The Fate of Workers in Successor Firms:
Does Law Tame the Market?

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The author argues that the NLRA, enacted to create a regulatory framework for the exchange of the assets of capital and labor, does not shift the balance of power between these assets. In a careful examination of the Supreme Court's pronouncements on the effect of the NLRA on successor obligations, the author notes a deference to market determinations beyond that called for by the words of the Act or by empirical data. After a discussion of social legislation, which is characterized by the guarantee of specific, state-determined benefits, the author concludes with reflections on the limited ability of legislation to change the basic bargaining power of capital and labor in a market economy.

Market regulation of the economy is the organizing principle of capitalism. Until the 1920's this principle received explicit support in American law, transforming the economic imperative of unregulated commercial transactions into a political value. In the area of employment law, the doctrine known as liberty of contract dominated analysis, as the courts celebrated the right of entrepreneur and worker to control disposition of the assets each brought to the workplace without intervention by legislatures or pressure by labor organizations.¹

The symmetry between legal doctrine and market regulation of employment relations ended with enactment of the National Labor Rela-

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tions Act (NLRA or Act). The political and economic values articulated in this statute suggest a dramatic break with the commitment to individual liberty. By providing legal protection for the concerted actions of workers and the right to exclusive representational status for their unions, the NLRA championed collective over individual interests. By requiring most employers to bargain with unions and to honor negotiated terms of employment, the legislation mandated participation by labor organizations in some decisions affecting the economy. Establishment of a federal agency to administer the Act added a governmental presence to a relationship long described as wholly private.

The impact of these policy choices on the economic and legal foundations of labor relations is hotly disputed. Conventional analysis holds that since 1935 the state has joined the market in shaping employment terms and that organized labor actively participates in many economic and political decisions. At the same time, according to the conventional view, the dominant influence on legal analysis of industrial disputes is the commitment to collective bargaining. Most legal scholars trace these developments to the NLRA and judge statutory regulation of labor relations a success. In doing so they identify the consequences of regulation—eliminating the worst features of liberty of contract and promoting collective bargaining—as the purposes of the statute. The Supreme Court tends to echo this assessment.

Revisionist scholars present a startlingly different picture of the Act. They see the NLRA as underwriting organized labor in its efforts to make the concerns of employees central to all business decisions. The general provisions of the statute, they say, if not a basis for expropriation, do strip employers of some property rights and limit the reach of others. Accordingly, federal labor policy could have contributed to a profound rearrangement of economic relations by establishing the legal right of workers to participate in all aspects of enterprise management. But, revisionists contend, the Supreme Court thwarted this opportunity when it interpreted statutory provisions in a manner designed to insure the main-

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5. Id. at § 143 (1982).
7. See NLRA § 1 (codified as amended at 29 U.S.C. § 151 (1982)).
tenance of legal and economic arrangements discredited in 1935. The revisionists seem to believe that under some circumstances the law can be powerful enough to sustain or transform governing economic principles; and that, in the case of the NLRA, a different set of statutory interpretations would have eroded, if not destroyed, the primacy of market regulation.

The divergent conclusions of traditional and revisionist scholars share a common premise, that the NLRA could inaugurate a transfer of power in labor relations by redefining the legal rights of labor and management. For the traditional scholar, government intervention could (and did) alter the basis of many economic decisions because the statute introduced a new process, collective bargaining, and a new participant, organized labor. In the assessment of revisionists, the NLRA offered an opportunity to restructure the economy by promoting conditions that could have led to the establishment of enterprises controlled by organized labor. Neither school doubts the ability of law to alter the determinants of power in the workplace, and both assume a steadily diminishing role for market regulation.

This Article offers a different perspective on the relationship between legal and market regulation. Its premise is that the NLRA merely adjusted the schedule of worker rights already acknowledged in the marketplace. This schedule included an employee's freedom to compete against co-workers for favorable employment terms, to pursue job opportunities from different employers, to bargain about terms of employment, and to withdraw from the labor market altogether. The statute adjusted these rights by legalizing collective action, so that the strike and collective bargaining could be used to strengthen labor's ability to prevail in disputes over those interests already recognized as legitimate under liberty of contract. What the NLRA and other labor legislation did not do, and according to this analysis did not attempt to do, was repeal the authority of employer and employee over those assets each brings to the workplace—the labor power of workers and the capital of owners.

To illustrate this claim and to provide a background for understand-


10. Nor could it. For in a capitalist economy, no law can give labor the ability to control decisions about capital investment, or management the ability to keep workers from quitting, for the simple reason that neither party needs the law to exercise its authority. Law merely expresses these structural facts by proclaiming a legal right to what the parties have authority to do anyway—agree on terms of employment and use capital or labor power to advantage. This view is based on an assumption, which this Article will support but not prove, about the relationship between economic
ing its significance, this Article examines one problem in labor relations, an employer's control over terms of employment in connection with its acquisition of an ongoing enterprise. Although discussion of a single topic, rather than a survey of labor law, may seem to limit the persuasiveness of any findings, confining the inquiry has compensating advantages. To isolate the conceptual foundations of legal doctrine requires the type of close examination of statutory and judicial sources which often turns surveys into tedious, repetitious or superficial projects. Conversely, a well-crafted discussion of one problem should enable the interested reader to extend the analysis to other areas of labor law.

For the purpose of investigating the roles of legal and market regulation in labor relations, the question of a successor's obligations to labor is an appealing one. In the absence of any reference to successor employers in the NLRA or its legislative history, the three Supreme Court decisions establishing the Act's successorship doctrine provide a manageable, if dense, text. The issues arising from transfers of ownership—insuring entrepreneurial flexibility while providing stable employment conditions—are central to labor law. Resolution of successorship problems under the NLRA tells us a good deal about the legal device chosen to shape labor relations and about the potential reach of this type of regulatory reform. An additional reason for focusing on transfers of ownership is that laws other than the NLRA address a successor's obligations to labor. Examination of these laws, in conjunction with the NLRA, allows a more penetrating analysis of whether legal regulation of labor disputes overcomes the structural weight of the market.

Part I of this Article examines the obligations of successor employ-

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1. But see J. Atleson, supra note 9 for a notable exception.
2. The term successor is used in a chronological sense and not to describe the scope of an employer's legal obligations.
4. In general Supreme Court decisions may not be the best source for investigating the roles of legal and market regulation, but in the area of transfers of ownership under the NLRA the Court's decisions appear to represent the view of those governmental sources that allocate market and legal obligations. Congress, although invited to do so, has not enacted legislation to overturn the successorship decisions. See, e.g., S. 528, 95th Cong., 1st Sess. 2752 (1977). Nor has the Supreme Court manifested an intention to reconsider these decisions. Lower federal courts and arbitrators have accepted the Court's decisions; and courts have extended the successorship doctrine of the NLRA to cases arising under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1982), and to employment cases brought under the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982). See, e.g., Musikiwamba v. ESSI, Inc., 760 F.2d 740 (7th Cir. 1985) (liability under the Civil Rights Act of 1866); EEOC v. MacMillan Bloedel Containers, Inc., 303 F.2d 1086 (9th Cir. 1974) (liability under Title VII). A few state legislatures have subjected employers not covered by the NLRA to more stringent obligations. See, e.g., Cal. Lab. Code § 1127 (West Supp. 1986); Ohio Rev. Code Ann. § 4113.99 (Page 1984); Mass. Gen. Laws Ann. ch. 149 § 179C (West 1982).
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ers under the NLRA. As interpreted by the Supreme Court, the statute rarely restricts the options of successor employers by requiring them to maintain existing employment terms. Most commentators present the successorship decisions as examples of poor statutory construction, praising the Court for accurately identifying competing interests but chiding it for giving too little weight to the rights of employees. Part I argues, however, that the Court limited the statutory obligations of successors in the belief that the market will deal fairly with the needs of the parties. This section also traces the development of a federal labor policy based on market regulation and shows how judicial analysis rooted in laissez-faire principles can be framed as statutory construction.

Part II continues the inquiry into successor obligations by examining legislation which removes some aspect of the employment relationship from the successor's control. Some of this legislation, like the Federal Service Contract Act of 1965, is triggered by a transfer of ownership; other laws, like the Employee Retirement Income Security Act, apply to employers generally but detail the special obligations of successors. What is distinctive about this type of legislation is the combination of direct government intervention to shelter selected terms of employment and the absence of any mechanism through which workers can increase their ability to influence employment conditions generally. The contrast between social legislation and the NLRA suggests some preliminary observations about legal regulation of labor relations and the function of law in a capitalist economy.

I

THE NLRA AND MARKET REGULATION

The NLRA defines the term employer, and all substantive provi-


16. Since the discussion explores the relationship between laws like the NLRA and the market imperatives responsible for the state's original decision to intervene, this Article identifies the foundations of legal doctrine but does not speculate about the motivations of any decision makers in developing such doctrine.


19. For the purposes of this Article, the term social legislation includes laws with the characteristics described in this paragraph of the text. It is not necessary to distinguish between social legislation that sets minimum standards by reference to terms of employment established by private employers and social legislation that holds private employers to governmentally designated minimums like the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1982).
sions of the Act apply to all statutory employers. These provisions instruct employers and labor organizations to bargain about wages, hours, and other terms and conditions of employment; to reduce negotiated terms to a collective bargaining agreement; and to refrain from engaging in certain conduct, including discrimination against employees because of union (or anti-union) activities.

But the Act and its legislative history do not indicate whether a change in the identity of an employer alters a company's legal relationship to its unionized workforce. The Supreme Court considered the responsibilities of successor employers in three cases in which unions sought to hold a company to statutory or contractual obligations incurred by its predecessor. In two of the cases a union sued to compel a successor to arbitrate the extent of its obligations under the predecessor collective bargaining agreement; the other case involved a successor's obligation to bargain with the incumbent union and to assume, in its entirety, the predecessor's bargaining agreement. The decisions in these cases establish the scope of successor employer obligations under the NLRA.

A. The Introduction of the Market's Invisible Hand

In *John Wiley & Sons v. Livingston*, the Court held that as a matter of federal labor law, courts have the power to compel a successor employer to arbitrate the extent of its commitments to retained employees under the collective bargaining agreement negotiated by its predecessor. The predecessor publishing company, Interscience, disappeared as a result of a merger with Wiley. Wiley retained the Interscience employees and transferred them to its substantially similar, but larger, facility.

Although Wiley had no contractual relationship with the union and the Interscience-union contract did not purport to bind Interscience's
successors, the Court reasoned that a successor’s obligation to arbitrate is not “imposed from without” but may “reasonably . . . be found in the particular bargaining agreement and the acts of the parties” as long as a change in corporate ownership or control is marked by “substantial continuity of identity in the business.”

The opinion identified the duty to arbitrate as furthering three elements of federal labor policy: the need to provide “some protection to the employees from a sudden change in the employment relationship;” a recognition of “the rightful prerogative of owners independently to rearrange their business and even eliminate themselves as employers;” and the goal of reducing industrial strife by substituting arbitration of the claims of retained employees for economic warfare. Wiley did not elaborate on the weight accorded each of these policies or on their relationship to the required finding of enterprise continuity.

Analysis of the decision shows, however, how Wiley gave successor employers the opportunity to influence the law’s accommodation of entrepreneurial flexibility, workforce protections and industrial stability. The sine qua non for imposing a duty to arbitrate on the successor is a finding of continuity in the employing enterprise. That finding depends solely on the actions of the successor.

The facts in Wiley illustrate the extent of successor control over the finding of enterprise continuity and, therefore, over the duty to arbitrate. Wiley merely eliminated a competitor through merger and chose to utilize the competitor’s workforce in its expanded operation. Presumably, Wiley management considered the Interscience employees valuable to the enterprise since they possessed the skills and knowledge necessary for Wiley to take over the Interscience work immediately. The duty to arbitrate arose when Wiley assigned the former Interscience workers to relatively unchanged work. Had Wiley chosen instead to absorb Interscience by automating some operations and restructuring the jobs of predecessor employees, the duty to arbitrate would not have survived.

Undoubtedly, under Wiley an arbitrator could order a successor to

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26. Id. at 551.
27. Id. at 549.
28. Some commentators view the Court’s enthusiasm for arbitration to be at the core of Wiley. See, e.g., Goldberg, supra note 15. The position advanced by this Article is not necessarily inconsistent with this view, since the arbitrator’s role is limited by the successor’s decisions about the direction of the enterprise. To the extent that Howard Johnson Co. v. Hotel Employees, 417 U.S. 249 (1973) is seen by these commentators as a departure from Wiley and from reliance on arbitration in labor relations, this Article shows that the successorship doctrine is not based on a faith in mechanisms like arbitration to further statutory goals. See infra notes 69-81 and accompanying text.
29. Additional reasons for utilizing predecessor employees include a tight labor market and the successor’s opportunity to monopolize the labor market, making it more costly for a new competitor to enter the field.
30. Since Wiley retained the predecessor employees, the Court did not address the question of Wiley’s obligation to arbitrate whether the company could choose its own workforce, and the deci-
honor all terms of a pre-existing collective bargaining agreement. This possibility does not conflict with the emphasis on entrepreneurial flexibility suggested here, since unilateral control over the structure of the business gives any successor the opportunity to shape the scope of an arbitrator’s decision, even if enterprise continuity is maintained. A new owner that intends to hire predecessor employees without substantially altering the nature of the employing entity can still change aspects of the production process in order to lead to an arbitral finding that most, if not all, of the predecessor’s contract terms are inapplicable. A successor that considers the existing business satisfactory, and retains the predecessor workforce in substantially similar operations, in effect consents to imposition of contract terms. Thus, in its initial foray into the successorship area, the Court formulated a doctrine under which management may control the degree of enterprise continuity and the extent to which existing contract provisions apply to the incumbent workforce.

Since Wiley gave successors this degree of control, the decision could be regarded as securing only entrepreneurial flexibility, and the Court could be charged with ignoring its own admonition that the law give some protection to the interests of employees when businesses change owners. A more creditable explanation of the seeming inconsistency between the practical effect of Wiley and the policies emphasized in the opinion is available. The decision seems to anticipate that the operation of a market economy will impose sufficient control on successor discretion to make explicit legal protection of worker interests unnecessary.


32. The arbitration that followed the Wiley decision produced this very result. See Inter-science Encyclopedia, Inc., 55 Lab. Arb. (BNA) 210 (1970) (Roberts, Arb.). The successor bears only the cost of the arbitration itself, and that cost may be anticipated and passed on to the seller. Throughout this Article, the terms buyer and seller are used as synonyms for the terms successor and predecessor, respectively, not to describe a status attributable to a particular form of transaction.


34. Since the arbitrator's function is to determine the degree to which the successor's maintenance of operations requires adoption of extant contract provisions, in some cases buyers may find themselves bound by more (onerous) obligations than anticipated. This only means that the buyer guessed incorrectly and/or bargained poorly. Market theory routinely assumes perfect knowledge while recognizing that mistakes in discrete instances may occur without distorting the (assumed) sociological truth.

35. Alternatively, the Court understood the NLRA to reserve some decisions for regulation by
Thus, the actions of successors may control the finding of enterprise continuity, but market forces supply the constraint required to protect incumbent employees. Presumably, a successor will not turn a profitable wallet manufacturing plant into an unproven shoe production facility to avoid imposition of the duty to arbitrate; nor will a successor continue a marginal operation unchanged solely to secure the beneficial terms of its predecessor's contract. Employee interests in continued employment on favorable terms are recognized, but the security of the workers, like that of the enterprise, is tied to the strength of the acquired business in the market.

This reading of *Wiley* rescues the decision from condemnation as partial or incoherent. But identification of market regulation as determining obligations under the NLRA is not consistent with the statutory premises advanced by either traditional or revisionist scholars. Government intervention, they say, was to secure the proper accommodation of entrepreneurial flexibility, worker protections and industrial stability, either by strengthening the roles of organized labor and the collective bargaining process or by supplementing labor's economic power with favorable interpretations of the statute. If *Wiley* endorses market control of employer discretion, in successorship cases the NLRA does little more than secure legal recognition for a result assured by the market. Supreme Court decisions following *Wiley* speak to this issue.

**B. The Logic of Market Regulation**

*Wiley* addressed the successorship problem arising from the union's desire to compel an acquiring employer to submit to arbitration. In *NLRB v. Burns International Security Services, Inc.*, the Court considered whether the NLRA requires a successor to bargain with an incumbent union and whether the National Labor Relations Board (NLRB or Board) may order a successor to honor all terms of an unexpired collective bargaining agreement.

Wackenhut and Burns each bid on contracts to provide guard protection services to third parties. In one such transaction the Lockheed Company replaced Wackenhut with Burns. Burns then hired the former Wackenhut employees to work at the Lockheed facility. Although Lockheed had notified bidders of an unexpired bargaining agreement covering the incumbent workforce, Burns treated the former Wackenhut employees as new hires. Burns ignored the unexpired agreement, unilaterally set initial terms of employment, and refused to recognize the union as the

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the market, regardless of the impact on workers. The *Wiley* opinion supports the more limited claim appearing in the text.

employees' bargaining representative. The union did not seek arbitration. Instead it challenged the company's actions by filing unfair labor practice charges before the Board.

In essence the union wanted to use the NLRA to re-establish the union's status as bargaining representative and to rehabilitate the terms of the collective bargaining agreement so that the incumbent employees would be no worse off as a result of the transfer of operations from Wackenhut to Burns. Although the union prevailed before the Board, it achieved only partial success in the Supreme Court. Burns held that under the NLRA the Board has no authority to order a successor to honor the terms of its predecessor's bargaining agreement; that the Board could order Burns to bargain with the union, but only after Burns had hired a legally sufficient number of predecessor employees to perform substantially unchanged work; and that Burns acted legally when it set initial employment terms without reference to the agreement and without notifying the union. These rulings confirm the role of market regulation in defining the statutory obligations of successors and emphasize the significance of entrepreneurial flexibility in the statutory scheme.

To determine whether Burns acquired an obligation to recognize and bargain with the union, the Court applied the concept of enterprise continuity found in Wiley. Since Burns hired Wackenhut's former employees to perform the same services as they had provided when Wackenhut held the Lockheed contract, enterprise continuity was present. Having declined its "rightful prerogative to rearrange its business" by choosing to operate an unaltered enterprise with the previously unionized employees, Burns could be required to bargain with its employees' union.

As in Wiley, the issue was resolved against the successor, but only because of the successor's own decisions. Any employer is free to avoid its predecessor's labor obligations, be they the duty to arbitrate or to bargain, by changing essential attributes of the enterprise. In a business such as security services, where personnel are central to the functioning and identity of the enterprise, assembling a different workforce is one of the few means to effect an essential modification in operations. By re-

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37. Other Burns employees were represented by a different union, and Burns attempted to encourage the Lockheed workforce to join this union. For these efforts, the NLRB found Burns in violation of § 8(a)(2). This finding was not subsequently challenged. 406 U.S. at 276.


39. The decisions on the duty to assume the bargaining agreement and the right to set initial terms were unanimous. On the duty to bargain, the Court split 5-4. Justice White's majority opinion was joined by Justices Douglas, Stewart, Marshall and Blackmun; Justice Rehnquist's dissent represented the views of Chief Justice Burger and Justices Brennan and Powell.

40. 406 U.S. at 281. See also id. at 292-96.

41. The only limitation on the successor is that employee selection be nondiscriminatory, i.e.,
taining predecessor employees Burns signalled its recognition of an unfavorable labor market or its calculation that the disadvantages of using unionized personnel did not outweigh the value of hiring an experienced workforce.

But, the Court held, the bargaining duty, and its attendant obligation to maintain existing terms of employment, did not arise until Burns had selected a sufficient number of employees to guarantee substantial identity between its workforce and those guards previously employed by Wackenhut. During the period when Burns was in the process of assembling its workforce, and before the degree of employee carryover was clear, the question of enterprise continuity was unresolved. Accordingly, the Court reasoned, Burns was like any employer beginning a new enterprise; and under the NLRA new employers, having no employment history to maintain, are free to determine for themselves the wages, hours, and other terms and conditions of employment to be offered to prospective employees.

By making enterprise continuity depend as much on the timing of hiring decisions as on the degree of employee carryover, the Court enhances a successor's ability to determine its legal obligations. A successor intending to operate in the same manner as its predecessor is free to acquire the business on Friday, suspend operations, select its workforce from the open market on Monday and Tuesday, and resume operations on Wednesday. Since enterprise continuity does not attach when hiring

not a product of anti-union animus. See 29 U.S.C. § 158(a)(3) (1982). "[A] new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union." Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 262 n.8 (1974) (emphasis added).

42. The formula for determining the requisite complement of predecessor employees is not firmly established. The favored description is that the successor bargaining unit be composed of at least 50% predecessor employees. Whether the prerequisite is a majority or substantial number of incumbent employees is irrelevant for the purposes of this Article. For the debate on this issue, compare Premium Foods, Inc. v. NLRB, 709 F.2d 623 (9th Cir. 1983); Spruce Up Corp., 209 N.L.R.B. 194 (1974), enforced, 529 F.2d 516 (4th Cir. 1975); Goldberg, supra note 15, at 750 n.52 (predecessor workers need only constitute a "substantial and representative" portion of the successor's workforce) with Pacific Hide and Fur Depot, Inc. v. NLRB, 553 F.2d 609 (9th Cir. 1977); Mondovi Foods Corp., 235 N.L.R.B. 1080 (1978) (predecessor workforce must constitute a majority of the successor unit).

43. A successor must engage in initial terms bargaining with the predecessor union only when 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." 406 U.S. at 294-95. One rationale for this limitation on the duty to bargain on initial terms is protection of the rights of new hires, who may not desire representation and may be more numerous than predecessor employees. The NLRB and courts of appeals have agreed, since Burns, that initial terms bargaining is required only when there is evidence that the new employer plans not only to retain substantially all the predecessor's workforce but to do so at the same or improved wages, hours, and other terms and conditions of employment. See, e.g., Spruce Up Corp., 209 N.L.R.B. 194, 195 (1974), enforced, 529 F.2d 516 (4th Cir. 1975); Machinists v. NLRB (Boeing Co.), 595 F.2d 664 (D.C. Cir. 1978), cert. denied, 439 U.S. 1070 (1979).
decisions commence on Monday, the successor may offer job applicants, including predecessor workers, any terms it chooses. 44 Even if the successor's workforce eventually consists solely of predecessor employees, the duty to bargain arises only after the successor hires enough predecessor employees to establish workforce and enterprise continuity. 45 Accordingly, the statutory prohibition against unilateral changes in terms of employment, triggered when the bargaining duty attaches, locks in the terms offered by the successor, not those under which incumbent employees had previously worked. 46 For a predecessor workforce returning to virtually unchanged jobs it is as though substantive regulation under the NLRA has been suspended and only formal requirements remain. The duty to bargain may be imposed by operation of law if and when a successor hires enough predecessor employees, but the base from which the successor and incumbent union negotiate is the set of employment terms unilaterally offered by the successor and accepted by the workers as individuals. 47

The striking fact about the Court's application of enterprise continuity in Burns is the absence of any control on successor discretion except for the market power of the predecessor labor force. Burns was entitled to run the same enterprise as a new operation, and to force incumbent employees to bid against each other and against non-incumbents to retain their jobs. The predecessor employees in Burns were sufficiently attractive to secure employment; but, left to bargain as individuals, they did not have sufficient market power to command job offers with terms comparable to those negotiated by their union. In theory, of course, the market power of predecessor employees increases once the successor must recognize and bargain with the employees' union. But negotiations, under these circumstances, may only emphasize the gap between theory and practice. Having accepted less favorable terms in order to keep jobs, workers may not be willing to strike in the hope of regaining the status quo ante. A successor like Burns is sure to understand this.

By tying enterprise continuity to employee carryover, the opinion confirms the theoretical foundation of the Wiley doctrine: the interests of

44. See, e.g., Martin Podany Assoc., 80 Lab. Arb. (BNA) 658 (1983) (Gallagher, Arb.) (purchase on Friday, December 4, 1981, and invitation to incumbent employees to apply for positions at lower wages and benefits; continuation of operations on Monday, December 7, 1981, the only change being that incumbent employees were employed by the successor). See also Local 19 v. Key Wines and Liquors, 113 L.R.R.M. (BNA) 3377, 3379 (D.N.J. 1983) (successor offering employment to the full complement of its predecessor workforce incurred no obligations because the employees "were advised that the terms of their employment would be altered. Even if Best 'intended' to hire all of Key's employees, that intention was from the outset tied to the condition that the employees agree to the new terms of employment.").

45. Burns, 406 U.S. at 295.

46. Id.

47. Id. at 294-95.
employee and employer are both served when the labor laws do not inhibit changes in operations permitted by a competitive market. But, as Burns makes clear, if labor is treated like any factor in production, the invisible hand of the market may deprive employees of the economic gains achieved through unionization. One can, of course, point to the weak bargaining position of the employees as the reason a successor can run the same business at greater profit by reducing wages. However, employer strength in the labor market was one factor giving rise to regulation. The perversity of the statutory interpretation embraced in Burns is the use of law to reinforce employer strength (or to contribute to the employees' weak bargaining position), by allowing successors to determine the circumstances under which a unionized labor force will be compelled to bargain, as individuals, over continued employment. That individual workers, deprived of union representation, fail to command their old terms of employment certainly cannot stand as a reason for endorsing a statutory interpretation that reproduces the results to be expected in a system characterized by voluntary trade.

In Burns, of course, the terms of employment that the union wanted the Board to reinstate were contained in a collective bargaining agreement. But the presence of a bargaining agreement did not enhance the ability of incumbent employees to retain the economic benefits gained through use of collective power. Although the continuity in operations maintained by Burns established some legal obligations, the Court held that the Board could not compel Burns, or any successor, to comply with the terms of a predecessor bargaining agreement.

The Court found the warrant for its statutory interpretation authorizing repudiation of bargaining agreements in section 8(d) of the Act, and in concerns about the impact of contractual restraints on entrepreneurial flexibility. In contrast to its discussions of the duties to bargain and to arbitrate, the Court does not rely on an accommodation of the competing interests of management and labor or use enterprise continuity as a surrogate for market regulation when evaluating a successor's obligation to assume contract terms. Despite these differences,

48. Id. at 285.
49. Id. at 282-84. The majority does acknowledge that contract assumption may be implied from a successor's actions; but Burns, with knowledge of the collective bargaining agreement, did nothing to signal its intention to assume the contract. In fact, except for hiring the former Wackenhut employees, Burns' decisions about employment terms evidenced only an intention to ignore the unexpired agreement. Burns, no doubt, believed that its actions implied a desire to be seen by its employees and the world as a stranger to the Wackenhut-Lockheed operations. See id. at 286-87. For an example of conduct evidencing a successor's desire to maintain the status quo, with the unintended effect of acquiring bargaining obligations, see Bellingham Frozen Foods v. NLRB, 626 F.2d 674 (9th Cir. 1980), cert. denied, 449 U.S. 1125 (1981).
50. 406 U.S. at 282-84.
51. Id. at 287-90.
52. See id. at 285-86.
the treatment of the obligation to assume contract terms carries forward the central assumption of successorship law: the NLRA was not intended to interfere with a successor's opportunity to take advantage of favorable market conditions.

Section 8(d) cautions that the NLRA "does not compel either party to agree to a proposal or require the making of a concession."\(^5\) In earlier cases not involving successors the Court used section 8(d) to protect parties from NLRB decisions that either found violations of the Act in positions taken during negotiations\(^5\) or remedied unfair labor practices by modifying the provisions of negotiated agreements.\(^5\) Such efforts by the Board transgressed "the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone."\(^5\) According to Burns, requiring a successor to assume its predecessor's bargaining agreement would also put the NLRB in the position of dictating terms, not because the Board would write any provisions, but because of the changed identity of the employer.\(^5\) To buttress this reading of section 8(d) the opinion notes the statutory policy of allowing "the balance of bargaining advantage to be set by economic realities."\(^5\) If the Board could bind successors to unexpired contracts, the expectation that the terms of a bargaining agreement will reflect the economic resources of the parties would be frustrated.\(^5\)

This construction of section 8(d) assumes that in order to decide whether a successor must honor an unexpired agreement, the Board must evaluate the desirability of existing contract terms in light of how the successor will run the acquired enterprise. In the absence of such an assumption, an order to assume a contract need not violate section 8(d). For example, an inquiry into enterprise continuity and a determination that the successor voluntarily acquired the enterprise with knowledge of

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57. 406 U.S. at 287.
58. Id. at 288.
59. The Court's concern for the plight of the union in this context is difficult to credit. Terms which do not reflect the vulnerability or financial soundness of an acquiring entity bind the union only for the duration of the bargaining agreement. Any temporary disadvantage to employees is offset by the opportunity for union officials to protect employee expectations while assessing the position of management representatives in preparing for formal negotiations on a new contract. In the absence of mandatory contract assumption, the union must either press for arbitration to determine the extent to which the successor is bound by the existing agreement or abandon that agreement and demand bargaining. Either choice requires immediate and unanticipated expenditures by the union and provides the successor, which has chosen to continue operations (more or less) unchanged, an opportunity to undermine union support by introducing uncertainty into the workplace, altering employment terms, and dealing directly with employees until the bargaining duty matures or an arbitrator reaches a decision. Cf. Severson & Wilcox, supra note 15, at 812.
the existing collective bargaining agreement would not involve Board interference in the substance of the agreement.

Even in the absence of section 8(d), however, the Court apparently would have condemned the wholesale imposition of contractual restraints on successors. In discussing the effect of bargaining agreements on transfers of operations, the Court observes:

A potential employer may be willing to take over a moribund business 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.\footnote{60}

The passage is curious. A concern about the impact of bargaining agreements on capital mobility is casually introduced as an important factor in interpreting the NLRA and the marketability of a failing company becomes the standard for establishing a rule applicable to all successors—no matter how healthy the acquired enterprise.

The failing company example has surface appeal. Restraints on restructuring and protections for the integrity of bargaining agreements are difficult to justify when the alternative is business failure. It is nothing but common sense to avoid this consequence by freeing successors from the contractual obligations of their predecessors.

On the other hand, the failing company example has no particular relevance to the question of a successor’s obligations under the NLRA. In Burns the Court was not dealing with a moribund business whose marketability depended on the opportunity to restructure operations.\footnote{61} Moreover, the scenario of a healthy enterprise changing hands appears to be typical. Research on mergers\footnote{62} establishes, beyond question, that en-

\footnote{60. 406 U.S. at 287-88.}

\footnote{61. See, e.g., Burns Int'l Detective Agency, 182 N.L.R.B. 348 (1970). Wackenhut itself, having just negotiated a three-year collective bargaining agreement with a newly certified union, sought to renew rather than escape from its service contract with Lockheed. Wackenhut’s competitors bid for the contract as well, despite Lockheed’s warning that incumbent employees were covered by a collective bargaining agreement. In circumstances like these, where an impact on restructuring opportunities or on capital mobility is speculative at best, the failing company example tells us little about the reason Burns was freed from its predecessor's bargaining agreement. Prior to Burns the question of mandatory contract assumption was unsettled, but Wiley taught that enterprise continuity could generate a duty to arbitrate. Burns' retention of Wackenhut employees and unchanged business operations would, therefore, require Burns to arbitrate and, quite likely, to honor some, if not all, of the unexpired bargaining agreement provisions.}

\footnote{62. This assertion relies primarily on studies of acquisitions by conglomerates, in part because these acquisitions have been subjected to extensive and recent analysis. As Professor Peter Steiner has argued, however, the evidence derived from conglomerate mergers may be applied to other forms of acquisitions:

It would be unwise to treat conglomerate mergers out of the context of all mergers, even if it were technically possible. A first reason is that the motives that impel firms (and men)
entrepreneurs seek profitable enterprises for acquisition and that transfers of ownership do not occur merely as an alternative to bankruptcies. There is thus no reason to base a rule against binding successors on the hypothetical needs of atypical targets for acquisition.

Moreover, the effect on capital mobility would be unclear even if the NLRB could require a successor to comply with the terms of an unexpired bargaining agreement. A hypothetical successor may be as likely to look elsewhere for an investment as to retain capital. In any event, reducing the number of transactions involving failing companies cannot be viewed solely in the context of labor law; any change must be weighed against the value to the economy of legal rules that reward operators of inefficiently run establishments (by nullifying one business liability) and that provide an incentive to restructure those enterprises rather than invest elsewhere. The economy may benefit over time and capital

63. Reviewing the empirical literature, Steiner found firms acquired before 1965 to be slightly below average in their pre-merger profitability but since 1965 "not at all different from the average firms in their industries . . . [and] certainly not on the brink of financial disaster." P. STEINER, supra note 62, at 185-88.

A Federal Trade Commission (FTC) report on firms over $10 million in asset size found that 48 percent of the 234 companies acquired in 1967-68 "exhibited a profit rate greater than their industry average." The FTC concluded: "From the standpoint of profitability . . . acquired firms were a typical cross-section of American manufacturing. In no sense were they predominantly failing companies." FTC ECONOMIC REPORT ON CORPORATE MERGERS (1969), reprinted in V. BRUDNEY & M. CHIRELSTEIN, CORPORATE FINANCE 506 (2d ed. 1979).

Using additional data and focusing on conglomerate mergers, Alfred Dougherty and Kenneth Davidson of the Federal Trade Commission reported in 1980 that "today's acquired firms are both well-managed and profitable, and are frequently leaders in their primary product markets." Dougherty & Davidson, Limitation Without Regulation: The FTC's Bureau of Competition Approach to Conglomerate Mergers, 1980 UTAH L. REV. 95, 106 (1980) (citation omitted).

Citing testimony to Congressional committees, Barry Bluestone and Bennett Harrison suggest that "at least in the 1970's conglomerates tended to acquire 'winners': independent firms that have exhibited higher-than-average growth or profit rates." B. BLUESTONE & B. HARRISON, CAPITAL AND COMMUNITIES: THE CAUSES AND CONSEQUENCES OF PRIVATE DISINVESTMENT 94 (1980). See also Gray, Thoughts on Acquisitions, FINANCIER 36 (Nov. 1978) ("[United Technologies Corporation] want[s] a company to be a market leader and profitable . . . we never go for a turnaround situation.").

Finally, Professor George Benston's discussion of small nonpublic companies, which emphasizes merger opportunities as a source of capital for expansion and a reward for success, confirms the profitability of many of the small businesses which are acquired. Mergers and Economic Concentration: Hearings on S.600 Before the Subcomm. on Anti-Trust, Monopoly, and Business Rights of the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 187-98 (1979) (testimony of George J. Benston, Professor, University of Rochester).

64. See infra note 80.

65. See Feder, The Broader Merger Debate, N.Y. Times, Aug. 8, 1981, at 36, col. 4:
mobility increase from liquidation of moribund businesses and pursuit of investment alternatives. To the extent that an NLRB order holding a successor to an unexpired bargaining agreement offends federal labor policy, it is not because growth and efficiency depend on revitalizing failing companies. The only interest served by this holding is the entrepreneur's desire for freedom from any legal regulation.

*Burns* is often described as inconsistent with *Wiley*, and following *Burns* a lively debate developed about the fate of the duty to arbitrate. Many observers asked how the Act could tolerate imposing contract terms on a successor through arbitration but not through Board proceedings.

A related question was the meaning of enterprise continuity in deciding the legal obligations of successors. As used in *Wiley*, enterprise continuity seemed to capture the sense of successors and incumbent employees sharing a stake in the new enterprise. In the absence of significant operational changes, employees expected, and the law would ensure, an enforceable collective bargaining agreement; with significant changes, management expected, and the law recognized, the right to release from burdensome or inappropriate contract terms. In *Burns*, however, continued employment of the incumbent workforce was treated as conjectural, enterprise continuity was defined solely from management's perspective, and federal labor policy appeared to condemn any contractual restraints on successors as unreasonable interferences with employer flexibility. There seemed no role left for arbitration.

The confusion over the fate of the duty to arbitrate stemmed, in part, from an inability to recognize the function of enterprise continuity as a guideline for establishing legal obligations. Although the decisions present enterprise continuity as a product of statutory policies, the concept merely describes the economic relations established by successors and confirms their legality. In *Wiley*, where the successor effected changes in operations but did not attempt to alter the identity of the workforce, the nature of the operational changes controlled the finding of enterprise continuity. In *Burns*, where the only attempt at restructuring involved reconsideration of the identity of the workforce, employee carryover became the salient factor for determining continuity. By empha-

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The acquisition of an existing business is often regarded as a nonproductive investment, on the theory that it simply transfers ownership instead of developing new goods or services. "If nobody wants to invest in productive assets, we turn into a society of value traders rather than value creators," said Robert Paulson, a strategic planning specialist at McKinsey & Company.


67. Once again, the NLRA may reserve some employment decisions for regulation by the market, but the discussions of enterprise continuity in *Burns* and *Wiley* do not acknowledge such a statutory policy.
sizing workforce continuity *Burns* did not transform the concept of enterprise continuity. As in *Wiley*, enterprise continuity functioned to allocate the legal obligations of successors according to the priorities set by those successors.

Similarly, by recognizing enterprise continuity as a device giving legal effect to the economic relationships established by successors, we can see how the duty to arbitrate survives the expressions of dismay in *Burns* about enforcing bargaining agreements against successors. As used in the decisions, enterprise continuity identifies major operational changes—in location, product line, manufacturing process, workforce—and asks whether those changes have a general legal consequence. For example, the hiring of predecessor employees to perform substantially similar work (enterprise continuity) triggers the duties to arbitrate and to bargain (general legal consequences). But neither of these legal obligations requires the successor to relinquish control over terms of employment. In submitting to arbitration, the successor allows an arbitrator to consider which, if any, existing contract terms are appropriate for the work environment created by the successor. The employer, therefore, retains ultimate control over significant employment terms—scheduling, incentive pay, work rules—that are not considered when the finding of enterprise continuity is made by the NLRB or courts. Similarly, in satisfying the duty to bargain with a union, the successor shares, but does not cede, the right to shape employment terms.

However, the concept of enterprise continuity, which is serviceable for resolving the issue of whether a successor must arbitrate or bargain, is too indiscriminate to use in deciding whether a successor must accept the whole of a predecessor’s bargaining agreement. The finding of enterprise continuity does not take into account the details of employment usually covered in a collective bargaining agreement. If merely hiring predecessor employees to perform substantially similar work triggered the obligation to assume a predecessor’s bargaining agreement, the successor would relinquish control of significant aspects of the employment relationship, at least for the term of the agreement. Thus, enterprise continuity, properly understood as the legal expression of the economic relationship intended by management, cannot support a decision that a contract in its entirety is appropriate for a successor. The final decision on the legal obligations of a successor, *Howard Johnson Co. v. Hotel Employees*, 68 confirms this understanding of enterprise continuity and the duty to arbitrate.

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C. The Right to Control Use of Capital

Howard Johnson Company purchased the personal property and leased the real property of the Grissom family, operators of a Howard Johnson franchise. Howard Johnson ran the restaurant-motel business in the same manner as its franchisee, except for personnel changes. It hired a new supervisory staff, reduced the workforce from fifty-three to forty-five, and retained only nine of the predecessor employees. The union sued to compel Howard Johnson to arbitrate the extent of its obligations under the predecessor collective bargaining agreement, which contained a successors-and-assigns clause. 69

As in Wiley the question of enterprise continuity dominated the Court's analysis, and as in Burns the Court conditioned a finding of enterprise continuity on a showing of substantial continuity in the workforce. 70 Under Howard Johnson the duty to arbitrate, like the duty to bargain, depends on the choice a successor makes about the composition of its labor force. 71

Howard Johnson's decision to retain only nine incumbent employees, thereby disrupting workforce continuity, forced the Court to consider the scope of a successor's discretion to choose personnel. 72 Indeed, the opinion characterizes "the heart of the controversy" as "[whether] Howard Johnson was bound by the pre-existing collective-bargaining agreement to employ all of [the] former Grissom employees, except those who could be dismissed in accordance with the just cause provision or laid off in accordance with the seniority provision. . . ." 73

Not surprisingly, the Court held that successors may base employee selection on any factor except specific anti-union animus. 74 A successor's changes in "composition of the workforce" are treated like changes in

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69. The union did not challenge Howard Johnson's right to diminish the size of the workforce, only the successor's failure to abide by the existing bargaining agreement in choosing its employees. Id. at 260-61.

70. Id. at 263.

71. The Howard Johnson Court relies on Wiley by noting that the Wiley Court "found the requisite continuity present there in reliance on the 'wholesale transfer' of Interscience employees to Wiley." 417 U.S. at 263 (quoting John Wiley & Sons v. Livingston, 376 U.S. 543, 551 (1964)). This reading of Wiley seriously misconstrues the significance of workforce carryover to the finding of enterprise continuity. In Wiley, the "wholesale transfer" of employees was adequate evidence of enterprise continuity; no further inquiry into the issue was required. 376 U.S. at 551. Nothing in the opinion suggests that workforce continuity is a necessary condition for a finding of enterprise continuity or for imposition of a duty to arbitrate. And nothing in Wiley presupposes that when an enterprise continues with changes only in personnel, continuity of business identity is lacking.

72. Howard Johnson also replaced supervisors. 417 U.S. at 252. Although an employee's inability to perform a job to a supervisor's satisfaction could be a reason for discharging the employee, it is unrealistic to presume that incumbent employees are always incapable of meeting a new supervisor's standards and, therefore, that whenever supervisors are replaced a significant change in operations has occurred.

73. Id. at 260-61.

74. Id. at 262 n.8, quoted supra note 41.
product line, corporate structure and company location: they are subject to statutory regulation only to the extent that a successor's sole motivation is to chill unionism. The failure to retain incumbent employees is not in itself evidence of the intention to discriminate against unionized personnel.

Once again, enterprise continuity ratifies the economic arrangements preferred by successors. If a successor chooses to emulate employers starting new businesses by taking advantage of a favorable labor market, the NLRA imposes no greater restraint on the successor's discretion to choose a workforce than it does on that of the virgin employer. If, however, a successor identifies itself as a continuation of the acquired enterprise by retaining incumbent employees in unchanged jobs, the NLRA respects the successor's choice and views it as an informed decision to accept the judgment of an arbitrator on the applicability of contract terms.

It is, of course, quite unlikely that many successors will hire incumbent employees. Selection of too many predecessor employees triggers legal obligations that invite constraints, albeit minimal ones, on employer discretion. Ironically, the NLRA, as read in *Howard Johnson*, all but guarantees loss of employment by workers who have secured the benefits of a collective bargaining agreement, including a successors-and-assigns clause, but unfortunate enough to be caught in a change of ownership. Only incumbent employees with uncommon skills or training will be able to overcome the hobbling effect of having exercised the right to engage in collective activity as guaranteed in the NLRA. Indeed, predecessor workers like those in *Howard Johnson*—facing an employer with no plans to change the enterprise—might have been better off had the statute been interpreted as not applying to successor employers at all.  

*Howard Johnson* also condemns enforcement of collective bargaining agreements against successors because of the effect on disposition of capital. Without reference to the impact on efforts to revitalize companies, the opinion echoes the observation in *Burns*:

[that h]olding a new employer bound by the substantive terms of the pre-existing collective bargaining agreement might inhibit the free transfer of capital, and that new employers must be free to make substantial changes in the operation of the enterprise.  

*Howard Johnson* suggests, therefore, that the NLRA was never intended

75. The Court does suggest that a union might rely on a successors-and-assigns clause to secure an injunction barring any transfer unless the buyer agrees to honor the bargaining agreement. *Id.* at 258 n.3. Presumably, buyers and sellers may be able to negotiate terms which incorporate the cost to a successor of contract compliance. The question remains, however, why such a restraint on capital mobility is tolerable, since the Court does not suggest that an injunction is warranted only if it slows down, rather than halts, the transfer of ownership. The leading decision on status quo injunctions is IAM, Lodge 1226 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981).

76. 417 U.S. at 255.
to interfere with the ability of employers to control unilaterally the use of capital.

The record in *Howard Johnson*, like that in *Burns*, did not support a finding of the need to restructure operations. Similarly, empirical evidence does not show that the opportunity to restructure is a significant factor in acquisition decisions or confirm the adverse effect of bargaining agreements on such transactions.

Moreover, *Burns* did not compel the result in *Howard Johnson* as a matter of precedent. The opinion in *Burns* refused to hold a successor to all contract terms but did not consider the effect of a successors-and-assigns clause, like the one in *Howard Johnson*, on the employment opportunities of incumbent workers. Nor did *Burns* discuss the degree to which a specific contractual commitment between a predecessor and its employees might override generalized concerns about marketability, restructurinig and capital formation. These distinctions, ignored by *How-

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77. See id. at 250-53.
78. See 406 U.S. at 274-76.
79. Investors look for already successful enterprises that will continue to generate income but will not require rejuvenation. Attractive companies have high earnings, competent management, and a leading market position. See V. Brudney & M. Chirelstein, supra note 63, at 504-09; Gray, supra note 63, at 37. Entrepreneurs choose mergers, in lieu of internal expansion or formation of a new business, because of the desire for diversification and/or growth, maximization of cash flow, favorable tax and antitrust provisions, improved market position, and expectation of efficiencies in management, research and design, etc. See, e.g., P. Steiner, supra note 62, at Chapter 4; Dougherty & Davidson, supra note 63; B. Bluestone & B. Harrison, supra note 63, at 94-131; testimony of G. Benston, supra note 63. In the context of divestitures, companies are sold off not because of economic nonviability but because business and tax factors mandate retention of only the most profitable assets. See, e.g., R. Stern, K. Wood, & T. Hammer, Employee Ownership in Plant Shutdowns 13-20 (1979); Brill, It Pays To Go Out Of Business, THE PROGRESSIVE, August 1980, at 20. Thus, investor conduct suggests that the opportunity to reorganize the operations of a company are far less significant than the Court's rhetoric indicates.


The economic literature dealing with investment decisions based on labor costs, as compared to unionization, is not particularly relevant. It is well documented that investors seek the highest rate of return on capital. To the extent that lower labor costs contribute to a greater profit, the tendency is to avoid investments within the United States altogether, rather than to limit investments to nonunionized companies. See B. Bluestone & B. Harrison, supra note 63, (demonstrating that the rate of capital flight from the Sun Belt to foreign countries is higher than it is from the unionized northeast to the Sun Belt). See also Charles Craypo's study of plant closings in South Bend, Indiana, 113 LAB. REL. REP. (BNA) 270 (1983), which challenges the orthodoxy that high labor costs or bad labor relations were responsible for shutdowns.
ard Johnson, are irrelevant only if certain areas, like control of capital, are considered outside the ambit of statutory regulation.81

No one denies that collective bargaining, like unionization, places restrictions on management. Equally unquestioned, however, is the endorsement in federal labor policy of some constraints on the owners of capital, on the ground that the benefits derived from unionization and collective bargaining outweigh the harms. The problem is whether interference with capital mobility is one of the constraints contemplated by the statute and, if so, how great a constraint is tolerable. The Court's construction of the NLRA in Howard Johnson confirms the singular importance to considerations of control over capital in the American economic system.

The opinion in Howard Johnson concedes what should have been apparent at the time Wiley was decided. Under the NLRA all employers, including successors, are free to establish the structure of their economic relationships without the interference of labor organizations or legislation. The schedule of worker concerns that is the subject of bargaining between individual workers and employers may be dealt with through the process of collective bargaining, but that process, and the attendant legal protections for organized labor, must respect the boundaries of a market-based economy.

81. The unwillingness to even consider limiting the "free transfer of capital" in order to further federal labor policy is not limited solely to members of the Court. See, e.g., Bakaly and Bryan, supra note 66, at 128:

The Burns majority stressed the free transferability of capital and the setting of terms and conditions of employment through the interplay of economic forces. To say that these policies are hardly novel is an understatement. They have been relied upon by the Court in other contexts [citing H.K. Porter Co., 397 U.S. 99], are embodied in Section 8(d), and are basic axioms of a free enterprise economy. (Citation omitted). Although H.K. Porter Co. and § 8(d) support Bakaly and Bryan's claim with regard to negotiating employment terms subject to economic pressure, they are inapposite to the question of free transferability of capital, as the authors acknowledge earlier in their article. Id. at 121. See also Note, Successor Employers—Duty to Honor Predecessor's Collective Bargaining Agreement—NLRB v. Burns Int'l Security Services, 14 B.C. INDUS. & COMM. L. REV. 193, 206-07 (1972) ("[T]he crippling restraints placed upon employer and union alike [through imposition of the predecessor's contract] will serve to retard industrial peace more surely than the stability inherent in contract survival will tend to promote it"); Silver, Reflections on the Obligations of a Successor Employer, 2 CARDOZO L. REV. 545, 554 n.43 ("There is force to the argument that binding a new employer to a host of obligations under an old collective bargaining agreement will force businesses to cease operations, to the detriment of all concerned"). The only commentators who analyze the claim concerning capital mobility at all are Henry, supra note 31, and Note, Contractual Successorship: The Impact of Burns, 40 U. CHI. L. REV. 617 (1973). Perhaps like the lawyers described by George Stigler, "to give their schemes the sheen of justice... [the Court and commentators] invoke [a] widely-held belief—on the tacit but convincing ground that any position is invulnerable against nonexistent attack." Stigler, The Law and Economics of Public Policy: A Plea to the Scholars, 1 J. LEGAL STUD. 1, 2 (1972).
II
SOCIAL LEGISLATION AND MARKET REGULATION

The examination of Burns, Wiley and Howard Johnson in Part I suggests that the NLRA incorporates two models of regulation. With regard to the internal organization of the workplace, labor and management share authority through the collective bargaining process. Insofar as decisions affecting disposition of capital are concerned, the statute applies only if the successor declines the prerogative to exercise exclusive control.

This finding is not surprising. There is nothing in the NLRA or its legislative history to suggest that Congress intended to redefine property rights to the extent necessary for labor to share authority over decisions involving the scope and nature of an enterprise. Nor is there any reason to expect statutory interpretations inconsistent with the assumptions embraced in a market economy. In the absence of a specific instruction to alter economic arrangements, the courts, quite unsurprisingly, tend to read legislation as acknowledging rights long considered to be at the heart of the economic system.

This understanding of the NLRA is confirmed by comparing the successorship doctrine of the Act to legislation that withdraws an employer's right to modify certain aspects of the employment relationship following a transfer of ownership. Unlike the model of labor relations associated with the NLRA, which promotes the use of collective bargaining to determine the economic fate of workers, this type of legislation, referred to as "social" legislation, identifies the government as the guarantor of the economic interests of labor.

The examples of social legislation discussed in this section contrast sharply with the NLRA. Each addresses a discrete employment issue, not a wide range of labor-management problems; and each burdens entrepreneurial flexibility and capital mobility by denying management a prerogative recognized by the NLRA—choice of employees, establishment of terms of employment, or repudiation of contract terms. In no case, however, do these laws promote participation by workers in decisions about employment conditions generally or recognize a role for employees in managing an enterprise. Like the NLRA, albeit in different form, these laws question some aspect of market regulation without challenging the existing economic structure.

A. Facilitating Transfers of Ownership by Government Regulation

Since 1933 Congress has experimented with programs designed to
increase the efficiency of the nation’s transportation systems. The distinctive feature of these plans has been government encouragement of transfers of ownership. The Emergency Railroad Transportation Act of 1933, enacted in response to underutilization of rail service during the Depression, facilitated consolidations; the Transportation Act of 1940 substituted voluntary agreements for a governmental master plan; the Rail Passenger Service Act of 1970 created a government agency to consolidate inter-city passenger lines; the Regional Rail Reorganization Plan of 1974 established a corporation to operate Conrail, a self-supporting railroad system in the midwest and northeast; and the Urban Mass Transit Act of 1964 (UMTA) helped localities maintain service in their areas by authorizing financial aid to governments willing to acquire private transit companies.

Most of these statutes include some form of job and wage protection for transportation employees, even though guaranteeing affected employees against being “in a worse position with respect to their employment” because of the change of owners could interfere with the goal of more efficient operations. A representative provision, drawn from the Rail

82. The history of this legislation is discussed in Rosenfeld, Labor Protective Provisions in Airline Mergers 7-24 (1981).
83. 48 Stat. 211 (1933).
84. 54 Stat. 898 (1940).
88. The “worse off” formulation first appeared in § 5(2)(f) of the Interstate Commerce Act; approval of transfers under the Transportation Act of 1940 were subject to approval by the Interstate Commerce Commission. Until 1978 the labor-protective provisions of § 5(2)(f) provided:

As a condition of its approval . . . of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those heretofore imposed pursuant to this subdivision and those established pursuant to section 565 Title 45. Notwithstanding any other provisions of this chapter and chapters 8 and 12 of this title, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees.

Passenger Service Act of 1970, requires continuation of bargaining agreements and bargaining rights, re-employment priority for laid-off employees, paid training programs, and a prohibition against subcontracting which could cause layoffs.\footnote{89} The statutory benefits apply to all covered employees; if a bargaining agreement enhances these benefits, its provisions are enforceable.\footnote{90} When labor-protective measures are a statutory prerequisite for federal assistance in taking over private transit companies, as under UMTA, governments that acquire these companies inherit the labor-related obligations of the private employers.\footnote{91}

The labor-protective provisions of these laws base the successor’s obligations on existing employment conditions, rather than a schedule developed by government agencies. In the absence of a collective bargaining agreement the terms of employment set by the predecessor employer obtain until an identifiable employee leaves a job. Only then may the successor eliminate the job or offer different employment conditions in refilling the job. For a successor with a unionized workforce, however, the labor-protective measures have a more inhibiting effect. An unexpired bargaining agreement not only serves as the reference point for determining the wages and working conditions of incumbent employees, but also dictates the employment conditions attaching to certain jobs regardless of who performs them. Collective bargaining agreements cover employees of approximately ninety-five percent of all transit systems eligible for these statutory protections.\footnote{92}

By bypassing the market and restricting a successor’s ability to restructure or reduce labor costs, these statutes apparently challenge the primacy of market regulation. In particular, direct government interven-
tion to guarantee employment terms combined with support for the status of bargaining representatives suggests a commitment to redistribute power in the workplace. This impression is misleading. The legislation requires the survival of bargaining agreements largely to insure that the state's positive presence in facilitating transfers of ownership does not undermine the federal policy in favor of collective bargaining. As is illustrated by recent legislation regulating the fate of bargaining agreements during bankruptcy proceedings, Congress attempts to accommodate broad-based labor laws, like the NLRA, when their policies conflict with those of another statute. But the desire to accommodate such labor laws does not transform legislation concerned with developing efficient transportation into an independent source of employee power. The labor-protective provisions are incidental costs of a program directed at improving transportation systems.

The Federal Service Contract Act (SCA) is also concerned with the impact on workers of government regulations promoting changes in employer identity, in this case periodic bidding requirements on designated federal contracts. The SCA directs successful bidders to honor provisions in a predecessor's bargaining agreement which pertain to wages and benefits, as long as "substantially the same service" is being performed. Courts have not, however, interpreted the SCA to require


The problems of worker protection presented by the bill are not necessarily identical to those presented under other laws. The committee believes, however, that workers for whom a standard of benefits has already been established under other laws should receive equally favorable treatment under the proposed new program. The committee also believes that all workers adversely affected under the bill should be fully protected in a fair and equitable manner, and that Federal funds should not be used in a manner that is directly or indirectly detrimental to legitimate interests and rights of such workers.


95. A 1978 study funded by the Department of Labor could not confirm the perception that negotiated benefits and the burdens of dealing with a union increased costs significantly. Siskind and Stromsdorfer found that direct cash payments for training, dismissal allowances and the like cost only a few thousand dollars, that an impact on wages could not be isolated, and that § 13(c) prevented only one technological, innovational or organizational change. The results of the study were largely inconclusive. See Curtis, supra note 92, at 626-27.


97. Section 353(c) provides:

No contractor or subcontractor under a contract, which succeeds a contract subject to this chapter and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality.

The legislative history of § 353(c) is discussed in SEIU v. GSA, 443 F. Supp. 575, 578-80 (E.D. Pa.)
successors to retain predecessor employees, to assume unexpired bargaining agreements, or to arbitrate the extent of obligations under those agreements. The rationale for limiting the reach of the SCA is that Congress was solely concerned with insuring stable compensation levels in sectors where federal policy uses periodic bidding to secure more efficient operations.  

The impact of the SCA is debatable. In theory, successors have no incentive to terminate incumbent employees in order to reduce labor costs, because the SCA requires continuation of compensation levels regardless of who occupies a job classification. But any successor is free to replace experienced employees with entry-level workers, thereby lowering its wage bill. For those successors disinclined to deal with unions, the opportunity to replace already unionized employees may be as important as reducing labor costs. The only real limits on successor discretion derive from the labor supply and the ability of the incumbent collective bargaining representative to control that supply.

Despite the explicit recognition in the SCA of the need to protect workers from loss of income caused by transfers of ownership, regulation of successors under the SCA resembles that developed under the NLRA. Both laws allow a successor considerable discretion in choosing its labor force and adjusting its personnel costs. And, like the legislation aimed at promoting efficient transportation systems, the SCA protects some economic needs of designated workers without strengthening labor's ability to influence employment conditions generally or to exercise control over the fate of an enterprise.


98. See Clark v. Unified Servs., Inc., 659 F.2d 49 (5th Cir. 1981) (failure to hire all interested predecessor employees and to grant newly hired employees seniority rights equal to those enjoyed under predecessor-union agreement did not violate Service Contract Act). The court relied on Trinity Servs., Inc. v. Marshall, 593 F.2d 1250 (D.C. Cir. 1978) (predecessor-union bargaining agreement provision requiring the successor to make severance payments to predecessor employees not retained in their existing job classifications was held not to be a fringe benefit under the SCA) and SEIU v. GSA, 443 F. Supp. 575 (E.D. Pa. 1977) (SCA does not require successor to hire predecessor employees). But see Trinity, 593 F.2d at 1265 (Lombard, J., dissenting) (“As salary rates and many fringe benefits are based upon seniority, it will always be in the best interest of a successor contractor to replace [its] predecessor's workforce to the greatest extent practicable. In this way contractors other than the incumbent can trim their labor costs and reduce their bids below that of the incumbent. Such economizing at the cost of job security for government service employees is precisely what Congress has sought to avoid in the Service Contract Act.”) (citation and footnote omitted). The majority in Trinity, 593 F.2d at 1261, and the court in Clark, 659 F.2d at 52 & n.9, while concluding that the Act did not provide employment security, indicated their disagreement with the congressional judgment.

99. See Machinists Lodge 166 v. TWA, 25 Wage & Hour Cas. (BNA) 208, 210 (M.D. Fla. 1981) (discussing the Act's “humanitarian purpose”). Other means to reduce labor costs may not be covered by the statute. See supra note 98.
B. Protective Legislation

The Employee Retirement Income Security Act of 1974 (ERISA)\textsuperscript{100} and the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA)\textsuperscript{101} address the problem of financial security for retiring workers. ERISA establishes minimum standards for employee retirement plans.\textsuperscript{102} MPPAA regulates pension plans to which two or more unrelated employers contribute pursuant to provisions in their collective bargaining agreements. Both statutes expressly and unconditionally extend liability to successors.

Underfunding may occur in plans regulated by ERISA and MPPAA. Depending on the nature of the actuarial cost-funding method on which a plan is based, the value of the accrued benefits at any given time may exceed the assets held to fund the plan. The problem of underfunding becomes acute when a company withdraws from or terminates a benefits plan.

ERISA safeguards employee financial security by holding the withdrawing company liable for any unfunded vested benefits. In addition, when a successor acquires a corporation through a merger or purchase of stock, ERISA requires the successor to honor the outstanding funding obligations stemming from its predecessor's pre-acquisition withdrawal or termination.\textsuperscript{103} Since the successor's obligation attaches regardless of enterprise continuity, the ERISA requirement may inhibit a successor's ability to reorganize. A particularly profound impact may occur when the actuarial assumptions underlying the seller's organization are incompatible with the buyer's plans, as when a buyer contemplates the use of early retirement to adjust labor costs.\textsuperscript{104}

Purchaser obligations are greater, and potential liability even more speculative, under MPPAA.\textsuperscript{105} The MPPAA plans hold all contributors liable for a share of unfunded benefits. Following withdrawal, liability continues for up to five years. More importantly, a withdrawing employer's obligation extends to all the workers covered by the plan, not


\textsuperscript{101} 29 U.S.C. §§ 1381 et seq. (1982).

\textsuperscript{102} ERISA created the Pension Benefit Guaranty Corporation (PBGC), which guarantees payment of nonforfeitable benefits to beneficiaries upon termination of employee benefit plans. See 29 U.S.C. § 1301; PBGC expenditures are the responsibility of the employer(s) maintaining the plan. See id. at §§ 1322, 1322(a), 1362(b), 1363(b), 1364(b), 1381 et seq.

\textsuperscript{103} Id. at §§ 1362(d), 1364. The successor is also liable for the predecessor's unmet obligations if the successor assumes the predecessor's plan but subsequently withdraws from or terminates it. When a sale of assets occurs, liability is transferred only on a voluntary assumption by the successor.

\textsuperscript{104} See Herzel, Sherck & Colling, supra note 80, at 34.

merely to its own present and former employees. Since these plans are often underfunded, such liability can be substantial.\textsuperscript{106}

Successor obligation under the MPPAA may be unknown (and unknowable) at the time of acquisition. Thus, while the legislation effectively binds a successor employer to the pension provisions of its predecessor's bargaining agreement, the successor is unable to negotiate a purchase price that accurately compensates for future liability.

Because of their potential for burdening a successor's flexibility to reorganize and for draining capital reserves, ERISA and MPPAA may be the most dramatic examples of Congressional unwillingness to subject employees to the uncertainties of decisions based on market considerations. In the same way that the purchaser of a pharmaceutical company is vulnerable to products liability claims based on events predating the acquisition, a successor employer may be exposed to claims arising from services performed for and obligations entered into by its predecessor.

But neither ERISA nor MPPAA does more than treat retirement benefits, whether established unilaterally or through negotiations, as a liability of the acquired enterprise. Once a successor employer meets its outstanding obligations to retiring workers, neither law restricts the successor's decisions about the acquired enterprise. Nor does either statute establish an institutional base from which incumbent employees can challenge successor actions unrelated to the retirement plan.

The Vietnam Veterans' Readjustment Assistance Act of 1974\textsuperscript{107} is another example of government intervention to protect economic needs without providing an organizational mechanism through which the target group can press its interests. In order "to insure that those who fulfill military commitments do not return to civilian life disadvantaged because of their service," the Act entitles veterans to reinstatement to their civilian jobs, with seniority, status and pay similar to that which they had previously enjoyed.\textsuperscript{108} The statute excuses compliance only if circumstances have changed sufficiently to make re-employment "impossible or unreasonable."\textsuperscript{109} Successors-in-interest have the same obligations as former employers, and courts construe the hardship defense narrowly regardless of whether a former or successor employer invokes it.\textsuperscript{110}

\textsuperscript{106} Herzel, Sherck & Colling, supra note 80, at 34.
C. Social Legislation, the NLRA and Market Regulation

The social legislation examined in Part II identifies certain employees or economic interests as particularly vulnerable to the exercise of successor discretion. In an attempt to minimize that vulnerability those laws substitute governmental policy for employer control. By imposing restrictions on choice of personnel, wage rates or refusals to comply with contract terms, those laws seem to reflect a legislative judgment at odds with the interpretation of the NLRA found in *Wiley, Burns* and *Howard Johnson*. Accordingly, it could be argued that these cases misconstrued the NLRA by describing public policy as hostile to protections for labor which might inhibit transfers of ownership. The social legislation we have examined, moreover, explicitly approved restrictions on the disposition of capital, challenging the view implicit throughout Part I, that laws regulating employment relations were never intended to disturb the fundamental economic arrangements characteristic of capitalism.

The resolution of these competing views lies in the distinct function and attributes of social legislation as compared to broad-based regulatory statutes. One distinguishing feature of social legislation is the decisive role given to government in identifying areas of employment requiring protective status and in setting applicable standards. Employee and employer may seek to influence governmental decisions through the political process, but the legislation does not anticipate the need to consult the affected parties or recognize the right of employees to exercise direct influence on employment conditions generally.

Another characteristic of social legislation is that minimum standards for selected aspects of the employment relationship are applied across the economy. Under ERISA and the SCA, for example, all covered employers forfeit unilateral control over those conditions of employment designated by the legislature. With respect to every other aspect of employment, successors remain free to act as they choose, consistent with market constraints. The economy-wide application of the minimum standards diminishes their impact on competitive status. Thus, the public policy expressed in social legislation accepts narrowly circumscribed governmental restraints that might inhibit transfers of ownership; but successors are not exposed to open-ended negotiations or claims.

Broad-based labor laws like the NLRA follow a distinctly different pattern. The Act endorses a process, including the use of economic power, through which the parties negotiate about the organization of the workplace. The role of government is to insure the stability of this process, not to set conditions of employment or an agenda for bargaining. Since the content of negotiated terms is determined by labor and manage-
ment and is limited only by the unwillingness of one party to agree, employers may be exposed to demands for joint control over decisions affecting every aspect of an enterprise, including capital investment. Thus, the nature and scope of possible restrictions which collective bargaining may impose on a successor dictate the Court's reading of public policy in *Wiley, Burns* and *Howard Johnson*, and explain why interpretations of the NLRA need not refer to the evidence of public policy found in social legislation.

The narrowness of the legal restraints which social legislation imposes is, however, only a partial answer to the more fundamental issue of whether controls on the disposition of capital challenge the operation of a market economy. ERISA and MPPAA, to take the most dramatic examples, may have a profound impact on a successor's financial planning and competitive status, particularly where management cannot pass the cost of funding acquired pension contributions on to consumers. Indeed, the adverse effect on transfers of capital may exceed that associated with an obligation to honor the entirety of a predecessor's collective bargaining agreement.

However, in pension reform law, as in all social legislation, the state retains control over the identification of economic interests requiring protection and over the extent of intervention. If the impact of a law proves too great or is otherwise dysfunctional for the economy, the state can respond at the administrative or legislative level. Political pressures to retain or extend the legislation may arise; but the legislation itself will not have generated a process or an institutional base with the ability to operate regardless of whether the law is retained, or with the capacity to demand additional restraints on disposition of capital. Social legislation limits entrepreneurial control, but the governmental controls found in social legislation are limited and controllable.

The opposite situation obtains under laws like the NLRA. The process authorized by that statute not only invites the parties to construct rules for the workplace, but also acknowledges the legitimacy of using collective power to secure those economic interests not guaranteed by the state. Thus, the ability of capital to withstand the power of labor determines the degree to which management maintains unilateral control.

**D. Some Observations**

This examination of social legislation and the comparison of the suc-

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111. Of course, the contract terms must also be lawful.

112. In theory, labor can use only economic power in connection with mandatory subjects of bargaining; but the practice of negotiations includes unrealistic demands on mandatory subjects, proposals on permissive subjects, and economic pressure triggered by the former but ending with concessions on the latter.
cessorship doctrine of the NLRA with other laws affecting ownership transfers suggest some tentative observations concerning the operation of law in a market economy.

First, laws regulating labor relations confront the structural inequality between labor and capital either by authorizing organized labor to use economic pressure to change employment conditions generally or by guaranteeing specified, limited economic benefits to individual workers. Where regulatory legislation supports the development of collective power, the permissible arena of conflict does not include restraints on capital nor does law intervene to support labor’s efforts to control the use of capital. The general authority of employers to control capital collapses only when labor is able to convert the right to use collective action into the power to force employers to accept restraints. Such power develops only when the economy as a whole will benefit.

Second, the state imposes restraints on use of capital only when the restraint promises to aid, rather than harm, the national economy.113

Third, and more generally, because social and regulatory legislation interact to stabilize workplace relations, legal intervention may facilitate the operation of a market economy, despite the adverse impact of any particular law on transfers of ownership or capital control.

III
Conclusion

This Article addresses the extent to which statutory regulation of labor relations stands in opposition to market control of the American economy. To focus analysis the discussion is limited to legal interventions in connection with changes in company ownership.

The NLRA, by acknowledging the legitimacy of collective action and requiring employers to bargain with unions, appeared to pose the strongest challenge to the primacy of the market. This Article traces the development of the Act’s successorship doctrine from its inception as a policy to further entrepreneurial flexibility, worker protections and industrial stability to its eventual designation as a shield against the adverse impact of collective bargaining on capital mobility. The Act is found to ratify, rather than regulate, the employment relations established by successor employers. Legal intervention in the form of the successorship doctrine is therefore wholly consistent with the continued operation of a market economy.

One consequence of the application of the NLRA to transfers of ownership was a loss of bargaining power by organized labor. The find-

113. This discussion does not suggest that the state only intervenes, in the form of social legislation or otherwise, to benefit owners of capital. The evidence presented contradicts that rather simplistic notion.
ing that a statute designed to increase the market power of workers can result in a loss of bargaining strength raises the question, which deserves further exploration, of how broad-based legal regulation like the NLRA operates in combination with the market.

Finally, the Article identifies two forms of legislation affecting labor relations: regulatory legislation such as the NLRA and social legislation such as the SCA. Examination of the successorship doctrine reveals a model of regulation under the NLRA in which the details of employment at the workplace are subject to joint labor-management responsibility, while the right of employers to unilateral control over use of capital is formally acknowledged. This model is consistent with the view that legal intervention into labor relations could not disturb the fundamental attributes of a market economy.

Social legislation, on the other hand, restricts the ability of some successors to exercise control over certain aspects of the employment relationship, such as selection of employees or rejection of terms contained in collective bargaining agreements. Such laws set minimum standards for a narrowly circumscribed set of economic issues, but otherwise leave successors in control of the employment relationship. Although a departure from the model of market control, social legislation lacks structural significance because of its limited substantive scope and the absence of a process through which labor can perpetuate or expand the rights guaranteed by the state.

This examination of legal controls on successor employers reveals that law does not tame the market. Indeed, the discussion suggests the futility of expecting social or regulatory legislation to transform existing economic arrangements. More promising is an inquiry such as this which undertakes to identify the limits of state intervention and the forms such intervention takes.