Dodging the Supremacy Clause Bullet: Do State Successor Statutes Survive Federal Labor Law Preemption

Edward C. Sweeney

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COMMENT

Dodging the Supremacy Clause Bullet: Do State Successor Statutes Survive Federal Labor Law Preemption?

Edward C. Sweeney†

Successor statutes, laws which require a purchaser of a company to honor that company's labor contract, are one method state legislatures have utilized to curb the perceived inequities of hostile takeovers. This Comment analyzes the issue of whether these statutes succumb to federal labor law preemption. In this analysis, the Comment describes the two types of successor statutes, discusses the weighty interests states have in this legislation, reviews the logical foundation of federal successor doctrine, and considers successor statutes in relation to the three strands of labor law preemption doctrine. The Comment concludes that both types of successor statutes must succumb to one strand of federal preemption, bargaining process preemption, due to the vision of industrial relations articulated in NLRB v. Burns Int'l Security Services Inc., 406 U.S. 272 (1972) and Howard Johnson Co. v. Detroit Locals Joint Executive Board, 417 U.S. 249 (1974). The Comment also determines that another preemption strand, § 301 preemption, will preempt one of the two types of successor statutes. Finally, the Comment argues that a successor statute could be designed which is compatible with federal successor and preemption doctrine, and suggests how such a law should be drafted.

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INTRODUCTION

Several state legislatures have attempted to make their recently passed successor statutes a difficult target for federal courts enforcing the National Labor Relations Act. Successor statutes make an acquiring firm (a successor) responsible for honoring the collective bargaining agreement (CBA) of an existing domestic firm (a predecessor) when the successor takes over its assets or operation. Passed typically as part of wide-reaching regulation aimed at the hostile takeover of domestic firms, successor statutes are designed to hinder the purchase of a company for the purpose of stripping its assets.

The stakes are high in this game of "dodge the bullet." It is widely

1. 29 U.S.C. §§ 151-166 (1988) [hereinafter "NLRA"]. Only one other analysis has addressed the question of whether successor statutes will survive federal labor law preemption. See Wendy C. Scjerven, Note, Labor Policy and Private Determination of Successor Liability: Illinois' Successor Clause Statute, 67 WASH. U. L.Q. 575 (1989) arguing that the Illinois successor clause statute is preempted under both strands of the NLRA preemption doctrine and under § 301 of the Labor Management Relations Act (LMRA), (codified at 29 U.S.C. § 185). This Comment is in part a reaction to the Washington University Law Quarterly Note, and it differs substantially from the analysis and conclusions in the Note.

State successor statutes are presently a heated topic in labor law. Since 1989, four states have passed and two legislatures have considered successor statutes. See DEL. CODE ANN. tit. 19, § 706 (1990); MASS. GEN. LAWS ANN. ch. 149, § 20E (West Supp. 1991); 1990 Pa. Laws 36, § 2585-88; R.I. GEN. LAWS § 28-7-19.1 (1991); see also H.B. 1257 1990 Mo.; H.B. 69 1989 N.Y.. These successor statutes differ substantively from the Illinois successor statute and pose even more difficult preemption questions. In addition, two state legislatures have proposed successor legislation similar to the Illinois successor statute, H.B. 1527 1989 Minn.; S.B. 5639 1989 Wash.; see also ILL. ANN. STAT. ch. 48, para. 2571-72 (Smith-Hurd 1987). This Comment's scope includes both the recently passed successor statutes as well as the Illinois successor clause statute.

2. This definition has been developed from the Bureau of National Affairs' definition for "successorship clause." Collective Bargaining Negot. & Cont. (BNA) 36:6 (11th ed. 1989) ("Successorship clauses stipulate that any change in the management or identity of the parties to the contract shall not invalidate the agreement, but rather that new management must assume the contractual obligations of the predecessor.") This definition will be used throughout this Comment.


Such legislation is a dubious approach to dealing with the problem. While successor statutes
accepted that NLRB v. Burns International Security Services, Inc.\(^4\) and Howard Johnson Co. v. Detroit Local Joint Executive Board\(^5\) prohibit both the National Labor Relations Board and federal courts, under the guise of federal labor law, from binding a successor to the predecessor's collective agreement, even when the union secures a contract provision requiring all successor firms to adhere to that agreement.\(^6\) Federal successor doctrine, therefore, offers little protection to unionized employees in takeover target companies, and state successor statutes give union employees much greater protection than they enjoy through the collective bargaining process.\(^7\) Furthermore, hostile takeovers may have a catastrophic effect on union employees' expectations of job security rooted in their written contractual agreement with the predecessor.\(^8\) Finally, state legislatures have a strong recognized interest in regulating domestic employment relations\(^9\) and corporate law.\(^10\)

inhibit hostile takeovers, they also inhibit legitimate, "friendly" purchasers who are not interested in adopting the predecessor's bargaining agreement.

Some authors suggest that anti-takeover legislation violates the Commerce Clause of the United States Constitution because it imposes an excessive indirect burden on interstate commerce. See Harvey L. Pitt & Peter M. Sherman, Labor Unions in Corporate Takeovers, 7 LAb. law. 287, 308-09 (1991). But see P. John Kozyris, Corporate Takeovers at the Jurisdictional Crossroads: Preserving State Authority Over Internal Affairs While Protecting the Transferability of Interstate Stock Through Federal Law, 36 UCLA L. Rev. 1109, 1161 (1989) (asserting that state anti-takeover regulation applicable only to domestic corporations survives under the dormant Commerce Clause).

6. A narrow exception to this rule occurs when the successor "impliedly adopts" the predecessor's agreement. Robert F. Mace, The Supreme Court's Labor Law Successorship Doctrine After Fall River Dyeing, 39 LAB. L.J. 102, 108-09 (1988); see also infra note 40 and accompanying text.
7. See infra notes 49-56 and accompanying text.
8. See Marion Crain-Mountney, Comment, The Unenforceable Successorship Clause: A Departure From National Labor Policy, 30 UCLA L. Rev. 1249, 1275 n.178 (1983), arguing that the federal successorship doctrine is insufficient to protect employees' rights adequately under the collective bargaining agreement with the successor because (1) the predecessor may be short of assets against which a judgement may be enforced; (2) an arbitrator may be reluctant to enforce a contract against a predecessor who acted in good faith, where the successor refuses to adopt the collective bargaining agreement or refuses to sign it; and (3) a monetary award is an inadequate reflection of the employees' interest in preservation of a job, because the employees possess more than just an economic interest in their jobs.

Legislatures intend that such laws give workers under a CBA protection from the drastic effect hostile takeovers often have on workers. For concise discussions of the economic, social, and psychological hardships that plant shutdowns have on workers, see James M. Cline, A Legal, Economic and Normative Analysis of National Plant Closing Legislation, 11 J. LEGIS. 348, 364-67 & n.9; Leslie Kay & Kevin Griffin, Plant Closures: Assessing the Victims' Remedies, 19 WILLIAMETTE L. Rev. 199, 201-04 (1983).

9. See De Canas v. Bica, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, and laws affecting occupational health and safety . . . are only a few examples.")

10. See Air Line Pilots Ass'n Int'l. v. UAL Corp., 874 F.2d 439, 447 (7th Cir.), aff'd on reh'g, 897 F.2d 1394 (7th Cir. 1989) ("Like the criminal law, the regulation of corporations is . . . a matter of primary state responsibility. In such areas the presumptions is against federal preemption.") (cita-
There are also strong policy arguments against state successor statutes. Successor statutes may divide the currently recognized successor regime under the NLRA.\textsuperscript{11} Shattering uniformity may be especially unwise given that current federal successor doctrine is based on important policy considerations, including the preservation of the mobility of capital and the free transferability of assets.\textsuperscript{12} Moreover, the primary legislative impetus behind state successor statutes is often the lobbying of incumbent corporate management who fear losing their jobs in the wake of a hostile takeover.\textsuperscript{13} Successor statutes deter takeovers by legislating a “poison pill”—the acceptance of a union contract—into every sale. Unlike management, however, corporate shareholders often would prefer that takeovers occur.\textsuperscript{14} The wisdom of permitting a state to protect incumbent management despite shareholders’ economic interests by inter-

\textsuperscript{11} See also CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 89, 92-93 (1987); Cort v. Ash, 422 U.S. 66, 84-85 (1975).

\textsuperscript{12} For a similar concern see Archibald Cox, \textit{Federalism in the Law of Labor Relations}, 67 \textsc{Harv. L. Rev.} 1297, 1303 (1954) (“Often the balance of convenience from the viewpoint of the people affected lies on the side of national control . . . collective bargaining is complicated and confused if the duties resting on the employer and union are different on each side of a state line . . .”). Cox also notes that national labor legislation has the advantage of preventing states from competing destructively for businesses. \textit{Id.}

National labor legislation can be viewed not only as a floor but also as a ceiling, under which states are prevented from legislating superior benefits due to preemption by national legislation. Some commentators have argued that excessive rigidity in national labor law stifles diversity and experimentation on the state level. Bernard D. Meltzer, \textit{The Supreme Court, Congress and State Jurisdiction over Labor Relations} (pts. I & II), 59 \textsc{Colum. L. Rev.} 6, 23 (1959).

The source of support for federal preemption has shifted radically since labor law’s early years. In the years soon after the NLRA’s enactment, labor union lawyers were the strongest advocates of preemption and management lawyers the strongest proponents of states’ rights. See Cox, supra, at 1302, 1346. The conventional wisdom was that management had much more influence in state legislatures than unions. \textit{Id.} Today, the roles have been reversed. Labor has taken a much more active role in the state legislative arena. See, e.g., Pitt & Sherman, \textit{supra} note 3, at 289 (takeover legislation); Cline, \textit{supra} note 8, at 353 (plant closing legislation). Management, however, has utilized federal labor law preemption to prevent its union employees from pursuing the burgeoning number of state law statutory and tort claims available to all employees within a particular state. See Anthony Herman, \textit{Wrongful Discharge Actions After Lueck and Metropolitan Life Insurance: The Erosion of Individual Rights and Collective Strength?}, 9 \textsc{Indus. Rel. L.J.} 596 (1987).

\textsuperscript{12} NLRB v. Burns Int’l Sec. Serv., Inc., 406 U.S. 272, 288 (1972); see also infra notes 49-56 and accompanying text.

\textsuperscript{13} See Roberta Romano, \textit{The Political Economy of Takeover Statutes}, 73 \textsc{Va. L. Rev.} 111 (1987). Professor Romano examined the politics behind the enactment of an anti-takeover statute in Connecticut. Her study found that the primary impetus for the statute was the lobbying undertaken by incumbent managers of a large domestic corporation. She asserts that these managers favored such legislation because the shareholders would not have adopted a charter provision if requested to do so by the corporation’s management. See also Roberta Romano, \textit{The Future of Hostile Takeovers: Legislation and Public Opinion}, 57 \textsc{Cinn. L. Rev.} 457, 461 n.11 (1988), for a list of anti-takeover statutes that have been pushed through state legislatures at the behest of major local corporations that fear they will be targets of hostile takeovers.

\textsuperscript{14} Shareholders frequently have both short-run and long-run interests at stake. In the short run, they often welcome the increased value that takeovers bring to their shares in the corporation. Moreover, takeover targets are often companies perceived as not being efficiently run. In the longer run, shareholders may benefit from changes in inefficient management.
ferring with the national regulatory scheme of labor/management relations is questionable.¹⁵

State successor statutes present two major labor law questions. First, does the Supreme Court's vision of industrial relations and its economic policy considerations articulated in Burns and Howard Johnson preclude state legislatures (as well as the National Labor Relations Board [NLRB or Board]) from making a successor assume the obligations under the predecessor's CBA? Second, are state laws which intend to benefit exclusively or primarily unionized employees, like successor statutes, preempted under the Act?

This Comment describes the two types of successor statutes, "successor clause" statutes and "blanket" statutes, that have been passed or are currently being considered by state legislatures and summarizes the interests states have in promulgating successor statutes. It then reviews current federal successor doctrine, highlighting the logical foundation of the doctrine in the Supreme Court decisions Burns and Howard Johnson.

Next it evaluates the two types of state successor statutes in light of possible federal labor law preemption. Finally, this Comment describes some features that would improve the chances that a successor statute would survive preemption.

I

BACKGROUND: THE TWO TYPES OF STATE SUCCESSOR STATUTES AND THE STATE INTERESTS IN SUCCESSOR STATUTES

A. Features of the Two Types of Successor Statutes

All successor statutes attempt to protect union employees covered by a CBA by requiring the successor to continue the union's employment relationship with the predecessor.¹⁶ There are, however, two distinct types of state successor statutes. The first type makes the successor liable

¹⁵. According to 1989 Bureau of National Affairs statistics, only 20.9% of the full-time workers in this country were represented by unions, a decline of over .6% since 1988. Collective Bargaining Negot. & Cont., supra note 2, at 18:326.

Depending on one's views of unionization, one could either question or advocate as a matter of policy utilizing state law to interfere with federal labor law. It could be argued that state laws which protect the incumbent management of a corporation by favoring unions may be slowing the natural death of a system of industrial relations that has already seen its day.

Policy grounds may also dictate the opposite conclusion. The state has an interest in the survival of unions. Unions tend to increase salaries in an industry, and the fear of establishing a union gives incentive to at-will employers to provide comparable benefits to their employees, lest they leave to work in a union shop.

¹⁶. The Supreme Court expressed in Burns precisely how these statutes operate: [E]mployees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. . . . Given the continuity of the employment relationship, the pre-existing contract's provisions with respect to wages, seniority rights, vacation privileges,
for the obligations of the predecessor's CBA where that agreement contains a successor clause. This variety of successor statute is called a "successor clause" statute. The second type makes the successor liable for the predecessor's CBA regardless of whether the CBA itself contains a successor clause. This variety of successor statute is known as a "blanket" successor statute, since it applies to all employees covered by CBAs. The features of both types are analyzed below.

1. Successor Clause Statutes Require a Successor to Adopt the CBA When a Union has Negotiated a "Successors and Assigns Clause" with the Predecessor

The 1987 Illinois statute exemplifies the first type of state successor statute. This statute was the first which refused to exempt employers subject to the NLRA. Although some successor clause statutes have been in effect for more than ten years, state legislatures previous to 1987 considered them preempted by the NLRA and therefore specifically exempted firms subject to the NLRA.

The Illinois statute provides that a CBA binds a successor employer when the predecessor and a labor organization have negotiated a successor clause. See NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. at 288-89. Moreover, the duties and rights of the predecessor arising from the NLRA would devolve on the successor. Id. at 289-90.

17. See Scjerven, supra note 1, at 575. This Comment will use "successor clause statute" to refer to this brand of state successor statute.

18. ILL. ANN. STAT. ch. 48, para. 2571-72 (Smith-Hurd Supp. 1991). ILL. ANN. STAT. ch. 48, para. 2571(a) provides:

Where a collective bargaining agreement between an employer and a labor organization contains a successor clause, such clause shall be binding upon and enforceable against any successor employer who succeeds to the contracting employer's business, until the expiration date of the agreement therein stated. No such successor clause shall be binding upon or enforceable against any successor employer for more than 3 years from the effective date of the collective bargaining agreement between the contracting employer and the labor organization.

Bills in two states have been proposed with features similar to the Illinois successor statute. See H.B. 1527 1989 Minn. (makes successor clause in CBAs binding upon and enforceable against transferee employers until the earlier of the agreement's expiration date or 36 months, the disclosure of the agreement an affirmative duty of employers in dealings with potential transferee employers, and violation a gross misdemeanor); S.B. 5639 1989 Wash. (provides that a successor clause in a CBA is binding on a successor employer; requires disclosure of the existence of a successor clause).

19. See Scjerven, supra note 1, at 592, n.97.

20. The state legislatures that first passed successor clause statutes specifically exempted employers who were subject to the National Labor Relations Act, 29 U.S.C. § 151, or the Railway Labor Act, 45 U.S.C. § 151, indicating a belief that their successor statutes would not survive federal labor law preemption. See Scjerven, supra note 1, at 575. See also CAL. LAB. CODE § 179(c) (Deering 1976); MASS. GEN. LAWS ANN. ch. 149 § 179(c) (West 1979); OHIO REV. CODE ANN. § 4113.30 (D)(2) (Pages 1990).

The above states' successor statutes, like the Illinois successor clause statute, enforced clauses independently negotiated by the employer and a labor organization and placed in a CBA.
The statute defines a "successor employer" as:
any purchaser, assignee, or transferee of a business the employees of
which are subject to a collective bargaining agreement, if such purchaser,
assignee, or transferee conducts or will conduct substantially the same
business operation, or offer the same service, and use the same physical
facilities, as the contracting employer.

The statute requires the predecessor employer to provide notice to the
buyer that the CBA contains a successor clause. However, the statute
nonetheless provides that a failure to disclose does "not affect the en-
forceability of such collective bargaining agreement against a successor
employer." The statute makes violations of the Act punishable by a
fine not to exceed $5,000, and one commentator has suggested that the
statute provides a private cause of action.

2. **Blanket Successor Statutes Force a Successor to Adopt the
   Obligations Under the Predecessor's Collective Bargaining
   Agreement**

Delaware, Massachusetts, Pennsylvania and Rhode Island have
each enacted successor statutes that even more aggressively bind a suc-
cessor to its predecessor's collective bargaining agreement. These stat-
utes make a successor employer liable for the provisions in any CBA
negotiated by a predecessor employer, whether the CBA contains a suc-

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21. Such clauses, commonly known as "successorship clauses" or "assigns clauses" in the la-
bor community, appear in 43% of collective bargaining agreements. Collective Bargaining Negot. &
Cont., at 36:6. This percentage has climbed from 38% in 1986 and 34% in 1983. *Id.*

22. ILL. ANN. STAT. ch. 48, para. 2571(b) (Smith-Hurd 1987).


24. *Id.*


26. It has been argued that the $5,000 fine alone would not provide an effective deterrent to
violating the statute, thus implying that a private cause of action by the union or union members is
available for the statute's violation. See Sejerven, *supra* note 1, at 593, n.107. The opposite conclu-
sion could also be drawn: the legislature could not agree on a more stringent deterrent than a $5,000
fine, and thus purposely left out a private cause of action. Also, the author's suggestion that a
private cause of action is permitted remains speculative since the statute does not specifically create
such an action, and no case has been decided to date applying the Illinois statute.

Note also that several of the more recent successor statutes specifically call for private causes
of action to enforce violations of the statute. DEL. CODE ANN. tit. 19, § 706 (1990); 1990 PA. LAWS 36

27. See DEL. CODE ANN. tit. 19, § 706 (1990); MASS. GEN. LAWS ANN. ch. 149, § 20E (West

Bills which would employ such a blanket approach have been introduced in two other states.
See H.B. 1257 1990 Mo. (provides a successor to a signatory of a CBA shall be bound by the terms
of the agreement for up to three years from the effective date of that agreement); H.B. 69 1989 N.Y.
(provides that a successor employer to a contracting employer's business shall be bound to her CBA
until the earlier of the expiration date of the agreement or three years).
cessor clause or not. The Pennsylvania statute is typical:

No business combination transaction shall result in the termination or impairment of the provisions of any covered labor contract, and the contract shall continue in effect pursuant to its terms until it is terminated pursuant to any provision contained therein, or until otherwise agreed upon by the parties to such contract or their successors.

The mere existence of a CBA between a predecessor and a union, consequently, imposes liability for the term of the agreement or until the union and either the predecessor or the successor mutually agree to an alternative termination date.

Although similar in their blanket approach to corporate takeovers, the Delaware, Massachusetts, Pennsylvania and Rhode Island statutes are not identical. The Delaware successor statute apparently regulates private businesses as well as corporations. The Delaware statute also does not distinguish between the sale, merger, or other disposition of all or part of a business. By contrast, the Pennsylvania and Massachusetts laws apply only to (1) the sale, merger, or other disposition of corporations and (2) events “affecting all or substantially all the property or assets, including [the] good will, of the business operation.” The Pennsylvania statute also permits a corporation to decide whether the successor provision and other anti-takeover provisions in the act will apply to it. A corporation wishing to “opt out” can place a disclaimer in its corporate by-laws stating that the anti-takeover act will not apply to it.

The Rhode Island successor statute mixes features of the other acts. Like the Delaware statute, the Rhode Island law applies to non-corporate businesses; however, like the Pennsylvania statute, it affects only business transactions that involve “substantially all” of the predecessor’s

29. 1990 PA. LAWS 36 § 2587.
32. Although no case has yet challenged this aspect of the statute, it is likely to be interpreted in light of the legislature’s stated purpose: “This section is enacted to protect the employment interests of all persons engaged in employment in Delaware under existing labor contracts and shall be liberally construed in every case in order to achieve that purpose.” DEL. CODE ANN. tit. 19, § 706(1)(d) (1990).
35. 1990 PA. LAWS 36 §§ 2561(a) & (b), 2562, 2581, 2586. The Pennsylvania successor statute is one of many corporate anti-takeover provisions in this legislation. The legislation was designed to give Pennsylvania corporations the option of deciding whether or not to apply the law to themselves. Corporations which amended their by-laws by July 26, 1990 to read “the Act will not apply” will avoid the Act’s strictures.
assets. All four statutes, unlike the Illinois successor clause statute, specifically provide that an aggrieved employee may bring an action to recover wages, benefits, or contractual losses brought about by the violation of the statute and to enjoin its violation.

B. The State Interests in Enforcing a Collective Bargaining Agreement Against a Successor Employer

1. Policy Interests

State governments have a number of policy interests in enforcing the predecessor’s CBA against a successor employer. The most obvious state interest lies in preventing the disastrous effect that some takeovers have on citizens and communities in a state. No less clear is the state interest in protecting the jobs of its citizens. All successor statutes specifically protect the jobs of union employees covered under a CBA. Moreover, since successor statutes provide a potentially powerful disincentive to would-be purchasers, successor statutes indirectly protect non-union employees of a business, particularly management.

The state also has an interest in safeguarding contractual expectations. A collective bargaining agreement constitutes a written contract that should be enforceable much like any other commercial or employment contract. Normally, absent privity, one party to a contract of sale (such as a successor) is not liable for the obligations of the second party to the contract. However, the law in every state provides that when two corporations merge into one, the surviving corporation is responsible for all prior liabilities and obligations of the disappearing corporation.

38. See Cline, supra note 8, at 364-65. Besides having a drastic effect on plant employees and their families, closings impose a number of external costs on local governments and communities, including lost tax revenue, increased budget outlays, and a general decline in local business activity. Id.
39. Of course, a successor could turn around an inefficient predecessor, benefitting all employees.
This includes the predecessor's employment contracts. A collective bargaining agreement affects a greater number of a state's citizens than the average commercial or employment contract, and these citizens merit no less protection than other citizens because of their union status. Finally, the predecessor may be short of assets against which a judgment may be enforced.

2. The Corporate Regulatory Interest

States have general authority to regulate corporations operating within their boundaries. A successor statute passed under the auspices of a state's power to regulate corporations increases its chances of surviving federal preemption. In the recent decision *CTS Corp. v. Dynamics Corp. of America,* the Court held that a state statute which gave minority shareholders a greater voice in a tender offer for a corporation was not invalidated by the "dormant" Commerce Clause of the U.S. Constitution. In reaching its holding, the Court stressed that the regulation of corporations is primarily a state responsibility:

[iit] . . . is an accepted part of the landscape in this country to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A state has an interest in promoting

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42. See, e.g., Linder v. Inhalation Therapy Serv., Inc., 834 F.2d 306, 309-10 (3rd Cir. 1987) (under Delaware law, acquiring employer assumed individual employment contract with its salesman where acquiring employer failed to exclude contract from merger agreement and instructed salesman to continue soliciting customers).

43. See Archibald Cox, Law and the National Labor Policy 77 (1960); Crain-Mountney, supra note 8, at 1272.

44. See Crain-Mountney, supra note 8, at 1275 n.178.


46. U.S. Const. art. I, § 8, cl. 3. The Court has long held that certain state actions respecting interstate commerce are prohibited even absent congressional action. This power is often called the "dormant" Commerce Clause power.
stable relationships among parties involved in the corporations it
charters . . . 47

Significantly, although the Court conceded that the state law might lead to decreased economic efficiency in the national economy, it noted that "[t]he Constitution does not require the States to subscribe to any particular economic theory."48

II
THE SCOPE OF FEDERAL SUCCESSOR DOCTRINE

A. Overview of Federal Successor Doctrine

Under current federal successor doctrine, developed case-by-case by the Supreme Court,49 it is the successor's own actions that determine the extent to which it is required to uphold the predecessor's contract. The successor is not required to adopt a CBA, even if the CBA explicitly states that all successor companies will be bound by it.50 Instead, a successor need honor the predecessor's CBA only where facts indicate that it has assumed the collective bargaining agreement.51 Similarly, a successor has a duty to honor the predecessor's CBA if the new employer and

47. 481 U.S. at 91.
48. Id. at 92. Traditionally, corporate directors were thought to have a fiduciary duty to maximize the economic prosperity of the corporation for the shareholders' benefit. See A.A. Sommer, Jr., Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later, 16 DEL. J. CORP. L. 33 (1991). In the last decade, in response to the perceived excesses of hostile takeovers, states have attempted to use their corporate regulatory authority to articulate a new vision of what a corporation is and which interests it ought to serve. Successor statutes are only one manifestation of this vision. Perhaps an even more fundamental development is the adoption by thirty states of "other constituency" statutes. Id. at 35. These statutes either permit or require corporate directors to consider the interests of other groups in addition to shareholders in making corporate decisions. These groups include employees and the communities where the corporations are operated. Id. at 39. Given the unique responsibility of states to regulate corporations in the federal framework of our nation, this new vision of corporate regulation represented by "successor statutes" and "other constituency" statutes should be granted a significant amount of deference in considering federal labor law preemption.


Although a "successors and assigns" clause will not automatically bind a new employer to its predecessor's collective bargaining agreement, it may require the predecessor by implication to secure from the new employers an agreement to be bound by the contract. See, e.g., Howard Johnson, 417 U.S. at 258 n.3 (suggesting asset sale may be enjoined where it would breach successors and assigns clause in a collective bargaining agreement); I.A.M. Local Lodge 1266 v. Panoramic Corp., 668 F.2d 276 (7th Cir. 1981) (asset sale enjoined pending arbitration of union's claim that sale violated successors and assigns clause). But see Local 1115 v. B & K Investments, 436 F. Supp. 1203 (S.D. Fla. 1977) (injunction restraining sale denied despite presence of a successors and assigns clause where seller would be forced out of business without sale). For a general discussion of this topic, see Mace, supra note 6, at 109 n.20.
51. See NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. at 291; Mace, supra note 6, at 108-09.
its predecessor are alter egos, having essentially the same ownership, management, business purposes, operation and customers. If the successor is not an alter ego, and does not hire a majority of the old employees, the successor has the right to impose initial terms of employment without consulting the predecessor's union. However, if there is "substantial continuity" in the business operation between the new employer and the predecessor, the successor must bargain with the predecessor's union over the extent to which the successor's obligation survives under the predecessor's CBA. Typically, arbitration determines to what extent, if any, the obligations under the CBA survive. A successor can obviate any responsibility for bargaining with the union by discharging all the predecessor's employees.

B. Theoretical Underpinnings of the Supreme Court's Successor Doctrine

In \textit{NLRB v. Burns Int'l Security Services, Inc.} and \textit{Howard Johnson Co. v. Detroit Local Joint Executive Board}, the Supreme Court laid out the theory behind federal successor doctrine. Given the principles which the Supreme Court developed in formulating the successor doctrine, it is apparent why lower courts have refused to enforce a successor clause against a successor even where substantial continuity in business operations exists. Moreover, the Court's arguments in the two cases raise serious doubts about whether successor statutes can survive federal preemption.


In \textit{NLRB v. Burns Int'l Security Services, Inc.}, the Supreme Court was faced with the issue of whether the National Labor Relations Board ("Board" or "NLRB") had the power under the NLRA to bind a successor employer to the terms of a predecessor's labor agreement as if the successor were a signatory. The Board had found that the Burns

52. Mace, supra note 6, at 108-09.
53. Id.
54. "Substantial continuity" may exist where the new employer continues the predecessor's business. Indications of substantial continuity include, inter alia, acquisition by the new employer of much of the predecessor's real property, continuation of the predecessor's business operations in the same way (i.e. the plant equipment is the same, the same employees are doing the same work, the successor employs the same supervisors), and perpetuation of the product line. Id. at 107.
55. Id. at 107-09.
56. Id. at 108.
59. See Bartenders & Culinary Workers Local 340 v. Howard Johnson Co., 535 F.2d 1160 (9th Cir. 1976); Emerald Maint., Inc. v. NLRB, 464 F.2d 698 (5th Cir. 1972).
60. 406 U.S. at 276. The Burns Court was also faced with the issue of whether the successor
Agency, a successor corporation, was bound to obey the provisions of the CBA. The Board believed that the stability of labor relations could be endangered if employees faced uncertainty in their bargained-for positions and the possible loss of advantages gained by prior negotiations. The Supreme Court disagreed with these arguments, and instead concurred with the Second Circuit that the Board's order binding Burns to its predecessor's CBA should not be enforced. The Court, in deciding that the Board could not mandate that Burns adopt the collective agreement, rested its decision on four rationales.

First, the Court declared that the fundamental premise of the NLRA is that "free opportunity for negotiation with accredited representation of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel." Consequently, the Board, which acts under the authority of the Act, may not order management or labor to agree to specific contractual terms.

The Court bolstered this argument by reference to Congress' 1947 decision to amend the NLRA by adding § 8(d), 29 U.S.C. § 158(d), which codified the duty to bargain. The Court stated that this "duty to bargain does not carry with it the duty to reach an agreement" and that § 8(d) was enacted in response to the Board's perceived drift from the goal of letting management and labor settle their own affairs. The Court resolved this issue in the affirmative.

The Board relied heavily on similar reasoning used by the Court in John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964) where the Court found that a successor has a duty to arbitrate the extent to which it is bound under the CBA with the predecessor's union. William J. Burns Int'l Detective Agency, Inc., 182 N.L.R.B. 348, 349 (1970). The Board specifically noted that the Court in Wiley declared that "a collective bargaining agreement is not an ordinary contract," but is an outline of the common law of a particular plant or industry. The Board argued that consequently a CBA is a special type of contract in which considerations of industrial stability outweigh the usual need for privity between a successor and a predecessor for successor liability to attach.

The Court quoted the legislative history of the NLRA to support its argument: [T]he present Board has gone very far, in the guise of determining whether or not employers had bargained in good faith, in setting itself up as the judge of what concessions an employer must make and of the proposals and counter-proposals that he may or may not make... [U]nless Congress writes into the law guides for the Board to follow, the Board...
own affairs. The Court found that § 8(d) indicated that the Board lacked authority to force parties to agree to either specific contractual terms or entire contractual agreements.

The Court's second argument was rooted in its understanding (or misunderstanding) of economic theory, and specifically in its concern that the mobility of capital be unimpaired. The Court feared that potential successors would be dissuaded from buying moribund businesses if they could not make changes in the corporate labor force and work conditions. A potential successor would purchase the predecessor only if it could avoid the same terms and conditions that had brought the predecessor to its knees. The transfer of capital on a national scale might may attempt to carry this process still further and seek to control more and more the terms of collective bargaining agreements.

Id. at 283 (quoting H.R. REP. NO. 245, 80th Cong., 1st Sess. 19-20 (1947)).

The Court's reliance on section 8(d) has been criticized by several commentators. Two commentators feel that the legislative history of section 8(d) is ambiguous, and since corporate mergers and takeovers were rare in 1947 when section 8(d) became law, "there is a great likelihood that successorship simply was not considered by the authors of section 8(d)." Nell Margolis, Note, Labor Law—Successor Employers—Duty to Honor Predecessor's Collective Bargaining Agreement—NLRB v. Burns Int'l Security Services, 14 B.C. IND. & COM. L. REV. 193, 195-200 (1972); see also Charles G. Bakalay & James S. Bryan, Survival of the Bargaining Agreement: The Effect of Burns, 27 VAND. L. REV. 117, 121 (1974) (language of section 8(d) directed at a union and employer facing each other across a bargaining table). Another commentator avers that the Court need not have interpreted section 8(d) to limit absolutely the remedial powers of the Board in light of Wiley. Note, Contract Rights and the Successor Employer: The Impact of Burns Security, 71 MICH. L. REV. 571, 576-78 (1973).

68. 406 U.S. at 283.

69. NLRB v. Burns Int'l Sec. Serv. Inc., 406 U.S. at 283. The Court also relied on its recent decision in H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970). In H.K. Porter, the employer adamantly refused to agree to a dues check-off clause in the CBA. Id. at 100-01. The Court agreed with the Board that the employer violated the good faith bargaining requirements of the Act by his refusal to bargain, but declared the Board's remedy—an order instructing the employer to agree to the provision—to be in error. Id. at 107. The Burns Court held that section 8(d) prevented the Board from granting such a remedy:

[While the Board does have power ... to require employers and employees to negotiate, it is without power to compel a company or a union to agree to any substantive contractual provision of a collective-bargaining agreement.

   * * *

The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract.


71. The Court's argument seems overstated (or perhaps more reflective of an era where management-labor relations were more adversarial). Admittedly, some purchasers may be scared away from purchasing a predecessor because of their antipathy towards unions and their wish to have free reign in restructuring the work place. However, in the majority of today's cases, labor obligations are not crucial issues in the purchase of a company. See Eileen Silverstein, The Fate of Workers in Successor Firms: Does Law Tame the Market?, 8 INDUS. REL. L.J. 153, 173 (1986) (empirical evidence indicates that labor obligations are not major considerations in corporate acquisitions). Furthermore, if a successor knows it will be obligated to the terms of the predecessor's collective
consequently be inhibited by successor liability for CBAs.\footnote{22}

Third, the Court reasoned that if the Board were given power to impose successor liability, the Board could circumscribe unions in the same manner as successor employers.\footnote{23} For example, a union which had granted concessions to a failing firm or had a modest contract with a small employer might find itself in the unenviable position of not being able to renegotiate the existing CBA with a large or economically successful successor.\footnote{24}

Fourth and finally, the Court buttressed its second and third arguments with the assertion that the congressional policy undergirding the Act is to let the parties determine their own bargaining equilibrium "by economic power realities."\footnote{25} The Court warned that "[s]trife is bound agreement, it will simply offer a lower price to the predecessor. See Jonathan L.F. Silver, \textit{Reflections on the Obligations of a Successor Employer}, \textit{2 Cardozo L. Rev.} 545, 578 (1981) for a similar point.

Supporters of the \textit{Burns} Court's logic might also suggest that contractual obligations in a CBA are difficult to evaluate, thus hindering potential sales. However, the relevant question then becomes whether CBAs are harder to estimate than any other corporate obligation of the successor. Arguably it is just as hard to put a dollar sign on the predecessor's other obligations as those in a labor contract.

\footnote{22. See Silverstein, \textit{supra} note 70. See also Bakaly & Bryan, \textit{supra} note 67, at 128-29 (arguing that not only does "common sense and practical experience" tell us that the mobility of capital is increased by the \textit{Burns} holding, but that the reasoning in \textit{Burns} applies equally to the Wiley duty to bargain).}

The Court's concern for the mobility of capital is slightly dissonant with the redistributive aspects of the Act. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 754 ("Of the ultimate goals of the Act was the resolution of the problem of 'depress[ed] wage rates and the purchasing power of wage earners in industry,' 29 U.S.C. section 151, and 'the widening gap between wages and profits,' 79 CONG. REC. 2371 (1935) (remarks of Sen. Wagner) thought to be the cause of economic decline and depression."). Unionization, itself, puts restraints on an employer's discretion and ability to use capital.

Notwithstanding this tension, given both that the NLRA was promulgated pursuant to the Commerce Clause, U.S. \textit{Const.} art. I, \textsection 8, cl. 3, and that one "purpose and policy" of the Act is "to promote the full flow of commerce," NLRA \textsection 1(a), the Court's reasoning holds insofar as the Act does not grant the NLRB such expansive remedial authority that it has a negative impact on the free flow of commerce.

\footnote{73. NLRB v. \textit{Burns Int'l Sec. Serv. Inc.}, 406 U.S. at 288. The Board argued that at the heart of the NLRA lay the promotion of industrial stability; it justified imposing successor liability because the drastic effect on employees' legitimate expectations would increase industrial instability. \textit{Burns Int'l Detective Agency}, Inc., 74 L.R.R.M. at 1100-01. The Court failed, however, to note that in light of this rationale the Board would not necessarily circumscribe the options of both the employer and the union.}

\footnote{74. NLRB v. \textit{Burns Int'l Sec. Serv. Inc.}, 406 U.S. at 288. While in theory this argument may be true, this Commentator believes it has little practical application. However, one respected academic has expressed the same sentiments as the Court. See Lawrence F. Doppelt, \textit{Successor Companies: The NLRB Limits the Options—and Raises Some Problems}, \textit{20 DePaul L. Rev.} 176, 177 (1971) ("[A] sophisticated successor recognizes that, when a union bargains, it wants more. Under normal circumstances, it would be naive to expect a predecessor's union to settle for less than its predecessor's contract, or even the same thing."). In 1992, however, most union employees in a takeover situation might be happy to forestall a "rollback" of wages and benefits by maintaining the status quo. This difference of opinion might be explained by the different economic and social atmosphere that unions experienced in 1971, the date of Doppelt's article.}

\footnote{75. NLRB v. \textit{Burns Int'l Sec. Serv. Inc.}, 406 U.S. at 288 ("The congressional policy manifest
to occur if the concessions that must be honored do not correspond to the relative economic strength of the parties.”

Moreover, the Court worried that the eventual success of the successor’s efforts to turn the predecessor company around would be hindered by the pre-existing terms of the predecessor’s CBA.

2. Howard Johnson Co. v. Detroit Local Joint Executive Board: Addressing the Successor Clause Problem

In *Howard Johnson v. Detroit Local Joint Executive Board*, the Supreme Court specifically addressed the question of the liability of a successor employer when the CBA between the predecessor and the union contains a successor clause. In this case, the union filed a § 301 suit to compel Howard Johnson, a successor, to arbitrate the extent of its obligations to the predecessor’s employees. The CBA between the

In the Act . . . enable[s] the parties to negotiate for any protection either deems appropriate, [and yet] allow[s] the balance of bargaining advantage to be set by economic power realities.”).

76. *Id.* at 288. The Court’s argument provides a fascinating theoretical structure for the NLRA. Namely, that the Act not only protects a union and an employer attempting to negotiate through use of economic weapons, but that industrial instability will occur if concessions do not correspond to the bargaining strength of the parties. Industrial peace can be secured in each particular workplace by management and labor negotiating to determine their own bargaining balance.

The Court did not indicate whether it was speaking solely to Board intervention or to state intervention as well. The Court’s argument is stronger when applied to the Board’s power than to a state’s.

Allowing the Board to compel agreement when the parties are unable to agree on an important issue would undercut the Act’s call for “private bargaining under government supervision of the procedure alone.” *H. K. Porter Co. v. NLRB*, 397 U.S. at 108. Moreover, allowing the Board to mandate CBA provisions would turn the staffing of the NLRB into a political football, with political parties attempting to capture the agency to pander to their constituencies.

When applied to state power, the Court’s argument is less convincing. As an empirical matter, it is difficult to assert that strife is fostered when weak unions are provided with a better bargaining balance through the democratic process (state law) than they could achieve by negotiation alone. If the Court’s argument is applied to state power, states would be unable to fulfill their traditional legislative role in the establishment of labor standards.

77. *NLRB v. Burns Int’l Sec. Serv., Inc.*, 406 U.S. at 288. The Court noted that the vast majority of CBAs have procedures to be utilized for filling open positions and that 92% of all CBAs place limits on the employer’s ability to discharge. Further, CBAs typically contain a long list of items which could hinder a successor’s efforts to reorganize a company, including wages, seniority rights, vacation privileges, job security provisions and work assignments. *Id.* at 388 n.9.

78. 417 U.S. 249 (1974). In *Howard Johnson*, the successor employer hired only nine of the predecessor’s fifty-three employees, none of whom were supervisors. The predecessor’s union asserted that this action constituted a “lockout” in violation of the CBA, and the union instituted an action under § 301 of the LMRA seeking an injunction.

79. The Labor Management Relations Act § 301, 29 U.S.C. § 185, authorizes suits for contract violations between an employer and a labor organization to be brought in any federal district court which has jurisdiction over the parties regardless of the amount in controversy and without regard to the citizenship of the parties.

Suits to compel arbitration, like the suit brought by the union in *Howard Johnson*, are based on a provision in the CBA compelling both sides to arbitrate differences. Most collective agreements contain such provisions. *BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS* 37 (12th ed. 1989) (“[A]rbitration is called for in 99 percent of the sample contracts.”).
predecessor and the union contained a successors and assigns clause.\textsuperscript{80} The District Court ordered the successor to arbitrate the extent of its obligations under the CBA, and the Court of Appeals affirmed. The Supreme Court reversed.

The Supreme Court dismissed the suit because the successor did not expressly or impliedly adopt the agreement and continuity of identity did not exist between the predecessor and successor.\textsuperscript{81} Declaring that "we do not believe that the fundamental policies outlined in \textit{Burns} can be so lightly disregarded[,]" the Court severely criticized the lower courts' position that \textit{Wiley} recognized federal courts' authority under § 301 to require successors to arbitrate absent continuity.\textsuperscript{82}

The Court stated in a footnote that the presence of a successors and assigns clause, while relevant, cannot bind a successor to the predecessor's obligation to the union.\textsuperscript{83} Unless continuity could be proven, a successor unwilling to negotiate with the predecessor's union could not be required to do so.\textsuperscript{84} The Court added that the union could have used the successor clause to enjoin the sale as a breach of contract by the predecessor employer.\textsuperscript{85}

3. \textit{Subsequent Circuit Court Decisions Correctly Determined That the Burns-Howard Johnson Rationale Prevents a Federal Court from Enforcing a CBA Against a Successor}

Neither \textit{Burns} nor \textit{Howard Johnson} directly answered the question of whether, given continuity, a federal court could enforce the predecessor's CBA on a successor where the CBA contained a successors and assigns clause. Subsequent circuit courts, however, have found that the rationale of \textit{Burns} forbids them from enforcing a CBA even on a true successor.\textsuperscript{86}

\textsuperscript{80} refusal to arbitrate constitutes a breach of the CBA, and federal district courts can and do issue injunctions ordering the intransigent party to arbitrate its differences with the petitioning party.

\textsuperscript{81} See supra note 2 and accompanying text for the definition and significance of a successor clause.

\textsuperscript{82} Id. at 255. The lower court's argument seems to have been that § 301, which authorizes federal courts to develop a federal common law regarding the enforcement of CBAs, gives greater latitude to federal courts to order a successor to arbitrate than the Board, which is limited by § 8(d).

\textsuperscript{83} Id. at 258 n.3.

\textsuperscript{84} Id. at 263-64.

\textsuperscript{85} Id. at 262.

\textsuperscript{86} See, e.g., Matter of Chicago, Milw., St. P. & Pac. R.R., 658 F.2d 1149, 1174 (7th Cir. 1981)
Despite protestations to the contrary, it is difficult to doubt that the logic of *Burns* and *Howard Johnson* prevents federal courts, in addition to the Board, from enforcing the predecessor's collective agreement on a successor whether or not substantial continuity exists. First of all, the Court in *Howard Johnson* disregarded the presence of a successor clause in discussing the authority of federal courts under § 301 of the LMRA to compel a successor to arbitrate. The Court emphasized that federal courts should look to the fundamental policy considerations outlined in *Burns* for guidance, while dismissing in a footnote the contractual expectations deriving from the CBA's successor clause.

Second, the policy considerations stressed by the Court in *Burns* and reiterated in *Howard Johnson* have almost as much force where there is substantial continuity as where there is not. Both cases relied heavily on the principle that the Board could not impose liability on a successor because a successor and the union have to determine their own "bargain-

( "We begin by noting the nearly unanimous rule of traditional federal labor law, that absent a near identity of employers and perfect continuity of a single enterprise, a court may not impose the substantive provisions of a collective bargaining agreement between a union and the predecessor employer upon a nonconsenting successor employer."); Bartenders & Culinary Workers Local 340 v. Howard Johnson Co., 535 F.2d 1160, 1162 (9th Cir. 1976). Quite consistent with *Burns* and *Howard Johnson*, courts have enforced the obligations under a CBA where the successor impliedly adopts by its actions the predecessor's contractual obligations. See NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. at 291. *See also NLRB v. Pine Valley Div. of Ethan Allen, Inc.*, 544 F.2d 742, 746 (4th Cir. 1976) (sufficient evidence of union recognition for NLRB to hold successor had adopted predecessor's CBA where successor continued remittances and deductions to union's welfare fund and continued negotiations with local's president).

87. *See, e.g.*, Lock Holmes, Comment, *Contractual Successorship: The Impact of Burns*, 40 U. Colo. L. Rev. 617, 629-31 (1973) (arguing that stability in industrial relations requires that courts enforce successor clauses); Crain-Mountney, *supra* note 8, at 1272-77 (arguing that stability in industrial relations requires a narrow interpretation of the *Burns* rationale, and that successor liability should exist where a successor employer takes over a company for a "profit motive").

Crain-Mountney draws an analogy between the court's disposition of the successorship cases and how courts have handled cases arising under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1171. *Id.* at 1278. The author asserts that a debtor-in-possession ("DIP") is analogous to a successor, in that it is a new judicial entity with its own rights and obligations, while the predecessor is analogous to the debtor. *Id.* at 1279. The comment argues that its "profit motive" test is similar to the balancing test used in bankruptcy to determine whether the DIP can reject the CBA. Similar to a DIP, a successor should be allowed to reject a CBA only when the rejection is critical to the survival of the debtor (the predecessor).

The bankruptcy analogy is flawed for several reasons. First, the DIP is responsible for submitting a plan of reorganization which at least partially pays off the obligations of the debtor; the successor clearly has no such obligation. Second, the concern that a refusal to accept CBA obligations arises from bad faith is much less where a successor purchases a company than when a company tries to reject its own CBA. Third, the *Burns* concern for the free transferability of assets applies with less force in bankruptcy, because the assets will either be liquidated to pay off creditors or used in the plan of reorganization.

88. *Howard Johnson v. Detroit Local Joint Executive Bd.*, 417 U.S. at 258; *see also supra* notes 81-83 and accompanying text.

89. *Howard Johnson v. Detroit Local Joint Executive Bd.*, 417 U.S. at 255, 258; *see also supra* notes 83-85 and accompanying text.
Moreover, both cases expressed an apprehension that binding successors would restrict the free transfer of assets.

Third and finally, if any part of Wiley still survives, it is the Court’s recognition that the strong “preference of national labor policy” is “for arbitration as a substitute for tests of strength before contending forces.” Arbitrators are generally skilled in the give-and-take of determining the obligations under a CBA, whereas courts function more as a blunt instrument. Under § 301, courts determine flatly that either a breach of contract exists or does not. Arbitration offers a better forum for arriving at a bargaining equilibrium with which both the predecessor’s union and the successor can live.

Burns and Howard Johnson provide only this comfort to those seeking federal court enforcement of a successor clause against a true successor: despite repeated assertions of the narrow reach of Wiley and the importance of Burns, neither Burns nor Howard Johnson explicitly prohibits federal courts under § 301 from enforcing a successor clause where substantial continuity exists. Commentators who criticize the circuit courts’ decisions, however, mistakenly rely on the Wiley vision of industrial relations that the Court specifically rejected in Burns and Howard Johnson.92

90. See supra notes 75-76, 81-82 and accompanying text.
92. See, e.g., Crain-Mountney, supra note 8, at 1272-73; Holmes, Comment, supra note 87, at 629-31.

The Court in Burns viewed a collective agreement as an agreement between parties who set their own balance of power by the use of economic weapons. NLRB v. Burns Int’l Sec. Serv., Inc., 406 U.S. at 288. In this vision, industrial peace was best preserved by letting the parties set their own balance. The Court rejected the view of the Board that a CBA is a ‘special sort of agreement,’ where considerations of industrial stability (as interpreted by the Board) were paramount. Id. at 285. See supra notes 62-63 and accompanying text.


An argument more in harmony with the current Court’s theoretical structure would posit that the successor adopted the predecessor’s bargaining position when the predecessor lowered the sale price of the company on the condition that the successor honor the CBA. Thus the successor is voluntarily assuming the predecessor’s bargaining position for the duration of the agreement. “Economic realities” have been served insofar as the successor “purchased” the obligation to honor the CBA.

However, the Burns Court indicated that the balance of power that the NLRA seeks to foster is a product of friction between the successor and the union. 406 U.S. at 277-81. A balance produced by a state statute would be an artificial balance, which would increase industrial instability over the long haul.
C. The Supreme Court’s Vision of Industrial Relations and Its Economic Policy Considerations in Burns and Howard Johnson Provide Strong Policy Rationales for Preempting State Successor Statutes

Burns and Howard Johnson were decided on grounds manifestly more broad than those necessary to decide the two cases. The Burns Court could have, but did not, rely solely on the legislative history of § 8(d) to prevent the Board from enforcing the CBA against the successor. Instead, the Court issued two arguments that are, in fact, policy conclusions about the nature of the Act. First, the Act requires parties to set their own bargaining equilibrium.93 Second, the free transfer of capital is an important consideration underlying national labor policy.94

Howard Johnson strongly reiterated both arguments as conclusive, declaring that the considerations prevent a federal court acting under the authority of § 301 of the LMRA from enforcing successor liability just as the Board is barred from acting under the NLRA.95 Conspicuously absent in the decision is reference to § 8(d). The Court could have, but did not, state that federal courts under § 301 are similarly prevented from acting because the Act does not compel either party to make a concession or agree to a proposal.

The Burns and Howard Johnson decisions suggest that the foundation of federal successor doctrine is rooted not in a particular section of the Act (§ 8(d)) but in policy conclusions about the fundamental nature of the Act. Consequently, while clearly preventing courts and the NLRB under the Act from mandating successor liability, the policies articulated by the Court in Burns and Howard Johnson may also prevent the states from enacting successor statutes.

III
ANALYSIS OF STATE SUCCESSOR STATUTES UNDER FEDERAL LABOR LAW PREEMPTION

A. Introduction: The Interaction of Federal Labor Law and State Law

Federal labor law preemption has been judicially created.96 In de-

93. See supra notes 75-76 and accompanying text.
94. See supra notes 70-72 and accompanying text.
95. See supra note 81-82 and accompanying text.
veloping the NLRA-LMRA, Congress did not address the extent to which federal law preempts state law.\textsuperscript{97} The Supreme Court has recognized that states have great authority under their police powers to enact laws which affect the lives, health, comfort and quiet of all persons.\textsuperscript{98} Moreover, the Supreme Court has frequently stressed that federal labor law is often interstitial to state employment law.\textsuperscript{99} Notwithstanding these ostensibly broad state powers, the Court has proven quite conservative in allowing states to regulate aspects of management-union affairs.

The conservative nature of the Court's view is clearly illustrated by the relative narrowness of the four exceptions to NLRA preemption doctrine. First, states may legislate where Congress has carved out exceptions to its intended preemption of state law via some sort of legislative action.\textsuperscript{100} Second, state laws may mandate that employers meet minimum labor standards applicable to union and non-union employees alike.\textsuperscript{101} Third, states may act where a "compelling state interest" is at

\textsuperscript{97} See Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180, 188, n.12 (1978) ("The [federal labor preemption] doctrine is to a great extent the result of this Court's ongoing effort to decipher the presumed intent of Congress in the face of that body's steadfast silence."); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 240-41 (1959) (quoting International Ass'n of Machinists v. Gonzales, 356 U.S. 617, 619 (1957)) ("[T]he statutory implications concerning what has been taken from the States and what has been left to them are of Delphic nature, to be translated by the process of litigating elucidation."); see also Linda D. McGill & Richard G. Moon, \textit{NLRA Preemption: The Free Play Doctrine in Metropolitan Life Insurance v. Massachusetts}, 11 EMPL. REL. L.J. 206, 207 (1985) ("In enacting the NLRA, Congress did not state explicitly whether and to what extent it intended to preempt state law, nor did it occupy the entire field of labor relations.").

\textsuperscript{98} Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 757 (1984) (quoting Motor Coach Employees v. Lockridge, 403 U.S. 274, 289 (1971)) ("[Federal courts] cannot declare pre-empted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions; obviously, much is left to the States."). See also DeCanas v. Bica, 424 U.S. 351, 356 (1976) ("States possess broad authority under their police powers to regulate the employment relationship to protect workers within the State. Child labor laws, minimum and other wage laws, laws affecting occupational health and safety . . . are only a few examples.")

\textsuperscript{99} See, e.g., Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987) ("Both employers and employees come to the bargaining table with rights under state law that form a 'backdrop' for their negotiations."); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 756 (where a state implements a minimum employment standard, federal labor law is interstitial, supplementing state law where compatible, supplanting it only when the purposes of the Act are prevented) (plurality opinion).

\textsuperscript{100} See, e.g., Baker v. General Motors Corp., 478 U.S. 621, 634 (1985) (deletion from congressional bills of prohibitions against payment of unemployment compensation to strikers indicated congressional intent to give states authority to make or not to make such payments); Brown v. Hotel Employees Local 54, 468 U.S. 491, 508-10 (1984) (Congress concluded in enacting the 1959 Landrum-Griffin Act that states would not be prevented from adopting different and more stringent qualifications for union officers); Malone v. White Motor Corp., 435 U.S. 497, 505 (1978) (Congress did not intend to preempt state laws regarding employee pension plans where explicit language of Welfare and Pension Disclosure Act authorized state law liability). This exception is associated with the bargaining process strand of NLRA preemption doctrine.

\textsuperscript{101} Fort Halifax Packing Co. v. Coyne, 482 U.S. at 19-23 (upheld Maine statute requiring employer to make a one-time severance payment in the event of plant closing, except where an
stake. Finally, states may legislate where the issues involved are of only "peripheral concern" to the purposes of the Act.

State successor statutes clearly do not fit under any of these exceptions. Because they apply only to unionized employees covered by a CBA, successor statutes cannot be classified as generally applicable minimum labor standards. The Court has so narrowly construed the "Congressional intent," the "compelling state interest," and the "peripheral concern" exceptions as to leave state laws like successor statutes outside their scope.

Despite these obstacles posed by Supreme Court holdings, state successor statutes remain difficult targets for preemption. Preemption questions invariably require a balancing of state and federal interests, and express contractual provision already provides for severance pay); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 754-58 (Massachusetts statute requiring minimum mental health coverage not preempted). This exception is associated with the bargaining process strand of the NLRA preemption doctrine.


103. Id. at 243-44. This exception is associated with the primary jurisdiction strand of NLRA preemption analysis.

104. Successor statutes apply only to unionized employees covered by a CBA. See also supra notes 21 and 27.

105. An interesting argument has been proposed that a Congressional policy in favor of successor statutes can be divined from two federal statutes requiring a successor company which continues a predecessor's federally funded project to maintain the wages and benefits of the predecessor's labor contracts. Jay D. Pimente, Successorship Clauses in Collective Bargaining Agreements, 1979 B.Y.U. L. REV. 99, 113-15. The two statutes are 41 U.S.C. § 353(c) (Government Service Contract Labor Standards) and 495 U.S.C. § 1609(c) (Urban Mass Transportation Labor Standards).

Further support for this argument might be found in the fact that railway employees in virtually every aspect of railroad restructuring enjoy full income protection for up to six years. See Daniel J. Kozak, Labor Protection in the Railway Industry, 34 LAB. REL. & PUB. POL'Y SER. 199, 506-07 (1989); see also Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 (1988). Similarly, the Civil Aeronautics Board ("CAB") has the authority to protect employee income through labor protective provisions ("LPP"), although since deregulation of the airline industry the CAB will issue an LPP only under "special circumstances." See Herbert R. Northrup, Labor Protective Provisions in the Airline Industry, 34 LAB. REL. & PUB. POL'Y SER. 555, 556, 566 (1989).

While these suggestions are provocative, this commentator believes that traditional labor law analysis would focus on the less nebulous Congressional intent provided by specific legislative action. See supra note 100. Moreover, even if these statutes hint at some Congressional intent in favor of successor statutes, each of the above industries for which Congress provided LPPs has some function directly affecting the public welfare. The application of this Congressional intent argument may consequently be limited.

106. This exception is strictly construed and is usually only given effect when domestic peace is threatened by acts of violence. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246-48 (1959). See also Linn v. United Plant Guard Workers Local 114, 383 U.S. 53, 67 (1966) (state remedy for malicious libel is not preempted in most cases).

107. The "peripheral concern" exception has been limited to controversies involving common law torts. See Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters, 436 U.S. 180 (1978) (state suit for union members' trespass not preempted); Farmer v. United Bhd. of Carpenters Local 25, 430 U.S. 290 (1977) (state suit for intentional infliction of emotional distress not preempted); Linn, 383 U.S. at 64, 65 (state suit for libel not preempted if actual malice can be proved).

108. Air Line Pilots Ass'n Int'l v. UAL Corp., 874 F.2d 439, 447 (7th Cir. 1989).
successor statutes present a number of weighty state interests that heretofore have been disposed of on narrow grounds by the Court. Furthermore, successor statutes present the unique question of whether a successor's purchase—by its very nature voluntary—can violate the Act. Since labor preemption is developed case by case, an analysis of successor statutes under federal labor preemption doctrines should prove fruitful.

The following three sections analyze state successor statutes under the two generally accepted strands of NLRA preemption doctrine, primary jurisdiction preemption and bargaining process preemption, as well as under the preemption doctrine of the LMRA, § 301 preemption.

("[R]ealistically, a judgment about [labor law] preemption requires a balancing of federal and state interests.")

109. See Archibald Cox, Recent Developments in Federal Labor Law Preemption, 41 OHIO ST. L.J. 277, 300 (1980) (criticizing preemption decision by the Court for failure to build a coherent and continuing body of law).

110. At one time, the Supreme Court gave indications that it was developing a fourth preemption strand, bargaining agreement preemption (Oliver preemption). Local 24, Int'l Bhd. of Teamsters v. Oliver, 358 U.S. 283 (1959) (state antitrust law preempted by NLRA where it prevented parties from including in CBA a minimum rental rate for trucks owned and operated by union drivers). However, this Commentator believes that although Oliver has not been given a formal funeral, the arguments used in and the holdings of recent Court decisions have indicated it has been laid to rest.

The Court, in recent years, has drawn away from the broad preemption rule articulated in Oliver that asserted a state may not "limit the solutions" on mandatory items of bargaining in collective bargaining. Accordingly, the "bargaining agreement" preemption will not be analyzed.

In Oliver, the Court asserted that a state may not "limit the solutions" on mandatory items of collective bargaining. Id. at 296. NLRA section 8(d), 29 U.S.C. § 158(d), requires both employers and unions to meet and negotiate in good faith about "wages, hours and other conditions of employment." These topics have become known as "mandatory subjects of bargaining" in the labor lexicon, and refusal to bargain on a mandatory subject of bargaining risks an NLRB order to bargain and a variety of sanctions for noncompliance. See NLRA § 10, 29 U.S.C. § 160. The Tenth Circuit in Lone Star Steel Co. v. NLRB, 639 F.2d 545 (1980) has upheld an NLRB order determining that a successor clause is a mandatory subject of bargaining. See Scjerven, supra note 1, at 583-86, for a discussion of the decision and its potential implications.

Recent Court decisions have indicated a retreat from this mode of analysis, primarily on grounds that Oliver preemption is so overbroad as to prevent a state from fulfilling its legislative function. See, e.g., Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20 (1989) ("the NLRA is concerned with ensuring an equitable bargaining process, not with the substantive terms that may emerge from such bargaining"); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753-54 (1984) (dicta in Oliver implying that states may not pass laws that interfere with the end result of bargaining unsound as NLRA contemplated states establishing minimum employment standards); New York Tel. Co. v. New York Labor Dept., 440 U.S. 519, 533 (1978) (laws of general applicability make a court less likely to preempt state action); Malone v. White Motor Corp., 435 U.S. 497 (1978) (holding that a state law establishing minimum pension standards was not preempted under Oliver because Congress "envisioned" such state legislation). See also Cox, supra note 109, at 298.

Lower courts that have recently had to address the Oliver preemption rationale have either distinguished it in light of Metropolitan Life, see Beckwith v. United Parcel Serv., Inc., 889 F.2d 344, 349 n.8. (1st Cir. 1989) (declaring that Oliver preemption would not preempt a state statute which prohibited employers from satisfying claims against employees through payroll deductions because Metropolitan Life allows a state to set minimum labor standards), or have tried (unsatisfactorily) to distinguish Oliver. Beckwith v. United Parcel Serv., Inc., 703 F. Supp. 138, 143, n.7 (D. Me. 1988), aff'd in part and rev'd in part, 889 F.2d 344, 349 (1st Cir. 1989) (Oliver does not require preemption of state law which prohibited employers from satisfying claims against an employee by payroll de-
B. Both the "Successor Clause" Statutes and the "Blanket" Successor Statutes Will Survive Primary Jurisdiction Preemption

1. Primary Jurisdiction Preemption

Congress created the NLRB in part to achieve national uniformity in labor policy and law. The primary jurisdiction preemption doctrine protects the NLRB's exclusive jurisdiction over activities that the Act prohibits or protects, or arguably prohibits or protects, through preemption of state law remedies. The rationale behind preemption doctrine is to avoid several different tribunals providing remedies for essentially the same types of conflict. The Supreme Court has accordingly held that the NLRB has exclusive authority to judge whether activity regulated by the states is protected or arguably protected by the Act's primary operative sections. Thus, if a litigant's cause of action under state law is identical to that which could be presented to the NLRB under the Act, NLRB primary jurisdiction will preempt the state law cause of action. The relevant inquiry under this test is whether there exists sufficient identity between the inquiries, injuries and remedies involved in the local and federal determinations.

111. Garner v. Teamsters, 346 U.S. 485, 490 (1953) ("Congress evidently considered that centralized administration of specifically designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.").
112. Id.
113. Id.
114. NLRA section 7, 29 U.S.C. § 157, grants employees the right to engage (or refrain from engaging) in collective activity. More specifically, section 7 guarantees employees the right to form, assist, or join labor organizations and to bargain through representatives of their choosing, and to engage in concerted activities to pursue bargaining goals.

NLRA section 8, 29 U.S.C. § 158, delineates activities designated as unfair labor practices. Section 8(a) provides that it is an unfair labor practice for an employer to interfere with rights guaranteed by section 7; to interfere with the administration of a labor organization; to encourage or discourage membership in any labor organization; to discharge or otherwise discriminate on account of employees' union activity or on account of their filing unfair labor practice charges or testifying about them; and to refuse to bargain collectively with representatives of the employees.

Section 8(b) states that it is an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of section 7 rights; to make an employer discriminate against an employee; to refuse to bargain collectively with the employer; to engage in secondary boycotts, jurisdictional strikes over work assignments, or strikes to force an employer to discharge an employee on account of his union affiliation, or lack of it; or to attempt to coerce the employer to pay monies for which services are not rendered.

116. Id.
2. **Analysis**

Successor statutes should not be preempted under the NLRA's primary jurisdiction preemption doctrine because these laws do not infringe on the NLRB's jurisdiction over activities that the Act protects or prohibits. The Act protects the right of employees to unionize and prohibits unfair conduct by either management or labor. Thus, the Act grants the NLRB jurisdiction to oversee the process of management-labor relations. Successor statutes neither regulate nor infringe on the NLRB's authority to oversee this process.

Primary jurisdiction preemption works most effectively and appropriately when applied to state laws which provide remedies that undercut § 7 or § 8 of the Act by supplementing or diminishing the economic weapons of either an employer or a union.\(^{117}\) Section 7 protects employees' collective bargaining activity.\(^{118}\) Since it is difficult to imagine how successor statutes threaten employees' rights to bargain collectively, § 7 provides no basis for preemption of successor statutes.\(^{119}\)

Scrutiny of state successor statutes under § 8, however, presents a much more complex analysis. Successor statutes may conflict with the duty to bargain in good faith established under §§ 8(a)(5)\(^{120}\) and 8(b)(3).\(^{121}\) Under § 8(a)(5), a union could file simultaneously both an unfair labor charge before the Board alleging that the successor failed to fulfill its duty to bargain under *Wiley*\(^{122}\) and a suit in state court for enforcement of the successor statute.\(^{123}\) Consequently, the state court would be considering the identical controversy coming before the

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117. The issue which successor statutes address is tangential to the thrust of either section 7 or section 8 of the Act. Section 7 guarantees the right of employees to engage in concerted activity. Sections 8(a) and 8(b), the "workhorse" subsections of section 8, delineate unfair labor practices for both the employer or the union. Successor statutes neither infringe on the right of employees to collectively bargain nor interfere with the duties or obligations which the Act places on the employer or the union.

118. See supra note 114.

119. The focus of section 7 is the protection of employees from employer interference with their rights to collective activity. See supra note 113. No such impediment is at issue with successor statutes, which, if anything, provide an incentive to join a union because they mandate that successors take over union contracts.

120. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees."

121. NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3), makes it an unfair labor practice for a labor organization or its agents "to refuse to bargain collectively with an employer."

122. Of course, the union could file suit only if continuity between the predecessor and the successor exists and the successor refuses to arbitrate about what obligations survive under the union contract. See John Wiley & Sons v. Livingston, 376 U.S. 543, 548 (1964).

123. Perhaps a better argument would note that if the Supreme Court had allowed the Board to impose successor liability in *Burns*, state successor laws would be preempted under the primary jurisdiction doctrine. The Board would definitely have jurisdiction to require a successor to assume the predecessor's CBA. Consequently, the Board would be focusing on the same inquiry, injury, and remedy as a state court.
That an identical inquiry, injury, or remedy could exist in both state court and before the NLRB would seem to run afoul of federal successor doctrine and *Burns*. Federal successor doctrine, and *Burns*, in particular, determine what the Board can or cannot obligate a successor company to do in light of the NLRB's powers under the Act. The *Burns* Court decided that the NLRB could obligate a successor to *bargain* with the predecessor's union when continuity exists, but *could not bind* the successor to the predecessor's CBA. State successor statutes attempt to do precisely that: bind the successor to the predecessor's CBA. Because the Board cannot enforce a state successor statute or even impose liability on a successor employer, the Board would have no jurisdiction over an action brought under successor statutes. This is because successor statutes are state laws which "ha[ve] no relevance to the Board's function." The inquiry, the injury and the remedy under successor statutes, therefore, differ from those that the Board could address.

As a practical matter, the question of the employer's duty under § 8(a)(5), moreover, is not likely to arise if the union has confidence that the successor statute is enforceable. The union will forego filing with the Board in favor of the more expansive remedy available in state court. Since the employer cannot enforce the duty to bargain against itself, it cannot file with the Board, and thus the Board's jurisdiction will not be invoked.

Finally, even assuming successor statutes present the same inquiry, injury, and remedy before a state court as they would before the Board, the basis for protecting the Board's jurisdiction is not as strong here as in

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124. *See*, e.g., Scjerven, *supra* note 1, at 595-96 (the primary jurisdiction doctrine preempts the Illinois successor statute because the union could ask for a determination before the Board that would be substantially the same as that available before a state court).

125. *See* *supra* notes 51-56.


127. This is analogous to the scenario presented in *Sears Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 202-03 (1978), where the union's picketing was arguably protected by section 7. The employer could not directly obtain a ruling by the Board as to whether the Union's trespass was federally protected. *Id.* Such a ruling could have been obtained only if the Union filed an unfair labor practice action against the employer's interference with the Union's section 7 right to picket peacefully on the employer's property. *Id.* Since the Union asserted it would leave only under compulsion of legal process, the employer filed suit in state court for trespassing. *Id.* The Court declared that the employer's conduct did not succumb to primary jurisdiction preemption: "[t]he primary jurisdiction rationale justifies pre-emption only in situations in which the aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or else induce his adversary to do so." *Id.*

Successor statutes touch on the employer's duty to bargain with the union under section 8(a). If a state court attempted to enforce a successor statute against a successor at the predecessor's union's bequest, the Union, not the successor (the aggrieved party), would be the appropriate party to invoke the Board's jurisdiction.
other situations. The Supreme Court has been principally concerned with state laws which supplement or supplant federal labor law remedies. But the federal successor regime is not remedial. Rather, it is a judicially-created, qualified duty on the successor's part to bargain with the predecessor's union in limited circumstances. It is a successor's actions—not the union's—which give rise to this qualified duty. Further, as Wiley points out, the primary rationale behind this qualified exception is the 'protection [of] employees [against] a sudden change in the employment relationship.'

Consequently, preemption of a state law on primary jurisdiction grounds because of the narrow federal successor regime seems unnecessarily severe. The successor regime is not crucial to the rights and obligations incorporated in the Act, but is a judge-made creation reflecting policies behind the Act designed to protect employees in limited circumstances. Successor statutes have nothing to do with what primary jurisdiction preemption protects, namely the Board's authority over the rules defining rights, privileges and duties in the negotiation and administration of CBAs and its ability to safeguard management's and labor's use of economic weapons or other forms of self-help.

Primary jurisdiction preemption rooted in § 8(b)(3), which imposes the duty to bargain on a union, makes even less sense. Conceivably, a successor employer, noting that it has a duty under Wiley to bargain with

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128. However, imagine that the facts are such that the successor obviously lacks substantial continuity with the predecessor, e.g., the successor merely bought the predecessor's assets. Could a state court determine successor liability in this case, where it arguably might not have had jurisdiction otherwise?

A regime wherein a successor has a duty to bargain only when substantial continuity exists but is forced to assume the obligations of the CBA only absent substantial continuity would seem incongruous.

Of course, such an extension of the existing successor regime would in reality either discourage the successor from buying the predecessor, since it would require it to assume obligations it was not prepared to assume, or it would encourage a successor to hire enough employees so "substantial continuity" would exist, thus placing itself beyond the reach of the state successor law.

129. See Garner v. Teamsters Local 776, 346 U.S. 485, 490-91 (1953) (Union's picketing in violation of section 8(b)(2) could not be basis for state action); Plankinton Packing Co. v. Wisconsin Empl't Relations Bd., 338 U.S. 953 (1950) (state of Wisconsin powerless to invoke its "Little Wagner Act" to grant employees remedies for an employer's conduct that was an unfair labor practice under federal law); La Crosse Tel. Corp. v. Wisconsin Empl't Relations Bd., 336 U.S. 18, 24-26 (1948) (attempt to apply New York's "Little Wagner Act" preempted by the potential for conflict with federal scheme).

130. Since the NLRA is silent as to whether a state can impose successor liability, there is no real issue as to whether successor statutes regulate or prohibit conduct subject to the NLRB's regulatory jurisdiction. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 748-49 (1984). Rather, the question of whether successor statutes are preempted seems to revolve around the issue of whether a state is interfering with policies implicated by the structure of the Act itself, such as freedom of contract. Such a question is more appropriately answered under the bargaining process preemption doctrine. Id.


132. Cox, supra note 109, at 296.
the union in certain situations, may allege that the Wiley rationale similarly requires a predecessor's union to bargain with it under § 8(b). The NLRB would therefore have jurisdiction over the union's refusal to bargain or its failure to bargain in good faith. But such an argument runs aground on the fact that the rationale behind the duty to bargain in the successor context applies only to the successor employer and not to the union. A predecessor's union has never been required to bargain with a successor employer.

It is important to mention one situation in which concern for the Board's authority may tip the balance in favor of preemption. Although state successor statutes may not directly conflict with the Board's responsibilities, they could interfere indirectly with the Board's jurisdiction over the duty to bargain. The duty of an employer under the NLRA is to bargain with the collective bargaining representative of the majority of employees in the unit. The representative has the right to bargain exclusively on the employees' behalf. When a successor company merges with or purchases a predecessor, the Board could rule that the predecessor's former employees are also merged into the successor company's present union. Since all successor statutes require the continuation of the predecessor's CBA, they could force the successor to commit the unfair labor practice of recognizing and bargaining with a minority union when a majority union is in existence. However, this situation seems likely to arise only in limited situations and, therefore, by itself provides an insufficient rationale for preemption in every situation.

133. See John Wiley & Sons v. Livingston, 376 U.S. at 549-50, where the peaceful settlement of industrial conflicts, the preference of national labor policy for arbitration, and the “protection [of] the employees from a sudden change in the employment relationship,” combined to create a duty in the successor to arbitrate claims based on the predecessor's agreement. Neither Wiley nor subsequent cases have addressed the issue of whether the predecessor's union has a duty to arbitrate with the successor about claims based on the predecessor's agreements. It is doubtful that the union has any such duty, given that Wiley was animated by a concern to protect employees.


135. The duty to bargain with the employees' agent under § 8(a)(5) imposes “the negative duty to treat with no other.” NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 44 (1937); see also NLRA § 9(a), 29 U.S.C. § 159(a).

136. See, e.g., McGuire v. Humble Oil & Refining Co., 355 F.2d 352 (2d Cir. 1966), cert. denied, 384 U.S. 988 (1966) (declaring that where NLRB merges predecessor's Union into successor's Union, successor does not have to arbitrate labor disputes under predecessor's CBA). See also Stove, Furnace & Allied Appliance Workers v. Gaffers & Sattler, Inc., 470 F.2d 860 (9th Cir. 1972), cert. denied, 411 U.S. 948 (1973); International Ass'n of Machinists v. Howmet Corp., 466 F.2d 1249 (9th Cir. 1972); Southern Conf. of Teamsters v. Red Ball Motor Freight, Inc., 374 F.2d 932 (5th Cir. 1967).

137. See supra notes 135-36 and accompanying text.

138. But note the potential disincentive for a company to purchase the predecessor if a successor statute legitimizes the establishment of two separate bargaining units. A potential purchaser may choose not to buy the predecessor rather than face the problems caused by two unions participating in collective bargaining.
C. Both the “Successor Clause” Statute and the “Blanket” Successor Statutes Will Succumb to Bargaining Process Preemption

1. Bargaining Process Preemption

Bargaining process preemption is based on the recognition that the NLRA’s central goal was to create the right for workers to organize, and to encourage organization by prohibiting employers from interfering with that right. Although the Taft-Hartley amendments to the NLRA weakened unions and their right to negotiate for collective bargaining, the central purpose of the NLRA remained to protect the rights of workers to organize and to bargain. “The theory of the Act is that free opportunity for negotiation . . . may bring about the adjustments and agreements which the Act in itself does not attempt to compel.” The right to bargain collectively does not entail the right to reach agreement. Instead, the Act leaves disputes about wages, hours of work, and other working conditions “to be resolved by the play of competitive forces.”

Bargaining process preemption doctrine, associated with the Supreme Court’s decision in Machinists v. Wisconsin Employment Relations Comm’n, proclaims that Congress, in enacting the NLRA, intended to preclude state regulation in areas left “to be controlled by the free play of economic forces [by management and labor].” In those areas, labor and management are to be allowed to find their own bargaining equilibrium. Consequently, attempts by state or local governments, as well as the NLRB and the judiciary, to control the means by which

139. Harry A. Millis & Emily Clarks Brown, From The Wagner Act to Taft-Hartley, 28-29 (1950). It is true that the NLRA had other goals expressly mentioned in its preamble. For instance, one of its ultimate goals was the resolution of “depress[ed] wage rates and the purchasing power of wage earners in industry.” 29 U.S.C. § 151. Another was “the widening gap between wages and profits.” 79 CONG. REC. 2, 371 (1935) (remarks of Sen. Wagner). However, these redistributive goals were to be obtained by the establishment of a procedure for more equitable private bargaining. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 754 (1984).


142. NLRA § 8(d), 29 U.S.C § 158(d) (duty to bargain in good faith “does not compel either party to agree to a proposal or require the making of a concession.”).

143. S. REP. NO. 573, 74th Cong., 1st Sess. 2 (1935). See also 79 CONG. REC. 6184, 7574 (1935) (Sen. Wagner affirming that the Act encourages voluntary settlement of industrial disputes and that the NLRB would not usurp the role of free collective action.).

144. 427 U.S. 132, 140 (1976). It is debatable whether Machinists was the first case that announced bargaining process preemption. See, e.g., Local 20, Teamsters v. Morton, 377 U.S. 252, 258-60 (1964) (state court could not award damages for peaceful secondary picketing, despite fact that the activity was neither protected under § 7 nor prohibited under § 8 of NLRA). Nevertheless, subsequent Court decisions associate bargaining process preemption with its decision in Machinists. See, e.g., Baker v. General Motors Corp., 478 U.S. 621, 634 (1985).

the parties reach bargaining equilibrium frustrates the purposes of the NLRA. Bargaining process preemption prevents a state from imposing restrictions on economic weapons such as strikes or lockouts\(^{146}\) that interfere with the balance of power between labor and management.\(^{147}\) Both sides are to be left free to deploy their means of "economic warfare" during the course of negotiations to try to secure a favorable agreement.\(^{148}\)

2. Analysis

Successor statutes are an elusive target for bargaining process preemption. The NLRA protects both management's and labor's ability to resolve disputes by resort to economic weapons of self-help. However, as illustrated by the arguments both against and in favor of bargaining process preemption, it is very difficult to determine whether either party's economic weapons are actually restrained by successor statutes. The successor could be regarded as agreeing to waive economic weapons by voluntarily purchasing the predecessor (section "a" infra). One could also view a successor as being restrained from fully exercising its right to resort to economic weapons (section "b" infra). Absent the policy articulations in *Burns* and *Howard Johnson*, either interpretation would be legitimate, with no intellectually satisfying method based in the Act or precedent for distinguishing between the two views. However, the Supreme Court's decisions in *Burns* and *Howard Johnson* provide an interpretation of the Act which requires that successor statutes succumb to bargaining process preemption (section "c" infra).

a. Arguments Against Bargaining Process Preemption

Two arguments suggest that successor statutes should not fall to bargaining process preemption because they neither restrict economic weapons nor dictate an improper balance of power between management and labor. A third argument would note that since as a general rule only unionized workers are protected by written contracts, the states therefore have a unique interest in protecting them through legislation.

First, a successor who assumes the predecessor's CBA under a successor statute will pay a reduced purchase price to the predecessor company.\(^{149}\) Assuming that the successor is aware of the existence of the

\(^{146}\) See Lodge 76, Int'l Ass'n of Machinists & Aerospacve v. Wisconsin Empl't Relations Comm'n, 427 U.S. at 147.


\(^{148}\) *Golden State I*, 475 U.S. at 617; Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. at 724; New York Tel. Co. v. New York Lab. Dept., 440 U.S. at 540-44 (plurality opinion); id. at 546, 547 (opinions concurring in the result and concurring in the judgment).

\(^{149}\) See supra note 71.
state successor law and believes it can be enforced in court, the purchase price she pays for the predecessor's company will reflect the obligations she expects to assume under the CBA. Viewed in this context, the argument is that no economic weapons are being restrained, because the purchaser voluntarily assumes the predecessor's bargaining equilibrium, thus waiving her right to set a new equilibrium until the earlier of the expiration of the CBA or the duration mandated by the state law. If the successor wants to purchase a firm where she can restructure the labor force and work rules, she can simply shop elsewhere, presumably in another state or where the predecessor employs non-union workers.

Second, since the predecessor employer knows a successor statute will make his company less valuable on the market, the predecessor will try to compensate by resisting a union's attempt to increase wages and benefits at the negotiating table. Indeed, conventional wisdom suggests that an employer might even try to "rollback" union wages and benefits to make the company's market value increase, especially if a sale is contemplated. Given this predicate, successor laws may actually hurt unions insofar as some unions undoubtedly would prefer the current successor regime with no rollback over a more onerous successor regime which forces the employer to negotiate against any increases. The argument follows that since unions appear to be both helped and hindered, and the statutes do not really affect the balance of power between labor and management, they should not be preempted.

Finally, since most union employees are protected by written contracts, and non-union employees are not, a state is realistically prevented from passing a successor statute applicable to both union and non-union employees. Without a written contract there is nothing concrete for a successor statute to protect. Because unionized employees have a written contract, however, they have expectations that can be protected.

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150. Note that the Illinois successor clause statute and the proposed Minnesota and Washington successor clause statutes require the predecessor to put potential buyers of its company or assets on notice that its CBA contains a successor clause. See supra notes 18 and 23.

151. Since federal courts have enforced the obligations under a CBA where the successor impliedly adopts the predecessor's contractual obligations, see supra note 86, the argument can be made that similarly the successor impliedly adopts the agreement here. This argument may be especially strong for the Pennsylvania successor statute, which has an "opt out" provision through which corporations can avoid some or all of the anti-takeover law's provisions. Consequently, it can be argued that predecessor employers voluntarily submit their firms to the law, which removes any uncertainty about whether the CBA is to be factored into a sale.

152. Logic would also suggest that successor statutes create a strong incentive for an employer to negotiate for shorter contract periods, thus providing the employer with the flexibility to sell his company to a successor once the union contract has run its course. None of the three successor statutes mentioned—Delaware, Rhode Island or Massachusetts—hold a successor liable for a contract that has expired.

153. In Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), the state of Maine set a minimum level of severance benefits for employers who employ more than 100 persons. The Court, in arriving
fact that successor statutes may apply only to unionized employees should not foreordain preemption.\textsuperscript{154}

\textbf{b. Arguments Which Favor Bargaining Process Preemption}

One argument which favors bargaining process preemption would center on the potential that successor statutes have to disrupt the balance of power between management and labor.\textsuperscript{155} State successor statutes require a successor to assume the predecessor's CBA. Since the Act (§ 8(d) in particular) emphasizes that "neither party is compelled" to make a concession, state successor statutes could be seen as "upset[ting] the balance of power contemplated by the Act."\textsuperscript{156}

at its holding, rejected the argument that since union employees could bargain for higher severance benefits, the statute does not fall equally upon union and non-union employees. The Court found that any difference between the ease in setting severance benefit levels arises from the basic fact that a non-union employer is freer to set employment terms than a unionized employer. Similarly, it could be argued that state laws which treat unionized employers differently because of other basic dissimilarities are legitimate. For instance, without delving into the legislative intent of the 1959 Landrum-Griffin Act, it would seem that a state law which attempted to prevent a union from being coopted by organized crime should not be preempted. Brown v. Hotel & Restaurant Employees Local 54, 468 U.S. 491, 505-07 (1984) (legislative intent of 1959 Landrum-Griffin Act suggests that state law can survive preemption). Since it would be difficult to design a successor statute that protected both non-union and union employees in takeovers, it could be argued that the fact that a state law is not generally applicable to all employees should not be dispositive. But seeinfra notes 159-64 and accompanying text for the contrary argument.


\textsuperscript{155} The Supreme Court has stressed several times that a state has no more authority than the Board to upset the balance that Congress has struck between management and labor in the collective bargaining process. See Golden State I, 475 U.S. at 619; Lodge Int'l Ass'n of Machinists v. Wisconsin Empl't Relations Comm'n, 361 U.S. 132, 149-50 (1976); NLRB v. Insurance Agents, 361 U.S. 477, 497-500 (1960). The Supreme Court also has declared that "[f]or a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." Garner v. Teamsters Local 776, 346 U.S. 485, 500 (1953).

But these words of the Court do not seem directly relevant to state successor statutes. The question that must be asked is whether Congress envisioned the area of successor liability to be an "area of labor combat designed to be free," and if so, to what extent.

\textsuperscript{156} Scjerven, supra note 1, at 598. Scjerven's Note asserts that the "Illinois [state successor] statute regulates in an area Congress sought to leave unregulated." Id. Section 8(d)'s provision that the duty to bargain does not compel either management or labor to accept terms of a contract requires that successor statutes fall to bargaining process preemption. Thus, the Illinois successor clause statute would be preempted because it forces a successor to concede to the terms of a contract it did not sign.

This argument is flawed. First, bargaining process preemption does not have the specific statutory origin in section 8(d) suggested by the Note. Traditional bargaining process analysis has never grounded this preemption strand in section 8(d) or any other particular section of the Act. Rather, traditional analysis has centered on the policy concern of preventing states from restraining a party's economic weapons so the parties became unable to affect their own balance of power. See, e.g., Golden State I, 475 U.S. at 617; Machinists, 427 U.S. at 150. Second, section 8(d) has never been interpreted to restrict state power, only the Board's. Reviewing section 8(d)'s legislative history, Burns portrays the provision as a limitation on the Board. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. at 282-83. The implication is that it does not similarly restrict the states. Third, the very words
A stronger argument favoring bargaining process preemption would assert that state successor statutes could be seen as implicitly determining what is or is not an equitable bargaining process. Successor statutes place no duty on the union to adhere to the predecessor’s CBA. Successor statutes bind only the successor employer. Union employees therefore emerge as double winners under successor statutes: unions can choose either to require a successor to adhere to the predecessor’s agreement or to try to renegotiate a more favorable contract. The only party restrained from using bargaining weapons would be the successor employer.

Moreover, successor statutes as currently written protect only union employees, and thus may indicate a pro-union sentiment. Union em-

of section 8(d) imply a broad preemption policy reminiscent of the now defunct Oliver doctrine where the parties cannot be restricted from choosing the provisions of their CBA. See supra note 110. Such a policy would frustrate the traditional and legitimate police power of a state to regulate labor standards.

Scjerven’s section 8(d) argument would be totally remarkable except for a recent Supreme Court decision which Scjerven does not cite that could be read to imply that 42 U.S.C. § 8(d) limits not only the NLRB’s power but states’ powers as well. Golden State I, 475 U.S. at 616. However, I believe the Supreme Court’s reference to section 8(d) was not meant to indicate a change in traditional bargaining preemption analysis. Only two of the Golden State I briefs mention section 8(d), both with the apparent intent of reinforcing the general notion that Congress meant disputes to be resolved by the free play of economic forces, rather than asserting section 8(d) as a specific restriction on state power. Brief for Petitioner at 19, Golden State I (No. 84-1644); Brief for NLRB as Amicus Curiae at 13-14, Golden State I (No. 84-1644).

This interpretation is also supported by Golden State Transit Corp. v. City of Los Angeles, 493 U.S. 103 (1989) [Golden State II], where the Supreme Court had another opportunity to comment on its holding in the same case. The issue before the Court was whether the employer could seek damages under 42 U.S.C. § 1983 for the city’s interference with the employer’s freedom under the NLRA to use its economic weapons to settle a labor dispute. The Court characterized its holding in the first Golden State case as based on a traditional bargaining preemption analysis, and declared that although the permissible range of state activity is not specifically set forth in the Act (e.g., § 8), section 1983 damages can be awarded for rights that are implicit in the Act. Golden State II, 110 S. Ct. 444, 451-52 nn. 12 and 13.

157. Note that a successor statute which applies only to successor corporations makes sense if the rationale of the statute was to legislate a “poison pill” for hostile takeovers. Whether the union is also bound to the contract would be irrelevant to preventing a hostile takeover.

158. The foregoing analysis is distinct from the “reduced bargaining power” analysis that the Supreme Court has found unconvincing in reference to minimum substantive labor standards. See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 20-21 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753-55 (1984). Several pre-Fort Halifax articles argued that preemption was merited where a state plant closing law undercut the bargaining position of either the employer or the union. See Kyle B. Hettinger, Comment, NLRA Preemption of State and Local Plant Relocation Laws, 86 COLUM. L. REV. 407, 423-25 (1986), James L. MacDonald, Jr., State Plant Closing Laws: Preempted by the NLRA?, 10 EMPLOYEE REL. L.J. 241, 253 (1984). However, subsequent to these articles, the Supreme Court in Fort Halifax reaffirmed that where a minimum substantive labor standard is at issue, the fact that the state standard might undercut a party to a CBA’s position is irrelevant. The Court stressed that a party to a CBA should not be able to use the agreement to carve exceptions to state laws of general application. Fort Halifax Packing Co. v. Coyne, 482 U.S. at 21-22.

159. As the Introduction to this Comment indicated, it is not clear whether state laws which intend to benefit exclusively or primarily unionized employees are preempted under the NLRA,
ployees, however, are not the only employees who have long-term interests worthy of protection. Certain management employees have individual written employment contracts for a set term. Nonunion employees are not protected by the successor statutes, even though they arguably have a similar need for protection from the merger, sale, or other disposition of a company. Some state courts have also begun to enforce implied employment contracts for at-will employees when an employer has set forth employment practices and policies in a manual or handbook. At least one state has found that an employer's own conduct and personnel policies can give rise to an implied "oral contract." Thus, successor statutes are arguably underinclusive, as a successor statute could have been designed to protect nonunion written or implied oral contracts.

A final argument, applicable only to successor clause statutes, is that they interfere with the power of the predecessor employer to resist either including a successor clause in its CBA or, in lieu of this, making large concessions to avoid its inclusion. Particularly when these laws do not prevent either party from resorting to economic weapons. Nevertheless, such laws may be seen to raise questions under the bargaining process preemption doctrine, in that it allows a union to attain something it may not have been able to attain through negotiation. See Sears Roebuck v. San Diego County District Council of Carpenters, 436 U.S. 180, 197-98 n.27 (1978) ("While the distinction between a law of general applicability and a law expressly governing labor relations . . . is not dispositive for preemption purposes, it is of course apparent that the latter is more likely to involve the accommodation which Congress reserved to the Board. It is also evident that enforcement of a law of general applicability is less likely to generate rules or remedies which conflict with federal labor policy than the invocation of a special remedy under a state labor relations law.")

160. For instance, according to one survey of "Fortune 1000" companies, 48% of such companies protected senior management with employment contracts. John C. Coffee, Jr., Shareholders versus Managers: The Strain in the Corporate Web, 85 Mich. L. Rev. 1, 78 n.214 (1986) (citing Ward Howell study).

161. See Frank R. Lichtenberg & Donald Siegel, The Effect of Ownership Changes on the Employment and Wages of Central Office and Other Personnel, 33 J.L. & Econ. 383, 385 (1990) (empirical evidence, based on Census Bureau data, suggests that takeovers, leveraged buy outs, and voluntary divestitures result in reductions in managerial and administrative employees, both absolutely and in comparison to production employees); Berle, supra note 160, at 7 (noting estimates that 600,000 or more "white collar" management positions have been lost in recent years due to corporate restructurings).


165. See Scjerven, supra note 1, at 598. The Note's reasoning is counter-intuitive. Successor clause statutes do not require an employer to include a successor clause in its CBA, and pursuant to
c. Burns and Howard Johnson: Resolving the Uncertainty

The Court's decisions in Burns and Howard Johnson provide a context within which to determine whether bargaining process analysis preempts state successor statutes. The considerations in Burns and Howard Johnson require that state successor statutes succumb to bargaining process preemption.166

The Court in Burns emphasized that management and labor must develop their own bargaining balance. Imposing an artificial balance would threaten to increase industrial strife.167 State successor statutes obligate a successor to assume the predecessor's bargaining position. Thus, if state successor laws are allowed to stand, the next chance an employer will have to negotiate his own bargaining balance with the predecessor's union will be the termination date of the CBA. The successor meanwhile will have to live with the "industrial blueprint" crafted by the predecessor corporation. The Supreme Court maintains that this situation increases industrial strife between it and the predecessor's union by mandating an improper bargaining equilibrium between the two entities.168

It is readily apparent that the simple imposition of a CBA's terms section 8(d) of the Act, the employer does not have to make a concession. Conceding that the employer has the ability to simply say "no" both to the successor clause and to larger concessions in lieu of a successor clause, it is difficult to conceive of how the employer is in a worse bargaining position. In fact, the reverse may be true. Since state successor clause statutes just make successor clauses more desirable for a union to secure in its contract, the employer will be able to exact concessions from the union in wages, benefits and workplace rules in exchange for inclusion of a successor clause.

Moreover, almost precisely the same argument was rejected by the Supreme Court in Fort Halifax Packing Co. v. Coyne, 482 U.S. at 20-21. In Fort Halifax, a state statute mandated that all employers within the state provide severance pay to in-state employees, with the proviso that employees under a collective agreement could bargain for a different level of severance pay. The Court specifically rejected the employer's argument that the state statute succumbed to bargaining process preemption because the statute undercut the employer's ability to withstand its union's demand for severance pay.166 Successor statute supporters might contend that the power of the Board (Burns) under the NLRA and federal courts (Howard Johnson) under § 301 of the LMRA can be distinguished from the much broader, traditional power of states to regulate employment relations and corporate affairs. If Burns is read simply to declare that section 8(d)'s legislative history prevented the Board from ordering successor liability, it could be argued that the reasoning of the Court does not apply to successor statutes. Accordingly, because section 8(d) was not directed at the legitimate and traditional state power to regulate employment relationships, successor statutes are not barred.

This argument, however, is undercut by the fact that the Howard Johnson Court relied solely on policy considerations behind the Act. See supra notes 81-82 and accompanying text. The policy grounds that the Court found persuasive apply with equal force to the exercise of state police power.167 Burns, 406 U.S. at 288; supra notes 75-76 and accompanying text.

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167. The Supreme Court's concern with successor liability is based in part on the implicit assumption that a successor either does not or cannot know precisely what obligations it would assume under the CBA. NLRB v. Burns Int'l Sec. Serv., Inc., 406 U.S. at 290. Since past practice in a workplace can bind both union and management, this concern is not inaccurate. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 437 (4th ed. 1985).
on a particular firm by a state would fall to bargaining process preemption. Not only would the employer's economic weapons have been restrained, but also the balance of power between labor and management would have been artificially established. In short, labor and management would have been prevented from designing their own industrial blueprint. By imposing the predecessor's CBA on the successor, successor statutes prevent the employer from using "economic weapons" to hammer out an agreement both management and labor can abide by in a particular workplace. Consequently, a state which provides a corporation with the option to decide whether or not to apply the successor statute does not stand a better chance of surviving bargaining process preemption. The process of forming an agreement is crucial to the effective implementation of the Act's goals; because successor statutes interfere with this process, they must fall to this strand of preemption doctrine.

The Burns Court's economic policy considerations of the free transferability of assets and the mobility of capital point toward the preemption of successor statutes as well. However, these considerations sit uneasily with the independent and legitimate power of state legislatures to regulate corporations, since a state may pass laws which have negative effects on the flow of interstate commerce. A distinction can be made between a state's power to effect the mobility of capital and assets in interstate commerce (with which the Act arguably has almost no relation) and a state's power to affect, within the workplace of unionized employers, the mobility of capital and assets. State successor statutes restrict the successor in this latter sense by making it adopt the predecessor's workplace outline under the CBA and its duties under the Act. Burns asserts that the Act speaks against this.

D. "Blanket" Successor Statutes Survive § 301 Preemption, Whereas "Successor Clause" Statutes are Targets for § 301 Preemption

1. Section 301 Preemption

Even if state successor statutes pass over the primary jurisdiction and bargaining process preemption hurdles, they must still overcome preemption analysis centering on § 301 of the LMRA. Section 301 authorizes direct suits in federal court for the breach of CBAs and "authorizes federal courts to fashion a body of federal law for the enforce-

169. See, e.g., Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986) (Golden State I) (municipality's attempt to condition renewal of taxicab company's license on settlement of strike was preempted by the NLRA).
170. For an example of this type of statute, see supra note 35.
ment of these collective bargaining agreements."\textsuperscript{173} Thus, although state courts have concurrent jurisdiction over actions seeking enforcement of CBAs,\textsuperscript{174} state courts must apply federal § 301 law in deciding those claims.\textsuperscript{175} Moreover, § 301 law entirely displaces any state law cause of action for violation of a CBA.\textsuperscript{176} As the Supreme Court recently stated, "[s]tate law is thus 'pre-empted' by § 301 in that only the federal law fashioned by the courts under § 301 governs the interpretation and application of collective-bargaining agreements."\textsuperscript{177}

The principle policy justification behind § 301 is the desire for nationwide uniformity in the interpretation of CBA provisions.\textsuperscript{178} The concern for uniformity is so strong that the mere possibility that a body of substantive law might give rise to different meanings in a CBA justifies preemption.\textsuperscript{179}

Section 301 is also motivated by a desire to preserve the effectiveness of arbitration.\textsuperscript{180} Nearly all CBAs designate arbitrators as the adjudicators of contract disputes.\textsuperscript{181} If a state created a separate process for enforcing collective bargaining rights, an individual could sidestep available grievance procedures. The effectiveness of arbitration would inevitably be undercut.\textsuperscript{182}

The purpose of § 301 is not, however, to prevent a state entirely from devising laws that effect rights or obligations outside of the collec-

\textsuperscript{173} Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448, 451 (1957) (district court has power under LMRA to order specific performance of arbitration provision in CBA).

\textsuperscript{174} Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962) (state courts are not divested of jurisdiction by § 301 of LMRA).

\textsuperscript{175} See Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968) (an action arising under § 301 of LMRA is controlled by federal substantive law even though brought in state court).

\textsuperscript{176} Id. at 560-61.


\textsuperscript{178} Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 410-11 (1988). See also Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 103-04 (1962): The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might be invoked in enforcing the contract. Once the collective bargain [i]s made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation. Indeed, the existence of possibly conflicting legal concepts might substantially impede the parties' willingness to agree to contract terms providing for final arbitration or judicial resolution of disputes.

\textsuperscript{179} Teamsters Local v. Lucas Flour Co., 369 U.S. at 103-04.


\textsuperscript{181} See Bureau of National Affairs, Basic Patterns in Union Contracts 37 (11th ed. 1986) ("Arbitration is called for in 99 percent of the sample contracts.").

tive bargaining process. Rather, the purpose is to ensure that state courts do not interpret or enforce CBAs directly. Thus, "[a]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for § 301 pre-emption purposes."

2. Analysis

At first glance, it might appear that both types of successor statutes—blanket and successor clauses—survive § 301 preemption. The text of blanket successor statutes provide a definition of "successor." In enforcing a blanket successor statute, a court would not need to interpret the contract at issue to discern the appropriate meaning of "successor." Consequently, since there would be no need to interpret a collective agreement, any suit under a blanket successor statute would be independent of the contract and would survive § 301 preemption.

It is less clear that successor clause statutes would survive § 301 preemption scrutiny. It can, of course, be plausibly argued that a state court would not have to interpret a CBA in order to enforce a successor clause statute. The Illinois successor clause statute, like other successor clause statutes, defines "successor" apart from the CBA. The mere presence of a successor clause in a CBA would trigger the state law.

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183. The Court has worried that the parties to an agreement may try to circumvent provisions of a state law by contracting around it. Allis-Chalmers Corp. v. Lueck, 471 U.S. at 212.


185. See International Ass’n of Machinist & Aerospace Workers Local 437 v. United States Can Co., 441 N.W.2d 710 (Wis. 1989), where Wisconsin’s highest court did not find section 301 preemption to apply where a union challenged a leveraged buyout under Wisconsin’s version of the Uniform Fraudulent Conveyance Act, WISC. STAT. ANN. § 242.01 et. seq. (West 1991). Rejecting the argument that to determine the putative liabilities of the union, the Court would have to interpret the collective agreement, the Court asserted that for section 301 preemption to apply "there must be more than 'tangential' reliance on the collective agreement." 441 N.W.2d at 716-17. The Court noted that the definition of "creditor" in the UFCA was quite broad. The Court declared that the union’s claim was primarily an issue of state law, and a contrary holding would deny state law protection to aggrieved employees as creditors. "[I]t would be strange to deny workers in collective-bargaining units the benefits of the remedies afforded all other creditors by UFCA just because they are organized laborers." Id. at 718.

This commentator sympathizes with the Court’s line of argument and its variation on the § 301 preemption test because section 301 was not designed to frustrate the application of state laws which have little to do with the collective bargaining process.
This argument, however, is not wholly convincing. A "successor clause" is a term of art in labor arbitration. As evidenced by the decisions of arbitrators on the obligations brought about by a successor clause, it is inevitable that a court will have to conduct a multifaceted analysis into the parties' intent in agreeing to a successor clause in the CBA. Arbitration decisions indicate there are two types of successor clauses, each susceptible to differing interpretations which lead to different substantive results. One type of successor clause attempts to require the predecessor to condition the sale of the firm on the assumption of the CBA by the buyer. Some arbitrators have found such successor clauses to be mere "boilerplate," i.e., the successor clause did not show an intent of the parties to condition any sale to a successor on the continuation of the CBA. Other arbitrators have found similar "boilerplate" wording to be binding. Finally, some arbitrators have found the successor clause to bind a predecessor only where there is very specific contractual wording to that effect.

Other successor clauses attempt to obligate the successor to honor the provisions of a collective agreement. Some arbitrators have found that such clauses do not bind the successor. Other arbitrators have held that a successor must either honor the predecessor's entire CBA or certain provisions in it when the CBA contains a successor clause.

The different outcomes reached by arbitrators when examining the collective bargaining agreement... it is of no moment that the language of the agreement is ambiguous or as plain as plain can be."

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same types of successor clauses indicate that interpretation of the CBA would be essential before a state court could enforce a successor clause.\textsuperscript{191} The issues raised by successor clauses, as pointed out by arbitration decisions,\textsuperscript{192} are not only whether such clauses are enforceable but also to \textit{what extent} they are enforceable. Interpretation by state courts could result in a new line of precedent as to what "successor" signifies. Unions and employers in other states would then cite such early decisions as "convincing precedent" that dictate the outcome in their cases. National uniformity in interpretation of the meaning of "successor" would suffer accordingly.\textsuperscript{193} This is precisely the kind of result against which § 301 was designed to guard.\textsuperscript{194}

Moreover, allowing state courts to enforce successor clauses undercuts the position of arbitration as the 'preferred method' of dispute resolution in collective bargaining. The NLRA encourages informal dispute resolution, and labor arbitrators have experience in interpreting the nuances of CBAs and past relationships between employers and unions. Arbitrators must consider the actual words of the clause, the history of bargaining between the parties, and relevant arbitration decisions. Arbitrators are accomplished in reaching an accommodation with which both management and the union can live. "Successor clause" statutes place the resolution of a successor clause issue in a state court of law, which may not be nearly as adept at such interpretations.\textsuperscript{195}

\textsuperscript{191} In reality, many of the arbitrators in these cases held the buyer liable for only selected provisions of the collective agreement or, upon a finding of successor liability, referred the matter to the parties so that they could negotiate among themselves to what extent the agreement survived. Consequently, these arbitrations are in accord with the Court's pronouncements in Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 263 n.9 (1973) ("[t]here is and can be no single definition of 'successor' which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others."). As such, these cases are closer to the Burns Court paradigm of letting the parties structure their own business relations.

\textsuperscript{192} The problems of interpretation would be exacerbated in a case involving a partial sale or transfer of assets. Without interpreting the particular CBA and bargaining history, a state court could not decide if the successor clause applies to partial sales or transfers, or only the sale or transfer of the whole company.

\textsuperscript{193} Some labor arbitrators may look to the Illinois court's interpretation of the word "successor" as authoritative commentary as to the word's definition for the duty to bargain.

\textsuperscript{194} A possible situation that could enable the Illinois statute to survive section 301 preemption would unfold if the Illinois courts enforced "successor clauses" only after a labor arbitration had determined that it was the intent of management and labor to bind the successor to the union contract, and the "successor clause" was not "boilerplate." In this case, the concerns for uniformity in interpreting contractual language and for the preeminence of arbitration would be addressed. However, there is no indication in the statute that this is how the Illinois state legislature contemplated the statute working.
Successor statutes currently require a successor to assume directly an existing CBA. A successor statute which instead requires the successor employer to compensate financially any employee under a written or implied contract should achieve state goals and survive federal labor law preemption.

One problem with existing successor statutes is that they attempt to make the successor step into the predecessor's shoes. State laws intend a successor to become subject to the predecessor's CBA and through it the applicable federal duties and penalties of the NLRA. The purpose of these statutes is to protect the employees' jobs, as well as every facet of their relationship with the predecessor. However, Burns and Howard Johnson state that the successor and the predecessor's union must develop their own working relationship. Accordingly, a statute must allow the new bargaining parties to design their own "industrial blueprint."

By requiring a successor to compensate the predecessor's employees for the losses brought about by the predecessor's breach of an existing CBA, successor statutes would follow the law applicable to the successor's obligation to any of the predecessor's contracts. Moreover, a purely financial remedy would fit with the Court's position that the Act requires collective bargaining parties to forge their own working relationship. Once the employees have been compensated for their losses, the successor could either decide not to hire them or negotiate a new agreement with them. If an employee is hired by the successor or any other employer during the term of the contract, his or her damages would be mitigated, and the successor's obligations accordingly reduced. This re-

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196. See supra note 16.
197. See supra note 41. The Burns Court held that while successor employers may be bound to recognize and bargain with the incumbent union, they are not bound by the substantive provisions of a collective-bargaining agreement negotiated by their predecessors. NLRB v. Burn Int'l Sec. Serv., Inc. 406 U.S. at 284. In so holding, the Court distinguished situations where a successor employer has acquired a company by merger. Id. at 284-85, distinguishing John Wiley & Sons v. Livingston, 376 U.S. 543, 548 (1964) (where successor employer had acquired a company by merger, in appropriate circumstances, the successor employer may be required to arbitrate with the union under the agreement).

However, in light of its original decision in Wiley, the Burns Court's distinction that Wiley was a case dealing with state corporate law is misleading. State corporate law was not binding upon the Court in Wiley, and thus merely aided the Court's decision in Wiley.

Citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456-57 (1957), the Court in Wiley specifically noted in reference to the New York corporate law that "[s]tate law may be utilized so far as it is of aid in the development of correct principles [of national labor policy] or their application in a particular case but the law which ultimately results is federal." Wiley, 376 U.S. at 548.

It is not at all clear what signal, if any, the Burns court was trying to make by its allusion to Wiley and the effect of state corporate law on the NLRB. See Bakaly & Bryan, supra note 67, at 124.
gime in most cases should not place an added burden on the successor. The successor would simply pay a reduced price for the predecessor’s company to reflect the obligations it assumes.

A problem with this proposal is that Burns and Howard Johnson also indicated that the mobility of capital and the free transferability of assets were important considerations to their holdings, and thus arguably to national labor policy. This proposal will inhibit capital and assets in the national economy. Notwithstanding, these concerns do not merit preemption.

It is questionable whether the Supreme Court intended its economic concerns to restrict state power. Rather, a better formulation of the Court’s concerns is that the remedial power given to the Board under the NLRA and federal courts under the LMRA cannot inhibit what the Act was meant in part to promote—the free flow of commerce. Viewed in this light, the Burns and Howard Johnson economic considerations have little application, as state governments have authority to regulate employment and corporate law independent from the Act. Moreover, it is doubtful that this proposal will interfere with capital and asset mobility to the large extent that current successor statutes do. A successor under this proposal will not have to assume an unwanted union contract, but will have to assume it as a financial obligation. Since the successor will reduce its offering price to mirror these new financial obligations, there does not appear to be a significant disincentive to purchase the predecessor. It is only when the predecessor’s value is worth less than its contractual obligations that a problem would seem to arise.

A second problem with current successor statutes is that they apply only to employees protected under a CBA (union employees). Even though the great majority of non-union employees do not have written contracts, and courts have not universally accepted implied contracts as enforceable, such a law may indicate to courts that the legislation makes an impermissible judgment in management-labor relations. A law which forced the successor to pay all employees under written and/or implied oral contracts—not just CBAs—for their losses would stand a better chance of survival. It would provide further indication that the state was interested in uniformly protecting employees who suffer potential losses due to a takeover.

198. See supra note 72.
199. Thus, there is no concern that potential purchasers will avoid purchases because of their antipathy to unionization or interest in restructuring the workplace. See supra note 71.
200. See supra notes 159-64.
201. Admittedly, this proposal is more in the nature of window dressing, in that practically all unionized employees are covered by employment contracts and non-unionized employees are not. Although this Commentator believes the better argument is that successor statutes which apply only to unionized employees should survive preemption, see supra note 153, this proposal makes their enforcement more palatable because under this proposal it appears that a state does not intend to
CONCLUSION

Both the “blanket” successor statute and the “successor clause” successor statute are preempted by federal labor law. The former falls to bargaining process preemption and the latter falls to both bargaining process preemption and § 301 preemption.

The outcome easiest to predict is that successor clause statutes will be preempted under § 301 of the LMRA because a state court would have to interpret a CBA to enforce the statute. However, blanket successor statutes, which define what is a successor with no reference to the parties’ intent and do not need interpreting, will avoid § 301 preemption.

Whether each type of successor statute survives preemption under both strands of NLRA preemption doctrine poses identical issues and is a more difficult question. Successor statutes will not succumb to primary jurisdiction preemption for the following reasons. First of all, the statutes should not succumb to primary jurisdiction preemption because successor liability is not within the NLRB’s jurisdiction over conduct protected or prohibited by § 7 or § 8 of the NLRA. Moreover, the NLRB will not attain jurisdiction of a successor statute dispute, as unions are likely to forego any remedy before the Board in lieu of their state law remedy and a successor would have no way of invoking the jurisdiction of the Board. Finally, successor statutes are not laws that supplement or supplant federal remedies incorporated in the NLRA, but rather merely impinge on the narrow, judge-created federal successor doctrine. Since that doctrine was created to protect employees’ interests during the sale of a company, requiring preemption based on primary jurisdiction preemption unnecessarily penalizes the union employees because of the existence of this qualified doctrine.

Successor statutes, however, will succumb to bargaining process preemption because such laws infringe on the free collective bargaining between the successor and the predecessor’s union. Admittedly, the voluntary nature of the successor’s purchase presents a difficult analytical problem: how can a state law which leaves a prospective buyer free to purchase a company or to shop elsewhere be considered to interfere with the successor’s economic weapons? Burns and Howard Johnson resolve the difficulty by providing a context through which successor statutes may be examined. A consistent thematic thread throughout the two decisions is that the Act mandates that the successor and the union create their own “industrial blueprint.” If, as the Supreme Court suggests, labor stability is truly promoted by the friction of collective bargaining, state successor statutes prevent this vital process from occurring. These
Supremacy Clause Bullet

Statutes mandate that the successor step into the shoes of the predecessor and thus prevent each side from resorting to economic weapons to establish an initial bargaining equilibrium. As Burns highlighted, the chief concern is that the predecessor's decisions might be iminical to the interests of new management, causing strife between a successor interested in changing "business as usual" and the predecessor's union which is more comfortable with the status quo.

This Comment asserts that a state legislature could design a successor statute which would survive federal labor law preemption. Certainly, states have a number of weighty policy interests in protecting unionized employees under a CBA from a takeover, which should be respected absent a conflict with federal labor law. Takeovers concerned simply with stripping a company's assets can devastate a community, and the simultaneous loss of numerous jobs places on the state government external costs such as lost tax revenue and increased social spending. Moreover, states have an additional concern in protecting its citizens' contractual expectations. Finally, many states are attempting to move toward a corporate law that is more reflective of community needs and interests. Successor statutes are just one manifestation of this new trend, a trend that should be respected because of the federal nature of our Constitution and given the state's primary role in this area.

A successor statute which survives federal labor law preemption would apply to union and non-union employees alike, and focus on their economic expectations in an employment contract, not on preserving the workplace relationship set up by the predecessor and its union. The suggested statute would thus adhere to the requirement under Burns and Howard Johnson that both sides create their own industrial blueprint: the successor would have no responsibility to continue the predecessor's relationship with the union. Rather, the suggested statute would evaluate the monetary value of the predecessor's employment contract(s), and make the successor responsible for it or them. Making the successor responsible for the predecessor's obligations to both union and non-union employees would indicate the law was intended to work as a minimum labor standard of general applicability.

The suggested statute will interfere with the Burns and Howard Johnson concerns of the free transfer of capital and the mobility of assets. Some companies and corporations will undoubtedly not appear as attractive to a purchaser and will not be acquired under this statute. However, it is submitted that this will happen infrequently, when the predecessor's company is worth less than its obligations under its employment contracts. As a general rule, the predecessor will appear just as attractive to a purchaser, as the purchase price will reflect the financial obligations that the successor will assume under the predecessor's employment con-
tracts. States, moreover, as opposed to the NLRB and federal courts acting under the guise of the Act's authority, have independent authority to pass legislation which has negative effects on the mobility of capital and assets. The suggested statute also has the distinct advantage of tracking the general rule in Corporate law that a successor corporation assumes the predecessor's contractual obligations. No principled reason exists why federal labor law creates a union contract exception to this generally applicable law, apart from the requirement that parties in collective bargaining must establish their own bargaining equilibrium. The suggested statute adheres to that requirement.