA also prohibits exports of any tangible form of information directly or indirectly to the enemy or an ally of the enemy.¹⁸² Finally, TWEA authorizes the President to implement these provisions by, *inter alia*, regulating or prohibiting transactions in foreign exchange.¹⁸³ The President invoked his authority under TWEA to impose embargoes against Germany during the First World War; against Japan prior to the attack on Pearl Harbor; against communist China; against Cuba after Fidel Castro seized power; and in the Korean and Vietnam Wars.¹⁸⁴

As with AECA, the explicitly punitive nature of sanctions under TWEA betrays its non-remedial purpose. TWEA section 16, which defines the authorized sanctions for violations of TWEA, provides for criminal sanctions. These sanctions include \$1 million fines for legal entities and, for individuals, fines and imprisonment up to ten years; the penalties are to be applied against “[w]hoever shall willfully violate any of the provisions of this Act, or of any license, rule or regulation issued thereunder, and whoever shall willfully violate, neglect, or refuse to comply with any order of the President issued in compliance with the provisions of the Act.”¹⁸⁵ TWEA additionally provides for a nominally civil penalty up to \$50,000 against “any person who violates any license, order, rule, or regulation issued in compliance with the provisions

178. Trading with the Enemy Act, Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 12 U.S.C.A. § 95a, 50 U.S.C. app. §§ 1-39, 41-44 (2000)).

179. H.R. REP. NO. 95-459, at 4 (1977).

180. 50 U.S.C. app. § 2 (2000). The operative provision is section 3 of TWEA, 50 U.S.C. app. § 3 (2000). In 1933, Congress amended TWEA to allow the President to invoke embargoes during peacetime national emergencies. Emergency Banking Relief; Bank Conservation Act, Pub. L. No. 73-1, § 2, 48 Stat. 1, 1 (1933). With the advent of IEEPA in 1977, Congress restored TWEA to its original purpose of authorizing wartime embargoes in the President’s discretion. International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, § 101, 91 Stat. 1625, 1625 (1977) (codified as amended at 50 U.S.C. app. § 5(b)(1) (2000)).

181. *Regan v. Wald*, 468 U.S. 222, 226 n.2 (1984).

182. 50 U.S.C. app. § 2405 (2000).

183. *Id.* § 2405(a)(1).

184. *See, e.g.*, 31 C.F.R. § 500.201 (2004) (Foreign Assets Control Regulations applicable to North Korea, Cambodia and Vietnam); *id.* § 515.201-03 (Cuban Assets Control Regulations).

185. 50 U.S.C. app. § 16(a) (2000).

of this Act.”¹⁸⁶ In case of either a civil or criminal violation of TWEA, all property, funds, securities, vessels, furniture, equipment, and other items “concerned in any violation” may be forfeited to the U.S. government.¹⁸⁷

Numerous other sanctions are imposed on persons who export to or deal in the assets of various blocked persons, including “foreign terrorist organizations,”¹⁸⁸ “global terrorism,”¹⁸⁹ and “foreign narcotics kingpin[s].”¹⁹⁰ These sanctions are intended to prevent U.S. persons from, inter alia, engaging in commercial transactions with, or releasing blocked funds held on behalf of, terrorists and illegal narcotics traffickers. “[C]ivil penalties” for violations of these sanctions range from \$55,000 per violation to over \$1 million per violation.¹⁹¹

Like AECA, TWEA lacks any remedial element that resembles the environmental and labor statutes under which courts have applied successor liability. As with AECA, fines and forfeitures correlate to no identifiable and compensable harm.¹⁹² No remedial purpose is identified in TWEA’s objectives. Instead, typical of punitive criminal laws, TWEA’s penalties are designed to deter unlicensed international trade with specific persons and states.

3. *Dual-Use Export Controls*

Before considering the current peacetime export administration law, some history of export regulation will be helpful here to illustrate the nature and purposes of the current export regulatory statute, IEEPA. The first general act authorizing the President to regulate exports in time of peace was enacted in 1949.¹⁹³ The 1949 Export Control Act was designed to protect the U.S. economy “by limiting exports of scarce materials, and to channel exports to countries where need is greatest and where our foreign-policy and national security interests would be best served.”¹⁹⁴ The 1949 Act delegated to the Secretaries of Commerce and Agriculture the power to determine which items would be controlled and to fix export quotas. The 1949 Act was not directed at controlling arms or military exports for national security reasons so much as to prevent shortages of important supplies, including food and textiles, to ensure that U.S. allies were given first priority in the allocation of such supplies after the Second World War and to prevent inflation caused by abnormally high international post-war demand. Nonetheless, national

186. *Id.* § 16(b)(1).

187. *Id.* § 16(b)(2), (c).

188. 31 C.F.R. pt. 597 (2004); *see also* 18 U.S.C. § 2339B (2000).

189. *Id.* pt. 594.

190. *Id.* pt. 598.

191. *See, e.g.*, 31 C.F.R. § 597.701(b) (2004); *id.* § 598.701(a)(3).

192. For deterrent purposes, OFAC does consider the value of the transaction in assessing penalties, but this is unrelated to the amount of harm, if any, caused by the unlicensed transaction. *See* Cuban Assets Control Regulations: Publication of Economic Sanctions Enforcement Guideline, 68 Fed. Reg. 4422, 4427 (Jan. 29, 2003).

193. Export Control Act of 1949, Pub. L. No. 81-11, § 6(c), 63 Stat. 7, 8-9 (1949). The Act had predecessors dating to 1940, however. *See* S. REP. NO. 81-31, at 1 (1949), *as reprinted in* 1949 U.S.C.C.A.N. 1094, 1094.

194. S. REP. NO. 81-31, at 1, 1949 U.S.C.C.A.N. at 1094.

security played a role in the law, as Congress sought to prevent shipments of items having "direct or indirect military significance" to the newly expanded Soviet bloc.¹⁹⁵

Congress undertook a major revision to the U.S. export control law two decades later. By this time, the post-war scarcity had long since evaporated, and the United States had experienced two decades of economic expansion.¹⁹⁶ Meanwhile, the Soviet Union had grown in power and was perceived as an increased threat to U.S. national security. The 1969 Export Administration Act (1969 EAA),¹⁹⁷ which replaced the 1949 Export Control Act, dealt almost exclusively with national security and foreign policy concerns rather than scarcity of supply. The 1969 EAA was designed to "restrict exports which would make a significant contribution to the military potential of any other nation or nations which would prove detrimental to the national security of the United States."¹⁹⁸ The export controls were instituted in cooperation with the Coordinating Committee on Multilateral Export Controls (COCOM), a group of NATO countries, Australia, New Zealand, and Japan, which jointly determined the outlines of export control policy to deny weapons and technological advances to the Soviet bloc.¹⁹⁹

The 1969 EAA expired on September 30, 1979 and, that year, was replaced with the last major revision to the U.S. export control statutes. Congress enacted the 1979 EAA²⁰⁰ to clarify exporter obligations while preserving the primary purpose of U.S. export law as restricting exports that may make a "significant contribution to the military potential of individual countries or combinations of countries [that] may adversely affect the national security of the United States,"²⁰¹ and, of lesser importance, complying with U.S. foreign policy obligations, protecting the domestic economy from excessive drain of scarce materials, and reducing the serious inflationary impact of foreign demand.²⁰² In enacting the 1979 EAA, Congress expected the Department of Commerce to balance the competing goals of exploiting U.S. technological and commercial superiority by encouraging exports without affording access to breakthrough technologies to communist countries

195. *Id.* at 4, 1949 U.S.C.C.A.N. at 1096.

196. See generally Stephen Krasner, *American Policy and Global Economic Stability, in AMERICA IN A CHANGING WORLD POLITICAL ECONOMY* 29 (William Avery & David Rapkin eds., 1982) (describing the ultimate decline of U.S. exports after the Second World War relative to total world trade).

197. Export Administration Act of 1969, Pub. L. No. 91-184, 83 Stat. 841 (1969).

198. H.R. CONF. REP. NO. 91-681, at 2 (1969), as reprinted in 1969 U.S.C.C.A.N. 2716, 2718.

199. See H.R. REP. NO. 91-524, at 9-11 (1969), as reprinted in 1969 U.S.C.C.A.N. 2705, 2707-10 (Background and Supplemental Statement of Rep. Thomas L. Ashley). COCOM has since been replaced by the Wassenaar Arrangement.

200. Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified as amended at 50 U.S.C. app. § 2401-20 (2000)).

201. 50 U.S.C. app. § 2401(5). See § 2401(8), 2402(2)(A) (2000); see also S. REP. NO. 96-169, at 3 (1979), as reprinted in 1979 U.S.C.C.A.N. 1147, 1150 (noting a recommendation of the Defense Science Board Task Force to focus national security controls on technology that could enhance the military capability of potential adversaries).

202. See S. REP. NO. 96-169, at 3 (1979), as reprinted in 1979 U.S.C.C.A.N. 1147, 1150. The second policy goal is primarily derivative of the first. The third had become vestigial by 1979, as foreign demand for U.S. products was largely normalized and threatened no serious inflationary impact by the late 1960s. See JAMES A. NATHAN & JAMES K. OLIVER, *FOREIGN POLICY MAKING AND THE AMERICAN POLITICAL SYSTEM* 3 (3d ed. 1994).

or other destinations that might harm U.S. national security.²⁰³ Like its predecessors, the 1949 Export Control Act and the 1969 EAA, the 1979 EAA vested the Executive Branch with broad authority to enumerate items of potential military significance and to institute export licensing controls, including outright prohibitions.²⁰⁴ Relatively few classes of goods, other than agricultural commodities,²⁰⁵ exceeded the purview of executive discretion.

The 1979 EAA, like TWEA and AECA, had no compensatory or remedial purpose. It, too, was designed to deter and punish unlicensed exports to protect national security and U.S. foreign policy interests. Its penalty provisions accordingly followed precisely in the pattern of its predecessor export regulatory acts, the AECA and TWEA. The 1979 EAA provided for civil as well as criminal penalties for violations of its terms and regulations enacted under it, but both were punitive in nature. Criminal penalties were divided into sanctions for willful violations, which could result in fines up to \$100,000 or five times the value of the exports per violation, whichever is greater, and imprisonment up to five years for “whoever” committed the violation “knowingly” or conspired or attempted to violate the 1979 EAA or regulations issued pursuant to it. “Willful violations” applied to “[w]hoever willfully” committed such a violation and “[a]ny person” who willfully failed to report a military or intelligence use by a controlled country, and could result in harsh penalties: fines up to \$250,000 or five times the value of the exports, whichever is greater, and imprisonment up to ten years for individuals, and fines up to \$1,000,000 or five times the value of the exports, whichever is greater, for legal entities.²⁰⁶ Civil penalties were limited to \$10,000, imposed by the Secretary of Commerce “for each violation” of the 1979 EAA or its regulations,²⁰⁷ and increased to \$100,000 for national security violations. In addition, knowing or willful violations of the Export Administration Regulations could result in the forfeiture of exported goods or funds and debarment from exporting goods and technologies subject to the EAR.²⁰⁸

The 1979 EAA was last reauthorized by Congress in 1990. Congress extended its authority for one-year intervals in 1993, 1994 and 2000. The 1979 EAA lapsed most recently on August 20, 2001, and has not been reenacted since, although a major revision is currently under consideration by Congress. During the several years of lapsed authority, the President has fallen back several times upon IEEPA²⁰⁹ to continue the EAR in effect.²¹⁰

203. This intent is pervasively apparent in the debates over the 1979 EAA. *See, e.g.*, 125 CONG. REC. 19,936-38 (1979) (statement of Sen. Stevenson); *id.* at 26,816-17 (statement of Sen. Frenzel).

204. *See* 50 U.S.C. app. §§ 2404-06 (2000).

205. *See id.* §§ 2404(q), 2405(g), 2406(g).

206. *Id.* § 2410(a)-(b).

207. *Id.* § 2410(c). The 1979 EAA made an exception for violations of regulations issued pursuant to the AECA, which could result in civil fines up to \$100,000. *Id.*

208. *See id.* § 2410(g)-(h).

209. International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701-06 (2001)). IEEPA was originally enacted as title II to the Trading with the Enemy Act Reform Legislation. TWEA is discussed in greater detail *supra* in Part V.B.2.

210. *See, e.g.*, Exec. Order No. 12,730, 55 Fed. Reg. 40,373 (Sept. 30, 1990); Exec. Order No. 12,470, 49 Fed. Reg. 13,099 (Mar. 30, 1984), *revoked by* Exec. Order No. 12,525, 50 Fed. Reg. 28,757

IEEPA follows the familiar pattern of deterrent and punitive trade regulation. Much like TWEA, IEEPA authorizes the President during time of “unusual and extraordinary threat” to national security²¹¹ to “investigate, regulate, or prohibit” any transaction in foreign exchange and to “investigate, regulate, direct and compel, nullify, void, prevent or prohibit” any trade transaction with a foreign country or national.²¹² IEEPA empowers the President to take the above measures regulating international economic transactions during both wars and during peacetime national emergencies. Its primary purpose is to preempt the President’s use of authority under section 5(b) of TWEA to regulate international and domestic trade transactions unrelated to any declared state of emergency.²¹³ Section 101 of IEEPA restricted the President’s authority under TWEA to wartime, while title II of IEEPA provided a new basis for the invocation of trade regulation during a declared state of national emergency. Regulation under IEEPA is undertaken in conjunction with some three dozen U.S. allies through the Wassenaar Arrangement on Export Controls for Conventional Weapons and Dual-Use Goods and Technologies,²¹⁴ as well as other international coordinating arrangements.²¹⁵ The Wassenaar Arrangement represents a commitment by participating states to prevent the international transfer of arms and dual-use items that could be used by terrorists or to unbalance regional stability by their accumulation in the hands of “states of concern” (formerly called “rogue states”).²¹⁶

(July 12, 1985); Exec. Order No. 12,451, 48 Fed. Reg. 56,563 (Dec. 20, 1983); Exec. Order No. 12,444, 48 Fed. Reg. 48,215 (Oct. 14, 1983). See generally Joel B. Harris & Jeffrey P. Bialos, *The Strange New World of United States Export Controls Under the International Emergency Economic Powers Act*, 18 VAND. J. TRANSNAT’L L. 71 (1985) (describing the President’s use of emergency powers to revive the EAR). Technically, these executive orders attempt to revive the EAA as well as the EAR, but the constitutionality of the President’s attempt to rely on one legislative act to create another is so faulty that no serious argument has been published in its defense.

211. 50 U.S.C. § 1701 (2000).

212. *Id.* § 1702.

213. S. REP. NO. 95-466, at 2 (1977), as reprinted in 1977 U.S.C.C.A.N. 4540, 4541.

214. The Wassenaar Arrangement, approved on July 12, 1996, by the 33 co-founding members, builds upon the former Coordinating Committee for Multilateral Strategic Export Controls (“COCOM”). See generally Wassenaar Arrangement, <http://www.wassenaar.org> (last visited Dec. 18, 2005). COCOM, much like the Australia Group (originally directed specifically against Iran’s quest to acquire chemical weapons), the Missile Technology Control Regime, and the Nuclear Suppliers Group, was originally designed to coordinate policy on the export of weapons of mass destruction and their delivery systems. The Wassenaar Arrangement expanded on this mission by coordinating export policies for a wide range of conventional weapons and dual-use items and technologies.

215. These include the Australia Group, the parties to the Missile Technology Control Regime, and the Nuclear Suppliers Group.

216. The purposes of the Wassenaar Arrangement, as expressed in its Initial Elements, are “to contribute to regional and international security and stability [by] . . . preventing destabilising accumulations [of weapons]. . . . to ensure that transfers of these items do not contribute to the development or enhancement of military capabilities which undermine these goals, and are not diverted to support such capabilities. . . . to enhance co-operation to prevent the acquisition of armaments and sensitive dual-use items for military end-uses, if the situation in a region or the behaviour of a state is, or becomes, a cause for serious concern to the Participating States . . . [and] to prevent the acquisition of conventional arms and dual-use goods and technologies by terrorist groups and organisations, as well as by individual terrorists. . . .” Wassenaar Arrangement on Export Controls for Conventional Weapons and Dual-Use Goods and Technologies, Initial Elements, at I, at <http://www.wassenaar.org/docs/IE96.html> (last visited Dec. 18, 2005).

The pattern of criminal and civil punishment is equally familiar. IEEPA permits the President to impose a “civil penalty” not to exceed \$10,000 “on any person who violates any license, order or regulation issued” pursuant to IEEPA.²¹⁷ It further mandates the imposition of criminal penalties upon “[w]hoever willfully violates . . . any license, order, or regulation issued” pursuant to IEEPA with a fine of up to \$50,000; certain natural persons who knowingly participate in such a violation may also be imprisoned for up to 10 years.²¹⁸ Moreover, the civil penalties increase periodically to account for inflation.²¹⁹

That IEEPA and 1979 EAA are both intended to serve solely deterrent and punitive functions, then, is clear from their terms and their legislative histories. This is confirmed by statements made by IEEPA’s primary enforcer, BIS, whose primary focus is national security.²²⁰ Kenneth Juster, the Undersecretary of Commerce for Industry and Security, has remarked that BIS’s “paramount concern is the security of the United States.”²²¹ National security is a preventative, not a remedial, function of government. Indeed, in enacting the 1979 EAA, Congress recognized that the United States hardly suffers economic loss from exports that threaten national security—rather, the prohibition of such exports “can have serious adverse effects on the balance of payments and domestic employment,”²²² thereby hampering economic growth. The purposes of the 1979 EAA and IEEPA are, in short, to prevent exports that may harm national security, not to compensate the government or any private party for a loss inflicted on it by an unlawful export.

4. Customs Regulation

Many of the penalties authorized by the 1930 Tariff Act share the intent of protecting national security through various measures, but the Tariff Act has always had a general purpose of providing for customs duties and ensuring that they are paid. While export regulation applies only to trade in controlled items, or items destined to controlled destinations or from controlled origins, customs laws and other import regulation apply to almost all imported goods from any country of origin or shipment.²²³

The Tariff Act and other customs laws are administered by the DHS’s CBP.²²⁴ When foreign goods enter the United States, CBP gathers information about the importation and, when appropriate, collects duties on the imported

217. 50 U.S.C. § 1705(a) (2000).

218. *Id.* § 1705(b).

219. *See* 28 U.S.C. § 2461 note (2000).

220. *BIS Who? New Monogram Heralds Focus Shift*, THE EXPORT PRACTITIONER, Apr. 2002, at 6.

221. BUREAU OF INDUSTRY AND SECURITY, U.S. DEP’T OF COMMERCE, GUIDING PRINCIPLES OF THE BUREAU OF INDUSTRY AND SECURITY, <http://www.bis.doc.gov/about/bisguidingprinciples.htm> (last visited Dec. 18, 2005).

222. S. REP. NO. 96-169, at 21 (1979), *as reprinted in* 1979 U.S.C.C.A.N. 1147, 1166.

223. There are some notable exceptions, however. Trade remedies, such as antidumping duties or countervailing duties, apply only to closely defined goods, as do exclusion orders under section 337 of the 1930 Tariff Act.

224. *See* 19 U.S.C. § 1624 (2000) (granting the Secretary of the Treasury power to administer customs laws); 19 C.F.R. pt. 0 (2001) (granting DHS, and specifically CBP, authority to administer customs laws).

merchandise. Every importer is obligated to inform CBP of each importation, report the details of the transaction, and pay any import, antidumping, or countervailing duties due. The Tariff Act's enforcement provisions authorize CBP to collect through legal action duties that were not properly paid on goods imported into the United States. The Tariff Act accordingly provides for restoration of any evaded duties, taxes or fees of which Customs has been deprived.²²⁵ The duty recovery provision is remedial in the sense of restoring the Treasury to the position it would have been in had the importer performed its legal duties.

But the Act goes beyond remediation and provides for the forfeiture of any vehicle "or other thing used in, to aid in, or to facilitate . . . the importation . . . of any article which is being or has been introduced, or attempted to be introduced, into the United States contrary to law."²²⁶ And, like the other trade regulatory laws, the Tariff Act also imposes criminal penalties and punitive "civil" fines to deter and punish violations of the Act. While customs impositions designed to collect unpaid duties are arguably remedial, the penalties for nonpayment are unquestionably punitive. CBP generally applies three standards of increasing culpability in assessing civil penalties—negligence, gross negligence, and fraud²²⁷—and, in addition to lost duties, it may seek civil penalties in sums that vary with the violator's culpability. For example, beyond any unpaid duties collected, CBP may seek civil penalties for negligent, grossly negligent, or fraudulent violations of the Tariff Act's requirement that "no person" commit any error on the import documents "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby."²²⁸ The point of this provision is to enforce laws designed to facilitate data collection on international trade, not to remedy any past harm.

It is interesting to observe how Congress coped with the contradiction between its treatment of fraud on the government, a traditionally criminal offense, and its attempt to impose a nominally civil penalty that would deprive defendants of the enhanced procedural protections required by the Constitution in criminal cases.²²⁹ To preserve the ability of the government to punish criminal offenses by fine without the necessity of observing these civil rights, Congress took a half measure of dubious constitutionality, requiring the state to prove its case with an intermediate standard of proof: clear and

225. 19 U.S.C. § 1592(d) (2000).

226. *Id.* § 1595(a).

227. *Id.* § 1592(a).

228. *Id.* § 1592(a)(1). A "person" is defined to "include[] partnerships, associations, and corporations." *Id.* § 1401(d). Maximum civil penalties range from an arbitrary twenty percent of the dutiable value of the imported merchandise for negligent violations resulting in no underpayment of duties, *id.* § 1592(c)(3)(B), to the full value of the imported merchandise (which can be many millions of dollars) for fraud, *id.* § 1592(c)(1). Under § 1593a, the maximum penalties for improperly seeking drawback include a nominally civil fine for fraud in an amount up to three times the actual or potential loss of revenue and, for negligence, in an amount up to 20% of the actual or potential loss of revenue for the first violation (with increasing penalties for subsequent negligent violations). *Id.* § 1593a. Customs is authorized under both sections to mitigate penalties based on various factors, such as the voluntary disclosure of a violation before Customs becomes aware of it. For improper drawback claims, the penalty ranges from 20% of the loss of revenue to Customs to three times the loss of revenue depending, again, on the level of culpability of the importer.

229. *See supra* note 173 and accompanying text.

convincing evidence.²³⁰ In an action alleging negligence or gross negligence, Congress mandated the usual civil burden of proof (preponderance of the evidence), except that in an enforcement action based on the former standard, Congress treated evidence of the *actus reus* as creating a presumption of intent, effectively forcing the defendant to prove that the cause of the misreporting was *not* its own negligence.

A panoply of knowing acts, such as the entry or attempted entry of imported merchandise into U.S. commerce by means of fraudulent or false documents or verbal assertions, can also give rise to criminal penalties independent of whether CBP is deprived of any duties owed to it.²³¹ Criminal penalties include imprisonment up to two years and fines up to \$250,000 for individuals and \$500,000 for organizations.²³²

The fraudulent introduction of merchandise into the United States can, therefore, give rise to both civil and criminal liability. The same act done with the same level of *mens rea* can give rise to two kinds of penalties, regardless of any actual loss to the U.S. Treasury, resulting in radically different consequences. Like criminal penalties, the penalties imposed under the Tariff Act rise in amount as the importer's culpability increases from clerical error (no penalty except repayment of any duties owed plus interest) to fraud (the penalty may not exceed the domestic value of the merchandise).²³³ Both civil and criminal penalties are severe—a fact that reflects their purpose of deterring and punishing carelessness or fraud in completing and filing import documents.²³⁴

The legislative history of the 1930 Tariff Act confirms that Congress's main purpose was the insulation of domestic industries from foreign competition—a goal of deterrence of imports, not compensation for harm to the federal government caused by the imports.²³⁵ The debate over the Tariff Act centered almost exclusively around the effect of import tariffs on U.S. farmers, industries, and consumers. The proponents of the Act argued that high, well-enforced import duties were necessary to protect domestic industries, while the opponents argued that such protection stemmed from servitude to special interests to the detriment of consumers.²³⁶ If raising revenue was a consideration in the passage of the Act, it is not evident from the debates. What is evident is an overwhelming concern to lower unnecessary

230. 19 U.S.C. § 1592(e) (2000). In a criminal trial, due process of law requires the state to prove its case beyond a reasonable doubt. *See, e.g., Ring v. Arizona*, 536 U.S. 584, 600 (2002); *In re Winship*, 397 U.S. 358, 361 (1970). In a civil case, the standard of proof is normally a preponderance of the evidence. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 253 (1989).

231. 18 U.S.C. § 542 (2000). Sections 541-52 describe the various knowing acts that may give rise to criminal liability under the customs laws.

232. *Id.* §§ 542, 3571(a)-(c).

233. 19 U.S.C. § 1592(a), (c) (2000); *see also* 19 C.F.R. § 162.73 (2001) (implementing section 592 of the Tariff Act of 1930).

234. *See Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974); *United States v. 1960 Bags of Coffee*, 12 U.S. (8 Cranch) 398 (1814).

235. Indeed, classical economic theory posits that import duties generally *cause* harm by decreasing competition, resulting in a deadweight economic loss. *See, e.g.,* Jeffrey A. Frankel, *Assessing the Efficiency Gains from Further Liberalization* 5-13 (John F. Kennedy School of Government Faculty Research Working Paper Series, RWP01-030, 2000).

236. *See* 72 CONG. REC. 10,692, 10,694 (1930) (statement of Rep. Sabath); *id.* at 10,696 (statement of Rep. Black); *id.* at 10,760-61 (statements of Reps. Shafer and Hawley).

tariff barriers while deterring imports having a strong negative effect on American farmers and domestic industries.

The design of the Tariff Act equally supports this conclusion. Import duties are not uniformly determined by a flat percentage of the value of all imports, nor are they designed to maximize revenue; rather, they are higher or lower depending on the level of protection that Congress wishes to extend to specific domestic industries. Indeed, unlike remedial laws, the Act's penalty provisions do not require the government to have sustained any loss at all due to the violation. Section 592 of the Act provides for penalties "[w]ithout regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee" due to the prohibited act.²³⁷ That Congress did not require any loss to the United States indicates the non-remedial nature of the Tariff Act's penalty provisions. If the purpose of these provisions were remediation and not deterrence of and retribution for the importer's negligence or fraud, penalties would only apply if Customs suffered some kind of cognizable loss and in that case would be limited to the amount of that loss. Also telling is that the Tariff Act prohibits "aid[ing] or abet[ting]" violations of the Act²³⁸—an extension of liability that is typical of criminal statutes but very rarely civil statutes.

From the preceding discussion, it should be evident that most customs duties are a form of taxation on imported goods, but usually more in the line of an excise tax.²³⁹ Like tax laws generally, customs duties may serve multiple purposes. Historically, raising government revenue was the primary goal of customs duties. For the first 125 years of the nation's history, customs revenue alone funded most of the federal budget. While the role of customs as a source of revenue has since declined drastically, import duties continue to provide some revenue. In 2004, customs duties contributed some \$27 billion to the federal budget.²⁴⁰ As a debt owed by the importer to the federal government, it may seem logical that liability for customs duties is considered by courts as a civil liability rather than as a penalty to discourage importation. From this, courts formerly concluded that revenue laws "are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good."²⁴¹ Such holdings relied, however, upon an antiquated theory that any

237. 19 U.S.C. § 1592(a) (2000).

238. *Id.*

239. The Tariff Act also contains several other provisions designed to regulate various kinds of imported goods and some services into the United States, such as goods sold at a price below their "fair" market value and goods subsidized by foreign governments. *E.g.*, 19 U.S.C.A. § 1337 (2000). These trade remedies, as they are known, penalize certain kinds of importations and, accordingly, serve the same deterrent and punitive functions as the customs provisions of the Tariff Act.

240. U.S. CUSTOMS & BORDER PROTECTION, PERFORMANCE AND ANNUAL REPORT, FISCAL YEAR 2004, at 3 (2004), available at http://www.cbp.gov/linkhandler/cgov/toolbox/publications/admin/cbp_annual.ctt/cbp_annual.pdf.

241. *In re Cliquot's Champagne*, 70 U.S. (3 Wall.) 114, 145 (1866); see *Taylor v. United States*, 44 U.S. (3 How.) 197 (1845); *United States v. Willetts*, 28 F. Cas. 612, 614 (S.D.N.Y. 1871) (No. 16, 699).

laws designed primarily to protect the government's interests through punishment are remedial.²⁴²

That view carries little persuasive force today. In modern jurisprudence, the CIT has come to the contrary conclusion. It said of the Tariff Act's civil penalty provision: "It appears that § 1592 is driven primarily by considerations of deterrence rather than compensation, as the statute's maximum penalty for fraud would bear a reasonable relationship to societal harm only in a system of 100 per cent tariffs."²⁴³ The CIT's point finds support in CBP's actual operations. The role of CBP in collecting revenue appears minimal when compared to its purpose in regulating trade for non-revenue purposes. The \$27 billion of revenue provided by customs duties constituted less than two percent of the federal budget receipts in 2004.²⁴⁴ Customs no longer plays a substantial revenue-raising role in the federal budget. Today, the purpose of customs duties is largely to offer a small impediment to imports competing with U.S. industries and jobs.

Moreover, pursuant to the Homeland Security Act of 2002, all non-revenue customs enforcement activities have been transferred to DHS.²⁴⁵ The mission of the DHS, as is evident from its name, is to protect homeland security—a preventative, not remedial, function. What was formerly known as the U.S. Customs Service was, accordingly, renamed the Bureau of Customs and Border Protection in 2003. According to its first Director, CBP does not consider itself primarily as serving a taxation function. Rather, its "priority mission . . . is to prevent terrorists and terrorist weapons from entering the United States."²⁴⁶

5. Conclusions

Regardless of how Congress has chosen to label them, the international trade statutes discussed here are de facto criminal laws with some civil window dressing. The AECA, TWEA, EAA, IEEPA, and 1930 Tariff Act, and their accompanying regulations, share the goals of preventing *ex ante delicto* actions deemed undesirable by Congress, the traditional characteristic of criminal laws. Although the statutes provide for nominally civil penalties, the label "civil" cannot erase the "penal" purpose and effect of the "penalties." The utter absence of any remedial purpose in the statutes betrays the pretense of its having a meaningful non-punitive character. Whatever Congress chose to call the penalties imposed on unintentional violations of the Acts, they were

242. See 2 RUTH F. STURM, CUSTOMS LAW AND ADMINISTRATION § 70.1 (1995) (citing cases to demonstrate that penalty provisions are seen as necessary to prevent smuggling and fraud and to protect government revenue).

243. *United States v. Complex Machine Works Co.*, 23 C.I.T. 942, 950 (Ct. Int'l Trade 1999).

244. Federal budget receipts in 2004 were \$1,922 billion. See OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, SUMMARY TABLES, <http://www.whitehouse.gov/omb/budget/fy2004/tables.html> (last visited Dec. 18, 2005). The gross domestic product in 2004 was estimated at \$11.303 trillion. OFFICE OF MANAGEMENT & BUDGET, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004, at 183 (2003), available at <http://www.whitehouse.gov/omb/budget/fy2004/pdf/hist.pdf>.

245. Homeland Security Act of 2002, 6 U.S.C.A. §§ 203, 212 (West 2005).

246. Press Release, U.S. Senate Comm. on Appropriations, Homeland Security Subcomm. Hearing: Statement of Robert C. Bonner 2 (May 13, 2003).

“penal” and certainly not remedial as those terms are traditionally used in American jurisprudence. They do not, consequently, properly come within the scope of judicial precedents authorizing successor liability.

The implementation and enforcement of these statutes bear out this analysis. The amount of civil penalties actually sought and imposed by the agencies typically results in the more or less mechanical application of the maximum penalty available in each case, rather than a calculus of the harm to any person or to the national interest caused by the charged party’s acts. The punitive goals of retribution and deterrence, rather than compensation for injury, can be the only purpose of such a system. Except in cases of multiple intentional illegal exports, charged individuals—who typically have lesser financial resources than organizations—have usually been fined no more than \$10,000, and are sometimes not fined at all but are instead denied export privileges for lengthy periods. Small companies typically receive fines under \$100,000. Large corporations, however, often receive much larger fines (or, more commonly, pay the monetary equivalent of such fines in settlement of civil charges), such as the \$25 million settlement extracted from Raytheon Company in February 2003 for alleged violations of ITAR,²⁴⁷ or the \$32 million paid by Hughes Electronics Corp. and Boeing Satellite Systems Inc. to settle charges of ITAR violations the following month.²⁴⁸ The amount of a penalty necessary to affect deterrence and punishment varies with the wealth of the defendant. Even if an illegal export could cause an identifiable injury to a person, the amount of remediation due to the injured person does not so vary.

Only the customs laws come close to having a remedial purpose, because they authorize the collection of unpaid customs duties. These provisions are better characterized as tax provisions than either criminal penalties or civil remedies, but, due to the protectionist rather than revenue-raising function of customs duties, they more closely resemble the former. Nonetheless, a reasonable argument could be made that a practice by CBP of imposing successor liability on asset purchasers who have purchased the assets of a seller liable for unpaid duties with interest (on condition, again, that the purchaser was aware of the liability) is not inconsistent with judicial precedents. But once the possibility of forfeitures or penalties (whether civil or criminal) enters the picture, remediation is no longer at issue. In such cases, CBP, like BIS, OFAC and DDTC, would be acting extralegally in imposing successor liability.

VI. CONSTITUTIONAL AND POLICY ISSUES IN APPLYING SUCCESSOR LIABILITY TO TRADE SANCTIONS

Attempts to impose successor liability find only scattered and limited statutory support and generally run contrary to judicial precedents. Under the *Chevron* standard of review, however, courts will defer to an agency’s

247. Ross Kerber, *Raytheon To Pay \$25m in Civil Fines*, BOSTON GLOBE, Feb. 28, 2003, at E1.

248. Rugaber, *supra* note 4, at 476; *see also* BIS Press Release, *supra* note 110 (reporting agreement in October 2002 by Sigma-Aldrich Corp. to pay the \$1.76 million for alleged violations of the EAR).

interpretation of statutes and regulations it is responsible for enforcing unless it is arbitrary, capricious, or manifestly contrary to the statute.²⁴⁹ One purpose of this Part is to consider whether it is arbitrary and capricious to interpret the relevant statutes as authorizing successor liability. In addition, this Part considers whether, beyond policy objections to successor liability in international trade law, there are valid constitutional objections to this practice.

A. *Equity in Aid of Penalties?*

This article previously described how the courts developed equitable exceptions to the general rule of nonliability in order to prevent corporate reorganization from interfering in preexisting debts and contractual liabilities, and in order to prevent such debts and liabilities from discouraging corporate restructuring and reorganization.²⁵⁰ Federal and state courts applying the doctrine of successor liability have stated consistently that the doctrine is equitable in origin and nature and, therefore, remedial.²⁵¹ As such, successor liability is a remedy to be applied only to avoid injustice and not to aid the government in seeking to punish, and especially not to punish wrongs committed by a third party.²⁵² Absent an express statutory authorization, the Supreme Court has long held that it will not sustain an action in equity to enforce noncompensatory penalties.²⁵³ Only when applying a statute can a court resort to successor liability to effect a punishment, such as punitive damages, under positive law, and even then courts have attempted to justify the application of the doctrine as compensatory as opposed to punitive.²⁵⁴ Where the statute upon which the government bases its authority does not provide a legal basis for successor liability and the government seeks noncompensatory damages, courts cannot properly impose liability by fashioning or applying an equitable remedy such as successor liability.

249. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984).

250. *See supra* discussion in Part III.A.

251. *See, e.g.*, *Howard Johnson Co., Inc. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249, 255-56 (1974); *United States v. Davis*, 261 F.3d 1, 53 (1st Cir. 2001); *Ed Peters Jewelry Co. v. C & J Jewelry Co.*, 124 F.3d 252, 267 (1st Cir. 1997) (citing *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995)); *Baker v. Delta Air Lines*, 6 F.3d 632 (9th Cir. 1993); *Atlantic Richfield Co. v. Blosenski*, 847 F. Supp. 1261, 1292 (E.D. Pa. 1994); *Kleen Laundry & Dry Cleaning Serv. Inc. v. Total Waste Management Inc.*, 867 F. Supp. 1136, 1144 (D.N.H. 1994); *New York v. Storonske Cooperage Co.*, 174 B.R. 366, 390 (N.D.N.Y. 1994); *GRM Indus. v. Wickes Mfg. Co.*, 749 F. Supp. 810, 814 (W.D. Mich. 1990); *Craig ex rel. Craig v. Oakwood Hosp.*, 684 N.W.2d 296, 304 (Mich. 2004); *Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 550 (Tex. 1981).

252. *Cf. North Shore Gas Co. v. Salomon Inc.*, 152 F.3d 642, 649-50 (7th Cir. 1998) (noting that the application of successor liability in CERCLA cases is acceptable because CERCLA cases concern compensation for environmental harm and do not punish the successor).

253. *See Tull v. United States*, 481 U.S. 412, 422 & n.7 (1987); *Stevens v. Gladding*, 58 U.S. (17 How.) 447, 454-55 (1854); *Livingston v. Woodworth*, 56 U.S. (15 How.) 546, 559-60 (1853).

254. *See, e.g.*, *Racich v. Celotex Corp.*, 887 F.2d 393 (2d Cir. 1989); *Musikiwamba v. Essi, Inc.*, 760 F.2d 740, 749 (7th Cir. 1985) ("An injured employee should not be denied any *remedy* whatsoever merely because punitive or compensatory damages should not be imposed on a successor, particularly where nothing in congressional policy nor in the successor doctrine prohibits a court from limiting the *remedies* that can be imposed on a successor to those that *make the victim whole for his losses.*") (emphasis added).

It has been shown that, with two very minor exceptions, the relevant international trade statutes do not authorize successor liability and that the civil and criminal penalties provisions of these statutes have no remedial purpose. The government is not deprived of compensation when it foregoes an opportunity to penalize an innocent party. An agency seeking to penalize a successor is never seeking equity, and traditional notions of successor liability consequently do not apply in such cases.

Courts sometimes make the following counterargument in the remedial context (though it might be extended to the punitive one as well): imposing successor liability in punitive cases is fair because the purchaser benefits from the seller's good will,²⁵⁵ so the purchaser should assume the responsibility for debts (or, by extension, penalties) "necessarily attached" to such good will.²⁵⁶ This argument has a fatal flaw even in the remedial context. The "good will" justification for successor liability is based on the unstated assumption that the good will associated with a business comes free to the purchaser. But this assumption is erroneous; the price that a good faith asset purchaser pays for the business always reflects the good will. Indeed, the value of the good will sometimes is the major determinant of the price paid, as with many service businesses such as those offering Internet or investment banking services. Such businesses may have a large market share and strong name recognition, but few physical assets. The purchaser values that good will based on what it knows or can reasonably learn of the benefits of that good will and the drawbacks of any ill will. The argument that the asset purchaser benefits unfairly from the good will and should, accordingly, suffer the consequences of any wrongful act committed by the previous owner is a non sequitur.

A variant of this argument is that the seller may have benefited financially from the violation of law (e.g., by cutting environmental safety costs, avoiding the payment of worker's compensation, or making prohibited foreign sales that could not otherwise be made), and this benefit is inequitably passed on to the asset purchaser. One reason federal courts have felt comfortable applying successor liability in the remedial context is that, if successor liability were not imposed on asset purchasers, "a predecessor could benefit from the illegal disposal of hazardous substances" or other illegal act "and later evade responsibility . . . by changing the form in which it does business."²⁵⁷ A similar notion is often considered to justify successor liability where the asset seller has violated a collective bargaining agreement or other labor contract. Again, while the seller may indeed save money by its violation, an arm's-length asset purchaser does not generally benefit from an increased value of the company because the purchaser pays for everything he or she

255. "Good will" is the consumer's recognition of and loyalty toward the business at issue, which only transfers to the purchaser insofar as the assets themselves or some conduct of the seller and purchaser convey these attributes to the purchaser. In the business world, it is generally considered the difference between the book value of a business and the price paid by the purchaser. See Darian M. Ibrahim, *The Unique Benefits of Treating Personal Goodwill as Property in Corporate Acquisitions*, 30 DEL. J. CORP. L. 1, 5 (2005).

256. See, e.g., *Ray v. Alad Corp.*, 560 P.2d 3, 9 (Cal. 1977); *New York v. Storonske Cooperage Co.*, 174 B.R. 366, 378-81 (N.D.N.Y. 1994); *Wilkerson v. C.O. Porter Mach. Co.*, 567 A.2d 598, 601 (N.J. Super. Ct. Law Div. 1989).

257. *B.F. Goodrich v. Betkoski*, 99 F.3d 505, 519 (2d Cir. 1996).

gets. The asset seller who violated the law receives the full benefit of any such violation in the form of payment for the increased value of the assets sold. The only possible beneficiary is, in short, the asset seller and its stakeholders at the time of the violation or tort.

Finally, the contention that equity requires punishment of a successor because the predecessor may have become unavailable (e.g., it may have dissolved after selling its assets), while sometimes made publicly,²⁵⁸ follows the foregoing pattern of nonsensical arguments. Whatever the merits of this contention in the remedial context, one does not punish an innocent party because the guilty one has become unavailable. If a thief disappears from the country, authorities cannot justify putting an innocent purchaser of the stolen goods in prison on equitable grounds. Moreover, this contention ignores the fact that in most states, corporations may be sued and defend lawsuits, even those brought under federal law, after dissolution.²⁵⁹

The inevitable conclusion seems to be that because equity is a remedial concept designed to avoid injustice to a harmed party and not to aid a state authority seeking to punish, it would be an arbitrary and capricious statutory interpretation for enforcement agencies or courts to import successor liability *praeter legem* to justify the imposition of sanctions for retributive or deterrent purposes.

B. Policy Analysis of Successor Liability

Putting aside for the moment all doctrinal reservations to successor liability in international trade regulation, the question remains whether successor liability is, nonetheless, justifiable on public policy grounds. Whatever one may conclude about the legality of the agencies' intended and actual behavior, it is still legitimate to wonder whether Congress ought to adopt explicit authorization for the imposition of successor liability in pursuit of more effective enforcement of the AECA, TWEA, IEEPA, and 1930 Tariff Act.

I have alluded several times to the judicial practice of requiring, as a condition of successor liability, that the asset purchaser be aware of the nature and scope of the liability it would be acquiring.²⁶⁰ The international trade

258. BIS made this argument in its submission to the ALJ in the Sigma-Aldrich case. While this argument has not been made elsewhere in the punitive context, it is commonly made in remedial cases. *See, e.g.,* Ramirez v. Amsted Ind. Inc., 431 A.2d 811, 820 (N.J. 1981); Rothstein v. Tennessee Gas Pipeline Co., 664 N.Y.S.2d 213, 220-21 (Sup. Ct. 1997), *rev'd in part*, 259 A.D.2d 54 (N.Y. App. Div. 1999).

259. Melrose Distillers, Inc. v. United States, 359 U.S. 271, 272 (1959); United States v. Arcos Corp., 234 F. Supp. 355 (N.D. Ohio 1964); *see* 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY § 3:10 (2d ed. 1992).

260. *See, e.g.,* Golden State Bottling Co. v. Nat'l Labor Relations Bd., 414 U.S. 168, 180 (1973); New York v. Nat'l Serv. Indus., Inc., 352 F.3d 682, 692-95 (2d Cir. 2003); Goodrich, 99 F.3d at 519; United States v. Mexico Feed & Seed Co., 980 F.2d 478, 489-91 (8th Cir. 1992); Oner II, Inc. v. U.S. Envtl. Prot. Agency, 597 F.2d 184, 186-87 (9th Cir. 1979); RCM Executive Gallery Corp. v. Rols Capital Co., 901 F. Supp. 630, 635 (S.D.N.Y. 1995); *In re* Raytech Corp., 217 B.R. 679, 693 n.17 (Bankr. D. Conn. 1998). An exception exists where the authorizing statute provides for successor liability without the purchaser's awareness of the acquired liability. *See* Coffman v. Chugach Support Serv., Inc., 411 F.3d 1231, 1236 (11th Cir. 2005) (holding that, where legislative history of a statute

enforcement agencies have departed from this limitation on successor liability not only by extending its reach beyond remedial cases, but also by disregarding the condition of purchaser awareness.²⁶¹ Besides destroying the balance of equities upon which successor liability should be based, this new practice creates a troublesome policy consequence.

A very good economic rationale explains the judicial practice of refraining from imposing successor liability on an unwitting asset purchaser. The price paid by the asset purchaser is based on the purchaser's valuation of the assets, which in turn is based on the inevitably limited information the purchaser can glean from public records and whatever private records the seller has kept and can be reviewed in the inevitably limited period before the asset purchase agreement is executed. If a court or federal agency were able to impose an unforeseen penalty on the purchaser, it would introduce an element of uncertainty into asset purchases. The purchase could appear profitable at the beginning of negotiations, only to turn into a less profitable transaction²⁶² or even a net loss after the acquisition due to an unexpected regulatory enforcement action.

The incentive for asset transfers would necessarily be chilled by this uncertainty,²⁶³ which creates a deadweight loss to society. Asset transfers promote the efficient allocation of capital. By creating the potential for an unforeseeable loss, there is a greatly increased risk that small asset purchases and some large asset purchases involving moderate efficiency gains will be discouraged by the risk of undiscovered violations. Yet the enforcement agencies have taken the position, as BIS successfully did in the Sigma-Aldrich case,²⁶⁴ that the purchaser need have no knowledge of the violations to be saddled with liability for their occurrence. Such impediments reduce total societal wealth by impeding capital from being moved from less productive to more productive uses. Such liability rules are also inefficient in the

providing for successor liability makes clear that the purchaser's knowledge of the liability is irrelevant, successor liability will attach in spite of the purchaser's ignorance).

261. DDTC is apparently an exception to the extent that it now "informally" requires that asset or stock purchasers investigate and disclose violations of the sellers. *See supra* note 119. Besides being unconstitutional as an unpublished rule subjecting violators to criminal penalties, as well as possibly violating the Administrative Procedures Act, DDTC is nowhere authorized by statute to require asset or stock purchasers to investigate and disclose violations of the AECA or ITAR by entirely different companies.

262. Turning a profitable transaction to a "less profitable" transaction may seem like a very minor policy consequence in terms of the deterrent effect of successor liability on asset purchases. The economic concept of opportunity cost explains why the problem is nonetheless a potentially serious one. Opportunity cost factors in alternative uses to which money could be put. For example, suppose that Company X is deciding between its two most profitable choices: whether to acquire Company Y's assets at a productive gain of \$y or Company Z's at a gain of \$y-z (where z is a positive number). X's decision to purchase Y's assets and thereby maximize its profits will be undermined if successor liability turns the expected \$y to a sum less than \$y-z. This represents an inefficient use of X's assets that creates a deadweight loss to the economy as a whole.

263. *See Hoard v. Chesapeake & Ohio Rwy.*, 123 U.S. 222, 227 (1887).

264. *See supra* discussion in Part IV.A. In fact, BIS's argument relied in part on its admission that Sigma-Aldrich and its subsidiaries were unaware of the asset seller's violations. BIS used this as a springboard to accuse Sigma-Aldrich of not conducting adequate due diligence. Although the ALJ agreed with BIS, its argument was almost surreal; there is no requirement under any applicable trade law for an asset purchaser to conduct any due diligence at all prior to an asset acquisition, much less whatever BIS considers "adequate" due diligence.

Calabresian sense of violating the least cost avoider principle,²⁶⁵ as they shift potential liability from the parties most likely to know whether they could be liable in the future for some past act (asset sellers) to parties less likely to know (asset purchasers).

The rejoinder offered by the enforcement agencies is that applying such liability will give asset purchasers a significant incentive to conduct careful due diligence of the seller's international trade transactions, which will have the beneficial effect of bringing past violations to light.²⁶⁶ Putting aside the absence of statutory authorization for the agencies to pursue such an incentive scheme, this answer does not solve this problem, and it creates some new problems. Due diligence is already expensive and time-consuming. Imagine a company with a moderately-sized international trade business that engages in an average of ten import and fifteen export transactions per week. Due diligence must go back for five years (the statute of limitations for most kinds of international trade law violations), totaling 6,500 shipment records. Assuming each shipment involves the review of five pages of records (e.g., purchase order, commercial invoice, entry summary, bill of lading or air waybill, shipper's export declaration), a full review of the shipments would require the purchaser to review upwards of 32,000 pages of international trade records in addition to the many other due diligence documents. Increased due diligence of this kind slows down asset purchases and increases the attendant transaction costs. As transaction costs increase, the incentive to purchase assets, and thereby allocate assets in the most efficient manner, decreases.

More problematic still, no remotely feasible amount of due diligence can guarantee that the seller did not commit a potentially disastrous violation of the international trade laws. Despite regulatory requirements, not all asset sellers keep complete records for the last five years of their trade operations, and not all of those that do keep records keep them well-organized and completely accurate. Furthermore, many rely on freight forwarders or brokers to keep such records. While disordered records may serve as a warning (and a potentially false one) to asset purchasers, even perfect records cannot guarantee a perfect compliance history on the seller's part.

Granting that an asset purchaser who has perfect information about the seller's record of compliance could factor liability for international trade violations into its purchase price, the fact remains that information is almost never perfect. This problem is compounded by the difficulty of discovering international trade law violations in general. Import and export law includes

265. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970).

266. Trade Compliance Panel Discussion, *supra* note 6; Mark Menefee, Director, Office of Export Enforcement, Bureau of Indus. & Sec., Panel Discussion at the Bureau of Indus. & Sec. and the Nat'l Council on Int'l Trade Dev. Conference on Managing Trade Compliance in Today's Environment: "Enforcement Approaches to Protecting the National Interest" (June 11, 2002).

Applying successor liability theories to international trade sanctions may indeed give asset purchasers an incentive to scrutinize the international trade practices of the sellers, but they usually cannot reveal these violations to the enforcement agencies because the purchasers are bound to observe a nondisclosure agreement. No asset seller would consent to an unrelated company scrutinizing its business records without such an agreement. The purchasers can usually bring these violations to the attention of the enforcement agencies after the asset sale has been completed, at which point, under the successor liability theory, the purchaser is liable for the violations in any case, which destroys the incentive to reveal the very violations the imposition of successor liability is supposed to uncover.

some of the most complex, convoluted, and vaguely worded statutes and regulations in the U.S. Code and Code of Federal Regulations. And beyond architectural and semantic concerns, separate regulatory regimes dealing with the same subject matter create areas of jurisdictional and substantive ambiguity.²⁶⁷

It is inevitably the case that unwittingly misclassified import shipments, misdescribed exports, and very complex and ever-changing regulations make it difficult to discover international trade violations. For example, imagine that an asset seller imported 200,000 tons of steel each year from South Korea between 2000 and 2005. The purchaser, conducting thorough due diligence, performs the following duties: notes the imports; verifies their classification under the regulations effective on each applicable day (a potentially time-consuming exercise); checks to see that the origin of the shipment was a port of call in South Korea; and ascertains that the proper duty was paid by referring to the applicable Harmonized Tariff Schedule. What the purchaser cannot discover, however, is the fact that the steel did not in fact originate in South Korea, but in Japan. Nothing in the seller's records might indicate such a mistake, particularly if the South Korean exporter incorrectly reported the shipments as originating in South Korea and the asset seller's trade compliance officer never checked the veracity of the claim. Far more alarmingly, suppose the seller's trade compliance officer knew of the origin but intentionally misrepresented it and destroyed the paperwork with the misguided intent of saving the importer from paying high duties. Criminal lawbreakers typically try to avoid leaving a paper trail and are unlikely to call the purchaser's (or anyone else's) attention to their violations. In short, the difficulty of discovering the asset seller's regulatory violations in the minimal time typically available for conducting pre-acquisition due diligence means that asset purchasers will often have little or no knowledge of the probability or scope of potential liability. The disincentive to purchase the assets of other companies increases in proportion to the uncertainty of the probability and potential magnitude of penalties engendered by successor liability.

Another policy problem with applying successor liability to international trade regulation originates in the goals of the regulatory sanctions themselves. To the extent that sanctions seek to punish by way of retribution, they are of course pointless when applied to corporate successors rather than the wrongdoer. Even accepting the problematic assumption that moral sanctions such as retribution are meaningful when applied to a fictitious entity such as a

267. A 1997 report by the GAO gives an example of two such ongoing jurisdictional disputes. The report responds to a request from Congress to analyze the implications of transferring jurisdiction over exports of commercial communications satellites and commercial jet engine hot section technology from the State Department's Office of Defense Trade Controls to the Department of Commerce's Bureau of Export Administration. U.S. GEN. ACCOUNTING OFFICE, EXPORT CONTROLS: CHANGE IN EXPORT LICENSING JURISDICTION FOR TWO SENSITIVE DUAL-USE ITEMS, GAO/NSIAD-97-24, at 1 (1997).

Another example of separate but overlapping regimes relates to the U.S. embargo against Iran. OFAC administers the Iranian Transactions Regulations, 31 C.F.R. pt. 560 (2004), while BIS maintains licensing requirements separate from and additional to the OFAC regulations, 15 C.F.R. § 746.7(a)(2), (b) (2005).

business organization,²⁶⁸ moral sanctions can only be meaningful when applied to the wrongdoer.

But international trade sanctions are aimed less at effecting retribution than at achieving deterrence. One would rather prevent threats to homeland security and domestic industries than gratify a national sense of moral righteousness by punishing lawbreakers. Here too, however, sanctions are pointless when applied to successors. Deterrence is most effective when the relevant actor is punished.²⁶⁹ Threatening to punish future asset purchaser Company B is unlikely to deter asset seller Company A from violating international trade laws. Of course, it is possible that the threat that B will conduct thorough due diligence and discover A's violation will increase A's incentive to avoid violations. But this is an attenuated form of deterrence in comparison to punishing the wrongdoer itself, and is outright ineffective if A believes it can successfully hide the violations from B. Deterrence is attenuated a fortiori where a sale of assets is not contemplated by A, is a remote possibility, or is unconnected to the employee or agent of A responsible for the violation.

268. See generally MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY (1986) (arguing that moral judgment is ineffective against utilitarian organizations). But see generally PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 143-50 (2002) (arguing that moral personality should not be required for the imposition of blame); Brent Fisse & John Braithwaite, *The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability*, 11 SYDNEY L. REV. 468, 483-88 (1988) (same).

269. Experience as an international trade lawyer has taught me that what motivates the federal enforcement agencies in practice is not only deterrence but the prospect of a large financial gain from the deepest available pocket. Particularly where the asset seller's funds have become difficult to trace, as in the *Sigma-Aldrich* case, the purchaser makes a convenient and usually better-funded target. Because federal enforcement authorities generally obtain professional recognition and promotion based on results achieved in terms of penalties collected, with a correlation between the size and frequency of such penalties and the prestige associated with the collection, bureaucratic incentives favor overlooking legal and policy concerns where large monetary rewards or publicity can easily be had. An observation of a federal district court several years ago is appropriate: "Under these circumstances, the government appears to be seeking to punish the property for a crime for which it cannot punish its owner." *United States v. Real Property at 6625 Zumirez Drive*, 845 F. Supp. 725, 736 (C.D. Cal. 1994).

That BIS, for example, seeks the maximum possible penalties regardless of the equities of the case is especially evident from its now routine practice of double-counting violations. The EAR includes as separate violations the unlicensed exportation of a controlled item and making false statements on a shipper's export declaration (SED). When unlicensed exports of controlled items are made in error, the exporter typically declares on the SED that the export requires no license, as it is required to do, in accordance with its belief. Obviously, if the exporter was aware that a license was required, it would have applied for one. Consequently, it is common in cases of accidental unlicensed exports that the exporter fails to realize that a license is required for the export at issue, accordingly fails to apply for such a license, and exports the item, declaring on the SED that no license is required. In such cases, BIS seeks two separate penalties for each violation—one for the unlicensed exportation and one for the false statement on the SED. See, e.g., Press Release, Bureau of Indus. & Sec., Connecticut Company Settles Charges Concerning Unlicensed Pump Exports to China, Taiwan, Israel, and Saudi Arabia (July 28, 2003), available at <http://www.bis.doc.gov/news/2003/sundstrand.htm>. BIS is fully aware that the exporter could not conceivably have given the correct information on the SED if it was unaware that a license was required, but this point has not fazed BIS in the least, leading to the likely conclusion that BIS is generally out to collect the maximum possible penalties rather than interpret and enforce the law in good faith.

C. *Due Process of Law and Civil Penalties*

In enacting the 1979 EAA, Congress stated that it is U.S. policy that exports not be controlled unless pursuant to laws "administered in accordance with due process."²⁷⁰ Of course, one likes to credit Congress with always intending that due process of law be guaranteed in the enforcement of any statute. But regulatory agencies cannot always be expected to strive to effectuate congressional intentions in executing the law. There are good reasons to believe that the successor liability practices employed by the international trade regulatory agencies are not just bad law and bad policy, but violate due process and are otherwise unconstitutional. The purpose of this subpart is to analyze some of the potential constitutional debilities of the current practice.

The Fifth Amendment to the Constitution provides that the federal government may not deprive any person of "life, liberty, or property, without due process of law."²⁷¹ The Due Process Clause provides heightened protection against government interference with certain fundamental rights and liberty interests guaranteed by the Constitution.²⁷² One such protected interest is the right to freedom from arbitrary or unreasonable deprivation of property or liberty. In pursuit of this goal, due process of law has been generally interpreted to require the state to take reasonable steps to ensure that it does not impose criminal punishment on an innocent party. Among such requirements are the state's obligation to prove its case beyond a reasonable doubt²⁷³ and to disclose exculpatory evidence.²⁷⁴ The Fifth Amendment accordingly forbids the state to disregard the identity of the offender in effectuating punishment.²⁷⁵ Given that civil and criminal penalties in the international trade statutes are intended to be and are in fact administered as punishment, the indiscriminate imposition of successor liability on the purchaser of assets or stock for international trade law violations of the seller appears to violate due process of law. Not only are these penalties punitive; they are effectively criminal sanctions in the guise of civil remedies, as has already been demonstrated.²⁷⁶

One possible reply is that successor liability is constitutionally acceptable because, although it may superficially appear to impinge upon the asset purchaser's right to due process, the policy (at least, if limited to civil penalties) really amounts to a deprivation of property that meets the standard of strict scrutiny. The strict scrutiny test could not, of course, justify imposing

270. H.R. CONF. REP. NO. 96-482 (1979), as reprinted in 1979 U.S.C.C.A.N. 1180, 1181.

271. U.S. CONST. amend. V.

272. See *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

273. See *Ring v. Arizona*, 536 U.S. 584, 599-600 (2002) (quoting *Jones v. United States*, 526 U.S. 227, 243 (1999)); *In re Winship*, 397 U.S. 358, 361 (1970).

274. See *United States v. Agurs*, 427 U.S. 97, 106-07 (1976).

275. The Supreme Court regards "as axiomatic that persons cannot be punished when they have done no wrong." *Bennis v. Michigan*, 516 U.S. 442, 467 (1996); cf. *Bell v. Wolfish*, 441 U.S. 520, 583-84 (1979) ("[T]he due process guarantee is individual and personal, it mandates that an innocent person be treated as an individual human being and be free of treatment which, as to him, is punishment."); *Winters v. New York*, 333 U.S. 507, 519-20 (1948) (holding that a law that does not adequately put potential defendants on notice that innocently intended conduct may be illegal is void for vagueness).

276. See *Fellmeth*, *supra* note 173, pt. III.A.

criminal punishment on an innocent person no matter how compelling the state's interest. Nonetheless, given the common (if erroneous) recognition in the case law of a distinction between civil and criminal penalties for constitutional purposes, it is possible that courts would justify an arbitrary deprivation of property under the guise of "civil" penalties as a permissible state action under the Fifth Amendment's Due Process Clause if that action were narrowly tailored to achieve a compelling state purpose.²⁷⁷ To satisfy strict scrutiny, government measures must be narrowly tailored to achieve a compelling purpose. If the practice of imposing successor liability meets the strict scrutiny standard, it may justify acts that might otherwise violate the asset purchaser's right to due process. The first task in evaluating the cogency of this reply is to determine whether deterring violations of the international trade statutes and regulations—the purpose of the civil and criminal penalties authorized by the statutes—is a compelling purpose.

While it may be possible to offer a cavil about some provisions of these statutes, particularly those relating to the protection of domestic industries from foreign competition, there can be no doubt that deterring and punishing such violations are generally compelling purposes.²⁷⁸ As discussed previously,²⁷⁹ the purposes of these laws are to protect the United States and its allies from terrorism and to promote U.S. foreign policy goals such as regional stability and disarmament. These are hardly trivial policy goals. Deterring violations of important federal laws and regulations has consistently been upheld as a constitutionally compelling purpose,²⁸⁰ as has the goal of punishing such violations.²⁸¹

Accepting that enforcement of international trade statutes and regulations is a compelling purpose, then, the next question is whether a policy of applying successor liability is narrowly tailored to achieve that purpose.²⁸² A measure is "narrowly tailored" when the purpose of the measure

277. Cf. Mark Tunick, *Constitutional Protections of Private Property: Decoupling the Takings and Due Process Clauses*, 3 U. PA. J. CONST. L. 885, 903 (2001) ("A regulation's uncompensated denials of economically viable uses of property, to the extent that the regulation's private detriment outweighs its public benefit, would be unconstitutional . . . because in a substantive due process analysis using heightened or strict scrutiny, a law violating a fundamental right to private property that failed a balancing test could be regarded as a deprivation of property without due process of law.").

278. If, however, the purpose of successor liability is to allow enforcement agencies to select the most inviting target for punishment—which, realistically, is the most probable reason for the agencies' adoption of successor liability principles—this goal fails to qualify as a compelling purpose. Courts have consistently confirmed that mere convenience does not rise to the "compelling" level. See, e.g., *Estelle v. Williams*, 425 U.S. 501, 505 (1976) (holding that convenience to jail administrators is no "essential state policy" imposing a "substantial need" sufficient to justify requiring the wearing of jail clothing at criminal trials); *Memorial Hosp. v. Maricopa City*, 415 U.S. 250, 267-69 (1974) (concluding that interest in convenient prevention of fraud did not justify denying health care benefits to all out-of-state immigrants in first year of residency); *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 2 F.3d 1514, 1545 (11th Cir. 1993) (holding that any city interest in the administrative convenience of dispensing with due process and equal protection of religious beliefs is not compelling); see also *DeFunis v. Odegaard*, 416 U.S. 312, 341 (1974) (stating that the Court has never held administrative convenience can justify violating the Equal Protection guarantees of the Fourteenth Amendment).

279. See *supra* discussion in Part V.B.

280. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991).

281. See *Moran v. Burbine*, 475 U.S. 412, 426 (1986) (referring to "society's compelling interest in finding, convicting, and punishing those who violate the law"); *Minneapolis & St. Louis Rwy. Co. v. Beckwith*, 129 U.S. 26, 36 (1889).

282. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273-74 (1986).

is substantially effective and cannot be achieved by any other, less burdensome, measure. The question, in other words, is whether successor liability is substantially effective at deterring violations of the international trade laws²⁸³ and, if so, whether the agencies can avail themselves of any alternative, less onerous means of achieving that deterrence.²⁸⁴

Here, the attempted justification for successor liability founders. A policy holding an asset purchaser liable for violations by the seller certainly falls short of a "necessary" or "narrowly tailored" standard to deter such violations or crimes by the seller for the reasons described above.²⁸⁵ It would be surprising indeed to learn that there is no less burdensome way of deterring a party from violating the law than by holding an entirely different party liable. Apart from the obvious expedient of holding parties liable for their own conduct, another approach would be to prosecute the individual directors, officers, partners, employees, agents, or other persons responsible for violations rather than (or in addition to) a violating entity itself.

Indeed, it would be difficult to argue that punishing an innocent party is rationally or substantially related, much less narrowly tailored, to deterring violations of the international trade laws. Where a deprivation of even a nonfundamental right is arbitrary and not reasonably related to effectuating a compelling government purpose, the deprivation violates the victim's substantive due process rights.²⁸⁶ Given the pragmatic impossibility of an asset purchaser detecting all of the past violations of the seller,²⁸⁷ where the purchaser had no knowledge of the seller's violations or the purchaser's inherited liability for them, the effect of successor liability is to deter asset purchases, not to deter violations by the seller. Any deterrence of violations of the law caused by successor liability would be entirely unpredictable and accidental. Redirecting punishment to an innocent party is neither a rational nor reasonable approach to deterring violations of law by the guilty party. Successor liability for undiscovered violations of law infringes due process even under the most relaxed form of due process scrutiny.

VII. CONCLUSIONS

The history of federal regulation of international trade reveals much about our diplomatic past and present. As U.S. foreign policy has evolved to accommodate a changing world public order and new domestic priorities, so have the scope of, basis for, and approach to international trade regulation. This history reflects particularly well how the end of the Cold War on one hand, and the increased success of foreign terrorism in the United States on the other, changed the political landscape. These changes have not always been for the best. While catastrophic events can motivate useful changes in

283. See *Carey v. Population Serv. Int'l*, 431 U.S. 678, 691 (1977) (noting deterrence can be a compelling state interest); see also *Ewing v. California*, 538 U.S. 11, 25 (2003) (listing deterrence as a major state interest for sentencing purposes).

284. See, e.g., *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 437-38 (1983).

285. See *supra* note 270 and accompanying text.

286. See *Pennell v. City of San Jose*, 485 U.S. 1, 11 (1988); *Nebbia v. New York*, 291 U.S. 502, 537 (1934).

287. See *supra* discussion in Part VI.B.

security practices, in some cases they can provide a pretext for ignoring important public policies and even infringing valued constitutional rights.

Recent administrations have been accused of using the threat of terrorism to justify acts that overtly flout constitutional rights,²⁸⁸ but the manner by which subtle shifts in law enforcement policies can insidiously encroach on personal and property rights is less conspicuous. The structure and operation of the regulatory state lends itself to deleterious abuses in many ways: through the opacity of agency operations; the concentration of executive, legislative,²⁸⁹ and judicial²⁹⁰ functions in a single agency; the high degree of prosecutorial discretion typically afforded to regulatory agencies by statute; an ongoing if not burgeoning tradition of judicial deference to the political branches,²⁹¹ and the continuous nature of regulatory oversight, which pressures regulated persons to accept arguably extralegal or even unconstitutional outcomes to avoid high litigation costs and a deterioration of their relations with the regulatory agency.

Recent abuses commanding the most attention involve human suffering that results from legally questionable or inhumane regulatory action, such as

288. See, e.g., Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169 (2004) (criticizing the Bush Administration for interpreting its foreign affairs and war powers to oppose judicial review of decisions carrying constitutional implications); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 ORE. L. REV. 1051, 1129-30 (2002) (“[T]he current expansion of executive powers and the concomitant restrictions on civil rights are not simply a response to a national emergency sparked by recent acts of terrorism In the name of ‘national security,’ governmental agencies have a consistent history of knowingly violating fundamental rights guaranteed by the Constitution.”).

289. The regulatory agencies act in a legislative role in their capacities as promulgators of regulations under what used to be known as the Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (current version at 5 U.S.C. §§ 551-59, 701-06 (2004)).

290. The regulatory agencies act in a judicial role in their capacities as fact-finding and law-declaring tribunals, such as the International Trade Commission and Department of Commerce’s International Trade Administration. Approximately 1,300 administrative law judges (ALJs), see Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 TULSA L.J. 203, 213 (1996), are employed by the various federal agencies to conduct proceedings, make findings of fact, and interpret law subject to the ultimate discretion of the agency or department head.

291. The Court has increasingly deferred to the findings of fact and interpretation of law of Executive Branch agencies, moving from the relatively undeferential *Skidmore* standard, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), to the more deferential *Chevron* standard, *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984). But see *Rockwell Fastener, Inc. v. United States*, 267 F.3d 1354, 1357 (Fed. Cir. 2001) (purporting to apply simultaneously a de novo review of an agency determination and *Skidmore* deference). Excellent discussions of judicial deference to administrative agencies can be found in Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000), and Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219 (1993). The Court has even sometimes deferred to the Executive Branch to the point of approving patently unconstitutional policies so long as matters arguably affect national security. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding as constitutional an Executive Order excluding all persons of Americans “of Japanese ancestry” from the entire West Coast during wartime); *United States v. United States Dist. Ct.*, 407 U.S. 297, 321-22 (1972) (creating a “foreign intelligence exception” to the Fourth Amendment’s requirement that the executive obtain a warrant prior to an invasive search). But see *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (limiting the President’s power to confine U.S. and foreign nationals indefinitely without affording them due process of law); *Rasul v. Bush*, 542 U.S.466 (2004) (same).

The Court’s deference to the Legislative Branch is more recent but equally radical. See, e.g., Aaron Xavier Fellmeth, *Civil Penalties and Civil Rights in the Constitution and Courts*, 94 GEO. L.J. (forthcoming Nov. 2005) (manuscript at Part I, on file with author).

in immigration law enforcement.²⁹² But some abuses do not make good headlines and take subtle and complex forms unlikely to foment public outrage. And any regulatory abuse may be exacerbated by the decreasing willingness of courts to scrutinize the behavior of regulatory agencies when the twin totems of national security and antiterrorism are invoked. This absence of judicial scrutiny leaves enforcement agencies virtually unchecked, despite the fact that they may neither operate under a benign incentive structure nor always act according to well-intentioned and rational motives.

The importation of successor liability from state law into international trade regulation exemplifies the problematic nature of this trend. In this Article, I have argued that successor liability has no place in international trade regulation as a matter of law, public policy, or constitutional doctrine. It is largely absent from the relevant statutes and, being equitable and remedial in nature, does not doctrinally fit into a system of deterrent and punitive regulations. Even assuming that it did, its imposition on good faith asset purchasers who were unaware of the liability at issue departs from the judicial precedents applying successor liability under other federal statutes.

The problem with incorporating successor liability into international trade regulation does not end at incompatibility with positive law. Successor liability creates unnecessary economic deadweight losses to society by discouraging the free movement of capital to more efficient uses and dilutes the deterrent and retributive effects of statutory penalties. Finally, applying successor liability to an unknowing purchaser in a penal context violates due process of law.

In fact, successor liability is so maladapted to international trade regulation in so many ways that the adoption of successor liability theories by BIS, OFAC, DDTC, and CBP may call into question the good faith of the agencies and their competence to interpret and enforce the statutes they are charged with administering. Their goal should not be to deter asset purchases, but rather to deter violations of the relevant statutes and regulations. In the international trade law context, successor liability is quite simply a cure concocted to remedy a nonexistent disease. It is, worse, a cure that creates the new and baleful side effects of injustice, economic inefficiency, and unconstitutional persecution.

Judicial deference to Executive Branch agencies is grounded in notions of respect for the legislature and an assumed agency expertise in the subject matter the legislature has delegated to an administering agency. But the agencies do not always benefit from the same commitment to impartial justice and sound public policy that is expected of Article III courts. While agencies

292. See Susan M. Akram & Maritza Karmely, *Immigration and Constitutional Consequences of Post-9/11 Policies Involving Arabs and Muslims in the United States: Is Alienage a Distinction Without a Difference?*, 38 U.C. DAVIS L. REV. 609 (2005); Kevin R. Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 UTAH L. REV. 279, 303-04 ("Judicial deference to the Executive Branch's immigration decisions often is significantly greater than that afforded to actions of other administrative agencies."); Marie A. Taylor, *Immigration Enforcement Post-September 11: Safeguarding the Civil Rights of Middle Eastern-American and Immigrant Communities*, 17 GEO. IMMIGRATION L.J. 63, 65 (2002) ("Civil rights advocates and many public officials have questioned the constitutionality and appropriateness of current federal investigatory activities that seem to rely to some extent on racial, religious, and ethnic profiling.").

may well view themselves as representing the law enforcement function of government, there is no serious disincentive to agency personnel behaving like private actors, disregarding the justice of the case, and seeking to obtain the largest possible settlement.

On the contrary, agency atmosphere and procedures often provide incentives to interpret the law aggressively and to engage in enforcement tactics that maximize agency revenue and justify proud headlines announcing that this or that company (ideally a large one that engages in a high volume of trade transactions) settled charges of wrongdoing by paying a multi-million dollar fine. It is the same old problem of street-corner cops hyper-aggressively fulfilling their citation quotas, but on a much grander scale. The police behavior, originally intended to control antisocial public behavior, itself becomes more antisocial than the behavior it was supposed to remedy. The ideal solution, of course, is for the international trade enforcement agencies to reverse course and stop trying to solve a “successorship” problem that does not exist. Before proffering a cure for corporate successorship in international trade regulation, the agencies should heed the advice: “Physician, heal thyself.”²⁹³

Especially troubling about this practice is the way it spread from agency to agency after the *Sigma-Aldrich* case. Now that successor liability has made its appearance in the non-remedial regulatory system of international trade law, there is nothing to stop other regulatory agencies administering non-remedial statutes from adopting the same practices. The Securities Exchange Commission, the Federal Communications Commission, the Internal Revenue Service, the Food and Drug Administration, the Federal Trade Commission, and others might well follow the international trade precedent and seek to punish the innocent to extralegal, ill-considered, and ultimately unconstitutional effect.

293. Luke 4:23 (King James).

APPENDIX

U.S. International Trade Law Acronyms					
Agency	Abbr.	Main Statutes Enforced	Abbr.	Regulations Enforced	Abbr.
Bureau of Customs & Border Protection	CBP	Tariff Act of 1930		Customs Regulations	
Bureau of Industry & Security	BIS	International Emergency Economic Powers Act	IEEPA	Export Administration Regulations	EAR
Directorate of Defense Trade Controls	DDTC	Arms Export Control Act	AECA	International Traffic in Arms Regulations	ITAR
Office of Foreign Assets Control	OFAC	Trading with the Enemy Act IEEPA	TWEA	Vary by country	