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ARTICLES

REKINDLING LABOR LAW SUCCESSORSHIP
IN AN ERA OF DECLINE

Wilson McLeod*

American law does almost nothing to protect workers when businesses change hands. When an employer sells or otherwise transfers a business operation, its employees will be lucky if they hold on to their jobs at all, and extremely lucky if they continue to receive comparable wages and benefits. If the employees had chosen a union to represent them in collective bargaining, the new employer may very well be free to ignore the union altogether, and almost certainly will not be required to abide by agreements the union won. The various rules are complicated, but can be easily summarized all the same: an employer that acquires a business operation will inherit certain labor law obligations if it wants to. With a few peripheral exceptions, it is all up to the employer.¹

* B.A., Haverford College; J.D., Harvard Law School; Member of the California Bar. Thanks to Joe Vitale for his contributions and to the Fund for Labor Relations Studies for its generous research grant.

¹ The Supreme Court has recognized as much. See Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40-41 (1987).
This harsh regime is unique among the major industrial nations — the United States' principal competitors in the global economy.\(^2\) In this regard only the United States continues to cling to traditional liberal notions about privity and freedom of contract.\(^3\) The sale or transfer of a business is considered to terminate the employment relationship — a relationship conceptualized as a "contractual" one — and it need only be resumed at the new employer's discretion. Should the new employer exercise its discretion to "rehire" the employee, existing law will usually consider the matter an entirely new transaction, so that the parties may negotiate — or, more realistically, the employer may dictate\(^4\) — new terms of employment.

This article will propose a wholesale reform of this harsh regime. Transfers of businesses should be made as irrelevant as possible from the standpoint of workers. A change in ownership should not work a fundamental restructuring of employee rights, or indeed any restructuring at all. The new employer should simply step into the shoes of the old. Employees should retain their employment on the same terms to which they are accustomed.

This thesis may appear unspeakably vague to readers familiar with the body of labor law known as "successorship."\(^5\) It is deliber-

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2. See infra Part III; but see Herber Northrip & Phillip Miscimarra, Government Protection of Employees Involved in Mergers and Acquisitions 629 (1989) (questioning this conclusion).


4. As Otto Kahn-Freund observes:

   [T]he relation between an employer and an isolated employee is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment."


5. Labor law successorship contains two components, one which may be labeled "prospective" and the other "retrospective." The former, which is the subject of my discussion in this article, involves ongoing obligations that affect the conduct of a successor employer's business. The latter, which I do not consider here, involves the successor's potential liability
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ately so. Labor law successorship has grown into a forest unusually thick with trees, and fundamental principles and problems can easily slip from view. To deal with these basic issues effectively, it is necessary to maintain a broad perspective. Similarly, I recognize that my proposals here are not entirely novel, and that at least to some extent they have been made and rejected before. But the existing body of American successorship law emerged a full generation ago, and the landscape has changed immensely since that time. The world has become far smaller, its economy far more integrated, and the United States, it now seems clear, has entered a period of long-term decline. During that time, moreover, the United States' economic rivals have all come to adopt legal protections of the kind I will be proposing here, while the American system of labor law has undergone great upheaval and prompted great concern about its continuing viability. Labor law appears to have simply failed, not least because it leaves five-sixths of American workers outside the scope of its protections.⁶

In Part I of this article, I describe the basic theories underlying existing successorship law and the shifting economic contexts in which they have functioned. In Part II, I provide a detailed investigation of the defects of the existing system, as it applies to both union

for unlawful conduct by its predecessor. See, e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168 (1973) (establishing the framework for successor liability for predecessor unfair labor practices under the National Labor Relations Act); Upholsterers' Int'l Union Pension Fund v. Artistic Furniture of Pontiac, 920 F.2d 1323 (7th Cir. 1990) (holding that a successor may be responsible under the Employee Retirement Income Security Act for unsatisfied employee benefit obligations incurred by its predecessor); EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974) (holding a successor liable under Title VII of the Civil Rights Act of 1964 for its predecessor's unlawful discrimination against an employee); see also EEOC v. Vucitech, 842 F.2d 936, 944-45 (7th Cir. 1988) (discussing the theoretical issues raised by retrospective successorship). The line between the two is not always bright, however. See, e.g., NLRB v. Aquabrom Div., Great Lakes Chem. Corp., 855 F.2d 1174, 1180 (6th Cir.), amended, 862 F.2d 100 (1988) (noting that a successor may be required to bargain with a union as a remedy for its predecessor's unfair labor practices); Bates v. Pacific Maritime Ass'n, 744 F.2d 705 (9th Cir. 1984) (subjecting a successor's hiring practices to a Title VII consent decree that resulted from its predecessor's unlawful racial discrimination).

Prospective successorship also encompasses a minor branch not addressed in this article: the so-called "alter ego" doctrine, which involves the obligations of successors that share the same ownership as their predecessors. This article will look only at what might be called "arms' length" successorship. For a critical analysis of the "alter ego" doctrine, see Wilson McLeod, Shareholders' Liability and Workers' Rights: Piercing the Corporate Veil Under Federal Labor Law, 9 HOFSTRA LAB. L. J. 115, 147-50 (1991).

6. Figures for 1992 show that only 15.8% of the American labor force now belongs to a union. See Proportion of Union Members Hits 15.8 Percent, 140 Lab. Rel. Rep. (BNA) 180 (1993). Insofar as "traditional" labor law does not significantly affect the worklives of unorganized employees, it cannot be said to protect them in any meaningful sense. See infra note 10.
and non-union workers. In Part III, I consider the ways in which successorship problems have been tackled in other industrial countries, particularly Canada and the European Community's member states, and then in Part IV, I address the complex problem of how an employee-neutral model of business transfers may be adopted in the United States' unwieldy federal system.

A NOTE ON TERMINOLOGY

This article considers the rights of both unionized and non-union workers, and it uses the general term “labor law” to describe the legal rules that affect workers, whether or not they belong to unions. At this point, the erosion of unionization is a basic fact of life. As noted, less than one-sixth of American workers now belong to a union, and it no longer makes sense (if it ever did) to segregate different groups of workers in this way. In recent years, the prevailing dichotomy has been between “labor law,” which deals with unionization and collective bargaining, and “employment law,” which deals with everything else, from sex discrimination in the workplace, to employment-at-will, to wage-and-hour regulation, to employee drug testing. This distinction has become less and less workable over time, however, and should now be abandoned.

This reconceptualization is not simply a matter of selecting a workable and heuristic intellectual framework; it has serious political ramifications. First, the prevailing emphasis on “traditional” labor law — that is, more or less, the National Labor Relations Act (“NLRA”) — has the effect of overstating its importance, thereby suggesting that employees are much better off than they actually are. The overwhelming majority of American workers derive no real benefit from this body of labor law, and they have far fewer rights than those who


do.¹⁰ To pretend that “traditional” labor law constitutes the baseline protection for American workers is to legitimize a system that effectively denies meaningful rights to the great majority. Like other critics, I believe that the current traditional labor law regime — weak to start with and sapped by feeble enforcement — has failed in its basic objective of empowering workers to protect themselves, and that it requires fundamental revision.

Second, and more important, unifying all employment-related labor laws under the heading of “labor law,” and attempting to tackle all related employment problems together, lends support to the crucial project of providing all workers with a decent “floor” of legal rights.¹¹ As many commentators have noted, the American labor laws are unique among industrial nations in the narrowness of their coverage and the meanness of their protections.¹² The inadequacy of the basic legal regime encourages incomparably aggressive resistance by American employers to workers and their unions, who are considered likely to seek expensive protections at the bargaining table.¹³ Developing a comprehensive set of basic “labor law” protections for all employees will not only improve the lives of American workers but may also diminish employer resistance to unionization and help reinvigorate the role of labor in American public life.¹⁴

¹⁰ Concerted activity by nonunion workers is technically protected by the NLRA, but this is hardly a significant day-to-day protection, especially given the restrictive recent precedents in this area. See Eastex, Inc. v. NLRB, 437 U.S. 556 (1978); Meyers Indus., 281 N.L.R.B. 882 (1986), petition for review denied, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988).

¹¹ See Stone, The Legacy of Industrial Pluralism, supra note 7, at 577. Clyde Summers has recently undertaken a useful cross-cutting study along these lines, considering, among other things, the problem of “job security” without regard to rigid boundaries and distinctions. See Clyde W. Summers, Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals, 141 U. Pa. L. Rev. 457 (1992) [hereinafter Summers, Effective Remedies].


¹⁴ See McDonald, supra note 13, at 24; Stone, The Legacy of Industrial Pluralism, supra note 7, at 577, 638.
I. CHANGING THEORIES OF SUCCESSORSHIP — AND CHANGING CONTEXTS

More than most areas of labor law, successorship doctrine is deeply infused with ideas about public policy, labor economics, and business reality. As such, the various legal rules have emerged not so much from careful statutory analysis or reasoned elaboration of precedent as from conscious choices of the kind typically left to legislative action.

These underlying ideas and theories have not remained static over time. An initial model of successorship theory, inspired by the Supreme Court’s 1964 decision in John Wiley & Sons v. Livingston and fleshed out by the lower courts and the National Labor Relations Board in a series of cases culminating in The William J. Burns International Detective Agency, yielded to the markedly different approach articulated by the Court in NLRB v. Burns International

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16. See K.B. & J. Young’s Super Mkts. v. NLRB, 377 F.2d 463, 466 (9th Cir.), cert. denied, 389 U.S. 841 (1967) (holding that “the right to continued employment does not automatically terminate on change in ownership” and that there is “no valid distinction between a discharge by [a successor] and a discharge by [the predecessor] at [the successor’s] behest on the eve of the changeover”); United Steelworkers v. Reliance Universal Inc., 335 F.2d 891, 895 (3d Cir. 1964) (developing a theory of arbitrators’ power to modify and adjust collective bargaining agreements in successorship cases); Wackenhut Corp. v. United Plant Guard Workers, 332 F.2d 954, 958 (9th Cir. 1964) (relying on Wiley to hold “that where there is substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership, a collective bargaining agreement containing an arbitration provision, entered into by the predecessor employer, is binding upon the successor employer”).
17. 182 N.L.R.B. 348 (1970), enforcement granted in part and denied in part, 441 F.2d 911 (2d Cir. 1971), aff’d sub nom. NLRB v. Burns Int’l Sec. Servs., 406 U.S. 272 (1972) (holding that a successor employer is required to adhere to the terms and conditions of employment fixed by its predecessor’s collective bargaining agreement). See also Martin Marietta Corp., 159 N.L.R.B. 905, 905 (1966) (finding an unlawful failure to bargain when a successor “staffed the plant — selecting, dismissing, and retaining employees — without consultation with the Union and in disregard of the seniority rights of the [predecessor’s] employees”); Overnite Transp. Co., 157 N.L.R.B. 1185 (1966), enforced, 372 F.2d 765 (4th Cir.), cert. denied, 389 U.S. 838 (1967) (finding an unlawful failure to bargain when a successor changed employees’ terms and conditions of employment, even though the successor had made clear its intentions at the time it rehired them); Chemrock Corp., 151 N.L.R.B. 1074, 1078 (1965) (holding that “the individuals employed by the seller of the enterprise must be regarded as ‘employees’ of the purchaser” for purposes of hiring and collective bargaining); cf. Harry Sangerman, The Labor Obligations of the Successor to a Unionized Business, 19 Lab. L.J. 160, 175 (1968) (noting that as early as 1964 the NLRB’s General Counsel began issuing complaints alleging that successors breached their duty to bargain if they failed to abide by the terms and conditions of their predecessors’ collective bargaining agreements).
Security Services\textsuperscript{18} and Howard Johnson Co. v. Detroit Local Joint Executive Board.\textsuperscript{19} Today, a generation later, that second theory continues to hold sway,\textsuperscript{20} but the assumptions that underpin it have eroded greatly over time.\textsuperscript{21}

The Wiley regime rested on two fundamental principles, one normative and one positive. As a normative matter, the Court declared that workers and their unions should be protected against “sudden change[s] in the employment relationship” as a result of business transfers.\textsuperscript{22} Implicit in that declaration was a view that business considerations — “the rightful prerogative of owners independently to rearrange their businesses” — could not be allowed to undermine the policy goal of cushioning employees.\textsuperscript{23} These normative expressions in turn relied upon a crucial assumption about positive reality: that labor concerns were “inevitably . . . incidental” in these matters, that these matters did not directly concern workers at all.\textsuperscript{24} The underlying vision, of course, was that things like buying, selling, merging and acquiring were management decisions for management to make, while the proper role of the law was simply to provide a modest floor of protection in case the ordinary course of business decisionmaking accidently affected bystanders of one kind or another.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{18} 406 U.S. 272 (1972).
  \item \textsuperscript{19} 417 U.S. 249 (1974).
  \item \textsuperscript{20} But see William H. DuRoss, Increasing the Labor-Related Costs of Business Transfers and Acquisitions — The Spectre of Per Se Liability for New Owners, 67 Wash. U. L.Q. 375, 396 (1989) (suggesting that in Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987), “the Court . . . shifted the focus of the successorship doctrine dramatically away from the Burns business transferrability considerations solely to the employee’s view of job continuity”). See infra notes 90-93 and accompanying text for an assessment of this shift.
  \item \textsuperscript{21} This problem of erosion is not confined to the successorship context. As Terry Collingsworth has argued, the assumptions underlying the Court’s harshly anti-labor decisions concerning management’s duty to bargain over plant closings are no longer valid in light of the recent globalization of the economy. See Terry Collingsworth, Resurrecting the National Labor Relations Act — Plant Closings and Runaway Shops in a Global Economy, 14 Berkeley J. Employment & Lab. L. 72 (1993).
  \item \textsuperscript{22} Wiley, 376 U.S. at 549.
  \item \textsuperscript{23} Id. Rather, the Court held the two would have to be balanced. Id.; see also James Severson & Michael Willcoxon, Comment, Successorship Under Howard Johnson: Short Order Justice For Employees, 64 Cal. L. Rev. 795, 810 (1976) (explaining the Court’s emphasis on protecting employees at this “point in the evolution of the successorship doctrine”).
  \item \textsuperscript{24} See Wiley, 376 U.S. at 549 (“[N]egotiations leading to a change in corporate ownership . . . will ordinarily not concern the well-being of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations”).
  \item \textsuperscript{25} Cf. Samuel Estreicher, Successorship Obligations, in Labor Law and Business Change: Theoretical and Transactional Perspectives 63, 66 (Samuel Estreicher &
The *Burns* decision eight years later expressed a very different set of views. Acting against a background of eager acquisition and conglomeration in the American business world, the Court turned Wiley's basic positive assumption on its head, declaring that labor matters might actually represent a central issue in business transfers, and that labor law strictures might impose serious and dangerous obstacles:

A potential employer may be willing to take over a moribund busi-

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Daniel Collins eds., 1988) [hereinafter LABOR LAW AND BUSINESS CHANGE] (suggesting that successorship protections were developed as a quid pro quo for preserving management's unfettered discretion in entrepreneurial matters). *But see* Eileen Silverstein, *The Fate of Workers in Successor Firms: Does Law Tame the Market?*, 8 INDUS. REL. L.J. 153, 160 (1986) [hereinafter Silverstein, *Does Law Tame the Market?*] (arguing that the Wiley doctrine actually provided almost no protections to workers and that the Court was really relying on the expectation that "the operation of a market economy w[ould] impose sufficient control on successor discretion to make explicit legal protection of worker interests unnecessary").

It is crucial to draw the connection between the labor-protective approach of the Court and the Board in *Wiley* and its progeny, and their contemporaneous pro-capital decisions concerning the "core of entrepreneurial control." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring); *see* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 273-74 (1965) (holding, per Justice Harlan, author of *Wiley*, that management may lawfully close its entire business and terminate all its employees for any reason, including anti-union animus); *General Motors Corp.*, 191 N.L.R.B. 951, 952 (1971), enforced sub nom. Local 864, UAW v. NLRB, 470 F.2d 422 (D.C. Cir. 1972) (holding that "decisions such as [the sale of an employing enterprise], in which a significant investment or withdrawal of capital will affect the scope and ultimate direction of the enterprise, are matters essentially managerial in nature" and do not fall within the scope of mandatory bargaining). The *General Motors* decision further expressed the view that such bargaining would exceed unions' competence, declaring that "the determinative financial and operational considerations are likely to be unfamiliar to the employees and their representatives." *General Motors*, 191 N.L.R.B. at 952; *see* IAM v. Northeast Airlines, Inc., 473 F.2d 549, 557 (1st Cir.), cert. denied, 409 U.S. 845 (1972) (contending that "employees are [not] in a position to judge the complex financial considerations involved" in a merger) (Railway Labor Act context).


27. *See* John Russo, *Corporate Restructuring and the Decline of American Unionism*, 18 POL'Y STUD. J. 374, 375 (1989-90). I do not mean to suggest here that the Court set out to devise labor law rules that would be helpful for Wall Street. *But see* DuRoss, *supra* note 20, at 433 (proposing that "employers . . . trigger [a] review [of successorship law] by demonstrating through econometric statistics that these obligations stagnate the economy"). Still, the changing behavior of American business during this era does provide a more viable explanation than the more superficially likely possibility that a mere change in Court personnel prompted the shift in approach. *See* JAMES ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW 170 (1983). *Wiley* was a unanimous decision, authored by Justice Harlan. *Burns* provoked four dissenting votes (in favor of a more conservative outcome), including that of Justice Brennan, and *Howard Johnson* was written by Justice Marshall over Justice Douglas' solo dissent.

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ness only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.28

Smoothing the path of business transfers became the primary purpose of the legal rules, and labor law was not to stand in the way. The talk was now of contract and markets, private ordering, not regulation and government involvement.29 It was assumed that the market would take care of things on its own.30 By and large, the Court thought, successors could be relied upon to retain the existing workforce, recognize its union, and work out a reasonable and mutually satisfactory arrangement — “rather than . . . face uncertainty and turmoil.”31

Twenty years after Burns the ground has changed dramatically. The Court’s revisionist approach proved to be a harbinger of things to

28. Burns, 406 U.S. at 287-88. Sentiments like these were not entirely foreign to previous successorship cases. See Chemrock Corp., 151 N.L.R.B. 1074, 1086 (1965) (Member Jenkins, concurring and dissenting) (arguing that successorship obligations “encumber[ ] stagnant and unprofitable enterprises by reducing the flexibility available to prospective buyers and tend[ ] to foreclose any rejuvenation which might result from sales to new owner-managers”); cf. Charles G. Bakaly, Jr. & James S. Bryan, Survival of the Bargaining Agreement: The Effect of Burns, 27 VAND. L. REV. 117, 128 (1974) (contending that “these policies are hardly novel . . . . and are basic axioms of a free enterprise economy”).

Although this statement in Burns has become a classic statement of capitalist dogma in labor law, it is not necessarily valid under neoclassical capitalist theory. See Keith N. Hylton & Maria O. Hylton, Rent Appropriation and the Labor Law Doctrine of Successorship, 70 B.U. L. REV. 821, 837 (1990) (explaining that under the Coase Theorem, restrictions on successor action imposed by successorship law should only affect sale prices, not determine whether or not sales occur).

29. See Theodore H. St. Antoine, Judicial Caution and the Supreme Court's Labor Decisions, October Term 1971, 6 U. MICH. J.L. REFORM 269, 276 (1973) (noting the "Willistonian" tone in Burns); cf. Morris & Gaus, supra note 13, at 1387 (contending that Burns "seemed to regard [a collective bargaining] agreement primarily as a contract of sale which fixes the price for labor at a particular plant"). Sarah Siskind has described the shift rather more bluntly, stating, "Rather than protecting employee rights . . . . the Court opted to protect capital." Sarah Siskind, Employer Instability and Union Decline: Problems in the Law of Successorship, in PROCEEDINGS OF NEW YORK UNIVERSITY 39TH ANNUAL NATIONAL CONFERENCE ON LABOR § 8.0314, at 8-13 (1986).


31. Burns, 406 U.S. at 291; see Silverstein, Does Law Tame the Market?, supra note 25. This approach is in accordance with the basic industrial pluralist regime, in which the legal rules are to provide a measure of protection, to make sure the basic process gets under way, but are not to regulate the actual results. The best illustration of this view is the Supreme Court’s decision in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970); the best academic analysis is Stone, The Post-War Paradigm, supra note 25.
come, not only in labor law, or even law in general, but in economics and politics across the board. Labor considerations did become a primary factor in corporate transactioneering; management did win its flexibility; and labor law rigidities were not permitted to interfere with the basic processes of capital accumulation and capital allocation and capital manipulation.

The consequences, however, have not been pretty. Today businesses change hands at a rate greatly increased even over the late 1960s,32 and workers are much more likely to get caught up in these maneuvers.33 The typical transaction is no longer the preservation of a healthy enterprise or the rejuvenation of a failing one, but the restoration of an "undervalued" target to profitability, as rapidly as possible, by any means necessary.34 Unlike earlier times, moreover, labor considerations often provide the central reason for business transactions.35 And while aggressive tactics to wring money out of "labor

32. On average, there were more than twice as many mergers and acquisitions recorded each year between 1982 and 1989 (3434) as there were between 1965 and 1970 (1643). Compare U.S. Bureau of Census, Dept. of Commerce, Statistical Abstract of the United States 1991, at 540 (Chart No. 888) (111th ed. 1991) [hereinafter Statistical Abstract 1991] with U.S. Bureau of Census, Dept. of Commerce, Statistical Abstract of the United States 1981, at 537 (Chart No. 904) (102d ed. 1981). The size of entities acquired in the 1980s was also unprecedented. The value of the companies and divisions exchanged between January 1983 and January 1987 was calculated as being equivalent to almost one-fifth of the market value of all traded stocks, see For Better Or For Worse?, Bus. Wk., Jan. 12, 1987, at 38, while the value of mergers in 1985 was more than five times as great as in 1965 or 1975. Bennett Harrison & Barry Bluestone, The Great U-Turn: Corporate Restructuring and the Polarizing of America 59 (paperback ed. 1990).

This rise in speculative activity has been persuasively linked to managerial shortsightedness and ineptitude rather than coherent long-term business strategy. See Robert H. Hayes & William J. Abernathy, Managing Our Way to Economic Decline, 58 Harv. Bus. Rev. 67 (1980).

33. In 1987 alone, a full 10% of the workforce was involved in a merger, acquisition or related transaction. See Jeanette A. Davy & Christine L. Scheck, Are Union Representatives Effective Communicators During Mergers and Takeovers?, Lab. Stud. J., Fall 1991, at 3, 3-4 (citing A. Bouno & J. Bowditch, The Human Side of Mergers and Acquisitions 5 (1989)).

34. Cf. Silverstein, Does Law Tame the Market?, supra note 25, at 173 & n.79 (explaining that mergers and acquisitions have traditionally involved healthy businesses and criticizing the Court's excessive attention to "moribund" enterprises).

35. Unfortunately, much of the evidence in this regard tends to be anecdotal — if one can describe events like RJR Nabisco's dismissal of 2000 workers after Kohlberg Kravis Roberts' 1988 leveraged buyout as an "anecdote." See Alan E. Garfield, Helping the Casualties of Creative Destruction: Corporate Takeovers and the Politics of Worker Dislocation, 16 J. Corp. L. 249, 254-55 n.32 (1991) (cataloging the wreckage of some major hostile takeovers during the 1980s).

Two studies of peripheral aspects of the problem are Frank R. Lichtenberg & Donald

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costs" were socially unacceptable a generation ago, they have now become standard operating procedure, even among the largest and most respected of American corporations.\(^6\) Thus, as the Burns Court suggested, today new owners tend to buy companies with an eye to "restructuring" — a euphemism that usually translates into heavy job losses and deep slashes in wages and benefits.\(^7\) The possibility of terminating "overfunded" pension plans and skimming off the surplus has been a particular temptation, as has the prospect of replacing high-seniority, full-time employees with low-seniority, part-timers.\(^8\) Even in the best of cases, employees of transferred companies are almost sure to lose their accumulated seniority and vacation benefits.\(^9\)

Siegel, *The Effect of Ownership Changes on the Employment and Wages of General Office and Other Personnel*, 33 J. L. & Econ. 383 (1990), which found overall declines in wages in employment following ownership changes, but as the title indicates, focused largely on administrative personnel; and Charles Brown & James L. Medoff, *The Impact of Firm Acquisitions on Labor*, in *CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES* 9 (Alan J. Auerbach ed., 1988), which found "little support" for the perception that acquisitions harm labor, but confined its attention to small Michigan companies sold during the late 1970s and early 1980s. One commentator thus dismissed Brown and Medoff's study as "having little to do . . . with . . . hostile takeovers and other ownership changes among large firms." Geoffrey Carliner, Comment, in *Brown & Medoff*, supra, at 25. Although they are full of horror stories, successorship cases themselves provide a uselessly skewed sample, since successors that respect workers and their unions are unlikely to get sued.

There is a negative corollary to this increased attention to labor matters: many corporations avoid acquiring unionized operations and divert their resources to nonunion targets. As one vice-president described his company's approach, "In reviewing a candidate for acquisition, we look much more at the employee relations component now than we did in the 1960s." KIM MOODY, *AN INJURY TO ALL: THE DECLINE OF AMERICAN UNIONISM* 122 (1988) (quoting Asil Verma & Thomas Kochan, *The Growth and Nature of the Nonunion Sector Within a Firm*, in *CHALLENGES AND CHOICES FACING AMERICAN LABOR* 92 (Thomas Kochan ed. 1985)).


37. HARRISON & BLUESTONE, supra note 32, at xxviii. The conventional apology for job slashing in this context is that "many of those same jobs would eventually be lost, even in the absence of takeovers, because of the backwash of the long wave of inflation-disinflation and the intensification of international competition." HARVEY SEGAL, *CORPORATE MAKEOVER: HOW AMERICAN BUSINESS IS RESHAPING FOR THE FUTURE* 118 (1989).

38. See Russo, supra note 27, at 378; see also Steve Gunderson, *Making the Case for a National Commission on American Labor Law and Competitiveness*, 42 LAB. L.J. 585, 593 (1991) ("Many leveraged buyouts and company mergers come at the expense of employee benefit plans, especially retiree health plans that are eliminated or scaled back to reduce costs"). See infra text accompanying notes 205-17 for an analysis of the legal rules that permit such activity.

At the same time, these trends have been exacerbated by dramatic changes in the basic financial structure of capitalist activity, especially with respect to the role of debt.  With the rise of the "junk bond" and similar innovations, a substantial proportion of successorship transactions, particularly those involving hostile takeovers and leveraged buyouts, end up producing financially weak acquirers — entities that are desperate to generate debt-servicing revenue in any way they can. Labor costs have been found to provide one of the expenses most readily susceptible to a cash-strapped new management's control. Typically, then, employees of highly leveraged companies will be pressured to accept sharp wage and benefit concessions; even if they are lucky enough to have the power to refuse, the alternative may well be their employer's bankruptcy.

The rise of "privatization" — a concept that was just about unknown twenty years ago — has inflicted similar kinds of hardships in the public sector. Guided by the imperative of "efficiency," a close cousin of the entrepreneurial concerns sketched out in Burns, governments throughout the United States have begun turning over many of their functions to private contractors, who typically endeavor to achieve their savings the old-fashioned way — through drastic wage and benefit cuts. While the merger-and-acquisition frenzy of the 1980s did calm down at least for a time, thanks to recession and enforcement of the securities laws, a decade and more of budget constraints at all levels of government suggests that "privatization" may gather yet more steam.

Most fundamentally, this is also a different era for American workers in general. Flush with post-war prosperity, the United States approached full employment in the late 1960s, in the years between Wiley and Burns, but unemployment rates almost doubled during the 1980s; the problem became structural, fundamental, no longer just a

40. See HARRISON & BLUESTONE, supra note 32, at 56.
41. See Weller, supra note 4, at 16; see also BELOUS, supra note 36, at 98 (explaining how cutting labor costs has become a preferred means of achieving short-term profitability and satisfying financial-market pressures).
42. See Russo, supra note 27, at 378.
43. See Al Bilik, Privatization: Defacing the Community, 43 LAB. L.J. 338 (1992); HARRISON & BLUESTONE, supra note 32, at 78, 97-99. For an analysis of the sociological and philosophical values that are jeopardized by privatization, see Craig Becker, With Whose Hands: Privatization, Public Employment, and Democracy, 6 YALE L. & POL'Y REV. 88 (1988).

Subcontracting by private-sector employers has also burgeoned in recent years, with similar consequences. See Kim Moody, The Sweatshops Are Back, LAB. NOTES, July 1993, at 1.
44. See JULIET B. SCHOR, THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF
frictional inconvenience. Among those who lost jobs as the result of 1980s plant closings, for example, only three-fifths found new jobs, and almost half of them were for lower pay. In light of these changes, legal rules that facilitate or encourage the elimination of jobs, and the displacement of those who hold them, have much more serious consequences than they did a generation ago.

Perhaps even more important than the quantity of jobs is their quality. Give or take a few blips in recession years, real wages went up consistently between 1945 and 1970, at an average of more than two percent per year. Since the early 1970s, however, real hourly wages have been falling almost as steadily. Today, real wages for nonsupervisory workers are nearly one-eighth less than they were in 1973, and scarcely higher than they were in 1965, the year after Wiley was decided. Twenty-five years ago the United States had the most equal distribution of wealth among the developed industrial nations; today it has the most unequal. What this adds up to, Kim Moody concludes, is "a substantial deterioration in the standard of living of the American working class."

Much of this decline is the result of the explosion of low-wage, no-benefit employment — the much-derided "McJobs," "the kind of jobs where if you hold three of them, you still can’t pay the rent." One third of all American workers — and almost one-fifth of full-time, year-round workers — now receive poverty-level wages. At

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48. Id. See also Schor, supra note 44, at 199 n.78.


50. Moody, supra note 35, at 8.

51. William Greider, Who's Pulling Bill Clinton's Strings?, Rolling Stone, Apr. 30, 1992, at 33, 35 (comments of Tom McNutt, United Food & Commercial Workers). The best-known study showed that nearly three out of five new jobs created between 1979 and 1984 paid poverty-level wages, whereas the ratio for the 1963 to 1979 period was less than one in five. Harrison & Bluestone, supra note 32, at ix. More recently, the Census Bureau has released a revisionist study showing "that nearly three-quarters of the 6 million jobs created during the last economic expansion were in high-paying industries" but critics have pointed out that "many jobs created within those high-paying industries were, in fact, low-paying jobs." Study Finds Most New Jobs in '87-'89 in High-Paid Fields, L.A. Times, Apr. 15, 1992, at A4.

52. See Schor, supra note 44, at 150; Segment of Full-Time Workers Earning Very Low
the same time, the number of part-time workers (who are disproportionately Black and female)\textsuperscript{53} has increased substantially, so that even if the hourly wage were tolerable the bottom line on the paycheck still is not.\textsuperscript{54} On the whole, though, part-time workers actually receive much lower hourly wages than full-timers; like the growing ranks of temporary employees and so-called "independent contractors,"\textsuperscript{55} they are also far less likely to receive health insurance or pension coverage from their employers.\textsuperscript{56} The prevailing euphemism for these shifts — all permitted, indeed encouraged, by existing law — is "flexibility."\textsuperscript{57}

\textit{Wages Surged in Past Decade}, WALL ST. J., May 12, 1992, at A2. According to the Census Bureau, "the proportion of full-time, year-round workers making too little to lift a family of four above the poverty line" increased by almost 50% between 1979 and 1990. \textit{Id.}


54. See \textit{BELOUS}, supra note 36, at 16 (showing that the "contingent" workforce of part-time, temporary, and contract personnel grew by at least 20% between 1980 and 1988, to at least 25% of the workforce, and that this rate of growth is 40% faster than the workforce as a whole). Part-time work is rarely the choice of the employee; "the official data on part-time work make it clear that practically 100 percent of the net additional part-time jobs created in the United States since the late 1970s are held by people who would have preferred full-time jobs but could not find any." \textit{HARRISON \& BLUESTONE}, supra note 32, at 47.

The growth in part-time employment alone actually understates the basic trend toward reducing the number of adequately-waged, full-time jobs. In recent years, many full-time employees have been forced to work longer and longer hours so that management can avoid the expense of hiring additional personnel. Overall, worktime has increased perceptibly over the last twenty years, with accompanying increases in job stress and elimination of leisure time. See \textit{SCHOR}, supra note 44, at 1, 31, 40.


56. Among blue-collar employees, part-timers averaged $4.95 per hour, 78% less than full-timers; among service employees, $4.15 per hour, 61% less; and among clerical employees, $5.70 per hour, 54% less. See \textit{BELOUS}, supra note 36, at 104. Almost four-fifths of full-time employees received health insurance from their employers, while less than a third of part-timers did. Three-fifths of full-timers received pension coverage, while less than one-fifth of part-timers did. See \textit{id.} at 105-06. In many instances temporary employment agencies do make insurance available, but only to employees who work a certain minimum number of hours per week, and they then make sure that no one reaches that level. See Colatosti, \textit{supra} note 53, at 9-10.

The Clinton Administration intends to study the possibility of improving "contingent" workers' access to employee benefits. \textit{See Benefits Studied for Part-Time Workers}, L.A. TIMES, June 16, 1993, at D1.

57. See \textit{HARRISON \& BLUESTONE}, supra note 32, at 39; David Harvey, \textit{Flexibility: Threat Or Opportunity?}, SOCIALIST REV., Jan.-Mar. 1991, at 65. As Camille Colatosti notes, the notion of "flexibility" is really only a euphemism or, as she calls it, "corporate mythology." In her view, "the increased use of temporary workers occurs . . . because capital wants a vulnerable and cheap work force — one that makes do with little job security and is too weak to organize effectively." \textit{Colatosti, supra} note 53, at 9.
Unionization, the bulwark of good wages, has also become much rarer since the days of Wiley and Burns, and employers have grown much more willing to take aggressive steps to rid themselves of unions. Just as non-union employers now resort to aggressive bullying to make sure they remain "union-free," and unionized employers prepare for contract negotiations by fortifying their factories and soliciting "replacement workers," successor employers will often go to great lengths to start anew and "union-free," with a cheaper and uncontaminated workforce. In this regard, the very process of merging and acquiring has itself played an important role, strengthening management's hand by building larger, stronger entities that can more easily overpower labor, especially given the almost hopeless ineffectiveness of the strike weapon, which is slowly fading into oblivion.

58. In 1991 the union-nonunion wage differential for full-time workers stood at 23%. The typical union worker earned $526 per week and the typical non-union worker $404. See Labor Month in Review, MONTHLY LAB. REV., Mar. 1992, at 2. Deunionization has been shown to be an "important" "determinant of the deterioration of the economic position of the less skilled" in recent years. McKinley L. Blackburn et al., The Declining Economic Position of Less Skilled American Men, in A FUTURE OF LOUSY JOBS?, supra note 46, at 31, 62.

59. As noted above, only 15.8% of the American labor force is unionized. See supra note 6. The post-war high was 34.7% (in 1954), and as late as 1964 and 1972, when Wiley and Burns were decided, the levels were still 28.9% and 26.4% respectively. See MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 10 (1988).


60. See McDonald, supra note 13, at 17 (suggesting that "[i]t has become an article of faith for most private-sector employers that unionization must be avoided at all costs").

61. See THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 237-38 (1991); see also Richard Trumka, Future of the NLRB: From the Union's Standpoint, in THIRD ANNUAL LABOR AND EMPLOYMENT LAW INSTITUTE 325, 331 (M. Volz ed., 1987) (describing employers' "militarization . . . of industrial communities" with "klieg lights at night, concrete pillboxes, and the importation of soldiers of fortune").

62. Successors have also been known to adopt ultra-aggressive tactics like pre-recruiting strikebreakers and introducing paramilitary security forces. See Union Shows How to Fight in West Virginia, N.Y. TIMES, May 8, 1992, at A7.


64. The Bureau of Labor Statistics recorded only 35 strikes involving 1000 or more workers in 1992, and only 40 in 1991. The 1992 figure is the lowest since the BLS began recording in 1947. The 1991 figure is tied for second-lowest with 1989. By comparison, 1974, the peak year in the last quarter-century, witnessed 424 strikes, while the figures for 1972 (Burns) and 1964 (Wiley) were 250 and 246 respectively. See Major Strikes Hit Record Low During 1992, 142 Lab. Rel. Rep. (BNA) 186 (1993); STATISTICAL ABSTRACT 1991, supra note 32, at 423 (Chart No. 694). Over the last five years, the annual average was 44. In the Wiley-Burns era, 1964 to 1972, it was almost eight times as high at 328. STATISTICAL
In view of today’s organizing realities, moreover, successorship rules that allow employers to discard union obligations will usually mean the loss of unionized workplaces that will not be canceled out by organizing victories somewhere else, as would have happened in earlier days. This deunionizing process then brings about a vicious cycle: because existing successorship law leaves unions so helpless to protect their members against corporate transformations, they become less attractive to American workers, so that labor’s weakness both in organizing and in American life in general is exacerbated.

After twenty years, the time has come to declare the Burns experiment a failure and to develop a protective regime of the kind hinted at in Wiley and brought to fruition in other industrial countries. Such a regime must extend beyond the confines of “traditional” labor law to cover the totality of the American workforce, union and non-union alike. Successorship protections should become part of the basic floor for all American workers, a basic social regulation like unemployment insurance and the overtime laws.

I certainly do not mean to suggest that adjustments to successorship law will cure all the ills I have pointed to. The deindustrialization of the United States and other advanced economies, and international capital’s systematic drive for “flexibility” and the lowest common denominator, are fundamental, long-term developments that transcend ordinary legal reforms. Nevertheless, I believe that the prevailing strategy of the American business community — to “compete” by cutting wages, eliminating benefits, and disregarding worker safety — has been a disastrous mistake, and that public policy at all levels should attempt to chart a new course. A new law of succession that provides genuine employee protections and discour-

ABSTRACT 1991, supra note 32, at 423 (Chart No. 694); Current Labor Statistics: Work Stoppage Data, MONTHLY LAB. REV., Jan. 1984, at 123 (Chart 37). Although legal shifts are partly to blame, see John G. Kilgour, Can Unions Strike Anymore? The Impact of Recent Supreme Court Decisions, 41 LAB. L.J. 259 (1990), the decline of the strike probably has more to do with growing levels of unemployment and workers’ increasing willingness to cross picket lines.


66. See Russo, supra note 27, at 378; see also Stone, supra note 7, at 583 (citing Henry S. Farber, The Recent Decline of Unionization in the United States, 238 SCOT. 915 (1987); attributing union decline in large part to diminishing employee confidence in the power of unions to obtain better wages, job security, and other working conditions); cf. Katherine Van Wezel Stone, Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities, 55 U. CHI. L. REV. 73, 104-05 (1988) (explaining how stronger successorship doctrines could increase labor’s role in corporate decisionmaking).
Rekindling Labor Law Successorship

ages slash-and-burn business transactions can make a small but important contribution.

II. DEFECTS IN THE EXISTING FRAMEWORK OF SUCCESSORSHIP LAW

The basic problem with American successorship law is that it does not exist. The legal system does nothing to ensure that employees will retain their jobs across a change in ownership, or that those jobs will continue to provide a similar level of wages and benefits. These are the fundamental issues that any body of labor law successorship needs to resolve, and the American system, essentially one of *laissez-faire*, fails miserably.

For the five-sixths of American employees who work without the benefit of a union, the legal system currently provides just about no protection whatsoever. As such, a critical analysis of the existing doctrinal framework requires little space. With regard to unionized workers, there is a large and complex body of law, but even here a successor employer retains almost total discretion to avoid any burdens, so that its significance is easily overstated.

In this section, I provide a sketch of the existing system and a criticism of some of its most serious defects. This is by no means an exhaustive discussion; successorship was something of a cottage industry in labor law during the 1970s, back when the Supreme Court’s decisions were fresh and workers’ wages were rising every year, and the doctrinal niceties have been comprehensively explored in literally scores of articles. I begin with successorship under the NLRA and Section 301 of the Labor Management Relations Act, 1947 (“LMRA”), which, with some peripheral exceptions, only affect unionized workers in private-sector workplaces outside the transportation industry, but which illustrate most of the problems in American successorship law generally. I then consider other pertinent federal statutes — particularly those regulating transportation carriers, federal service contractors, employee benefits, and plant closings — and then pass to a (necessarily brief) discussion of successorship under state

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law, which determines the fate of most non-union workers.

A. Federal Law

1. The NLRA and the LMRA

The Supreme Court has been primarily responsible for both the basic principles and the technical rules of successorship under federal labor law. Although the Labor Board began holding successors liable for predecessor unfair labor practices within three years of the passage of the Wagner Act, and began requiring successor employers to bargain with incumbent unions as early as 1944, it was the Court's Wiley decision in 1964 that brought successorship to the forefront of labor law. Then, after the NLRB undertook to adapt and expand Wiley, the Court rebuffed these efforts and fixed its own firm limits on employee rights in Burns and Howard Johnson. More recently, in an important if somewhat technical 1987 decision, Fall River Dyeing & Finishing Corp. v. NLRB, the Court ratified the Board's implementation of Burns and declined employer invitations to weaken the law still further.

Based on these precedents, labor law successorship boils down to a few key principles. As noted above, however, these are not fixed obligations, and will only take effect if the employer so chooses.


70. See South Carolina Granite Co., 58 N.L.R.B. 1448 (1944), enforced sub nom. NLRB v. Blair Quarries, Inc., 152 F.2d 25 (4th Cir. 1945). The Board's early analysis was substantially similar to the inquiry used today. See, e.g., NLRB v. Lunder Shoe Corp., 211 F.2d 284, 287 (1st Cir. 1954) (finding a successor bargaining obligation and rejecting the employer's claim that "basic changes occurred in the working force, products, machinery, operations and supervisory staff").

71. Wiley was not, however, the first case involving a union's attempt to require a successor to arbitrate under its predecessor's collective bargaining agreement. See, e.g., Matter of the Arbitration Between Greenstone & Amusement Clerks, Local 1115, 166 N.Y.S.2d 858 (Sup. Ct. 1957) (applying New York law to deny successor's motion to stay arbitration); Application of Swift & Co., 76 N.Y.S.2d 881 (Sup. Ct. 1947) (same); see also IAM v. Shawnee Indus., Inc., 224 F. Supp. 347 (W.D. Okla. 1963) (applying traditional corporate law principles to hold that a successor was not bound to its predecessor's collective bargaining agreement); Gold v. Gibbons, 3 Cal. Rptr. 117 (Ct. App. 1960) (same); IAM, Lodge No. 6 v. Falstaff Brewing Corp., 328 S.W.2d 778 (Tex. Civ. App. 1959) (same). Arbitrations against successors were also actually conducted. See, e.g., C-F-M Co., 37 Lab. Arb. Rep. (BNA) 980 (1962) (Kates, Arb.).

72. See supra note 17 and accompanying text. Both these decisions and the court cases cited in note 16 have never been explicitly overruled, but they retain no life whatsoever.


An employer will be considered a "successor" for labor law purposes only if it:

a. Acquires control of an existing business operation by a means other than a purchase of stock, and makes no important changes to the employees' jobs. (*Burns, Fall River Dyeing*).
b. Retains enough of the predecessor's employees that those employees constitute a majority of the new workforce. (*Burns, Howard Johnson*). Note that it doesn't have to retain any of the predecessor's employees, though. Existing law only bars the employer from discriminating against them on the basis of union membership (or race, sex, religion, national origin, age, or disability).\(^{75}\)

If the employer chooses to become a successor, it may have to:

a. Recognize the predecessor's employees' union and bargain with it in good faith. (*Burns*).
b. Allow an arbitrator to decide whether it should be bound to the predecessor's collective bargaining agreement, in whole or in part. (*Wiley*).

But if the employer chooses to become a successor, it is not required\(^{76}\) to:

a. Pay the employees the same wages or provide them with the same benefits or working conditions that they received from the predecessor, unless an arbitrator orders the employer to do so and the employer does not succeed in having the arbitrator's award vacated. (*Burns, Wiley*).
b. Comply with the collective bargaining agreement between the predecessor and the predecessor's union, again unless an arbitrator orders it to do so and the employer does not succeed in

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76. *Any of these obligations may, of course, be assumed voluntarily; and in some cases consent may be implied. However, the NLRB is extraordinarily reluctant to find such constructive consent. See, e.g., Field Bridge Assocs., 306 N.L.R.B. 322 (1992), enforced sub nom. Local 32B-32J Serv. Employees Int'l Union v. NLRB, 982 F.2d 845 (2d Cir.), cert. denied, 113 S. Ct. 2995 (1993). The employer may also be required to apply predecessor terms and conditions of employment unless it makes clear its intention to change them at the time it hires its workforce. *See infra* note 146 and accompanying text. Finally, as a practical matter, the successor may sometimes have little choice but to hire the existing workforce and thereby acquire certain obligations. *See Sue J. Henry, Is There Arbitration After Burns?: The Resurrection of John Wiley & Sons, 31 VAND. L. REV. 249, 280 (1978).*
having the arbitrator's award vacated. (Burns, Wiley).

Finally, by choosing not to become a successor, the new employer is not only freed of any bargaining requirement, but is also immune from any obligations under the predecessor's collective bargaining agreement, even if that agreement is expressly made binding upon successors (Howard Johnson).

Each of these points gives rise to a number of problems, some of which are simply complications of this particular regime and others basic matters that must be addressed under any system of labor law successorship. These issues are considered sequentially.

a. The continuity of the enterprise

The basic theory of existing labor law successorship is simple: business transactions do not necessarily alter workers' views about union representation. As such, a change in ownership, without more, will not nullify a group of employees' decision to have a union represent them.

Ordinarily, once a union is certified as the representative of a group of employees, the employer is precluded from questioning its majority status, and must bargain with the union in good faith concerning the terms and conditions of the employees' employment. This bar is almost absolute during the first year after the certification; after that first year the union's status may be challenged only when the employer produces solid evidence to back up a good-faith doubt about its continuing support from a majority of the employees. The rationale is stability. There cannot be union elections every day, or every month; a union must be given a certain degree of leeway to do what it is supposed to do. 77

Within this framework, the identity of the employer is not con-

77. See Fall River Dyeing, 482 U.S. at 37-39; see also Briggs Plumbingware, Inc. v. NLRB, 877 F.2d 1282, 1288-89 (6th Cir. 1989) (explaining the doctrine in the successorship context).

Successor employers do enjoy a little more leeway than other employers to challenge the union's majority status. Successors are permitted to retract their voluntary recognition of a union at any time, instead of being required to bargain in good faith for a "reasonable time," as is usually the case. See Landmark Int'l Trucks, Inc. v. NLRB, 699 F.2d 815, 818 (6th Cir. 1983); Harley Davidson Transp. Co., 273 N.L.R.B. 1531 (1985). This new rule encourages employers to stir up anti-union sentiment in the workforce at a time when, as the Supreme Court has recognized, workers may be reluctant to align themselves with the union. See Fall River Dyeing, 482 U.S. at 40.
sidered significant. A simple change in ownership does not create a good-faith doubt about the union’s status. Only if there has been a wholesale change in the employing enterprise, so that the employees are genuinely likely to feel differently about their work and thus about their choice of representative, does the union’s certification become ineffective. Successorship law thus begins with rules about the kinds of changes that do and do not affect union certifications.

Compared to other aspects of the current successorship regime, and even compared with the systems of other countries that provide meaningful protections in this area, the current approach to this “continuity of the enterprise” problem is not seriously deficient. It does have a few holes, though, and the analysis is unduly complex. Unfortunately, these complexities tend to vitiate workers’ rights.

i. The varieties of affected transactions

Under current law, the form of the transaction by which a successor takes control of a business is of little importance. An employer can be held to successor obligations whether it arrives via a partial or total sale of assets, a lease, a subcontract, a competitive bidding process, a leveraged buyout, and, last but perhaps no longer least, a governmental “privatization.” Even when the new owner takes over following a bankruptcy or receivership sale, successorship may still be found.

When the new employer takes control by means of a stock purchase, though, the conventional analysis suggests that successorship doctrine does not apply. The new employer is considered to remain the same legal entity and thus to be bound to existing contractual and statutory obligations. It cannot alter the composition of the

78. Burns, 406 U.S. at 279.
79. See infra text accompanying notes 241-63.
80. See United Tel. Workers v. NLRB, 571 F.2d 665, 669 (D.C. Cir. 1978) (Bazelon, C.J., dissenting), cert. denied, 439 U.S. 827 (1978) (listing various different possible successorship situations); see also Garcia v. Hudson Lumber Co., 679 F. Supp. 961 (N.D. Cal. 1987) (applying successorship doctrine in the LBO context); Base Servs., Inc., 296 N.L.R.B. 172, 175 (1989) (holding that successorship status may be found even when the predecessor — here the U.S. Army — “was not covered by the Act”).
82. See, e.g., Esmark, Inc. v. NLRB, 887 F.2d 739, 751 (7th Cir. 1989); Western Boot & Shoe, Inc., 205 N.L.R.B. 999 (1973); see also Hylton & Hylton, supra note 28, at 852-60
workforce or the terms and conditions of employment any more than the predecessor could have done. In recent years this principle has become a little clouded, however, with several courts of appeals expressing uncertainty about the inapplicability of successorship rules in this situation.\textsuperscript{83}

The courts’ unease is justified: this long-standing omission makes little sense. Guided in part by Wiley, which referred briefly to New York corporate law in its decision ordering a successor into arbitration, the NLRB appears to have given undue weight to traditional, formalistic principles of state corporate law that should have no relevance in the context of federal labor law.\textsuperscript{84} Whether or not a stock purchaser can be conceptualized as the “same” entity as its predecessor, under traditional corporate law or otherwise, does little to ad-

\textsuperscript{83} See, e.g., NLRB v. Rockwood Energy & Mineral Corp., 942 F.2d 169, 175 (3d Cir. 1991); EPE, Inc. v. NLRB, 845 F.2d 483, 490 (4th Cir. 1988); UFCW, Local 152 v. NLRB, 768 F.2d 1463, 1471 (D.C. Cir. 1985); NLRB v. Edjo, Inc., 631 F.2d 604 (9th Cir. 1980); see also MPE, Inc., 226 N.L.R.B. 519 (1976) (applying successorship principles to hold that a stock purchaser was not bound to the terms of a collective bargaining agreement; somewhat cryptic rationale).

\textsuperscript{84} Wiley noted that under New York corporate law the survivor of a merger is bound to the merged company’s contractual obligations, see Wiley, 376 U.S. at 547-48, 550 n.3, and in Burns the Court gave as one ground for its different approach the lack of a similar “background of state law.” Burns, 406 U.S. at 286. See Sangerman, supra note 17, at 162 (questioning the relevance of state corporate law in the successorship context); see generally McLeod, supra note 5 (criticizing the adherence to traditional principles of state corporate law in labor cases). But see Edward B. Rock & Michael L. Wachter, Labor Law Successorship: A Corporate Law Approach, 92 Mich. L. Rev. 203 (1993) (proposing to tie labor law successorship more closely to corporate law successorship).
vance the analysis. A stock purchaser can do what it wants with a new company, just like an asset purchaser, and an asset purchaser can preserve an existing operation intact. A stock purchaser may well change the name of the business and fundamentally restructure its operation, even transform it into a "substantially different enterprise." By the same token, many asset purchasers go out of their way to acquire existing business names, trademarks, customers, and goodwill — in other words, to preserve as much continuity as possible and do their utmost to ensure that the entity remains "the same."

Accordingly, stock purchases should be added to the long list of transactions to which successorship doctrine applies, so that continuity would be decided on a case-by-case basis. I am somewhat reluctant to propose this revision given the harshness of existing successorship law; after all, it is a good thing that at least employees of stock purchasers do not have their rights placed in jeopardy through business transactioneering, even if the legal rule that gives them this protection is difficult to understand. The stock-purchase exception should be eliminated, therefore, only if the existing rules are reformed so as to provide meaningful guarantees.

ii. Changed circumstances: the employee perspective

Over the last few years, and especially since the Supreme Court's decision in *Fall River Dyeing*, the NLRB and the courts have begun to take a more employee-protective view of the kinds of operational changes that will preclude a finding of successorship.

85. See Rock & Wachter, supra note 84.
86. EPE, Inc. v. NLRB, 845 F.2d 483, 490 (4th Cir. 1988).
87. See, e.g., Boardman Co., 91 Lab. Arb. Rep. (BNA) 489, 494 (1988) (Harr, Arb.) (describing an asset purchase in which the successor acquired the predecessor's name, trademark, contracts, bids, and even telephone numbers); see also HARRISON & BLUESTONE, supra note 32, at 65 (describing the 1987 asset purchase of Greyhound, which was designed to maximize the appearance of continuity).
89. See, e.g., Delta Carbonate, Inc., 307 N.L.R.B. 118 (1992), enforced, 989 F.2d 486 (3d Cir. 1993); UFCW, Local 152 v. NLRB, 768 F.2d 1463, 1470 (D.C. Cir. 1985); NLRB v. Jeffries Lithograph Co., 752 F.2d 459 (9th Cir. 1985). But see Smegal v. Gateway Foods, Inc., 819 F.2d 191, 194 (8th Cir. 1987), cert. denied, 484 U.S. 928 (1987). Employer advocates have greeted this shift with considerable dismay. See, e.g., DuRoss, supra note 20, at 397 (criticizing as "myopic" this new focus on "the employee's view of job continuity" instead of "operational modifications").

The Board's shift would appear attributable in part to a string of appeals court decisions vacating Board orders in cases where the agency had failed to find successorship but
Where various kinds of alterations in business structure were once considered sufficient to permit an employer to escape labor obligations, a lack of continuity will now be found only if the bargaining-unit jobs change in such a way that employees are likely to feel differently about union representation. Thus, even when there has been a considerable change in the basic direction of the business, or a substantial hiatus between the predecessor's shutdown and the successor's start-up, the successor may still incur a bargaining obligation, provided that the bargaining-unit jobs remain largely unaffected.

This is a healthy development, but it needs to be taken a step further, for the law is still burdened with an unduly complex analysis. Successorship determinations currently require a thoroughly unnecessary examination of a string of meaningless factors pertaining to business matters. These include whether the new employer uses the same plant, machinery, and equipment, employs the same managers and supervisors, services the same customers, and produces the same production of goods as the predecessor (and neglects to focus on how operational changes would have affected employee attitudes toward union representation. See District 1199P, Nat'l Union of Hosp. & Health Care Employees v. NLRB, 864 F.2d 1096 (3d Cir. 1989); UMW Local Union 1329 v. NLRB, 812 F.2d 741 (D.C. Cir. 1987); UFCW, Local 152, 768 F.2d at 1472-73.


91. A substantial change in the employees' jobs will not be sufficient in and of itself. See, e.g., Systems Management, Inc. v. NLRB, 901 F.2d 297 (3d Cir. 1990) (changing from full-time to part-time schedule does not undo continuity). And of course an employer cannot defeat successorship by simply paying decreased wages — even dramatically decreased wages. See id. (50% hourly wage cut).

92. Fall River Dyeing provides a useful example. The successor engaged solely in special-order "commission" textile dyeing, while two-thirds of the predecessor's work involved mass-production "converting" dyeing. See Fall River Dyeing, 482 U.S. at 30, 32. Regardless, the production process remained the same, and the workers continued to use the same machines, so the Court found sufficient continuity from the employee perspective. See id. at 44.

product.\textsuperscript{94} The problem is not so much that this unnecessarily
detailed investigation wastes time and resources (although it clearly
does) but that it may prejudice the more important inquiry. In a close
case, where bargaining unit jobs have changed somewhat but not
overwhelmingly, evidence of irrelevant changes in sales structure and
customer base might tend to tip a fact-finder — or, perhaps more
important, a cautious General Counsel unsure about whether to issue
an unfair labor practice complaint in the first instance — against a
finding of continuity of the enterprise.\textsuperscript{95} If these peripheral issues are
discarded, and the analysis becomes solely and exclusively an inquiry
into the nature of bargaining unit jobs, the matter will be considered
on a clean slate, and employers will no longer be able to rely on
irrelevant factors to the detriment of their employees.

b. Job insecurity

In the years following Wiley, both the NLRB and a number of
federal courts assumed that the basic policy of providing “some pro-
tection to the employees from a sudden change in the employment
relationship”\textsuperscript{96} required protection of the most fundamental kind: as-
surances that employees would not simply lose their jobs altogether
as the result of business transfers.\textsuperscript{97} But Burns and Howard Johnson

94. See, e.g., Bell Glass Co., 293 N.L.R.B. 700, 708 (1989); Premium Foods, Inc., 260
N.L.R.B. 708, 714 (1982), enforced, 709 F.2d 623 (9th Cir. 1983). Theodore Kheel has criti-
cized this approach:

\begin{quote}
It is not entirely obvious why the Board sees various of the [business-related]
factors as being in any way relevant to a determination of bargaining duties. One
might reasonably ask what possible difference it could make to a given group of
employees that the new employer continues to purchase supplies from the old
supplier, or obtains financing from the same institution.
\end{quote}

4 THEODORE KHEEL, LABOR LAW § 17.03[1], at 17-18 (1991).

95. It is vital to consider this problem from the charging party’s standpoint. Ordinarily,
the NLRB regional office will demand evidence from the charging party to sustain a succe-
сорship charge; if the union cannot affirmatively prove the continuity of the business struc-
ture, or if the employer provides evidence of business changes (evidence the union will rarely
be in a position to rebut), the Region will typically decline to issue a complaint. Cf. Ellen I.
(emphasizing the crucial role of the NLRB’s regional offices in the underenforcement of the
NLRA).


97. The Board approached the job security problem somewhat indirectly. In Chemrock
Corp., 151 N.L.R.B. 1074 (1965), it held that a successor had unlawfully failed to bargain in
good faith with the representative of “its employees,” ruling that predecessor employees were
to be considered the successor’s “employees” for bargaining purposes, even though the suc-
cessor had not hired them. Then, in Martin Marietta Corp., 159 N.L.R.B. 905 (1966), the
Board found that a successor violated its bargaining obligation by failing to take seniority
did away with this approach, and today successor employers enjoy more or less total discretion in hiring, so that unionized workers stand to lose their jobs unless the successor wishes to retain them. The Court appeared to assume both that the market would sort things out in a reasonable fashion (because many successors would choose to retain predecessor employees, under strike pressure or otherwise, while those discarded would soon find comparable jobs somewhere else) and that the legal system would provide sufficient protection through its ban on discrimination against union members.

Today, however, neither the market nor the law appears to work. As described above, great shifts in the American economy and the strategies of American business have seriously undermined the standard of living for working Americans. Given the rising "cost of job loss," falling out of a well-paying job is a distinctly more serious affair than it was twenty years ago. At the same time, the rise of the "union-avoidance" strategy in corporate America means that successors are much more likely not to (re)hire a unionized workforce than they were back when unionization was still accepted as a basic

into account in its hiring decisions. In Burns itself, of course, the Board required the successor to adhere to the terms and conditions of employment fixed by its collective bargaining agreement — a requirement both the Supreme Court and almost all commentators interpreted to include a term prohibiting discharge (and thus "restructuring" of the workforce) except for good cause. See NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 288 (1972); Lawrence F. Doppelt, Successor Companies: The NLRB Limits the Options — And Raises Some Problems, 20 DEPAUL L. REV. 176, 186-87 (1971). But see Henry, supra note 76, at 279 n.22 (arguing that preserving the terms of the predecessor agreement does not require retention of the predecessor workforce).

The Second Circuit (and, of course, the Sixth Circuit in Howard Johnson, 482 F.2d 489 (1973)) took the position that a successor that maintained continuity of the business enterprise was required to arbitrate under the predecessor's collective bargaining agreement, even if it had hired hardly any of the predecessor's employees. See Monroe Sander Corp. v. Livingston, 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967). The assumption there was that an arbitrator could order reinstatement of predecessor employees that the successor had failed to hire. But see TriState Maintenance Corp. v. NLRB, 408 F.2d 171, 173 (D.C. Cir. 1968) (finding no NLRA violation when a service contractor refused to hire its predecessor's employees).

98. "T]he cost of job loss is the difference between current earnings and expected income during the year following an employment termination." Juliet B. Schor & Samuel Bowles, Employment Rents and the Incidence of Strikes, 69 REV. ECON. & STAT. 584, 585 (1987). This cost has increased markedly to the extent that underlying rates of unemployment have risen, particularly in regions suffering long-term distress. Unionized manufacturing jobs pay much better than the new breed of "McJobs," and the unemployment insurance system covers fewer workers and pays diminished benefits. See Barbara Rhine, Business Closings and Their Effects on Employees — Adaptation of the Tort of Wrongful Discharge, 8 INDUS. REL. L.J. 362, 365 n.11 (1986) (describing the inadequacies of the unemployment insurance system).
cost of doing business. Such successors have little to fear from the union members they displace, for strikes, especially effective strikes, are now little more than a historical memory.99

The antidiscrimination remedy, meanwhile, is distinctly ineffective, both because of the general flaws in this area and because of the peculiar circumstances that arise in successorship cases. As Michael Gottesman and Clyde Summers have demonstrated, the NLRA's antidiscrimination provision, Section 8(a)(3), grants only the feeblest of remedies — reinstatement and back pay, less interim earnings — and it is lethargically and unzealously enforced.100 The NLRA's baseline conception of discrimination, moreover, is the individual case. As Cynthia Estlund points out, this myopia "permit[s] the artful employer to engage in massive and systematic union avoidance without seriously risking liability."

Given these deficiencies, something of a consensus has emerged that Section 8(a)(3) is inadequate to protect workers' rights to self-organization in representation proceedings.102 That failure is perhaps even more striking in the successorship context, where discharged workers are required to make out an extraordinarily stringent case.103 A mass termination of predecessor employees will not be taken as

99. See supra note 64.
100. See Michael H. Gottesman, Rethinking Labor Law Preemption: State Laws Facilitating Unionization, 7 YALE J. ON REG. 355, 363-72 (1990) [hereinafter Gottesman, Rethinking Labor Law Preemption]; Clyde W. Summers, Effective Remedies, supra note 11, at 475-77. Reinstatement is almost meaningless in that few victims accept such offers, and the overwhelming majority of those who do are fired again within a year or two of their return to work. See Paul Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 HARV. L. REV. 1769, 1792 (1983).
103. To show that a successor abused its hiring program so as to avoid union obligations, it must be established that there is substantial evidence of union animus; lack of a convincing rationale for refusal to hire the predecessor's employees; inconsistent hiring practices or overt acts or conduct evidencing a discriminatory motive; as well as a reasonable inference from the evidence that [the successor] conducted its staffing in a manner precluding the predecessor's employees from being hired as a majority of [the successor's] overall work force to avoid the Board's successorship doctrine.

sufficient in itself. There must be direct and "substantial" evidence of anti-union sentiment on the part of the new employer, the kind of evidence that is rarely available from "savvy" successors.104 Where discriminatory motives must be inferred, both the Board and the courts are noticeably reluctant to act. In the extreme cases, of course, discrimination will be found and relief provided,105 but in cases that merely cry out rather than scream, the employer will get away with it.106

For example, although it is generally considered suspicious if an employer discards an experienced workforce in favor of new employees with no relevant experience at all,107 the NLRB has found "not
inherently implausible" and discriminatory an employer's policy of refusing to hire anyone with any experience in the pertinent industry — even if the obvious consequence is that none of the unionized predecessor employees will be hired. Similarly, if a long-time union employee were to tell a successor that she wanted to work on a union basis, the successor's refusal to hire her would not be considered discriminatory. In the eyes of the law she would be demanding "terms and conditions to which [s]he is not legally entitled" — the continuing presence of the union at a time when the employer, still in the midst of its hiring process, might not necessarily end up as a legal successor, employing a union majority. As such her request would become a valid reason not to hire her. Painstaking legal analysts may trace the logic here, though few unemployed workers would succeed in digesting it. It probably approaches the legendary paradox that one cannot be "fired" for going on strike, but may be "permanently replaced."

In successorship cases after Burns and Howard Johnson, then, hiring tends to become something of a game. Often the new employer will incur great expense or devise elaborate stratagems to avoid hiring predecessor employees. One anti-union successor, for example, chose to hire 525 new employees to fill 220 job slots at its newly acquired meatpacking plant, and then ended up having to fire 275 of them in short order. Most of the newcomers were "wholly inexperienced," with the predictable consequence that productivity at the plant was extremely poor. In similar fashion, another meatpacking company decided to hire "nearly two hundred persons . . . for a unit normally comprised of just over eighty," and the non-union substitutes were almost 90% slower than the union workforce; indeed, the new workers turned out to be so incompetent that meat had to be destroyed. That company brought in its new workers from over two hundred and fifty miles away; in a similar sort of case, a Pittsburgh bus line went to the trouble of conducting its hiring and training three hundred miles away in Detroit, so as to keep the process hidden from the

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109. Packing House & Indus. Servs., Inc. v. NLRB, 590 F.2d 688, 696 (8th Cir. 1978). If the new employer had already hired a predecessor majority, of course, the employee's request would be rendered superfluous, and a failure to hire because of this request would be considered discriminatory.
111. UFCW, Local 152 v. NLRB, 768 F.2d 1463, 1474-75 (D.C. Cir. 1985).
112. Packing House, 590 F.2d at 693.
former employees. One successor, meanwhile, considered the matter more practically, and simply tried bribing the union to "bow out." A different variation on the game involves a successor who does wish to retain predecessor employees, given their skill and experience, but nevertheless wants to avoid any union obligations. Such a successor will carefully control its hiring so as to ensure that it retains a solid complement of experienced workers, but not enough that it ends up with a workforce majority of predecessor employees. The numerical analysis in successorship cases is now very strict: where once the NLRB was satisfied if the successor merely retained "substantially the same workforce," and courts would accept "a good substantial proportion," today a rigid mathematical demonstration of majority status is required. As such, employers will sometimes do strange things to make sure they do not reach the fatal number of fifty percent plus one.

Whether successor employers' hiring behavior is testament to irrational anti-unionism of a pathological variety, or the new "rational" strain of anti-unionism that seeks to cut labor costs by any means necessary, it should not be condoned as a matter of nation-

114. NLRB v. Foodway of El Paso, 496 F.2d 117, 118 (5th Cir. 1974).
115. See Henry, supra note 76, at 280 n.122 (explaining that successors may often hire the predecessor's employees because "they are the only personnel with sufficient skill, training, and experience to operate the business smoothly and efficiently immediately after the successor takes over.").
117. John Stepp's Friendly Ford, Inc., 141 N.L.R.B. 1065, 1069 (1963), rev'd, 338 F.2d 833 (9th Cir. 1964). As late as 1982, longtime Board member John Fanning maintained the position that an absolute majority was not required in every case. See, e.g., General Processing Corp., 263 N.L.R.B. 86, 87 n.4 (1982).
118. NLRB v. Lunder Shoe Corp., 211 F.2d 284, 287 (1st Cir. 1954); see also Retail Clerks Union, Local 775 v. Purity Stores, Inc., 116 Cal. Rptr. 40, 42 (Ct. App. 1974) (ordering a successor to arbitrate and rejecting its argument that "there [was] no evidence that a majority of [the predecessor's] employees entered [its] employment," because *Howard Johnson* did not necessarily require a majority, only "substantial continuity").
119. See THE DEVELOPING LABOR LAW 782-83 (Patrick Hardin ed., 3d ed. 1992) ("In no decision since *Burns* has the Board found successorship absent a finding of 'majority'").
al labor policy. As I argue below, workers should be entitled to retain their jobs across a change in ownership, unless the job is eliminated for valid economic reasons.

c. The uselessness of contract

Negotiating contractual protections against displacement through corporate transformations is a highly unpromising route for workers and their unions. As a practical matter, the retrenchment of successorship law has imposed firm limitations on the effectiveness of such protections, and both courts and arbitrators have accepted, if not welcomed, those limitations.

At the outset, however, any discussion of contractualism under the NLRA must emphasize the fundamental imbalance of the American labor law regime. Even in the heyday of industrial pluralism — the so-called Pax Americana period of post-war prosperity and rising expectations — labor never achieved true equality of bargaining power. Today, after a series of devastating economic restructurings and restrictive legal decisions, workers are more powerless than ever. In this regard the American system is extreme but not exceptional. By definition, every capitalist economy rests upon an imbalance of bargaining power between labor and capital. In a capitalist economy, reliance upon contract is necessarily a prescription for substantive injustice. All that can vary is the degree of that injustice.

In the context of successorship law, moreover, these basic disadvantages are accompanied by specific legal obstacles that block viable contractual protections. First and foremost, of course, is the *Howard*
Johnson doctrine, a rule which simply cannot be contracted around. Under Howard Johnson, unions have just about no recourse against a successor that chooses not to allow a majority of its workforce to consist of predecessor employees, even if the union had negotiated an express contractual provision requiring preservation of the workforce and the bargaining agreement. The best that can be achieved is an explicit guarantee from the predecessor that it will secure the successor's assumption of the collective bargaining agreement, but here courts and arbitrators generally ignore all but the strongest contractual prohibitions, and even the most explicit language will not actually ensure compliance, either by the predecessor or the successor.\textsuperscript{123}

Howard Johnson itself suggested that unions seek injunctive relief to secure compliance with successorship clauses before deals are actually consummated.\textsuperscript{124} To the extent this alternative was intended to balance the harsh underlying rule of successor discretion, it has been a dismal failure. Courts have proven extremely hostile to union claims of this kind: only once in the last twelve years has a union obtained an injunction and successfully blocked a sale or similar transfer of control.\textsuperscript{125}

Second, even though successorship is a mandatory term of bargaining under the NLRA,\textsuperscript{126} negotiating appropriate protections is sometimes made dangerous as a result of Section 8(e) of the Act,\textsuperscript{127} which has been used to invalidate a variety of union protective efforts. Section 8(e), added in the Landrum-Griffin reforms of 1959 as an attempt to block "top-down" organizing tactics, prohibits unions from, among other things, forcing employers to "cease doing business" with any other employer.\textsuperscript{128} Restrictions of this kind will only

\textsuperscript{123} See infra notes 158-64.
\textsuperscript{124} See Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249, 258 n.3 (1974); see also Kramer & Schindel, Bargaining Obligations and Corporate Transformations, in PROCEEDINGS OF NEW YORK UNIVERSITY 33RD ANNUAL NATIONAL CONFERENCE ON LABOR 256 (1981).
\textsuperscript{125} See infra note 173.
\textsuperscript{126} See Lone Star Steel Co., 639 F.2d 545 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981).
\textsuperscript{127} NLRA § 8(e), 29 U.S.C. § 158(e) (1988).
\textsuperscript{128} Section 8(e) provides, in pertinent part, that:
It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract entered into hereto-
be upheld if they are found to be attempts to preserve work for a
existing group of employees rather than to extend unionization to a
new group of employees.129

In the successorship context, employers typically argue that a
contractual successorship provision attempts to make them “cease
doing business” with potential buyers who do not wish to assume
union obligations.130 Whether a contract restriction will be held to
violate Section 8(e) usually depends on the form of the transaction
involved131 — a matter the union cannot reasonably be expected to
know at the time it demands the clause. Thus, a typical successorship
provision, purporting to extend the collective bargaining agreement to
“successors and assigns,” will be legal if the employer sells its entire
operation and thus ceases “doing business” altogether, or if the sold
operation is “separate and distinct” from the rest of the enterprise, so
that the “business” will continue unaffected despite the change in
ownership.132 It will be illegal, however, if the employer merely
leases or subcontracts its operation and continues to “do business”
with the lessee or subcontractor after the transaction is completed.133
Even when a sale is involved, the successorship clause will be invalid
if sales of employing enterprises are found to occur frequently in the
ordinary course of the employer’s business. Such a provision is then
considered an attempt to preserve work for the union’s members as a
whole and not merely for the employees of that specific employer.134

Judges have shown little sympathy for unions’ efforts to protect

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130. Employers have also contended that successorship provisions improperly interfere with
their right to “deal [ ] in products of any other employer” within the meaning of Section 8(e).
See Lone Star Steel Co. v. NLRB, 639 F.2d 545 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981)
(bolding that a successorship clause relating to the sale of a steel company’s coal
mines did not affect the employer’s “product,” for that product is steel, not mines).
132. United Mine Workers, 231 N.L.R.B. 573, 574-75 (1977), enforced sub nom. Lone
Star Steel Co. v. NLRB, 639 F.2d 545 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981);
see also District No. 71, IAM, 224 N.L.R.B. 100 (1976).
133. See, e.g., NLRB v. Hotel & Restaurant Employees, Local 531, 623 F.2d 61 (9th Cir.
1980).
134. See National Maritime Union, 196 N.L.R.B. 1100 (1972), enforced, 496 F.2d 907
(2d Cir. 1973), cert. denied, 416 U.S. 970 (1974); see also National Maritime Union v. Com-
merce Tankers Corp., 457 F.2d 1127, 1137 (2d Cir. 1972).
themselves through contract, and although one court has refused to use the Burns capital mobility policy as a basis for invalidating an otherwise-valid contract clause, it would appear that others take that policy very seriously, even if they do not always say so explicitly. In an indirectly related context, for example, Section 8(e) has been used to invalidate union efforts to protect their members from manipulations of corporate form — the so-called “double-breasting” scenario — and these violations have also resulted in crippling damages awards.

Despite these obstacles, and the predictions of conventional economic theory, more and more collective bargaining agreements actually do contain successorship provisions, but the surveys do not explain how many of these provisions are of the almost-useless “passive” type that have crushed employee expectations in so many cases. More important, to the extent the true value of any success-

135. See Lone Star Steel Co. v. NLRB, 639 F.2d 545, 555 (10th Cir. 1980), cert. denied, 450 U.S. 911 (1981).


137. A standard economic analysis suggests that unions will tend not to negotiate successorship provisions because they are unable to value them properly: they do not know how likely it is that management will transfer the business and bring the successorship clause into operation. See Hylton & Hylton, supra note 28, at 850. There may also be a gap between union leadership and rank-and-file on this point, with the membership unwilling to sacrifice wage and benefit increases in order to win protective contract language that would only address contingencies. See Burton F. Boltuch, Workplace Closures and Company Reorganizations: Enforcing NLRB, Contract and Noncontract Claims and Obligations, 7 LAB. LAW. 53, 55 n.3 (1991).


139. See Boltuch, supra note 137, at 78 (describing the disbelief unions usually feel when they discover that typical successorship language is next to useless). “Passive” language may simply recite that the agreement “shall be binding” upon successors, or that the agreement is made between the union and the employer and “its successors and assigns.” In contrast, “active” language affirmatively requires the predecessor to secure the successor’s adoption of the agreement, or expressly prohibits sales or transfers in the absence of such assumption. For examples of weak successorship language, see NORTHRUP & MISCIMARRA, supra note 2, at
sorship clause — ensuring that the successor will be bound to the collective bargaining agreement — has been frustrated by the *Howard Johnson* doctrine,\(^4\) there is precious little use in negotiating such clauses, and precious little significance to their existence.

i. The disappearance of *Wiley*

Although *Wiley* technically remains good law, it has been all but overruled in practice. Successors are rarely forced into arbitration any more and almost never saddled with predecessor collective bargaining agreements. Given the cost of litigation and the bias of the law, unions have even grown reluctant to file suit seeking to have obligations imposed upon successors.\(^4\) The basic reason for the shift is the.

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374. For examples of strong successorship language, see Boltuch, *supra* note 137, at 101-07. Most arbitrators ignore passive language. See *infra* notes 159-60 and accompanying text.


In recent years, perhaps because of the dangers posed by business transactions that are motivated by the prospect of “zapping labor,” unions have pursued a panoply of new legal theories against successors. What these theories have in common is that they are not really “successorship” theories but creative applications of common-law remedies. Unfortunately, they are also united in imposing substantial litigation costs and in failing to produce many end-of-the-day legal victories.

First, unions have successfully charged successors with tortious interference with contract if they persuade predecessors not to require assumption of the collective bargaining agreement in accordance with the terms of the agreement. *See*, e.g., *UMW v. Eastover Mining Co.*, 623 F. Supp. 1141 (W.D. Va. 1985). *But see* Andrew J. Kahn, Comment, *Tortious Interference with Contract Under Section 301*, 10 *INDUS. REL. L.J.* 258, 260 (1988) (noting that five circuits have held that such claims are not available under the LMRA). Other intentional torts have also been tried out. *See* Kraus v. Santa Fe S. Pac. Corp., 878 F.2d 1193 (9th Cir. 1989), *cert. dismissed*, 493 U.S. 1051 (1990) (affirming employer’s liability for tortious interference with an economic relationship based on its having employees fired to avoid successorship-related costs); Glass Molders Int'l Union v. Wickes Cos., 707 F. Supp. 174 (D.N.J. 1989), *after remand*, 578 A.2d 402 (N.J. Super. 1990) (permitting a union to prosecute an action for tortious interference with prospective economic advantage against a defendant whose attempted hostile takeover of an employer prompted devastating layoffs to service new, defensive debt).


Another possible approach, suggested (albeit with skepticism) by one court of appeals, is to assert an “equitable servitude on chattels” theory and argue that a successor is bound to a predecessor’s collective bargaining agreement containing a successorship clause because it knew of the predecessor’s obligations at the time it took possession of its assets. *See* Ameri-
Court’s warning in *Burns* about the dangers of burdening capital, and although *Burns* distinguished NLRB proceedings from Section 301 court actions, the Court itself abandoned this distinction in *Howard Johnson*, and lower courts now take *Burns* as their guiding light in Section 301 cases.

The entire point of *Wiley* was that arbitrators had the power to enforce collective bargaining agreements against successors and that federal courts could assist this process by ordering such arbitrations and enforcing the awards that came out of them. Thus, over the eight years between *Wiley* and *Burns*, a number of arbitrators enforced predecessor agreements against new owners, and several courts took the view that labor contracts would automatically be binding on successors under Section 301. Neither *Burns* nor *Howard Johnson* did anything to interfere with these holdings, or with the holding of *Wiley* itself. *Burns*, by its terms, dealt only with the issue of bargaining obligations under the NLRA, while *Howard Johnson* imposed limits only on the nature of the continuity necessary to send successors into arbitration, and said nothing about the obligations of successors once such continuity was found. Thus, even can Bell, Inc. v. Federation of Tel. Workers, 736 F.2d 879, 887 (3d Cir. 1984). For a useful practical overview of possible legal avenues, see Boltuch, supra note 137.

Finally, it is of course possible to prevent destructive transactions by non-legal means. See, e.g., Teamsters Claim Victory in Fight for Safeway Jobs, L.A. TIMES, Apr. 27, 1992, at D1 (describing a union’s successful boycott effort to prevent a subcontract). But see James Gray Pope, Labor-Community Coalitions and Boycotts: The Old Labor Law, the New Unionism, and the Living Constitution, 69 Tex. L. Rev. 889 (1991) (describing the potential legal pitfalls of boycott campaigns).

142. See *Burns*, 406 U.S. at 287-88.

143. See id. at 285. The crucial difference, the Court held, is the applicability of § 8(d) of the NLRA, 29 U.S.C. § 158(d) (1988), which provides that a collective bargaining obligation “does not compel either party to agree to a proposal or to require the making of a concession.” See id.; H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). Section 8(d) does not come into play in § 301 cases.

144. See *Howard Johnson*, 417 U.S. at 255 (“Although [the NLRA § 301] distinction was in fact suggested by the Court’s opinion in *Burns* . . . we do not believe that the fundamental policies outlined in *Burns* can be so lightly disregarded”).

145. See Henry, supra note 76, at 264.


147. See, e.g., Teamsters Local Union 524 v. Billington, 402 F.2d 510 (9th Cir. 1968); Wackenhut Corp. v. International Union, United Plant Guard Workers, 332 F.2d 954 (9th Cir. 1964); International Bhd. of Pulp, Sulphite & Paper Mill Workers v. Great Northwest Fibre Co., 263 F. Supp. 167 (E.D. Wash. 1967); see also Holayer v. Smith, 104 Cal. Rptr. 745 (Ct. App. 1972) (applying *Wiley* and *Wackenhut* in a California-law case involving an employer not engaged in interstate commerce).

148. In dictum, however, *Howard Johnson* did distinguish *Wiley* on the ground that the
after the Supreme Court’s retrenchment, courts and arbitrators could have enforced predecessor contracts against successors as a matter of routine, even if the contract contained no successorship language of any kind.\footnote{49}

But that is not what happened. After Burns and Howard Johnson, enforcing contracts against successors came to be considered an interference with capital reallocation and fundamental national labor policy.\footnote{50} Thus, in an important 1976 decision, the Ninth Circuit refused to bind a successor to its predecessor’s collective bargaining agreement, even though it had retained an identical operation and hired the entire predecessor workforce.\footnote{51} Other courts have followed survival of the predecessor after it sold its assets provided the union with an alternative source of relief, whereas in the merger context the successor is the only surviving entity. See Howard Johnson, 417 U.S. at 257-58; see also Edward Sweeney, Comment, Dodging the Supremacy Clause: Do State Successor Statutes Survive Federal Labor Law Preemption?, 13 INDUS. REL. L.J. 183, 201-02 (1991) (questioning the enforceability of predecessor agreements in light of Burns and Howard Johnson). Given an opportunity to rule on this question in an important case that arose shortly after Howard Johnson, the Court twice declined to grant certiorari (on a unanimous vote in both instances). See United Steelworkers v. U.S. Gypsum Co., 492 F.2d 713 (5th Cir.), cert. denied, 419 U.S. 998, reh'g denied, 419 U.S. 1097 (1974) (enforcing an arbitration award binding an asset purchaser to the predecessor agreement). The Fifth Circuit also refused to grant rehearing in U.S. Gypsum after the Supreme Court decided Howard Johnson. See 498 F.2d 334 (5th Cir. 1974).

149. The collective bargaining agreement in Wiley did not contain any successorship language; the Supreme Court’s order was based solely on the broad arbitration clause itself. See Wiley, 376 U.S. at 552-55. This history notwithstanding, “[c]urrent law and arbitral precedent are both clear that absent a Successors/Assigns clause no successorship obligation ensues.” Roadway Express, 80-2 Lab. Arb. Awards (CCH) ¶ 8528, at 5361 (1980) (Tamosh, Arb.).

150. See, e.g., Wood v. IBT, Local 406, 807 F.2d 493, 500 (6th Cir. 1986), cert. denied, 483 U.S. 1006 (1987); Bartenders Local 340 v. Howard Johnson Co., 535 F.2d 1160 (9th Cir. 1976); see also Printing Specialties & Paper Prods. Union No. 447 v. Pride Papers Aaronson Bros. Paper Corp., 445 F.2d 361 (2d Cir.), cert. denied, 404 U.S. 1001 (1971) (relying on the Second Circuit’s pro-capital opinion in Burns). But see U.S. Gypsum, 492 F.2d at 725-26 (refusing to scrap the Wiley doctrine in light of Burns and holding that an “arbitrator was not prohibited by national labor policy from holding [a successor] to the dues check off and wage reopener provisions of its predecessor’s labor agreement”).

151. See, e.g., Bartenders, 535 F.2d 1160; see also Southward v. South Cent. Ready Mix Supply Corp., 7 F.3d 487 (6th Cir. 1993) (reaffirming the principle announced in Bartenders). Note, however, that in Bartenders the union deliberately chose to seek a judicial rather than arbitral ruling on the effectiveness of the collective bargaining agreement, and that the NLRB successfully prosecuted a successorship action against the new employer. See Bartenders, 535 F.2d at 1161 n.1, 1164.

Even under the current extraordinarily flexible rules, a careless employer may find itself bound to the terms of a predecessor collective bargaining agreement. If it assumes the agreement, deliberately or accidentally, it will of course be bound. See, e.g., Burns, 406 U.S. at 291. More important, if all or almost all its workforce consists of predecessor employees, it will sometimes be required to bargain with the union about their initial terms of employment, and if no bargaining takes place, the terms fixed by the predecessor’s labor agreement will
suit, and today arbitrators are extremely reluctant to enforce obligations against successors\(^\text{152}\) and courts are firmly opposed.\(^\text{153}\) Today,

remain the benchmark. See, e.g., Appelbaum Indus., Inc., 294 N.L.R.B. 981, 982 (1989). This obligation will not take root, however, if the successor makes clear to the employees at the time of their rehire that the terms of employment will be different. See Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974), enforced, 529 F.2d 516 (4th Cir. 1975). This Spruce Up exception has been interpreted broadly, so that even vague or offhand suggestions of changes will allow the employer unilaterally to impose sweeping new initial terms of employment. See, e.g., Holiday Inn of Victorville, 284 N.L.R.B. 916, 916 (1987). This sub-doctrine is the progeny of a somewhat cryptic aside in Burns. See Burns, 406 U.S. at 294-95 ("[T]here will be circumstances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms").

152. Since Howard Johnson, only three reported arbitration decisions have enforced collective bargaining agreements against successors, either wholly or partially, and the most recent of them is fifteen years old. See Standard Beverage Co., 80-1 Lab. Arb. Awards (CCH) ¶ 8022 (1979) (Thornell, Arb.) (holding successor to its predecessor's collective bargaining agreement with respect to those predecessor employees it chose to hire, but denying relief for those not hired); Schneier's Finer Foods, Inc., 72 Lab. Arb. Rep. (BNA) 881 (1979) (Belkin, Arb.) (imposing upon a successor the economic terms of its predecessor's collective bargaining agreement, but not the non-economic terms); B & K Invs., Inc., 71 Lab. Arb. Rep. (BNA) 366 (1978) (Turkus, Arb.) (binding a successor to its predecessor's collective bargaining agreement, with minor modifications). B & K Investments, moreover, involved a stock transaction, such that commercial contracts would have been binding on the successor in any event, as a matter of state corporate law.

For a recent decision denying successor obligations based on the Burns dictum about capital mobility, see Clark Cincinnati, Inc., 98 Lab. Arb. Rep. (BNA) 1009, 1011-12 (1992) (Geggin, Arb.).

Some recent articles have misrepresented the state of the law on this point. Sometimes this is a matter of misleading emphasis: for example, Celestine J. Richards, Note, The Efficacy of Successorship Clauses in Collective Bargaining Agreements, 79 GEO. L.J. 1549 (1991), devotes six pages of detailed analysis to the problem of binding successors, but never explains the rarity of these cases and cites only three decisions in which successors were bound, one of which preceded Howard Johnson and the most recent of which dates from 1979. See id. at 1560-66. In other instances the distortion appears more serious. One article asserts that "[w]here new employers have been ordered to arbitrate whether the transferee was bound . . . a number of arbitration decisions have found an express obligation to assume the collective bargaining agreement." Raymond Wheeler & Patricia Murray, Mergers, Acquisitions, and Takeovers: Labor Relations Consequences of Corporate Transactions, 7 LAB. LAW. 111, 125 (1991). Yet none of the four cases cited to support this proposition are proceedings against successors; all involve predecessors only. See id. at 125 n.60. Thus, although an "express obligation" was indeed found in each case, it was solely a predecessor obligation, and in none of these cases was an agreement imposed upon a successor, in whole or in part.

153. See, e.g., Philadelphia Joint Bd., ACTWU v. After Six, Inc., 141 L.R.R.M. (BNA) 2709 (E.D. Pa. 1992); Operating Eng'rs, Local 542 v. Evans Asphalt Co., 721 F. Supp. 73 (M.D. Pa.), aff'd, 891 F.2d 281 (3d Cir. 1989); see also Boltuch, supra note 137, at 64 ("since Burns, courts have not enforced awards that bind the successor"). The one exception is Local 1115 Joint Bd. v. B & K Investments, 100 L.R.R.M. (BNA) 2174 (S.D.N.Y. 1978), which involved a stock transaction. More recently, the Second Circuit enforced an award against an asset purchaser, but the successor had expressly assumed the collective bargaining agreement on a prospective basis, and the dispute involved a "retrospective" obligation to pay
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an arbitral award binding a successor might well be vacated as an affront to "public policy."\(^{154}\)

Even so, the circle has not been completed. If Burns has triumphed over Wiley, as it certainly seems to have done, there is no principled reason why successors should be forced to arbitrate at all. If assuring free capital mobility is to be the central policy in this area, then it should never be upset — not by the Board, not by courts, not by arbitrators.\(^{155}\) Yet matters remain in a curious kind of limbo: as one court put it, "a successor employer may be compelled to arbitrate under the arbitration clause of the predecessor's collective bargaining agreement, even though ultimately the arbitrator may be precluded from imposing on the successor employer any of the agreement's substantive obligations."\(^{156}\) The only reason this curious state of affairs persists is the Supreme Court's failure to overrule Wiley, so that lower courts oscillate between limiting it to its facts and pretending that it still retains substantial vitality.\(^{157}\)

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154. Notwithstanding the Supreme Court's recent attempt to reaffirm the traditional finality of arbitration awards and to restrict judges' power to invalidate decisions that violate "public policy," see United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987), lower courts remain eager to invoke the "public policy" doctrine to set aside arbitration awards that favor workers. See, e.g., Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993); Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991).

One court has rejected an argument that an award ordering a successor to comply with its predecessor's collective bargaining agreement violates the public policy in favor of capital mobility, but that was in 1974, long before the rise of the "public policy" doctrine and the arrival of most of today's federal judges. See United Steelworkers v. U.S. Gypsum Co., 492 F.2d 713, 726 (5th Cir. 1974), cert. denied, 419 U.S. 998 (1975). More recently, another court has rejected a public policy argument against holding a predecessor liable for failing to secure adoption of the agreement by its successor, but the court took pains to distinguish this from an award binding the successor, and explicitly declared that the successor could not have been required to assume the agreement. See Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Owens-Illinois, Inc., 758 F. Supp. 962, 972-73 (D.N.J.), aff'd, 941 F.2d 1201 (3d Cir. 1991), cert. denied, 112 S. Ct. 877 (1992).


157. Compare, e.g., Wood v. IBT, Local 406, 807 F.2d 493 (6th Cir. 1986), cert. denied, 483 U.S. 1006 (1987) (finding Wiley inapplicable because the seller remained in existence following the sale, state law did not establish successorship in the asset sale context, and there were certain differences in the operation following the sale) and American Bell, Inc. v.
Nevertheless, the bottom line is clear. Under existing law successors have no contract obligations unless they choose to assume them, and workers can do almost nothing about it.

ii. Pursuing the predecessor

Because pursuing the successor has become so unproductive, workers and their unions must necessarily confine most of their attention to predecessors. Here, arbitrators continue to issue favorable awards from time to time — and courts usually still enforce them but sometimes with reluctance and generally only if the collective bargaining agreement contains strong, mandatory language that demands affirmative action by the employer. When it is up to the

Federation of Tel. Workers, 756 F.2d 879 (3d Cir. 1984) (denying declaratory relief because the successor had applied the old agreement's terms to the individual bargaining unit employees, even though the grievance in question involved subcontracting — that is, the failure to apply the agreement to all employees) with Gigliotti Corp. v. Building & Constr. Trades Council, 583 F. Supp. 396 (E.D. Pa. 1984) (ordering arbitration against a successor) and Graphic Arts Int'l Union Local 1B v. Martin Podany Assocs., 531 F. Supp. 169 (D. Minn. 1982) (same). Not all courts continue the pretense. See, e.g., 152 W. 58th St. Owners Corp. v. Local 32B-32J, SEIU, 514 N.Y.S.2d 11 (App. Div. 1987) (refusing to order a successor to arbitrate, based on a traditional contractual analysis); United Steelworkers v. South Bend Lathe, Inc., 633 F. Supp. 1342 (N.D. Ind. 1986) (refusing to order a successor to arbitrate on the puzzling ground that it was financed through an employee stock ownership plan).


In Zady Natey, the Fourth Circuit rejected an employer argument that would have devastated unions' efforts to negotiate successorship protections: the contention that language purporting to extend the contract to "successors" should only take effect if the new employer became a "successor" within the meaning of Burns. Had this position been accepted, buyers and sellers could both avoid liability simply by making sure the buyer did not hire a majority of predecessor employees.


courts rather than arbitrators to make the initial determination, however, even predecessors are likely to escape liability.\textsuperscript{161} And although the damages for failing to secure assumption of a collective bargaining agreement can sometimes be massive,\textsuperscript{162} such awards are not equivalent to an actual guarantee of continued employment for the bargaining unit. Only the successor can provide meaningful relief of grievances concerning continued employment, discharge for just cause, and seniority rights.\textsuperscript{163} Going after the predecessor, then, is a very

\textsuperscript{161} Compare UMW v. U.S. Steel Mining, Inc., 895 F.2d 698 (10th Cir. 1990) (finding no breach); UMW v. LTV Steel Co. \textit{(In re Chateaugay Corp.)}, 891 F.2d 1034 (2d Cir. 1989) (same); and Central States Southeast & Southwest Areas Pension Fund v. PYA/Monarch of Tex., Inc., 851 F.2d 780 (5th Cir. 1988) (same with District 17, UMW v. Allied Corp., 765 F.2d 412 (4th Cir.) (en banc), \textit{cert. denied}, 473 U.S. 905 (1985) (finding breach) \textit{and} UMW v. Eastover Mining Co., 603 F. Supp. 1038 (W.D. Va. 1985) (same). In "straight" § 301 actions like these, the court acts as the finder of fact, whereas in arbitration cases it may vacate awards only in exceptional circumstances. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

\textsuperscript{162} See Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union v. Owens-Illinois, Inc., 758 F. Supp. 962 (D.N.J.), \textit{aff'd}, 941 F.2d 1201 (3d Cir. 1991), \textit{cert. denied}, 112 S. Ct. 877 (1992) (refusing to vacate an arbitration award requiring an employer to pay $2 million in damages for failing to secure assumption of the contract). Note, though, that even the \textit{Owens-Illinois} court would have found a contractual remedy against the successor difficult to swallow, declaring that the seller and its union "could not purport to impose liability on a non-signatory third party." \textit{Id.} at 971.

\textsuperscript{163} Henry, \textit{supra} note 76, at 270. Predecessors may also often be insolvent or nonexistent following the transaction, see Severson & Willcoxon, \textit{supra} note 23, at 839, but then so
poor substitute.

To the extent courts and arbitrators are willing to find predecessor breaches and award meaningful damages, though, predecessors might be expected to begin complying with their agreements and assuring successor performance. As such, contract might still win the day. More likely, however, employers would become less willing to agree to serious successorship language in the first place, so that the basic problems of contract — workers' inability to negotiate from a position of strength — will return to the fore.

iii. The problem of injunctions

Injunctive relief will almost always be necessary if a union wishes to use the arbitration process to hold a predecessor to its bargain and prevent it from disposing of its business without obtaining the requisite protections for its workers. Without such relief the deal will go through, even if it blatantly violates the contract, and the union will be effectively precluded from obtaining meaningful remedies after the fact, since arbitrators cannot (or at least do not) rescind sales.

Efforts of this kind are treated in the same manner as other attempts to preserve the status quo pending arbitration, and these sorts of injunctions are notoriously difficult to obtain. To win such relief, a union must demonstrate both that the underlying grievance is arbitrable — usually no great burden under the broad traditional presumption of arbitrability — and, more important, that it meets the traditional criteria for injunctive relief, most troublesome the "irreparable injury" requirement.

On this score courts have proven hostile on at least two
Rekindling Labor Law Successorshipgrounds. First, although inquiry into the likelihood of success on the merits is supposed to be minimal, so as to avoid ruling on the grievance itself and thereby usurping the arbitrator's function, several courts have found it difficult to restrain themselves. Second, courts are extraordinarily unreceptive to the notion that job loss can be considered "irreparable injury." Most courts have implicitly accepted the view that a union is "some sort of business devoted to the filling of its treasury," so that after-the-fact awards of back pay are held to be the equivalent of preserving jobs.

In addition to these doctrinal hurdles, some courts have also invoked the Burns capital mobility policy here, suggesting that "routine issuance of injunctions against the sale of businesses could in many instances be extremely disruptive and costly." Others apr-

168. Some courts have also denied injunctive relief on the ground that the balance of the equities favors management. See, e.g., Goodyear Aerospace, 656 F. Supp. at 1294.


171. National Maritime Union v. Commerce Tankers Corp., 325 F. Supp. 360, 366 (S.D.N.Y. 1971), vacated, 457 F.2d 1127 (2d Cir. 1972). Arbitrators considering requests for injunctive relief in cases of this kind do not necessarily demonstrate the same hostility. See, e.g., Sexton's Steak House, Inc., 76 Lab. Arb. Rep. (BNA) 577, 579 (1981) (Ross, Arb.) (finding "irreparable damages . . . unless the Employer is ordered to comply with the contract as a condition of his sale" and holding that "[t]he benefits intended to be protected could only be partially returned by a monetary award").

172. Panoramic, 668 F.2d at 289; cf. Wood v. IBT, Local 406, 807 F.2d 493, 500 (6th
ently do not need to actually invoke the policy, but simply base their
decisions on *Burns* sub silentio.

As a result of these hurdles, unions almost never succeed in
winning status quo injunctions against business transfers. There have
been a total of three reported successes since the *Howard Johnson*
decision back in 1974, and the last reported instance occurred more
than twelve years ago.[173] Even with the negative state of the law,
though, simply filing suit and moving for injunctive relief may still
prompt some kind of settlement.[174] But perhaps more often, the
union does not even find out about the transaction until it is too late,
and it does not have a meaningful opportunity either to bargain or to
sue.[175]

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supp. 1292 (D. Colo. 1980); Local 1115 Joint Bd. v. B & K Invs., Inc., 96 L.R.R.M.
(BNA) 2353 (S.D. Fla. 1977). In a 1985 case, a union did obtain a status quo injunction that
prevented a predecessor from dissipating its assets pending arbitration, but the transaction
itself went through unaffected. See *Nursing Home & Hosp. Union No. 434 v. Sky Vue Ter-
race, Inc.*, 759 F.2d 1094 (3d Cir. 1985). There are several other cases in which lower court
injunctions were vacated on appeal or temporary restraining orders were issued and then
dissolved. See *IBT, Local Union No. 251 v. Almac's Inc.*, 894 F.2d 464 (1st Cir. 1990)
(district court injunction reversed); Miscellaneous Drivers, Local 610 v. Kroger Co., 858 F.2d
415 (8th Cir. 1988) (TRO dissolved); Local 879, Allied Indus. Workers v. Chrysler Marine
Corp., 735 F.2d 1367 (7th Cir. 1984) (district court injunction reversed, as explained in sub-
sequent related proceeding, 819 F.2d at 787); UAW v. Goodyear Aerospace Corp., 656 F.
supp. 1283 (N.D. Ohio 1986) (TRO granted, preliminary injunction denied); *see also IBT,
Local Union No. 2707 v. Western Air Lines, Inc.*, 813 F.2d 1359 (9th Cir.) (per curiam),
*stay granted, 480 U.S. 1301, vacated and remanded sub nom. Delta Air Lines, Inc. v. IBT,*
484 U.S. 806 (1987) (RLA context, injunction against merger granted, then stayed, then va-
cated when the matter became moot as a result of the stay).

Arbitrators occasionally enjoin transactions based on successorship clauses, but these
cases are necessarily aberrational: the employers in question must *agree* to suspend the trans-
action pending arbitration. Arbitrators cannot issue injunctions against recalcitrant employers
who refuse to submit to immediate arbitration. See, e.g., *C.P. Nat'l Corp. v. IBEW Local
(BNA) at 579.

Some recent articles on successorship appear either negligent or disingenuous in de-
scribing the state of the law in this area. For example, in arguing in favor of a restrictive,
contract-based successorship regime, one 1989 Note asserts rather blithely that unions "have
successfully enjoined sales and mergers pending arbitration," cites the *Panoramic* case, above,
for that proposition, and fails to point out that this is the *only* reported case in the eight
years preceding the publication of the Note. Skjerven, *supra* note 138, at 586. More seriously,
a 1991 article ascribes continuing vitality to the possibility of injunctive relief by pointing
to the district court's injunction in *Almac's*, above, while neglecting to alert the reader that
the injunction was vacated on appeal (more than a year prior to the article's publication). See

174. *See Boltuch, supra* note 137, at 56.
175. *See Henry, supra* note 76, at 269. Under a recent NLRB modification, employers are
2. Other Federal Statutes
   a. The Railway Labor Act and statutory protection of transport employees

   For a number of historical reasons, federal regulation of transport industries has given rise to a variety of special statutory protections for workers not only in successorship situations but also with regard to liquidations and abandonments of existing operations. The various provisions are complex and highly particularized, and although many transport employees remain a great deal better off than other workers, there is very considerable room for improvement in this area.

   Labor relations matters for railroad and airline workers are governed by the Railway Labor Act, a statute that in many respects differs sharply from the non-transport labor laws. Most strikingly, the RLA has recently been held not to have a successorship doctrine of any kind, so that successor transport employers are not required to recognize or bargain with incumbent unions (let alone respect existing labor contracts) even if there is overwhelming continuity in the enterprise and in the workforce. In the case of airline and railroad mergers, the National Mediation Board will simply “extinguish”
all union certifications unless the union-represented employees constitute an "uncontrovertible" majority of the new, expanded unit,179 or unless the employer voluntarily recognizes the union.180 After such a government-imposed extinction, unions lose their collective bargaining victories and must re-organize the employees from scratch.181 Within this system, then, a transport union has no means of assuring its continuing status following a merger or acquisition, even by negotiating an express successorship provision in the collective bargaining agreement. The best it can hope to do is seek arbitration against the predecessor, claiming damages, and even that avenue seems somewhat questionable under existing law.182 Like workers covered by the NLRA, of course, transport workers cannot require their employers to bargain about decisions to sell all or part of their operations.183

Along with several related statutes,184 however, the Interstate Commerce Act establishes a complex set of regulations that protects railroad employees against disruptions from various kinds of business transactions.185 These regulations are not intended to empower workers. As Eileen Silverstein notes, they are simply "incidental costs of a

dues, holding them "incompatible with the certification regime established by the RLA." Railway Labor Executives' Ass'n v. NMB, 988 F.2d 133, 141 (D.C. Cir. 1993).

These principles also apply to certain kinds of acquisitions, which are relatively rare in these industries (except with respect to the sale of route rights or trackage). See Midway Airlines, Inc., 14 N.M.B. 447 (1987).

179. USAir, Inc., 16 N.M.B. 412, 428, reconsideration denied, 17 N.M.B. 28 (1989); see, e.g., 16 N.M.B. at 427. A simple mathematical majority is not good enough; extinctions and elections have been ordered even when unions have proved majorities as high as 61% and 62.5%. On the other hand, the NMB did preserve a certification when the union showed a 79% majority. See 17 N.M.B. at 36-37.

180. See, e.g., Alaska Airlines, Inc., 15 N.M.B. 42 (1987). Even in cases of voluntary recognition, however, the NMB will not declare existing collective bargaining agreements to bind the successor. See id. at 49.

Inexplicably, the NMB will extinguish a union's certification if the union had been recognized voluntarily on both of the carriers in question; majority status is held to be uncertain in such circumstances. See USAir, 16 N.M.B. at 428.

181. See, e.g., USAir. Note that under the RLA a union is required to win a majority of the entire bargaining unit, not just a majority of the votes cast, as under the NLRA. Like the NLRB, however, the NMB does not appear especially concerned about anti-union tactics by employers during election campaigns. See, e.g., Federal Express Corp., 16 N.M.B. 433, 455 (1989).


program directed at improving transportation systems." By and large, moreover, the exceptions have come close to swallowing up the rules. In the case of airline employees, the rules have simply been abolished. Labor protection was swept away with the comprehensive deregulation of 1978, and Congress has not yet provided an effective replacement.

When a rail carrier sells one or more of its lines to another rail carrier, and when two carriers merge, the Interstate Commerce Commission will generally impose labor protective conditions so as to ensure that "the employees of the affected rail carrier will not be in a worse position related to their employment as a result of the transaction" for a period of four years. Among other things, the standard set of conditions requires guaranteed employment for the existing workforce and the assumption of existing collective bargaining agreements. If the line is sold to an employer that is technically entering the railroad industry for the first time, however, such protections are only required at the Commission's discretion, which it almost never exercises for the benefit of workers. Similarly, if the rail

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186. Silverstein, Does Law Tame the Market?, supra note 25, at 178.
187. See Northrup & Miscimarra, supra note 2, at 556-58; Thomas & Dooley, supra note 177, at 149-75; see also ALPA v. Department of Transp., 791 F.2d 172 (D.C. Cir. 1986) (approving the government's policy of refusing to provide labor protective provisions in airline mergers). The sole remaining protection for airline employees is a hiring-preference provision, which places all carriers under a duty to hire "furloughed" or otherwise terminated employees before individuals without industry experience. See 49 U.S.C. § 1552(d) (1988). But even this provision has never been properly implemented. See Hon. Bob Graham, Protecting Airline Employees, Protecting the Public Interest, 10 Hofstra Lab. L.J. 1, 8 & n.45 (1992).
189. See IAM, Dist. Lodge No. 19 v. Soo Line R.R., 850 F.2d 368, 371 (8th Cir. 1988), cert. denied, 489 U.S. 110 (1989) (summarizing these so-called "New York Dock conditions"). For an explanation of the complex history of this body of law, see New York Dock Ry. v. United States, 609 F.2d 83 (2d Cir. 1979). For a discussion of the different protective conditions that are imposed in different kinds of transactions, see Northrup & Miscimarra, supra note 2, at 637-40.

Although existing labor agreements are made binding on the new carrier, special dispute resolution systems imposed as part of the package of labor protective provisions may override contractual commands. See Norfolk & W. Ry. v. American Train Dispatchers Ass'n, 499 U.S. 117 (1991). The ICC also retains a limited power to modify existing agreements. See Railway Labor Executives' Ass'n v. United States, 987 F.2d 806, 812-13 (D.C. Cir. 1993).
190. See Railway Labor Executives' Ass'n v. ICC, 914 F.2d 276, 278 (D.C. Cir. 1990), cert. denied, 499 U.S. 959 (1991); see also Winter v. ICC, 828 F.2d 1320, 1321 n.4 (8th Cir. 1987) (explaining the rationale for the different treatment of non-carrier acquisitions). Acquisition by a non-carrier is governed by 49 U.S.C. § 10901(e) (1988), under which labor protective conditions need not be imposed. This loophole allows for manipulations of corpo-
line in question is deemed "abandoned," an existing carrier may acquire it, even under suspicious circumstances, without having to worry about expensive labor protections. But no matter who acquires the line, and by what means, only the primary corporation will be made subject to the protective conditions, and employees of related subsidiaries will be left out in the cold. The specter of Burns definitely haunts this area as well.

During the 1960s and early 1970s, the Urban Mass Transit Act, which ensures that "fair and equitable arrangements are made ... to protect the interests of employees affected" by mass transit grants,

rate form: in RLEA, the acquiring carrier was a newly created subsidiary of an existing carrier that was formed apparently for the sole purpose of availing itself of Section 10901(e). See, e.g., Railway Labor Executives' Ass'n v. ICC, 999 F.2d 574 (D.C. Cir. 1993).


191. See Black v. ICC, 762 F.2d 106, 111 (D.C. Cir. 1985); but see Railway Labor Executives' Ass'n v. ICC, 825 F.2d 238, 239 (9th Cir. 1987) (remanding an abandonment case to the ICC because of its failure to provide a "carefully articulated, reasoned balancing of factors" to explain its refusal to impose labor protective conditions).

Note also that the ICC has no authority at all to impose labor protective conditions when so-called "distress purchases" are involved. See Simmons v. ICC, 766 F.2d 1177 (7th Cir. 1985), cert. denied, 474 U.S. 1055 (1986) (interpreting 49 U.S.C. § 10905).

192. See Kansas City S. Indus. v. ICC, 902 F.2d 423, 438 (5th Cir. 1990). This has become a particularly glaring problem with the rise of intra-corporate line leases in recent years. See NORTHUP & MISCIMARRA, supra note 2, at 539-46.

193. See In re Chicago, Milwaukee, St. Paul & Pac. R.R., 658 F.2d 1149, 1173-75 (7th Cir. 1981) (invoking the Burns capital mobility argument to justify the failure to bind new carriers to predecessor collective bargaining agreements).

194. Urban Mass Transit Act § 13(c), Pub. L. 88-365, 78 Stat. 307 (codified as amended at 49 U.S.C. § 1609(c) (1988)) [hereinafter UMTA]. Specifically, the Secretary is required to ensure that "collective bargaining rights" and all "rights, privileges, and benefits . . . under existing collective bargaining agreements" are continued, and that employees do not suffer "a worsening of their positions with respect to their employment." Id. These requirements may have ramifications for some NLRA employers. See Springfield Transit Management, 281 N.L.R.B. 72, 79 (1986) (holding a successor to the terms of its predecessor's collective bargaining agreement, on the ground that these terms were fixed pursuant to the UMTA's labor-protection provisions).

also tended to operate as a kind of successorship protection for urban transit workers, because these grants were frequently used to buy out existing private transit lines and turn them over to public authorities. Today, however, public ownership and control of transit lines is almost universal, so that as a practical matter the protections of the UMTA are confined to ensuring "fair and equitable arrangements" for workers employed by existing public lines. With the rise of privatization, however, the statute may once again assume significance as a successorship protection. Federal assistance will be disallowed if contractors fail to maintain existing jobs under existing conditions.

The patchwork of protections for transport employees is plainly inadequate to prevent harsh disruptions to workers affected by business transactions in these industries, which have become especially volatile in recent years. Like other employees, union and non-union alike, transport workers deserve straightforward and comprehensive protections.

b. The Service Contract Act of 1965

The Service Contract Act of 1965 is the only federal statute that provides explicit successorship guarantees. Under the Act, every successor federal service contractor is required to give its employees the same wages and benefits they would have received under the predecessor's collective bargaining agreement.

195. See NORTHUP & MISCMARRA, supra note 2, at 602.
196. See NORTHUP & MISCMARRA, supra note 2, at 602, 610-11. Note that public transit employees are not covered by the RLA but by state public sector labor laws. If these laws are deemed inadequate to protect workers' rights, federal assistance must be discontinued. See id.; see also Metropolitan Atlanta Rapid Transit Auth. v. Local 732, Amalgamated Transit Union, 403 S.E.2d 51 (Ga. 1991) (describing a statutory revision designed to comply with the UMTA and reduce the scope of a transit authority's managerial discretion).
199. See Service Contract Act § 4(c), 41 U.S.C. § 353(c) (1988). More sweeping protections in this vein extend to all employees and not just employees of successors, but a fortiori, employees of successors benefit as well. See Davis-Bacon Act, ch. 411, § 1, 49 Stat. 1494 (1931) (codified at 40 U.S.C. §§ 276a to 276a-5 (1988)) (requiring that federal construction contractors pay employees the "prevailing wage" in the locality); Walsh-Healey Act, ch. 881, § 1, 49 Stat. 2036 (1936) (codified at 41 U.S.C. §§ 35-45 (1988)) (requiring that federal supply contractors pay the "prevailing wage"). Similarly, although as a matter of practical fact most beneficiaries of these statutes are union employees, they do extend to non-union workers as well.
protection, but it is important to make clear what it does not provide. It does not require the successor to hire the predecessor’s employees, to recognize predecessor employees’ seniority rights, or to arbitrate grievances under the predecessor’s agreement; and it does not accord workers a right to sue if the successor fails to meet its obligations. As such, the successor is permitted to ignore the predecessor union, as well as to hire a new workforce with limited experience and thereby win contracts away from employers with more senior, higher-paid employees. Finally, although the statute permits the Secretary of Transportation to waive the wage-preservation provisions if he or she finds the old contract’s wages are too high, he or she is not permitted to do so if the wages are too low. In essence, then, the Act is a peculiar kind of wage-stabilization provision, and not a genuine protection for service contract workers against business disruptions.

c. The Employee Retirement Income Security Act

Continuity of employee benefits across a change in ownership—which like all other benefits matters is regulated by the Employee Retirement Income Security Act (“ERISA”)—generates a complicated set of issues. Perhaps the clearest analytical division falls between obligations that result from collective bargaining, on the one hand, and non-bargained obligations on the other; there are also certain problems peculiar to different kinds of pension plans. As with successorship under the NLRA, though, the sometimes-Byzantine

200. See Clark v. Unified Servs., Inc., 659 F.2d 49 (5th Cir. Unit B 1981); Trinity Servs., Inc. v. Marshall, 593 F.2d 1250 (D.C. Cir. 1978); SEIU, Local Union No. 36 v. GSA, 443 F. Supp. 575 (E.D. Pa. 1977). In an unusual recent arbitration decision, Vinnell Corp., 98 Lab. Arb. Rep. (BNA) 319 (1991) (Concepcion, Arb.), the arbitrator held that although a service-contract successor “was not bound by any provision of the [predecessor’s agreements] as such,” it nevertheless violated the agreement by failing to pay holiday pay in accordance with the agreement. Id. at 324. The arbitrator further opined that the successor “had an implied, if not expressed [sic] obligation, to recognize the accrued seniority of the employees continuing in service from [the predecessor]” and that “[t]he principle is that a right earned under a predecessor agreement is carried forward.” Id.


202. See Clark, 659 F.2d at 52; see also Silverstein, Does Law Tame the Market?, supra note 25, at 179 (arguing that anti-union contractors may be as interested in getting rid of unions per se as in reducing labor costs).

203. See Gracey v. IBEW, Local 1340, 868 F.2d 671 (4th Cir. 1989).

details should not obscure the basic inadequacies of the system. Whether or not its employees are covered by a collective bargaining agreement, a successor need not maintain existing pension, medical, or other benefit plans — or provide benefits at all — unless it wants to.205

If a benefit obligation arises from a collective bargaining agreement, that obligation will generally be terminated with a change of employer, just like other contract requirements, unless the transaction is structured as a purchase of stock rather than assets. Only if the successor chooses to assume the obligation will it continue across a change in ownership or control.206 As such, a successor can avoid benefit obligations by ensuring that a majority of its workforce does not come from the predecessor, or by retaining the old workforce but making it “perfectly clear” from the outset that the terms of employment will be changed.207

If the predecessor was obliged to make contributions to an underfunded multiemployer pension plan, however, the change in ownership will usually trigger (potentially crushing) “withdrawal liability” for the seller.208 Unlike other benefits obligations, this liability cannot be avoided simply by having the successor continue to make contributions; the successor must also post substantial bonds to ensure that the underlying liability will ultimately be satisfied.209 But ERISA does not require assumption of the contribution obligation; the successor is free to cut off contributions to the existing plan if it chooses, even to discontinue all pension benefits.210 As such, this

205. See McGann v. H & H Music Co., 946 F.2d 401, 407 (5th Cir. 1991), cert. denied, 113 S. Ct. 482 (1992) (under ERISA, “employers remain free to create, modify and terminate the terms and conditions of employee benefits plans without governmental interference”). As such, employer decisions “to establish, amend, or terminate” employee benefit plans (as opposed to administering such plans or managing their assets) “are not to be judged by fiduciary standards” and thereby subjected to close judicial scrutiny. Musto v. American Gen. Corp., 861 F.2d 897, 911-12 (6th Cir. 1988).

206. See, e.g., Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop, Inc., 823 F.2d 289 (9th Cir. 1987) (enforcing a contribution obligation against a successor that hired a majority of predecessor employees and failed to specify changed terms of employment at the time of their hire).

207. See supra note 151 and accompanying text.


210. A successor may be held liable for withdrawal liability incurred by its predecessor.
problem is really nothing more than an issue to be worked out in negotiations between buyers and sellers, and it has little to do with workers — except insofar as the risk of withdrawal liability acts to reduce the number of transactions involving employers with such obligations, and thus to reduce the likelihood of employees losing their jobs or seeing them deteriorate as the result of transactioneering.

Single-employer pension plans are rather more easily discarded, and have been more significant in successorship cases. As elsewhere, stock purchasers are technically required to continue existing plans, while asset purchasers are not, but such plans may generally be "terminated" at any time, with the proviso (adopted only in 1986) that they are fully funded. As a practical matter, then, continuation or termination is a choice for the successor. Plan terminations have actually become a common accompaniment to corporate acquisitions in recent years; "excess" funds, although initially contributed for the sole benefit of employees, may lawfully be appropriated by the new employer for its own purposes, typically to pay down debt incurred through high-leverage financing. Conversely, some employers have terminated their own pension plans to generate cash to prevent certain kinds of corporate acquisitions — hostile takeovers, that is. But no matter what the employer's motivation, employees tend to receive far less in benefits than they would have absent the termination; the concept of "full funding" is something of a lawyer's and actuary's term of art.

ERISA also creates certain successorship obligations and complications with respect to welfare (i.e. non-pension) plans. Once again, though, these are tangential difficulties. The basic law is that the successor can do what it wants; if it chooses it may simply terminate all welfare plans, including basic health insurance. One peripheral
exception involves what is known as "continuation medical coverage": even if they take control by means of an asset purchase, a unique regulatory framework requires successors\textsuperscript{215} to make group health insurance available to predecessor employees (at the employees' cost) for up to eighteen months.\textsuperscript{216}

Severance pay considerations, meanwhile, may sometimes prompt a predecessor to insist upon the rehiring of its employees, for if employees lose their jobs as the result of business transactions, the predecessor could suffer substantial liability under its severance-pay benefit plan. Ensuring "rehire," meanwhile, even if it is for a short time or under inferior conditions, will generally allow the predecessor to escape liability, for courts have given employers extraordinary leeway to deny severance benefits to employees who are rehired by successors.\textsuperscript{217}

In sum, ERISA provides almost no protection to employees whose benefits are jeopardized by business transfers. As part of a comprehensive overhaul, then, this vital federal statute needs considerable reform. I address this matter in Part IV below.

d. The Worker Adjustment and Retraining Notification Act

The Worker Adjustment and Retraining Notification Act ("WARN")\textsuperscript{218} contains a rather peculiar provision concerning employment losses caused by sales of employing enterprises. As with the ERISA withdrawal liability problems discussed above, though, this is essentially only a detail to be ironed out between the buyers and

\textsuperscript{215} As elsewhere, these obligations may be avoided if there is insufficient evidence of enterprise continuity following the transfer of control. See Leiding v. FDIC, 940 F.2d 1538, 1991 WL 154047, at *3 (10th Cir. 1991).


This "continuation coverage" law, usually referred to as COBRA from the Consolidated Omnibus Budget Reconciliation Act of 1986 in which it was included, allows employees who experience certain "qualifying events" — most notably a voluntary or involuntary termination of their employment — to continue to enroll in the employer's group health insurance plan, at their own expense, for a period of up to 18 months. See 29 U.S.C. §§ 1161-1168 (1988).

\textsuperscript{217} See Welch, supra note 209, at 85. For an overview of the severance plan problem, see Mark Daniels, The Regulation of Severance Plans Under ERISA, 12 INDUS. REL. L.J. 340, 357 (1990). For an example of the harsh consequences of the prevailing judicial approach, see Schwartz v. Newsweek, Inc., 827 F.2d 879 (2d Cir. 1987).

The basic requirement of WARN is that employers must provide sixty days’ notice of “plant closings” or “mass layoffs,” or risk liability for up to sixty days’ backpay to the affected employees. If a sale will bring such consequences — most likely a “mass layoff” arising from a reduction in the workforce by the buyer or from the buyer’s refusal to hire predecessor employees — then the seller is required to provide notice to employees laid off on or before the effective date of the sale, and the buyer is required to provide notice to employees laid off after the date of the closing. Interestingly, employees of the seller are deemed employees of the buyer as of the time of the sale, so that even if they are not rehired, any liability for failure to give notice will fall upon the buyer rather than the seller.

Based upon these provisions, the AFL-CIO has suggested that notification would not be required when the buyer agrees to hire the predecessor’s employees. This view must surely be correct; under such circumstances — and also where the successor refuses to hire up to forty-nine predecessor employees — there would be no “mass layoff” under the terms of the statute. Less persuasively, one com-

220. Note, however, that under the terms of the statute, this provision technically applies to both plant closings and mass layoffs. See WARN § 2(b)(1), 29 U.S.C. § 2101(b) (Supp. III 1992).
221. See id. Although both the statute and the accompanying interpretive regulations speak only of “sales,” one court has invoked this provision in the merger context, although it vacated this holding when it became apparent that the transaction in question was not actually a valid merger under state law. See Carpenters Dist. Council v. Dillard Dep’t Stores, Inc., 778 F. Supp. 297, 303 n.9 (E.D. La. 1991), aff’d in part, rev’d in part, 15 F.3d 1275 (5th Cir. 1994) and 790 F. Supp. 633 (E.D. La. 1992). As with the NLRA successorship doctrine, then, the form of the transaction may be insignificant.
222. See WARN § 2(b)(1), 29 U.S.C. § 2101(b) (Supp. III 1992); cf. Chemrock Corp., 151 N.L.R.B. 1074, 1078-81 (1965) (holding, in a pre-Burns case, that predecessor employees would be considered “employees” of the successor for bargaining purposes under NLRA Section 8(a)(5)). Obviously, though, the parties to any sale are likely to negotiate about the allocation of any liability in this regard. For example, the buyer could amend the purchase price, demand indemnification from the seller, or, as was once common in Britain as an anti-successorship evasion mechanism, arrange for mass termination of the predecessor workforce before the actual time of sale. See infra note 260.
223. See DuRoss, supra note 20, at 421-22.
Commentator has argued that "sellers will be under great pressure to avoid the risk of monetary penalties for inadequate notices by insisting that the buyer retain the seller's workforce." As the Department of Labor notes, all that is really required here is "prudence": the buyer and seller simply need to "determine the impacts of the sale on workers" and "arrange between them for advance notice to be given." After all, WARN does not impose any genuine obligations: it does not prevent employers from disrupting their employees' lives, it only prevents them from disrupting them in secrecy.

B. State Law

To all intents and purposes, the existing successorship doctrines provide no protection at all to non-union workers, whose rights, such as they are, come from state law. The great majority of such workers — who constitute, it bears repeating, more than five-sixths of the total — are employed "at-will," and although the traditional at-will doctrine has been whittled away almost everywhere, the exceptions still very definitely prove the rule. By and large, non-union workers have no rights against predecessor employers, successor employers, or any employers at all, and if they lose their jobs through the sale of a business they are simply out of luck.

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225. DuRoss, supra note 20, at 422.
228. Courts in 45 states and the District of Columbia have found exceptions to the at-will rule. See 9A Indiv. Emp. Rts. Man. (BNA) 505:51-52 (1992); Montana has also legislated such exceptions. See MONT. CODE ANN., tit. 39, ch. 2, §§ 901-914 (1987). These exceptions have all been developed in the context of wrongful firings, not wrongful refusals to hire; employer freedom in hiring is still almost total, except of course for prohibitions on invidious discrimination. See Mark A. Rothstein, Wrongful Refusal to Hire: Attacking the Other Half of the Employment-At-Will Rule, 24 CONN. L. REV. 97 (1991); see also, e.g., statutes cited supra note 75.

The exceptions may be grouped in three categories — discharges in violation of an express or implied contract, discharges against public policy, and discharges that breach a covenant of good faith and fair dealing. The first exception depends on the employer's carelessness; the second has been cut back with narrowing constructions of "public policy," see, e.g., Gantt v. Sentry Ins., 824 P.2d 680 (Cal. 1992); and the third has lost much of the momentum it once had (see Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988)).
Of course, non-union workers are free to negotiate agreements requiring continued employment in the event of a change in business ownership, but only the most dedicated followers of neoclassical revisionism could take comfort in this possibility. Yet even so, such an extraordinary independent contract would be no more effective than a collective agreement in ensuring compliance by an unwilling successor. Any remedies, necessarily second-best, would have to come from the predecessor.

In the absence of an express agreement as to successorship, promises of continued employment by a predecessor employer have been held insufficient to bind the successor. Rather, the traditional common-law rules of contracts and corporations will prevail, so that stock sales and mergers will preserve contractual obligations, whereas employees will be unable to enforce such promises against asset purchasers except in extreme and unusual circumstances.

State collective bargaining laws — for both the private and the public sectors — may also include successorship protections of one kind or another, but the restrictive federal strictures appear to have been adopted more or less on a wholesale basis. In one recurring
situation, for example, most state courts have found bargaining agreements extinguished when government departments are reorganized so that the employing entity undergoes some kind of structural change.24

There are also various state analogues to the more specialized federal protections. Several states have imposed detailed guarantees for workers in transportation industries,235 for example, or enacted laws along the lines of the Service Contract Act, requiring that government contractors pay prevailing wages and benefits if a service is privatized.236

By far the most significant state initiatives, however, are statutes that purport to bind successors to preexisting collective bargaining agreements. Since Howard Johnson, at least seven states have enacted requirements that hold successors to predecessor agreements if the agreement contains a successorship provision, and three have passed laws preserving predecessor agreements regardless of the existence of a successorship clause.237 Apparently fearing federal preemption,
though, three of these laws exempt NLRA and RLA "employers" from their coverage, rendering them more or less irrelevant; interestingly, the more-recently enacted statutes contain no such restrictions. As explained below, these statutes might indeed run into preemption problems, but no such challenges appear to have been mounted, and in fact there are no reported cases at all involving these laws.

Unfortunately, no states have yet required that successors retain existing workers when they take control of a business, irrespective of whether those workers belong to a union. As I argue below, such a requirement would provide significant protection to union and non-union workers alike. Given the apparent willingness of the states to legislate in this area, such preservation-of-employment laws, in combination with modified contract-preservation laws, may well be the most promising avenue for reform. I consider this approach in detail below.


238. See CAL. LAB. CODE § 1127(c) (West 1988); MASS. GEN. LAWS ANN. Ch. 149, § 179C (1993); OHIO REV. CODE ANN. § 4113.30(D)(2) (1991). But see MASS. GEN. LAWS ANN. Ch. 149, § 20E (Supp. 1993) (no exception). Even states that have declined to include such exceptions have indicated preemption concerns. See 66 DEL. LAWS Ch. 220, § 1(d) (providing for severability of the statute should it be invalidated in part); Skjerven, supra note 138, at 592 n.108 (noting that Illinois legislative analysts believed that the state's successorship law was preempted).

NLRA jurisdiction is discretionary, but has been extended to all private-sector employers "having, in [the Board's] judgment, a substantial impact on interstate commerce," except for transportation carriers, which fall under the RLA. F. BARTOSIC & R. HARTLEY, LABOR RELATIONS IN THE PRIVATE SECTOR 27 (2d ed. 1986); see id. at 25-35; RLA § 1 First, 45 U.S.C. § 151 (1988).

239. However, three states have recently enacted severance pay laws that, if enforced, will provide strong incentives to rehire and retain predecessor employees. Under the Pennsylvania statute, for example, employees with more than three years' seniority are entitled to two weeks' severance pay for each year of service if they are terminated within the 90 days preceding or the 24 months following a business transfer. See PA. CONS. STAT. ANN., tit. 15, § 2582 (Supp. 1993); see also MASS. GEN. LAWS ANN., Ch. 149, § 183 (Supp. 1993); R.I. GEN. LAWS, § 28-7-19.2 (Supp. 1993). Unfortunately, however, the First Circuit has recently held the Massachusetts statute to be preempted by ERISA, on the ground that a system for paying out severance pay pursuant to the statute constitutes an "employee benefit plan" off-limits to state regulation. See Simas v. Quaker Fabric Corp., 6 F.3d 849 (1st Cir. 1993).
C. Conclusion

American successorship law is little more than a hollow shell. In this era of economic insecurity and instability, workers have almost no “protection ... [against] sudden change[s] in the employment relationship,”240 and business transfers can be catastrophic. It need not be so. The political and intellectual obstacles to significant reform can readily be transcended. As explained in the following section, other leading industrial countries have all managed to provide their workforces with meaningful protections against these disruptions. The United States can and should follow suit.

III. A Glance Abroad: Successorship Protections in Other Industrial Countries

Although comparative labor law usually threatens dangerous pitfalls241 — the different legal systems in question may be as different as apples and oranges — problems of successorship are remarkably constant across borders. The fundamental difficulty is the traditional liberal framework that considers a new employer a stranger on the scene (particularly with regard to contractual undertakings242) and fails to recognize the systematic inability of the freedom-of-contract model to protect employees.243 The necessary modification, in turn, involves negotiating this gap and imposing contract-related obligations upon “unconsenting” successors. In almost all major industrial countries, this gap has been successfully overcome, as it was for a time in the United States by the NLRB’s Burns decision and in various court cases that had extended Wiley.

Below, I briefly discuss the successorship regimes of Canada and the member nations of the European Community. Together these regimes protect the workers of almost all the world’s largest capitalist economies.

240. Wiley, 376 U.S. at 549.
241. See Clyde W. Summers, Comparative Perspectives, in LABOR LAW AND BUSINESS CHANGE, supra note 25, at 139 [hereinafter Summers, Comparative Perspectives].
242. See Tony Kerr, Implementation of Directive 77/187 into Irish Law and Case Law of the Court of Justice, in ACQUIRED RIGHTS OF EMPLOYEES, supra note 82, at 1, 3 (describing this traditional approach as it functioned in European Community jurisdictions before the implementation of recent reforms).
There is one notable omission here, that of Japan. In a way it is a significant omission. Successorship law is of marginal relevance in Japan because the sale of ongoing businesses has traditionally been almost unheard of. It is indeed considered immoral — something akin to selling a human being. As such, the view suggested in Burns and in sympathetic commentary that unrestricted transferability of enterprises is an essential need of a market economy must be at least somewhat open to question.

A. Canadian Successorship Law

In contrast to the United States, another federal system with a substantially similar approach to labor law, Canadian labor legislation is established at the provincial level. The federal rules are only applicable to the territories, which hold less than 1% of Canada's population, and to federal works, undertakings, and businesses.

244. James C. Abegglen, Can Japanese Companies Be Acquired?, MERGERS & ACQUISITIONS, Winter 1983, at 16, 18. But see Foreign Acquisitions Are Still the Exception in Japan, L.A. TIMES, June 29, 1992, at D5 (explaining that acquisitions have increased somewhat in recent years, but that the companies offered for sale tend to have serious problems). To the extent enterprise transfers do occur in Japan, however, the successor appears to be obligated to hire the existing workforce and assume the predecessor's collective bargaining agreement. See Jill R. Whitelaw, Note, Duties to Employees Affected by a Transfer of the Enterprise: United States, Europe and Japan, 9 COMP. LAB. L.J. 558, 582-83 (1987-88). But see K. Sugeno, JAPANESE LABOR LAW 393 (1992) (suggesting some ambiguities).

245. See, e.g., Hylton & Hylton, supra note 28, at 853 (pointing to "the extremely important role of entry in bringing about productive efficiency in a competitive economy" and suggesting that strict successorship rules "would reduce the rate of entry into manufacturing and service industries").

246. The basic nature of union representation and the emphasis upon collective bargaining agreements are similar in Canada and the United States, although many of the more technical rules are distinctly more pro-union in Canada, especially with regard to organizing. Nevertheless, Canada is rather less than the workers' paradise portrayed in some commentary from south of the border. See, e.g., Geoghegan, supra note 61, at 257. For an instructive overview of the realities of Canadian industrial relations, see Daniel Drache & Harry Glasbeek, The New Fordism in Canada: Capital's Offensive, Labour's Opportunity, 27 OSGOODE HALL L.J. 517 (1989); and for an explanation of how free trade agreements are jeopardizing Canada's labor and social welfare standards, see Maude Barlow, For the Down Side, Look North, L.A. TIMES, July 19, 1992, at M5. With the electoral successes of the labor-backed New Democratic Party in several key provinces, however, several progressive labor law reforms have been enacted. See Canadian Provinces Strengthen Labor Laws, 141 Lab. Rel. Rep. (BNA) 344 (1992).

Nevertheless, because the different systems tend to learn from each other's successes and mistakes, the divergences between the various Canadian jurisdictions are not overwhelming, and in all cases the rules are noticeably superior to those that prevail south of the border.

Successorship in Canada rests on premises similar to those of Wiley — that "[r]ealistically, one cannot expect the[ ] interests of the employees and their union to be at the forefront of the business negotiations which employers are free to engage in." But the protective regime that has been created to address this problem is considerably more forceful. The crucial inquiry in Canada is whether a "sale" of an enterprise has occurred. In considering this question, the federal and provincial labor boards have taken a broad view, so as "to include almost any mode of transfer." When such a sale is found, the new employer will be bound to the predecessor's collective bargaining agreement until the labor board orders otherwise. If no collective bargaining agreement is in effect at the time of transfer, a bargaining order will issue, but the successor will have no obligation to maintain the pre-existing terms and conditions of employment.

The tests for determining whether a sale has occurred vary somewhat from jurisdiction to jurisdiction, with some provinces focusing on the employee perspective and others looking more to business considerations. Many partial sales will also be covered, as will leases, and several provinces now provide successorship...
protections when government operations are "privatized." With respect to these non-traditional transactions, though, and also in considering acquisitions that follow an operational hiatus, the Canadian scheme actually appears less protective than that of the United States. As in the United States, successorship obligations will apply in many cases of insolvency, but, unlike in the U.S., will not usually do so when one contractor replaces another. As the Canadian Supreme Court put it in an important recent case, "something must be relinquished from the first business and obtained by the second."

Canada also provides useful job security guarantees for employees of transferred businesses through its wrongful dismissal legislation. As a general matter, all employees are entitled to a certain amount of notice of termination and to damages (usually one week's pay for each year of service) if such notice is not given. In the successorship context, all employees not rehired by the successor are entitled to such damages. Employees who are rehired by the successor, meanwhile, are deemed to retain all seniority earned while in the service of the predecessor, so that a subsequent dismissal by the successor will entitle them to damages that reflect their initial date of hire.

breast will be bound to union obligations "where it is established that because of the presence of the non-union company the union company is losing work, or the union company is wound down." W.W. Lester, 76 D.L.R.4th at 413.


255. See C. FOISY ET AL., supra note 247, § 7:1134, at 165 (citing Terminus Maritime Inc., 50 di 178 (1983) (C.L.R.B.).) Terminus Maritime represented a retrenchment from earlier decisions that used an "organic" approach, "which had relied exclusively on the transfer of work classifications covered by the bargaining certificate." Id. Burns itself involved the imposition of bargaining obligations upon a successor contractor, and although this holding sparked both a vigorous dissent and considerable academic criticism, it remains the law. Compare Burns, 406 U.S. at 304-09 (Rehnquist, J., concurring and dissenting) and St. Antoine, supra note 29, at 275 with Systems Management, Inc. v. NLRB, 901 F.2d 297 (3d Cir. 1990).

256. W.W. Lester, 76 D.L.R.4th at 410; see also, JKT Holdings Ltd., 5 C.L.R.B.R.2d 316, 320 (1989) (S.L.R.B.) (refusing to find successorship unless the new employer "acquire[s] the essential elements of a business as a block or as a going concern").

257. See, e.g., Employment Standards Act, R.S.O., ch. E-14, § 13(3) (1990) (Ont.).

B. Successorship Law in the European Community

European Community successorship law springs from the so-called Acquired Rights Directive, enacted in 1977, which in turn took its inspiration from West German legislation of 1972. All E.C. member states are required to adopt their own national legislation to implement the Directive; as such, although the touchstone is the same, there are noticeable differences among the member countries.

The Acquired Rights Directive imposes two key obligations. First, all rights and obligations arising under the predecessor’s employees’ employment contracts are automatically transferred to the successor. In other words, the successor is required either to retain the predecessor’s workforce or to pay the appropriate damages for unfair dismissal. Second, the successor is required to observe the


260. For example, Britain’s implementing legislation, see Transfer of Undertakings (Protection of Employment) Regulations, S.I. 1981, No. 1794, flew in the face of the text of the Directive until the House of Lords intervened. Under the early interpretation, a successor only acquired obligations to employees who were actually employed at the time of sale, and as such could escape liability by arranging for a mass termination on the eve of the closing. Compliance with the Directive thus became entirely “voluntary.” See Secretary of State for Employment v. Spence, 1987 Q.B. 179 (Eng. C.A.); Hugh Collins, Transfers of Undertakings and Insolvency, 18 Indus. L.J. 144, 144 (1989). The House of Lords overruled this interpretation in 1989, holding that “dismissals occurring by reason of the transfer of a business, albeit before the moment of sale of the business itself, give rise to claims against the transferee for fair dismissal.” Collins, supra, at 146 (interpreting Litster v. Forth Dry Dock & Eng’g Co., [1989] 2 W.L.R. 634); see Acquired Rights Directive, Art. 4(1). Ireland’s implementing regulation, in contrast, clearly prohibits the kind of manipulation that once prevailed in Britain. See Kerr, supra note 242, at 15 (citing the European Communities (Safeguarding of Employees’ Rights on Transfer of Undertakings) Regulations 1980, Reg. 5(1)).

261. See Acquired Rights Directive, Art. 3(1).


E.C. countries provide comprehensive protections for displaced employees, not only those who are terminated without good cause (in the American sense) but also for those made “redundant” for economic reasons. See Whitelaw, supra note 244, at 574 & n.123. Thus, under the Acquired Rights Directive and the Collective Redundancy Directive of 1975, 1975 O.J. (L 48) 29, a successor that acquired an enterprise previously employing 200 people, and “downsized” the operation so that it only required 150 employees, would have to hire predecessor employees for those 150 slots, while the predecessor would also have to compensate the 50 employees not hired as a result of the downsizing. See Summers, Comparative Perspectives, supra note 241, at 160. While I believe such a system would be ap-
The crucial inquiry under the Directive is the existence of a "transfer" that will trigger the Directive's obligations. The paradigm is that of a traditional sale of an ongoing business — "a going concern" — and thus some critics have criticized the ambiguity of its application to different kinds of transfers, such as changes in contractors. Unlike United States successorship law, moreover, the "transfer" question tends to be considered as a business matter, rather than from the employee standpoint. The Directive framework is also less protective than the U.S. system in that it does not apply to assets acquired through bankruptcy sales. Finally, like American successorship law, and for the same questionable reasons, the Directive does not apply.

propriate in the United States, imposing such requirements would require major changes far beyond the successorship area, and I will not make the case for them here. Accordingly, as detailed below, I would propose an intermediate arrangement by which successors would be required to fill all their positions with predecessor employees, but would not suffer legal consequences if they reduced the number of available positions for economic reasons.

263. See Acquired Rights Directive, Art. 3(2). Member states have the option of limiting the period for observing predecessor agreements, provided that the obligation extends for at least one year. See id. This provision is of little practical significance in Britain and Ireland, where collective bargaining agreements are not legally enforceable, although it is important in the Continental member nations. See Kerr, supra note 242, at 19. Even the Continental conception is distinctly different from the (North) American model. The Directive has been interpreted only to require application of the predecessor's agreement to employees who had worked for the predecessor, and not to extend to subsequent hires. See Case 287/86, Landsorganisationen i Danmark on behalf of Tjenerforbundet i Danmark v. Ny Mølle Kro, 1987 E.C.R. 5465.

The Directive also requires "information and consultation" with unions or unrepresented employees concerning the effects of the transfer. This requirement is comparable to the NLRA's "effects bargaining" obligation. Compare Acquired Rights Directive, Art. 3(1) with Riedel Int'l (Willamette Tug & Barge Co.), 300 N.L.R.B. 282 (1990).


266. See Collins, supra note 260, at 154. Collins actually suggests a shift toward the American approach. Id.

nothing to protect workers against disruptions that result from stock acquisitions.\textsuperscript{308}

C. Conclusion

The Canadian and European successorship regimes, although certainly susceptible of improvement, give employees a decent measure of security against business transfers. While any American counterpart must necessarily function differently given the nature of the United States' federal system, there is no mysterious and insurmountable barrier that prevents contract obligations from retaining their force against new owners, or that prevents workers from staying in their jobs when businesses are sold. Other countries survive and flourish despite — or perhaps in part because of — such restrictions.

IV. MECHANISMS

Although it is easy to state the basic principle of a strong successorship doctrine — that business transfers should be made as irrelevant as possible from the standpoint of employees — the structure of the American legal system, particularly as it deals with labor matters, presents a barrage of technical difficulties. Reforms can be made

...
in the shoes of its predecessor, while in the non-union setting the successor would actually be required to accept extraordinary limits on its right to change the terms of employment of at-will employees.

There are a variety of means by which this proposal could be effected, and each gives rise to its own particular problems of federalism and political reality. Although a sweeping federal legislative reform would undoubtedly be the simplest method, the political ramifications of federalizing the general law of the workplace in such a manner would be enormous, while a piecemeal state-by-state approach, even if fraught with preemption difficulties and very much a second-best solution, might well be the most viable. I discuss the various possibilities below.

A. Federal Approaches

The easiest and most comprehensive reconstruction of labor law successorship would simply federalize this entire area of law by amending Section 8(a) of the NLRA to provide concrete protections of the kind suggested above for all workers, union and non-union alike. Although such legislation would undoubtedly be valid as a constitutional matter, it would represent a remarkable expansion of the federal role in the employment law realm at a time when the states' agreements if they both desire. The Burns dictum about the importance of restructuring is not nonsensical, just overbroad, and if economic circumstances justify new terms the parties should be free to adopt them. There should be no special role for arbitration in this process, however. I have no particular confidence in the ability of arbitrators to reshape the “law of the shop,” as some courts and commentators have proposed in this regard. See, e.g., United Steelworkers v. Reliance Universal, Inc., 335 F.2d 891, 895 (3d Cir. 1964); see Henry, supra note 76, at 275. The glory days of arbitration and industrial pluralism are dead and buried. See, e.g., GEOGHEGAN, supra note 61, at 164-68 (providing a depressing revisionist account of the arbitration process).

Tentatively, I would propose prohibiting renegotiation between employers and individual employees. The imbalance in bargaining power creates an excessive potential for abuse. In contrast, the European Community’s Acquired Rights Directive does not bar renegotiation here. The successor stands in the shoes of the predecessor, and if the predecessor retains the power to change employment terms under the laws of the member state in question, renegotiation is permissible. See Case 324/86, Foreningen af Arbejdsledere i Danmark v. Daddy’s Dance Hall A/S, [1989] 2 CEC (CCH) 99.

Finally, to the extent a business transfer results in the integration of two unionized operations, I believe existing law, which deals with this matter through bargaining unit clarification and accretion proceedings, is substantially adequate. See NLRB v. Security-Columbian Banknote Co., 541 F.2d 135 (3d Cir. 1976); Frederick K. Slicker, A Reconsideration of the Doctrine of Employer Successorship — A Step Toward a Rational Approach, 57 Minn. L. Rev. 1051, 1068 (1973); see also McGuire v. Humble Oil & Ref. Co., 355 F.2d 352, 357 (2d Cir. 1966) (discussing § 301 problems in this area).
role has been growing steadily for some decades. Cutting against the grain in this manner, moreover, would only redouble the tremendous political difficulties that such a proposal would be bound to provoke by virtue of its substance. Practically speaking, then, this idea is a non-starter.

As a second-best federal solution, a solution that would do nothing for almost nine-tenths of the workforce, the NLRA could be amended so as to overrule Burns and provide that a successor’s bargaining duty includes an obligation to abide by existing terms and conditions of employment, including a “good cause” restriction on discharge when the bundle of existing terms contains such a limitation. While federalism concerns would evaporate under this proposal, business opposition would undoubtedly remain ferocious, and in view of the reduced stakes the cause might not be worth the fight.


272. Only 11.3 million workers are represented by unions in private sector workplaces, and this figure includes several hundred thousand transport employees who work under the RLA. The total workforce is 103.9 million people. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, UNION MEMBERS IN 1991, at tbl. 2 (1992).

An additional minor federal reform could add successorship protections to the RLA, so as to preserve union certifications and collective bargaining agreements across transfers of ownership or control. The total number of affected employees would not be great, however, especially in view of the fact that many railroad employees are already protected by other means. See supra notes 194-99 and accompanying text. On the other hand, as a practical political matter the RLA does seem more open to reform than the NLRA. See Railway Labor Act Study Recommended, 140 Lab. Rel. Rep. (BNA) 370 (1992).

273. As explained above, see supra note 272, ensuring the continuity of contract terms should have the effect of imposing a “just cause” requirement on discharges/failures to “hire” by the successor, so that specifying the obligation to rehire might be redundant. But given the minority view that binding successors to such “good cause” provisions would not restrict successor hiring, it would probably be best to spell out this obligation.

Legislation along these lines was introduced in the Senate in 1977 but got lost in the shuffle amid the labor law reform fiasco of 1978. This proposal would have made it an unfair labor practice for a successor to refuse to assume the predecessor collective bargaining agreement and would have established § 301 jurisdiction to remedy violations of predecessor agreements. See 95th Cong., 1st Sess. 2752, 2771 (1977).

It is worth noting here that Congress has never overridden a Supreme Court interpretation of the NLRA in the nearly sixty years since the passage of the Wagner Act. Professor William Eskridge suggests that “organized worker groups,” including unions, “fare particularly well in overturning adverse [Supreme Court statutory interpretation] decisions,” William Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 YALE L.J. 331, 352 (1991), but his point is directed more at broad employment-related overrides than at “traditional” labor law. See id. at 345 n.62. For the last generation, labor has been considerably more successful in winning legislation that benefits all workers, as opposed to parochial union-only legislation, and as such an all-out effort to protect all employees might actually prove more successful than a proposal to overrule Burns per se, even though the universal legislation would make a far more drastic change to existing law.
Alternatively, and perhaps still less likely, an attempt could be made to have Burns overruled administratively and judicially. Although the NLRB is bound by existing Supreme Court precedent, overruling necessarily has to begin somewhere,\footnote{274. It is possible, however, that the Supreme Court's successorship rules could be considered "ossified" by virtue of Congress' twenty-year acquiescence, so as to make them immune to overruling except by the legislature. Cf. NLRB v. Bell Aerospace Co., 416 U.S. 267, 288-89 (1974).} and perhaps a challenge could be taken all the way up. There has been no relevant change in the text of the NLRA, or in its basic policies, over the last twenty years, though, and as such the essential argument would probably have to be the one suggested here — that the world has changed since the days of Burns, and that the law must move with the times.\footnote{275. Cf. Eskridge, supra note 273, at 387 (suggesting that older precedents are only overruled when there has been intervening social change and an accompanying shift in societal attitudes).} Given the views of the Court's current personnel, such a course would seem distinctly questionable. Almost as difficult would be an attempt to modify the legal theory of successor obligations, although it is certainly intellectually possible; in the years between Wiley and its own Burns decision, for example, the NLRB proved quite creative in devising useful intermediate successorship protections.\footnote{276. See cases cited supra note 17.}

In addition, the NLRB unquestionably retains the power to make marginal improvements to its own existing successorship doctrines. Thus, as argued above, a reexamination of the peculiar exception for stock transactions may be in order, and the basic continuity-of-the-enterprise analysis should be simplified so as to eliminate the inquiry into irrelevant business matters.\footnote{277. See supra notes 82-95 and accompanying text.} These revisions would not only cover NLRA proceedings but might also then become the baseline for the more substantial reforms proposed below.

One final, but extremely important, item for the federal agenda is the matter of employee benefits. As explained above, ERISA essentially ignores the disruptions that result from business transfers — even though disruptions to employee benefits have been one of the most severe problems confronting workers in recent years.\footnote{278. See supra text accompanying notes 204-17.} Here,
however, there may be a real possibility of reform at the federal level: unlike the NLRA, as to which the reform process "has been paralyzed by the competing political demands of labor and management" for more than a generation, ERISA has been modified and amended on several occasions since its enactment twenty years ago, and Congress appears at least somewhat willing to adopt effective mechanisms to protect and secure employee benefits. This openness is fortunate, because ERISA contains an exceptionally broad preemption provision that courts have applied with vigor, if not mean-spiritedness, so as to prohibit almost all state regulation in this vital area.

As such, and in accordance with the broad state-law reforms proposed below, ERISA should be amended to require that successor employers continue to maintain, or contribute to, all preexisting benefit plans for a period of at least one year from the time of transfer. In the case of pension funds, then, successors should be prohibited from terminating single-employer plans (or reducing the benefits thereunder) and from withdrawing from multi-employer plans for that one-year period. A comparable level of health benefits should also be required, with appropriate assurances against hiatuses and discontinuity in connection with the transfer.

Unfortunately, with these peripheral exceptions, federal approaches to successorship reform do not appear politically viable at this time. In accordance with the new federalism in progressive labor law scholarship, then, I suggest that the more practical approach may involve looking to the states.

B. State Approaches

Successorship legislation at the state level would appear considerably more promising as a matter of practical political reality, although here there are a number of serious federalism concerns. As noted above, seven states have recently enacted employee-protective successorship laws, five of them within the last five years, and, en-
couragingly, the newest statutes are the most progressive. Unfortunately, but perhaps not accidentally, all these regulatory efforts have been directed to the preservation of employment terms — specifically those contained in collective bargaining agreements — rather than the preservation of employment itself. Both areas must be addressed in order to construct a truly meaningful successorship regime.

At the outset, it is necessary to confront a serious underlying difficulty with the state-by-state approach: the prospect of business voting with its feet against state regulation, and other states bidding for its favors with inadequate labor laws. This capital veto has been a serious concern ever since the enactment of right-to-work laws in Southern states after the passage of the Taft-Hartley Act, and it has intensified in recent years as business successfully demands tax concessions and other subsidies as the price of maintaining operations in their current location or shifting them to green fields elsewhere. Nevertheless, even though employers can be demonstrably irrational in their response to legal interference, successorship restrictions should not be considered such crushing obligations that capital is bound to flee any state that adopts them. After all, Germany and Italy have not experienced debilitating capital flight because of the strictures of the Acquired Rights Directive. In the final analysis, moreover, this capital veto is not much more than a form of blackmail, and it should not deter a democratic government from doing the right thing.

Below, I analyze the nature of the necessary reforms and their potential pitfalls, first addressing the problem of preserving employment and then considering the means by which the terms of that employment may be regulated effectively.

1. Employment-Preservation Laws

Because job insecurity is the central problem of the existing successorship regime, reform must tackle the matter of employment preservation as its first order of business. The law should guarantee

281. See supra note 237 and accompanying text.
282. See Fran Ansley, Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base, 81 Geo. L.J. 1757, 1772-82 (1993). Note that only Northern industrial states have enacted successorship laws so far; it might be predicted that other states that have thrived on their anti-worker “business climates” will be rather more sluggish.
283. See, e.g., Randall Samborn, Study: Discharge Suits Alter Corporate Policy, Nat'l L.J., Apr. 13, 1992, at 19 (describing employers' wildly disproportionate response to new limitations on the right to fire at will).
continued employment across a change in ownership or control — unless the job is eliminated for valid economic reasons — and should cover all employers, public and private, and whether or not a union has been certified, so as to afford protections to all workers.

There are two major difficulties here. First, no state has yet attempted to provide protections of this kind, and it is uncertain whether state legislators have the political will to do so. Second, there are potential constitutional problems with state intervention, given the expansive scope of federal preemption in the labor law context. Nevertheless, as explained below, I believe that employment-protection laws can survive constitutional scrutiny. For in the end, the basic law of hiring and firing still remains a matter for the states, and it cannot fairly be said that Congress has occupied this field.

Politically speaking, the prospects for such reforms are not at all clear. By enacting their contract-preservation laws, several states have evidenced some degree of willingness to protect workers against disruptive business transfers, but it is hard to tell how serious their resolve really is. Some of these protections were only enacted amid broader legislative efforts to deter hostile takeovers, as such their passage may not really reflect any particular concern over labor matters. It is also possible that legislators have considered their votes in favor of contract-preservation statutes to be “free,” politically popular yet inconsequential in that the legislation could be relied upon to fall under constitutional challenge. Still more likely, employers may not have mounted vigorous opposition to these proposals because they too have felt confident such laws would be invalidated if ever put to use. The prospect of serious legislation that would affect all employers and survive legal challenge would almost certainly inspire a different response.

Were they enacted and enforced, then, employment-preservation laws would be sure to provoke preemption attacks, but they could very well be upheld, provided that the judiciary retains some degree of open-mindedness in the matter. Of course, if the courts are

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284. Massachusetts, Pennsylvania, and Rhode Island have come the closest, requiring that successors pay severance to rehired predecessor employees if they are terminated within a certain period following a transfer of control. See supra note 239.


286. See Sweeney, supra note 148, at 185-87.

287. This pattern is especially suspicious because legislatures are notoriously thick with lawyers, who will readily understand the problems of preemption, and because preemption risks were brought into the open as some contract-preservation statutes were being enacted. See supra notes 237-38 and accompanying text.

288. For an example of unconventional judicial thinking on preemption matters, see Mid-
flexible enough to accept radical innovations, such as Eileen Silverstein’s recent proposal that state labor laws should be invalidated only if they “actually conflict” with federal protections, then these statutes would survive with almost no trouble at all.

NLRA preemption contains two discrete strands. The principal rule, derived from the Supreme Court’s 1959 decision in *San Diego Building Trades Council v. Garmon*, prevents the states from regulating matters “arguably protected” by Section 7 or “arguably prohibited” by Section 8 of the NLRA. In its current incarnation, this doctrine only blocks overlapping state regulation of “arguably prohibited” conduct if the controversy presented to a state court would be “identical” to that which might come before the NLRB. The second problem is “balance of power,” or *Machinists* preemption, which holds that state law cannot upset the balance of economic forces struck by Congress. This second doctrine is most readily applied to prohibit the states from restricting the exercise of economic weapons — such as a union’s right to strike or an employer’s right to keep operating during a strike — but it can also work to deem certain matters deliberately unregulated, so as to block states from writing on what might appear to be a clean slate. These preemption doctrines operate in many different ways and in many different contexts, but the Supreme Court has recently made clear that neither

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291. See *id.* at 244-45.


strand of preemption doctrine reaches so far as to affect a state’s conduct as “market participant” rather than regulator.295

Carefully dodging these constraints, Michael Gottesman has provided a powerful revisionist argument against preemption of employment-preservation statutes. Gottesman relies upon a novel “non-continuum” thesis of NLRA preemption: that “NLRA prohibition of certain conduct does not justify preempting parallel state regulation of that conduct, unless the conduct lies on a continuum some part of which is protected by the NLRA.”296 Applying this principle to a (necessarily) hypothetical state employment-preservation law, he argues that “while federal labor law prohibits purchasers from refusing to employ the seller’s employees for reasons of anti-union animus, it neither establishes nor protects a countervailing right of purchasers to refuse to employ the seller’s employees for other reasons.”297 Accordingly, “[b]ecause there are federal interests on only one side of the line (prohibiting certain failures to hire),”298 federal law should not undo a state command that successors retain predecessor employees.

Gottesman points to two potentially sticky preemption issues here. First, under Garmon, such an employment-preservation law might be considered an improper regulation of conduct “arguably prohibited” by Section 8 of the NLRA,299 because it would duplicate the NLRA’s prohibition on refusals to hire predecessor employees for anti-union reasons, as part of its universal ban on refusals to rehire. In actuality, however, the NLRA is simply not concerned with hiring issues other than anti-union discrimination, and the basic choices in this area are really for the states to make. Unfortunately, the Supreme Court has confused the matter with a number of ill-phrased pronouncements, speaking in Howard Johnson of the successor’s “right” to hire a new workforce when the operative principle of the NLRA is simply not to require retention of the old workforce.300 As

296. Gottesman, Rethinking Labor Law Preemption, supra note 100, at 410. This argument is a response to the traditional Garmon preemption doctrine. See supra notes 290-91 and accompanying text.
297. Gottesman, Rethinking Labor Law Preemption, supra note 100, at 418-19. This is most clearly demonstrated by the unquestioned continuing force of the other federal restrictions on hiring discrimination. See supra note 75. Howard Johnson surely did not nullify Title VII for the benefit of successor employers.
298. Gottesman, Rethinking Labor Law Preemption, supra note 100, at 423.
299. Garmon, 359 U.S. at 245.
Gottesman makes clear, however, the judiciary should be looking at the origins and principles of labor preemption, not mechanically applying the overbroad formulae through which the doctrine has come to be expressed. If the matter is considered with care, there is every reason to believe that employment-preservation laws would be upheld.

Although Gottesman does not discuss it, the most useful Supreme Court decision on this point may be *Phelps Dodge Corp. v. NLRB*, something of an old chestnut perhaps, but nevertheless a useful corrective to the distorted vision that has been the legacy of the preemption decisions that followed a generation later. In *Phelps Dodge*, the Court observed that an employer

is as free to hire as he is to discharge employees. The [NLRA] does not touch “the normal exercise of the right of the employer to select its employees or to discharge them.” It is directed solely against the abuse of that right by interfering with the counter-vailing right of self-organization.\(^{302}\)

As such, if other, independent constraints are placed on the right of the employer to select its employees, it is not the NLRA’s concern. Those new constraints will simply establish a new baseline — that which is “normal.”

In addition, an action to enforce a state employment-preservation law would involve a substantially different controversy than an NLRB discrimination proceeding, and thus should escape Garmon preemption as that doctrine has now been limited in cases involving “arguably prohibited” conduct.\(^{303}\) In the employment-preservation context there would be no need to establish the employer’s motivation, which is the centerpiece of the NLRA inquiry; the employee should be able to prove her prima facie case by the simple fact of the successor’s failure to retain her, and the employer’s potential defense would involve the continuing existence of the job slot, a factor that is entirely irrelevant in the NLRA context.

Second, Gottesman deals with the potential argument that employment-preservation laws would be invalid under the Machinists doctrine because they would impose NLRA obligations on successors

\(^{301}\) 313 U.S. 177 (1941).

\(^{302}\) Id. at 186-87. The quoted material here is taken from the Court’s earlier decision in *Jones & Laughlin Steel Corp. v. NLRB*, 301 U.S. 1, 45 (1937), although the *Phelps Dodge* opinion does not note the source.

that they otherwise would not have had. Again, the non-continuum thesis inspires his answer. "Employers have no right to be union-free, nor to hire to achieve that outcome. They have no right to escape bargaining with a union that has been selected by their employees . . . . Federal law is concerned only that the choice respecting unionization of those actually employed be honored." In Gottesman's view, the real federal interest here is confined to the matter of timing: "providing employees a bargaining right as soon as it is known that a majority of the successor's employees come from the predecessor's workforce." Employment-preservation laws "would merely establish from the moment of [transfer] that a majority come from the predecessor's workforce." The NLRA would then operate as usual, imposing an immediate bargaining obligation on the successor, but not requiring the maintenance of existing terms and conditions of employment.

Again, what is really required is a fresh look at the purpose of the preemption rules. The Machinists doctrine is primarily intended to

304. Gottesman, Rethinking Labor Law Preemption, supra note 100, at 424.
305. Id. Taking this approach would get rid of one annoying issue under the existing system — the problem of the "representative complement." At present, a successor only acquires a bargaining obligation when a majority of its workforce consists of predecessor employees. In many instances, however, the successor does not complete its hiring for a considerable period of time, and it cannot be promptly determined whether a majority of the final workforce will consist of predecessor employees. To get over this problem, the Supreme Court has approved the Board's "representative complement" rule, which creates a bargaining obligation as soon as the successor's hiring has produced a predecessor majority in a "representative complement" of its new workforce. See Fall River Dyeing, 482 U.S. at 46-52. But determining if and when such a complement has arrived can be complex and time-consuming. In contrast, when it is clear from the outset that all the successor's employees will come from the predecessor — as would always be the case if employment-preservation laws were in effect — the bargaining obligation will take root immediately. See Burns, 406 U.S. at 294-95.

Ensuring continuity of the union presence would also avoid the annoyance of proving a valid bargaining demand. See Williams Enters. v. NLRB, 956 F.2d 1226 (D.C. Cir. 1992) (denying enforcement to a Board successorship order because the union's request for bargaining was technically flawed).
307. Specifically, under Burns, it would be "perfectly clear" in all instances that the successor would end up hiring all or substantially all the predecessor's employees, so as to require bargaining with respect to the "initial" terms and conditions of employment under the successor. Burns, 406 U.S. at 294-95.

As an alternative to legislation in this area, discharging predecessor employees simply because they are predecessor employees could be held to be a violation of public policy, so that the employer would be required to provide a valid reason for its action. Under such a regime, of course, a successor could not be permitted to discharge a predecessor employee simply because it deemed someone else more qualified.
avoid state interference with the use of economic weapons and the *process* of collective bargaining;\textsuperscript{308} it is a tremendous intellectual stretch to extend it so far outside its original domain. To hold that the states cannot enact employment laws of general application, merely because they might have the peripheral effect of triggering collective bargaining responsibilities on the part of a few employers who might otherwise have chosen to escape those responsibilities, would be pointless and unjustified overreaching. Such overreaching would be especially inappropriate in light of the Supreme Court's unanimous 1993 *Boston Harbor* decision,\textsuperscript{309} which firmly rejected an expansive interpretation of the *Machinists* doctrine.

2. Contract-Preservation Laws

To be truly effective, a revitalized law of successorship must also ensure some substantive regulation of the terms and conditions of employment. It would make little sense to require the successor to retain predecessor employees, yet simultaneously allow it to impose massive wage and benefit cuts. Providing substantive protections to non-union workers, in particular, requires fairly significant reform, for without additional constraints a successor that was required to retain predecessor employees could turn around and discharge them for a good reason, a bad reason, or no reason at all.\textsuperscript{310} Effective reform in this regard thus requires attention to the different problems of unionized and non-union workers.

With respect to unorganized employees, in the private and the public sector alike, legislation should require both preservation of employment for a period of one year following a transfer of their employer's business, and continuation of the same terms and conditions of employment during that time.\textsuperscript{311} Such a reform would give


\textsuperscript{310} See Whitelaw, supra note 244, at 586. E.C. countries have apparently not had to deal with this problem directly, perhaps because union density is generally much higher, but also because the Acquired Rights Directive provides that if a "transfer" "involves a substantial change in working conditions to the detriment of the employee, the [successor] employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship." Acquired Rights Directive, Art. 4(2). Such a "termination" will in turn create a claim for damages.

\textsuperscript{311} To avoid preemption problems that might arise with laws that preserve collective bargaining agreements, see infra text accompanying notes 318-24, legislation dealing with non-union workers should be enacted separately, thereby foreclosing the possibility that a
protects to non-union workers in the successorship context far more rights than they have elsewhere, thus producing an interesting anomaly. Reform of this sort would very probably tend to discourage transactioneering at the expense of workers, and might well discourage transactioneering of all kinds. However, Japan manages to get by without selling its businesses, and discouraging the most destructive kinds of corporate reshuffling simply cannot be expected to undermine the American economy. To the extent this argument goes against the conventional wisdom of corporate America and those who defend its interests, I believe that this wisdom has proven itself to be folly. The time has come to pick up the pieces and move on from the excesses of the laissez-faire renaissance.

With respect to unionized workers, the appropriate mechanism for preserving existing rights would have to be somewhat different. If state law ensured that all successor workforces contained a predecessor majority (indeed a "totality"), the existing federal regime would impose an immediate bargaining obligation on the successor, but would only require the successor to maintain the existing employment terms if it did not succeed in altering them through this bargaining. Without some substantive protection, the successor might well be able to take advantage of its strength during this time of uncertainty to win union acquiescence in inferior terms. Professor Gottesman suggests that contract terms might still be imposed under Section 301, insofar as every transferee would now inevitably be a Howard Johnson successor, but as explained above, in the aftermath of Burns courts and arbitrators alike have been extremely reluctant to saddle new employers with predecessor agreements, even when total workforce and enterprise continuity is present. As such, without reform, unionized employees might still suffer serious adverse consequences even if continued employment were guaranteed.

The best model for change is that of the most recent contract-

Sweeney argues that states are "realistically prevented from passing a successor statute applicable to both union and non-union employees" because non-union employees typically have no written contracts that could be preserved by operation of law. Sweeney, supra note 148, at 214. However, if the matter is considered in practical terms — a matter of wages, benefits, and so on — there is no real obstacle. Only the obfuscatory imagery of "contract" makes the matter seem problematic. Cf. KAHN-FREUND, supra note 4, at 6.


preservation successorship statutes, those of Massachusetts, Pennsylvania, and Rhode Island, which extend to all employers and continue contractual obligations whether or not the bargaining agreement contains successorship language. Unf

fortunately, there is a possibility that these laws might be preempted, deemed to interfere either with the NLRA or with Section 301. All the same, predictions of demise may be exaggerated, whether the preemption doctrines are conventionally applied, or revised so as to allow state laws to survive unless they "actually conflict" with federal labor law, as Professor Silverstein has proposed. Additionally, Professor Gottesman has suggested that such laws could provide the basis for a new federal rule of Section 301 successorship.

As noted above, NLRA preemption contains two distinct doctrines: primary jurisdiction (Garmon) preemption and balance-of-power (Machinists) preemption. Garmon should not pose a significant problem here, despite the potential for overlapping regulation of "arguably prohibited" conduct, for "successor statutes have nothing to do with what primary jurisdiction preemption protects" — the authority of the NLRB.

Further, the operative inquiry would not be

314. See supra note 237. Note that other states' contract-preservation laws apply only when the bargaining agreement contains successorship language, and some exclude NLRA and RLA employers.

315. See, e.g., Sweeney, supra note 143, at 219; Skjerven, supra note 138, at 592. In contrast, although the new successor severance pay laws, see, e.g., R.I. GEN. LAWS ANN., § 28-7-19.2 (1990), should also survive preemption challenge, on the authority of Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), which upheld a similar protection against displacement caused by plant closings, the First Circuit has recently held Massachusetts' statute to be preempted by ERISA, on the ground that the required distribution of severance pay would be sufficiently complex to transform the compliance process into a forbidden "employee benefit plan." See Simas v. Quaker Fabric Corp., 6 F.3d 849 (1st Cir. 1993).

316. See Silverstein, Against Preemption, supra note 271, at 50-51. Professor Silverstein argues that successors could easily comply both with the NLRA and with state laws requiring preservation of collective bargaining agreements, because the NLRA does not prohibit successor compliance but simply does not itself require such compliance. See id.

317. See Gottesman, Rethinking Labor Law Preemption, supra note 100, at 425 n.257.


319. Sweeney, supra note 148, at 210. In accordance with Gottesman's non-continuum theory, Sweeney points out that contract-preservation laws do not interfere with § 7 rights in any way. The only issue here is a possible duplication of restrictions on matters arguably prohibited by § 8, a less serious concern. Id. at 208. As a practical matter, moreover, the NLRB's jurisdiction would rarely be invoked if a state suit could bring about the preservation of the collective bargaining agreement, while an unfair labor practice charge could yield only a bargaining order. Id. at 209; see Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 189 (1978).
“identical” to that of an NLRB successorship proceeding, as is now required for preemption to take effect.\textsuperscript{320} where the NLRB first gives attention to the question of majority status, and does not even consider other issues until it has satisfactorily resolved that question,\textsuperscript{321} a state court action involving a contract-preservation law would sidestep the workforce composition problem, since the matter would necessarily already have been resolved by operation of law, and would only address enterprise continuity matters.\textsuperscript{322}

The \textit{Machinists} doctrine is somewhat more problematic, and it is here that the most detailed analysis of this question, that of Edward Sweeney, has found the Achilles heel. By virtue of the \textit{Burns} policies of capital mobility and unfettered bargaining, Sweeney argues, labor and management (or, more realistically, just management) must retain the liberty to strike a new, economically realistic bargain based on the balance of economic power, and the states cannot be permitted to interfere.\textsuperscript{323} This conclusion is questionable: as vividly illustrated by \textit{Burns}, the NLRA is concerned with the process and not the outcome of collective bargaining, and the \textit{Machinists} doctrine is simply intended to ban state interference with that process.\textsuperscript{324} If state law operates to provide certain basic protections that might otherwise be provided through collective bargaining, it is simply not a problem under the NLRA.

More important, this analysis is based on the paradigm of the existing statutes, which target collective bargaining agreements and ignore the needs of non-union workers. If preservation of wages and benefits across transfers of ownership is assured for all employees — not just those in unionized workplaces — this regulation would sim-

\textsuperscript{320} See Sears, 436 U.S. at 190.
\textsuperscript{321} See Dicker, supra note 93, at 173.
\textsuperscript{322} Indeed, if the NLRB continued to consider business-continuity criteria in its successorship analysis, a state-law inquiry that looked solely to employee matters might well be considered different enough to escape preemption.
\textsuperscript{323} See Sweeney, supra note 148, at 219. Sweeney further argues that the employer is prevented from using valid economic weapons to achieve a new agreement. \textit{Id}. This argument proves too much, for the Supreme Court has approved state laws that effectively prohibit employers from using economic weapons to avoid agreeing to provide certain employee benefits. See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). In the absence of such laws, the employer would be permitted to lock out its employees rather than agree to such terms, because benefits are mandatory subjects of bargaining under the NLRA.
\textsuperscript{324} Cf. Fort Halifax, 482 U.S. 1; \textit{Metropolitan Life}, 471 U.S. 724. On this point Sweeney suggests rather sophistically that contract-preservation statutes interfere with “[t]he process of forming an agreement” by imposing a pre-formed agreement on the parties and preventing the formation of a new agreement. Sweeney, supra note 148, at 219.
ply become another plank in the basic floor of rights that the states are entitled to provide. In such circumstances, as Eileen Silverstein comments, “this concern about upsetting the balance of power established in the NLRA” can only provide a basis for preemption if one “is prepared to deny states the power to legislate on any matter touching the employment relationship.” In the era of the new federalism, this surely cannot be the law.

Section 301 preemption involves an altogether different analysis. Generally, a state cause of action will be preempted by Section 301 only if it requires the actual interpretation of a collective bargaining agreement.

On the other hand, the Supreme Court has repeatedly emphasized that Section 301 “displaced all state actions for violations of contracts between an employer and a labor organization,” so that collective bargaining agreements cannot actually be enforced except in Section 301 proceedings. As such, an action under a state contract-preservation statute seeking a declaration that a successor is bound to a predecessor agreement would be permitted unless contract interpretation were required; but a suit to remedy a specific violation of the agreement, which would necessarily demand such interpretation, could not be framed as an action under the state contract-preservation statute but would have to proceed under Section 301.

The more cautious state contract-preservation statutes would stumble at the first hurdle, so that even a declaratory relief action to determine the continuing validity of the agreement would be disallowed. These statutes only come into play if the collective bargaining agreement contains a successorship provision, so that the agreement would necessarily have to be scrutinized to determine whether such a provision actually exists.

On the other hand, where the statute is framed more broadly, and seeks to impose obligations on all “successors” as defined in the legislation itself, there would be no need to refer to the bargaining agreement at all. As such, broad contract-preservation statutes should survive this initial inquiry.

But a declaration that the contract bound the successor would be little more than symbolic unless specific interstitial violations of the

326. Silverstein, Against Preemption, supra note 271, at 48.
329. See Sweeney, supra note 148, at 221-23.
330. See Sweeney, supra note 148, at 222-23; Silverstein, Against Preemption, supra note 271, at 51 & n.239.
agreement could then be remedied as well. As noted, such remedies can only come through Section 301 proceedings. In this regard, Professor Gottesman has proposed that state contract-preservation statutes might properly provide the basis for a revised body of federal law under Section 301—that is, the law that would be used in an action to remedy the breach of a collective bargaining agreement made binding by virtue of a state contract-preservation statute. As with federal common law in general, Section 301 analysis may rely on related state law for its rules of decision, and the Supreme Court gave at least some weight to New York's law of mergers in *Wiley.*

As such, Gottesman suggests "that there is no reason why a state's decision to alter the rule that purchasers of business assets are not bound by predecessors' agreements should not...be honored." Like his discussion regarding employment preservation laws, this argument rests upon a version of the "non-continuum" thesis: that state regulation should be permitted unless it interferes with conduct of a kind that may be affirmatively protected by federal labor law. In the context of contract preservation, Gottesman suggests that federal law has no interest in assuring the non-continuity of collective bargaining agreements, and that its reluctance to bind successors to predecessor agreements may arise from "a desire not to intrude upon interests established by state law." As such, Gottesman proposes, "the federal law of Section 301 would be that purchasers of business assets are not bound by predecessors' collective bargaining agreements unless state law declares the state preference to be that purchasers are bound."

There are several problems with this argument, but they certainly need not be fatal. First, Gottesman's suggestion that no federal interest is frustrated by the survival of predecessor agreements must surely be open to question in light of *Burns* and its influential pronounce-

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332. *See Wiley,* 376 U.S. at 550 n.3; *see also id.* at 547-48 & n.2 (explaining the union's argument and quoting the operative statute).
334. Gottesman's article deals with NLRA preemption, not § 301 preemption, and, as explained above, his non-continuum argument is originally a response to the traditional *Garmon* preemption doctrine. *Id.* at 394-426. Although the policy underlying this revised approach can be usefully applied to the § 301 context, it must be emphasized that this view, however imaginative and persuasive, is not the law at the moment.
335. *Id.* at 425 n.257.
336. *Id.*
ment about the importance of unfettered capital mobility.\textsuperscript{337} Recall that this policy was expressly made applicable to Section 301 in the \textit{Howard Johnson} decision.\textsuperscript{338} Although \textit{Wiley} does technically remain alive, assuring capital mobility has long been the dominant policy of labor law successorship, as shown most strikingly by the near-total unwillingness of arbitrators and courts to enforce predecessor agreements even when the new employer is properly a \textit{Howard Johnson} successor.\textsuperscript{339} But this trend among the lower courts and among arbitrators is not entirely sound from an intellectual standpoint — it simply does not follow from the Supreme Court’s various successorship holdings\textsuperscript{340} — and thus Gottesman’s view may retain vitality by virtue of its technical correctness.

Second, Gottesman’s suggestion that federal law is neutral about successorship rules and will follow state modifications may rely too heavily on judicial ingenuousness and ignore potentially serious problems of national uniformity. As he points out, \textit{Howard Johnson} distinguished \textit{Wiley} in part because the merger at issue in \textit{Wiley} was conducted against a background of state law that held predecessor contracts enforceable against the entity that survived the merger, whereas the \textit{Howard Johnson} transaction involved an asset purchase that took place against a background of state law that generally held such purchasers immune from claims under predecessor contracts.\textsuperscript{341}

As such, if an asset purchase were to take place against a different state law background, in which predecessor contracts generally continue their effectiveness, \textit{Wiley} should continue to command the preservation of the agreement.

But it is not entirely clear that these statements in \textit{Howard Johnson} should be taken at face value. After all, the Court was straining to distinguish a precedent that was extremely difficult to distinguish. \textit{Wiley’s} references to state corporate law were dictum of the most tangential kind. The holding was based squarely on the “impressive policy considerations favoring arbitration,”\textsuperscript{342} and the \textit{Howard John-
In an era when the principle of stare decisis has become more honored in the breach than in the observance, moreover, it is not at all certain that a nuanced distinction such as this would be taken seriously.

More important, allowing the states to upset the general rules of successorship would tend to undermine the uniformity of Section 301 law. Implicit in Wiley and Howard Johnson was the understanding that the rules concerning mergers and asset purchases in New York and Michigan, where those cases arose, were the general common law rules, applicable throughout the nation. Mergers in all states take place against a background of corporate law that preserves contractual obligations; asset purchases in all states take place against a background of corporate law that rejects such continuity except in extraordinary circumstances. The Court might well have been less willing to defer to state rules had they varied substantially from jurisdiction to jurisdiction. At this point, the analysis appears to be at odds with the basic policy underlying preemption, the need for uniformity; which Gottesman’s rethinking does not seek to challenge, and not simply the unplanned and unjustified consequences of poorly framed preemption doctrines. This problem is compounded by the fact that the state contract-preservation laws in question are not general modifications of corporate law rules, but specific revisions of the rules concerning collective bargaining agreements and collective bargaining agreements alone. A state’s choice to hold all contracts binding upon asset purchasers is surely something quite different from an attempt to impose collective bargaining agreements while preserving the existing rules for every other sort of contract.

If, however, as proposed above, the statute preserving collective bargaining agreements were but part of a broader legislative effort to preserve independent employment contracts and the terms of employ-

344. Cf. Seymour v. Hull & Moreland Eng’g, 605 F.2d 1105, 1109 (9th Cir. 1979) (describing national uniformity in the enforcement of collective bargaining agreements as the “overriding” policy of § 301).
345. See supra notes 232-33 and accompanying text.
346. See Gottesman, Rethinking Labor Law Preemption, supra note 100, at 373.
347. I recognize and firmly support the principle that “a collective bargaining agreement is not an ordinary contract.” Wiley, 376 U.S. at 550. However, I do not believe it provides a valid basis in this context for different treatment of bargaining agreements by the states. Cf. Silverstein, Against Preemption, supra note 271, at 10-11 (arguing that state laws that “target[ ] collective bargaining agreements” cannot be upheld based on the principle that the states may impose threshold obligations on all contracting parties) (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985)).
ment where the "contract" is only a legal fiction, that statute would appear a more legitimate attempt at ensuring stability in business transfers, and not a directed effort to interfere with the balance struck by national labor policy.\footnote{Under such circumstances the federal courts might rightfully choose to accept such a revised approach under Section 301.} As a final alternative, given the complexity of the various pre-emption analyses, the scope of reform could be trimmed back so as to reduce supremacy clause problems. Rather than seeking to preserve all the terms of collective bargaining agreements, state law might simply provide that all successors must continue to provide the same level of wages, along with comparable hours of work,\footnote{For example, full-time workers could not be involuntarily cut back to part-time status.} for a period of one year following the takeover. Such a law could apply to both non-union workers, as described above, and to unionized workers, who would then lose their collective bargaining agreement and all its protections other than the most basic ones concerning wages and hours. But even such a reduced protection would make a substantial improvement over the rules that currently prevail.

A statute of this kind would seem immune to preemption attack. Collective bargaining agreements, and thus Section 301 difficulties, would obviously be irrelevant. Most important, such a comprehensive, basic set of protections would surely survive a \textit{Machinists}-based NLRA preemption challenge. Such a reform would be similar in character to the state wage-and-hour laws, which are unquestionably valid. In this era of decline and diminishing expectations, half-loaves, even crumbs, should not be scorned.

**CONCLUSION**

Protracted economic difficulties and the now-manifest failings of deregulation and laissez-faire seem to have brought about a new openness in crucial matters of national policy. Coordinated strategies for research, development, training, and education are higher on the agenda than they have been in years, and many observers are looking enviously at other countries' innovations. In such a climate it seems appropriate to suggest reconsideration of the fate of workers in eco-

\footnote{Cf. Silverstein, \textit{Against Preemption}, supra note 271, at 10-11 (suggesting difficulties with this argument in the context of state laws that do not apply universally but "target[ ] collective bargaining agreements").}
nomic transition and business change. The current approaches, minimal in their scope, were devised under very different circumstances and have not adapted well to changing conditions. The time has come for something better.