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NOTES

STATE LEGISLATIVE ATTEMPTS TO MANDATE CONTINUATION OF COLLECTIVE BARGAINING AGREEMENTS DURING BUSINESS CHANGE: THE UNFULFILLED EXPECTATIONS AND THE PRE-EMPTED RESULTS

INTRODUCTION

Corporate business combinations\(^1\) are complex transactions. Both buyers and sellers must analyze numerous issues that may ultimately affect the business risks and financial returns of the resulting organizations. One such issue is how to allocate the various obligations of the transacting parties, and how this allocation will affect the execution of the transaction and the ultimate profitability of the resulting organizations. The potential survivor will, of course, conduct its own analysis and, as a result, may voluntarily assume some obligations and explicitly disclaim others. The technical form of the transaction is a key factor in this analysis because it may define the allocation of, or preclude the avoidance of, many ordinary obligations. If, for example, the transaction is structured as a merger rather than an acquisition many obligations are legally "assigned" to the survivor regardless of attempts to avoid them.\(^2\)

Labor obligations, however, are not ordinary obligations. They require a separate analysis that has typically followed the doctrines developed by the National Labor Relations Board (NLRB) and the

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\(^1\) This Note uses “business combination transaction,” “business combination,” or “combinational transaction” to refer to statutory mergers, consolidations, and asset sales.

\(^2\) See infra text accompanying note 12, notes 13-14 and accompanying text.

A business definition of a merger is “any transaction that forms one economic unit from two or more previous ones.” Thomas E. Copeland & J. Fred Weston, Financial Theory and Corporate Policy 677 (1988). In essence, the owners of these separate organizations pool their interests to form a single firm; and the previous owners of these firms remain as owners of the survivor. Dale A. Oesterle, The Law of Mergers, Acquisitions, and Reorganizations 38 (1991). A businessperson’s definition of an asset acquisition (or asset sale) is a “sale” in the lay sense of the word; after the transaction, the shareholders of the “seller” have no ownership interest in the “acquiror.” Id. at 38-39; Copeland & Weston, supra, at 678.

Legal definitions of a merger or an asset acquisition include transactions that strictly comply with state corporate code sections which specifically define and control them. This Note technically refers to mergers and acquisitions in the legal sense. Practically, however, the businessperson’s definitions may be perfectly suitable for understanding the issues in this Note.
federal courts\(^3\) to specifically address labor obligations during and after business combinations.\(^4\) These doctrines focus not on the technical form of the transaction but on the presence or absence of "continuity" in the employment relationship. These doctrines reject the "categorical" approach that is used to analyze other obligations, and attempt to balance the "rightful prerogative of owners to independently rearrange their businesses" with "some protection to the employees from a sudden change in the employment relationship."\(^5\)

Recently, however, some states, including Delaware, Massachusetts, and Pennsylvania, have enacted legislation that deviates from the balancing approach of federal doctrines. These statutes reject both the categorical and balancing analyses in favor of a mandatory continuation of collective bargaining agreements regardless of the circumstances or effects.\(^6\) This legislation represents a bold attempt to reverse the federal balancing approach, and, if allowed to control the allocation of labor obligations, will force significant and detrimental changes in the way corporations and businesses orchestrate combinational transactions as well as the ways in which our society is affected by such transactions.

This Note analyzes these recent state enactments. Section I first reviews the federal doctrines regarding collective bargaining agreements during business change.\(^7\) It then presents the recent state legislation and discusses how these enactments would change the analysis and effects of the federal doctrines.\(^8\) Section II analyzes

\(^3\) The NLRB and the federal courts interpret and apply various national labor acts, such as the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA). The NLRB functions as the primary administrator of the NLRA by receiving and prosecuting charges of unfair labor practices. See Bernard D. Meltzer & Stanley D. Henderson, Labor Law 69 (3d ed. 1985). If, after investigation, the NLRB decides that the charges form a sufficient basis for a formal complaint, it will formally prosecute the complaint. See Archibald Cox et al., Labor Law 108-09 (11th ed. 1991) [hereinafter Cox, Labor Law]. Hearings on these complaints are held before an administrative law judge appointed by the NLRB. Id. at 109. Unless exceptions are filed, the findings and recommendations of the administrative law judge are adopted by the NLRB and included in an NLRB order that dictates the actions the parties are to take. If exceptions are filed, the NLRB reviews them and then issues a formal opinion and a corresponding order. These orders are, at first, subject only to voluntary compliance. Id. at 111. However, if the parties do not voluntarily comply, the NLRB may petition a federal court of appeals for an enforcement order, and, if necessary, the Supreme Court will review the court of appeals' decision by writ of certiorari. Id. Through this process of hearings, orders, and review, the NLRB and the federal courts work together to develop the federal doctrines concerning labor related obligations.

\(^4\) See infra notes 22-137 and accompanying text.


\(^6\) See infra notes 159-71 and accompanying text.

\(^7\) See infra notes 22-137 and accompanying text.

\(^8\) See infra notes 138-71 and accompanying text.
the underlying policies, the resulting effects, and the constitutionality of these recent state enactments. This section argues that legislatures should repeal these statutes because they fail to satisfy legislative intent and because they negatively affect employees, businesses and society. Further, Section II argues that courts should declare these enactments unconstitutional because they intrude on an area of federal power legitimately exercised by Congress under the National Labor Relations Act.

I

BACKGROUND

In planning for a business combination, acquirors must carefully consider the post-transaction duties and responsibilities flowing from the predecessors' obligations because these duties and responsibilities can easily develop into either very profitable assets or very costly liabilities. Acquirors may voluntarily assume these obligations if they somehow represent positive net present value investments. Alternatively, acquirors may attempt to explicitly avoid obligations if they perceive them to be costly, negative net present value liabilities. In certain situations, however, state law may prevent acquirors from avoiding these obligations and may assign them to the survivor by operation of law.

This legal assignment of ordinary obligations often depends on the technical form of the transaction. In a merger, for example, state corporate law typically assigns most, if not all, of the predecessors' debts, liabilities and duties to the survivor. In an asset sale, on the other hand, similar obligations are not assigned to the buyer unless the transaction falls within one of four general excep-
With respect to ordinary obligations, then, acquirors can predict their post-transaction liabilities solely on the basis of trans-
actional form. Collective bargaining agreements, however, are not treated as "ordinary contract[s]" by either the NLRB or the federal courts.

The exceptions to the general rule are those situations when (1) the buyer expressly or impliedly assumes the other company's debts and obligations; (2) the transaction is really a de facto merger; (3) the transaction was executed to fraudulently avoid obligations; or (4) the acquiror is a mere continuation of the seller, i.e., a reorganization. See Fletcher, Law of Private Corp., supra note 13, § 7122; cf. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973):

[The general rule of corporate liability is that when a corporation sells all of its assets to another, the latter is not responsible for the seller's debts or liabilities, except where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction was entered into to escape liability.]

These rules are "form-dependent" because their obligations hinge on the technical form of the transaction, i.e., merger versus acquisition. See supra notes 13-14.

John Wiley & Sons v. Livingston, 376 U.S. 543, 550 (1964). Though collective bargaining agreements (or labor contracts) are similar to ordinary contracts in that they define the signatory parties' relationship, the differences between the two are significant. For purposes of this Note, the most important distinguishing feature is that labor contracts are legal arrangements which regulate the tenure and terms of employment. They are not, however, contracts of employment. Cox, Labor Law, supra note 3, at 740.

Labor contracts, unlike ordinary contracts, usually do not develop out of a relationship of mutual self-interest; instead, they emerge from a hostile relationship compelled and controlled by law. Id.; see also Wiley, 376 U.S. at 550 (collective bargaining agreements are "not in any real sense the simple product of a consensual relationship"). Labor contracts also look forward to an indefinite period of continued dealing. They uniquely control the rights and duties of nonsignatories—the employees of some particular business. These rights and duties function as a general "code of regulations," rather than a mutual agreement regarding specific details. They continue to "evolve," even after formal execution through continued collective bargaining, grievances, and settlements. Cox, Labor Law, supra note 3, at 741; see also Wiley, 376 U.S. at 550 ("The collective agreement covers the whole employment relationship.") (quoting United States Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-79 (1960)).

Labor contracts are also "peculiarly enmeshed in a framework of regulatory laws." Particularly enmeshed are: federal labor legislation (NLRA, LMRA, RLA, etc.), decisions and procedures of the NLRB and other administrative agencies, and state and federal court decisions. Cox, Labor Law, supra note 3, at 741; see also Wiley, 376 U.S. at 550 (A labor agreement "calls into being a new common law—the common law of a particular industry or of a particular plant." (quoting Warrior & Gulf, 363 U.S. at 578-79)). These characteristics of labor contracts make them sufficiently different from ordinary contracts for the NLRB and the courts to disregard ordinary contract principles when deciding labor issues. Instead, the NLRB and the courts turn to distinct doctrines that are based on "impressive policy considerations," such as balancing business needs against employee expectations and avoiding industrial labor strife. Wiley, 376 U.S. at 549-50.
Therefore, duties of the transacting parties with respect to the predecessors' labor obligations do not depend on transactional form. Instead, allocation of labor obligations has typically been determined in accordance with the substance-dependent doctrines of the NLRB and the federal courts.17 These federal doctrines employ case-by-case factual inquiries18 and rely not on the technical form of the transaction,19 but on the practical substance and findings of "continuation" of the employing enterprise and the associated employment relationships.20 This "substance over form" analysis explicitly rejects the rigid approach used to evaluate ordinary obligations, opting instead for a more equitable approach that balances the business needs of the employer with the social expectations of the employees.21 This background section reviews these federal doctrines and presents the recent state legislative attempts to supplant these federal doctrines with a more rigid state-by-state approach.

A. The Federal Doctrines With Respect To Collective Bargaining Agreements

In general, courts categorize corporate acquirors, for purposes of labor obligations,22 as successor employers, continuing employers or completely separate employers.23 The labor relations obligations following a combinational transaction differ for each category. Under the federal doctrines, successor employers must recognize and bargain with the predecessors' unions only if they hire a majority of their employees from the predecessors' work forces.24 Successor employers do not, however, have to assume the substantive provisions of the predecessors' collective bargaining agreements unless they explicitly or impliedly choose to do so.25 Continuing

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17 These doctrines hereinafter are referred to as the "federal doctrines."
18 See Fortress Pennsylvania, MERGERS & ACQUISITIONS, Mar.-Apr. 1990, at 22 ("Preservation of contracts after acquisitions traditionally is a complex legal issue that often is decided on a case-by-case basis.").
20 See infra notes 103-25 and accompanying text.
21 See infra notes 126-37 and accompanying text.
22 "Acquirors" in this Note includes survivors of a merger or consolidation as well as acquirors in an asset acquisition.
24 See infra notes 81-87 and accompanying text.
25 See infra notes 51-80 and accompanying text.
employers, and comparable "alter egos" of the seller, must always recognize and bargain with the union and assume the substantive terms and conditions of the predecessors' collective bargaining agreements. When successor, continuing employer, or alter ego status is not warranted by the factual situation, new employers are considered to be separate employers by default. Separate employers do not have to recognize or bargain with the predecessors' unions and are not required to assume substantive provisions of the predecessors' labor agreements.

1. The Successorship Doctrine

The successorship doctrine is the most detailed and complex of the federal labor obligation doctrines. Thus, this section devotes particular attention to reviewing the criteria and effects of the successorship doctrine. After presenting the factual findings required by the NLRB and the courts to impute successor status, this section reviews the effects that such successor status has on labor obligations arising in and from business combination transactions. Finally, this section establishes that successorship findings and requirements do not depend solely on transactional form.

a. Successorship Criteria

Successorship analyses focus on "continuity" of the overall employment relationship. A new employer is considered a successor if the employment environment and relationships existing after a business combination transaction closely resemble those that existed prior to the transaction. In Fall River Dyeing & Finishing Corp. v. NLRB, for example, the Supreme Court held that a new employer will be considered a successor to the previous employer if the employees would "understandably view their job situations as essentially unaltered" because of the "substantial continuity" existing between the preacquisition and postacquisition enterprises.

In Fall River, the Sterlingwale Corporation operated a textile dyeing and finishing plant. The corporation experienced financial difficulties in the late 1970s and early 1980s and in February,

26 See infra notes 102-23 and accompanying text.
27 Id.
28 "[I]n some cases changes to a business that is acquired through a stock transfer may be so great that the resulting business is not even a 'successor.'" EPE, Inc. v. NLRB, 845 F.2d 483, 490 (4th Cir. 1988) (citation omitted).
29 Id. at 487.
31 Id. at 46.
32 Id. at 45.
33 Id. at 30-31.
1982, laid off all its production workers. In the late summer of 1982, the company went out of business and assigned many of its assets to its creditors. Its remaining assets were disposed of at a liquidation auction, with the Fall River Dyeing & Finishing Corporation purchasing many of these assets. In September of 1982, Fall River used these assets to commence textile dyeing and finishing operations very similar to Sterlingwale's previous operations. To run these operations, Fall River hired some of Sterlingwale's previous employees, but refused to recognize or bargain with their old union. In response, the union filed an unfair labor practice charge alleging that Fall River's refusal to bargain was a violation of certain National Labor Relations Act provisions.

The Court held that Fall River was Sterlingwale's successor because of the substantial continuity between it and Sterlingwale. This continuity resulted from seven factors that remained essentially unchanged between the two enterprises: the essential business in which they were involved; the employees' jobs; the working conditions; the supervisors; the machinery, equipment, and methods of production; the manufactured product and offered services; and the respective body of customers. In particular, Fall River employees worked on the "same machines" that they had worked on for Sterlingwale and were supervised by the same supervisors that had supervised them at Sterlingwale. Additionally, Fall River did not introduce new product lines and operated many of the same production processes as Sterlingwale. In sum, the Court found that Fall River was Sterlingwale's successor because of the "substantial evidence" of enterprise continuity.

This generic type of successorship, however, arising merely from enterprise continuity, does not by itself demand that pre-existing labor obligations be assigned to the successor. Obligations of the successor relating to collective bargaining agreements depend on the continuity of the whole employment relationship, including

34 Id. at 31.
35 Id. at 32.
36 Id.
37 Id.
38 Id. at 33.
39 Id. at 34.
40 Id. at 46.
41 Id. at 43 (citing NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272, 280 n.4 (1972); Aircraft Magnesium, 265 N.L.R.B. 1344, 1345 (1982), enforced, 730 F.2d 767 (9th Cir. 1984); Premium Foods, 260 N.L.R.B. 708, 714 (1982), enforced, 709 F.2d 629 (9th Cir. 1983)).
42 Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 44 (1987).
43 Id.
44 Id.
both enterprise continuity and work force continuity. In Fall River, for example, the court found substantial continuity between both the enterprises of Sterlingwale and Fall River and the work forces of Sterlingwale and Fall River.

Finding work force continuity, however, depends on a different degree of continuity than does enterprise continuity. Whereas enterprise continuity exists when the two enterprises are essentially the same, work force continuity exists not when its work force is essentially the same as the predecessors’ but when the new employer hires merely a majority of its employees from the predecessors’ work force. In this situation, a court applying the successorship doctrine will deem the previous bargaining unit to have sufficiently retained its substantive form, such that there exists "substantial continuity in the identity of the work force." Upon finding both substantial work force continuity and essential enterprise continuity, courts conclude that employees could reasonably view their job situations as "essentially unaltered." Thus, in the view of the courts, the previous bargaining unit should remain an

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45 See G.W. Hunt, 258 N.L.R.B. 1198, 1200 (1981) (Even though all the other criteria were satisfied, successorship did not attach since only four of the successor’s nine employees were hired from the predecessor’s workforce); Cohen, supra note 23, at 5 ("The fact that a new employer hires a majority of its employees from the predecessor is a crucial requirement that must be satisfied to find successorship."); cf. NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464-65 (9th Cir. 1985) (Work force continuity, though critically important, is insufficient by itself to support a finding of successorship.).

46 Fall River, 482 U.S. at 46-52.


48 Saks & Co., 634 F.2d at 684 (quoting Nazareth Regional High School v. NLRB, 549 F.2d 873, 879 (2d Cir. 1977)); see also Stewart Granite Enter., 255 N.L.R.B. 569, 573 (1981) (the mere fact that only a portion of the old bargaining unit is transferred to a new owner does not defeat successorship obligations, as long as the transferred employees constitute a separate, appropriate unit and comprise a majority of the unit under the new operation).

In Fall River, the Supreme Court upheld the NLRB’s “substantial and representative complement” rule which defines when the new employer’s workforce will be analyzed to determine work force continuity. Id. at 46-52. The five criteria of this rule are:

1. whether the job classifications designated for the operation “were filled or substantially filled;”
2. whether the operation was in "normal or substantially normal production;"
3. the size of the complement [of workers] on the date of normal production;
4. the time expected to elapse before a substantially larger complement would be at work; and
5. the relative certainty of the employer’s expected expansion.

NLRB v. Jeffries Lithograph Co., 752 F.2d 459, 464 (9th Cir. 1985) (quoting Premium Foods v. NLRB, 709 F.2d 623, 628 (9th Cir. 1983)).

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appropriate representative of the employees, and the new employer
is deemed a successor employer of that "continued" bargaining
unit.50

b. Successor Employers Have No Duty to Assume Substantive
Provisions of Collective Bargaining Agreements

Although a court may deem the new employer a successor, the
federal successorship doctrine does not require the new employer
to assume the substantive provisions of the predecessors' collective
bargaining agreements. In John Wiley & Sons v. Livingston,51 the
Court held that mergers do not automatically extinguish or extend
the provisions of the predecessors' labor contracts because "a col-
lective bargaining agreement is not an ordinary contract governed
by ordinary merger doctrine."52 Instead, under "appropriate cir-
cumstances" the union and the new employer must arbitrate
whether the labor agreements should extend to the successor.53

In Wiley, Interscience Publishers, Inc. planned to merge into
John Wiley & Sons.54 Interscience and its union held premerger
discussions but could not agree on how the merger would affect
their collective bargaining agreement.55 Interscience then merged
into Wiley and Wiley subsequently refused to recognize the union,
asserting that the merger terminated the bargaining agreement.56
The union argued that the decision with respect to the agreement
should be submitted to arbitration57 and the Supreme Court agreed
because of the "appropriate circumstances" of the case. First, the
transaction was a merger, and under the general rule for mergers, a
survivor is liable for the contracts of the predecessors.58 Second,
the transaction was completed under New York law which provided
that "no 'claim or demand for any cause' against a constituent cor-
poration shall be extinguished" by a merger.59 Third, the operation
continued in substantially the same form despite the change in own-
ership.60 These three factors constituted the "appropriate circum-
cstances" and the Court ordered Wiley to arbitrate with the union
with respect to the bargaining agreements. Thus, the Wiley Court
held that substantive provisions of the predecessors' collective bar-

50 Id. at 41, 43.
52 Id. at 550.
53 Id. at 548.
54 Id. at 545.
55 Id.
56 Id.
57 Id. at 546.
58 Id. at 550 n.3.
59 Id. at 547-48.
60 Id. at 551.
gaining agreement do not automatically evaporate or extend to the successor. Instead, they merely pass to the findings of arbitration under "appropriate circumstances."

Cases subsequent to Wiley have narrowed its holding so that successors need not assume the substantive provisions of the predecessor's collective bargaining agreements unless they explicitly or impliedly agree to do so. In NLRB v. Burns International Security Services, Inc., the Wackenhut Corporation had a contract to provide plant security to the Lockheed Aircraft Services Company. This contract was about to expire, and Lockheed requested various companies to submit bids with respect to a follow-on contract. Lockheed selected Burns International Security Services, Inc. which assumed the responsibility for protection services. Burns chose to retain twenty-seven Wackenhut employees, without voluntarily assuming their collective-bargaining agreement, who with fifteen of Burns's own employees transferred in from other locations then comprised the Burns workforce serving Lockheed. Burns later refused to observe the terms of the Wackenhut collective-bargaining agreement and the union filed unfair labor practice charges with the NLRB. In resolving the dispute, the Supreme Court modified Wiley and held that a successor has no obligation to assume the substantive provisions of the predecessors' collective-bargaining contract when the successor neither agreed to, nor implied an intention to, assume the contract.

Two years later, in Howard Johnson Co. v. Detroit Local, Hotel and Restaurant Employees & Bartenders International Union, the Court reaffirmed the Burns holding and extended it to situations in which the predecessors' labor contracts contain successorship clauses. In Howard Johnson, the Howard Johnson Company purchased substantially all of the assets of a restaurant and a motor lodge owned by Grissom. The Grissom employees were covered by collective bargaining agreements that included generic "successors and assigns" clauses. Prior to official transfer of the operations, Howard John-

62 Id. at 274.
63 Id. at 275.
64 Id.
65 Id.
66 Id. at 275-76.
67 Id. at 276.
68 Id. at 281.
70 Id. at 258 n.3.
71 Id. at 250.
72 Id. at 251. The agreements "provided that they would be binding upon the employer's 'successors, assigns, purchasers, lessees or transferees.'" Id.
son explicitly refused to recognize both Grissom’s union and any obligations resulting from Grissom’s labor agreements.\textsuperscript{73} Subsequently, Howard Johnson hired only a small fraction of the Grissom employees\textsuperscript{74} and the union filed suit, alleging that Howard Johnson violated the terms of the Grissom collective-bargaining agreements by failing to hire all of the employees.\textsuperscript{75} The union requested the court to order Howard Johnson and Grissom to arbitrate the extent of their obligations to the old employees under the bargaining agreement.\textsuperscript{76} The Supreme Court, reaffirming \textit{Burns}, held that the union could not bind a successor to the substantive provisions of the contract, particularly when the new employer had explicitly refused to assume that obligation,\textsuperscript{77} and could not compel the successor to arbitrate the extent of its obligations to the former employees.\textsuperscript{78}

Recently, the Supreme Court, in \textit{Fall River Dyeing and Finishing Corp. v. NLRB},\textsuperscript{79} reaffirmed both \textit{Burns} and \textit{Howard Johnson} by holding that successors are not bound to the substantive provisions of their predecessors’ collective-bargaining agreements.\textsuperscript{80} Thus, even though successor employers may have some obligations with respect to their predecessors’ employment relationships, they do not have an obligation to assume the substantive provisions of collective bargaining agreements to which they were not a party.

c. \textit{Successors Have No Duty to Hire the Predecessors’ Employees but They May Have a Duty to Bargain With the Predecessors’ Unions}

Even though successors do not have to assume the predecessors’ collective bargaining provisions, they must bargain with the predecessors’ unions\textsuperscript{81} if the courts find “substantial continuity of identity in the business enterprise.”\textsuperscript{82} As the Court explained in \textit{Fall River}, this substantial continuity depends principally on the acquirer’s post-transaction hiring decisions:

\textit{[T]o a substantial extent the ... [obligation to bargain] ... rests in the hands of the successor. If the new employer makes a con-}

\textsuperscript{73} \textit{Id.} at 251-52.
\textsuperscript{74} \textit{Id.} at 252.
\textsuperscript{75} \textit{Id.} at 252.
\textsuperscript{76} \textit{Id.} at 252-53.
\textsuperscript{77} \textit{Id.}
\textsuperscript{78} \textit{Id.} at 265.
\textsuperscript{79} \textit{Id.} at 265-56.
\textsuperscript{80} \textit{Id.} at 266.
\textsuperscript{81} \textit{Id.} at 265.
\textsuperscript{82} \textit{Id.} at 265.
\textsuperscript{79} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{80} \textit{Id.} at 40.
\textsuperscript{81} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{82} \textit{Id.} at 40.
\textsuperscript{79} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{81} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{82} \textit{Id.} at 40.
\textsuperscript{79} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{81} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{82} \textit{Id.} at 40.
\textsuperscript{79} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{81} \textit{See supra} notes 30-46 and accompanying text.
\textsuperscript{82} \textit{Id.} at 40.
scious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of [the NLRA] is activated. This makes sense when one considers that the employer intends to take advantage of the trained workforce of its predecessor.\textsuperscript{83}

As the Court explained in \textit{Burns}, the source of the bargaining obligation is not the collective-bargaining agreement itself but the continued existence of a recognized bargaining unit.\textsuperscript{84}

The successorship doctrine also permits acquirors to choose whether to hire the predecessors' employees and on what terms. In \textit{Howard Johnson}, for example, the Court held that "the employees of the terminating employer have no legal right to continued employment with the new employer."\textsuperscript{85} Similarly, in \textit{Burns}, the Court held that "a successor employer is ordinarily free to set the initial terms" of employment without bargaining with the union unless it is "clear that the new employer plans to retain all of the [predecessors'] employees" and the bargaining unit would otherwise remain an appropriate representative of the employees.\textsuperscript{86} In \textit{Fall River}, the Court reaffirmed this holding, stating that a successor is "ordinarily free to set initial terms" on which it will hire employees.\textsuperscript{87} It is only after they are hired that new employees may organize another bargaining unit, or join the new employer's existing bargaining unit, to negotiate with the new employer over the terms of their employment.

d. \textit{Effects of the Form of the Transaction}

Transactional form usually affects the assignment of ordinary obligations,\textsuperscript{88} but commentators disagree whether transactional form influences the criteria and effects of the successorship doctrine.\textsuperscript{89} Some commentators argue that form still plays an important role in the analysis and that survivors under mergers and stock acquisitions have to assume obligations that purchasers under asset

\begin{footnotes}
\textsuperscript{83} Fall River, 482 U.S. at 41.

\textsuperscript{84} See Burns, 406 U.S. at 284-287, 292; see also Carter v. CMTA-Molders & Allied Health & Welfare Trust, 736 F.2d 1310, 1312 (9th Cir. 1984) ("The duty to bargain arises when 'the bargaining unit remains unchanged and a majority of the employees hired by the new employer are represented by a certified bargaining agent.'") (quoting NLRB v. Edjo, Inc., 631 F.2d 604, 606-07 (9th Cir. 1980)).

\textsuperscript{85} 417 U.S. at 264; see also id. at 261 ("'[A]n employer . . . 'who purchases the assets of a business [is not] obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be [voluntarily] assumed by the employer.'") (quoting Burns, 460 U.S. at 280 n.5.).

\textsuperscript{86} 406 U.S. at 294-95.

\textsuperscript{87} 482 U.S. at 40 (quoting Burns, 406 U.S. at 294).

\textsuperscript{88} See supra notes 12-14 and accompanying text.

\textsuperscript{89} Transactional form is controlling with respect to most obligations. See supra note 13 and infra notes 140-43 and accompanying text.
\end{footnotes}
acquisitions do not.\textsuperscript{90} Other commentators argue that transactional form is unimportant and that notions of continuity or competing equity control.\textsuperscript{91}

This argument focuses on the holdings of Wiley, Burns, and Howard Johnson.\textsuperscript{92} In Wiley, the Court's holding that mergers do not necessarily extinguish all rights under a labor contract implied that mergers would generate different labor obligations than would asset acquisitions.\textsuperscript{93} In Burns, however, the Court seemed to hold that it was improper to bind any new employer to the substantive terms of a collective-bargaining agreement.\textsuperscript{94} Thus, a narrow reading of these cases leaves room for argument that successorship obligations depend on transactional form. This analysis, however, disregards the substantive reasoning of the Court.

In Wiley, for example, the Court did not hold that the form of the transaction would determine the obligations of the new employer. Instead, it relied on a combination of factors that tipped the balance in favor of requiring the survivor to arbitrate with the union.\textsuperscript{95} If the form of the transaction were controlling, the Court would not have had to rely on the other factors that it considered important. Furthermore, it would not have decided that the successor's assumption of labor agreements was contingent on arbitration.

In Burns, the Court explicitly stated that both employers and unions “are free from having contract provisions imposed upon them against their will,”\textsuperscript{96} implying that all new employers are entitled to this “freedom,” regardless of the transactional form. Burns,

\textsuperscript{90} See Marvin Dicker, Sale of Assets, Mergers, and Acquisitions: A Management View, in \textit{Labor Law and Business Change: Theoretical and Transactional Perspectives} 172 (Samuel Estreicher & Daniel G. Collins eds. 1988) ("The purchaser of the assets, as opposed to the stock, of a business is normally not required to assume or adopt the seller's existing labor agreement."); see also Samuel Estreicher, Successorship Obligations, in \textit{Labor Law and Business Change}, supra, at 71 ("The federal labor law governing the successorship obligation of a purchaser of the assets of a business provides, with clarity unusual in this area, that a purchaser is ordinarily not legally obligated to assume the seller's collective-bargaining agreement.").


[In most cases, it will be competing equities, and not the form of the transaction, that will determine labor-related liabilities. . . . [T]he form of the transaction, logically and legally, should be irrelevant. . . . The successorship inquiry thus turns on the 'essential' nature of the new business, and the corporate formalities by which the change is accomplished should not signify [sic].]

\textsuperscript{92} See supra notes 51-77 and accompanying text.

\textsuperscript{93} See supra notes 51-52 and accompanying text.

\textsuperscript{94} See supra notes 61-68 and accompanying text.

\textsuperscript{95} John Wiley & Sons v. Livingston, 376 U.S. 543, 547-48, 550 n.3, 551 (1964); see supra notes 58-60 and accompanying text.

however, involved neither a merger nor an asset acquisition, but merely a "substitution" of a new entity to provide follow-on services to an expiring business contract. The Court's discussion of new employer "freedom," therefore, may be dicta with respect to actual mergers or acquisitions. The disagreement concerning the effects of transactional form hinges on the scope of the holding in Burns.

Subsequently, in Howard Johnson, the Court provided some clarification. The narrow holding of Howard Johnson was that an asset acquiror need not assume the substantive terms of the predecessors' collective bargaining agreements. The Court, however, explicitly stated that transactional form does not control. The Court distinguished Wiley by noting that the surviving corporation in Wiley had hired all of the employees of the disappearing corporation, whereas the acquiror in Howard Johnson had not. Thus, the Court implied that the major criteria of the successorship analysis is work force continuity, and that transactional form alone does not control successorship obligations.

2. The Continuing Employer and Alter Ego Doctrines

In most cases, the NLRB and the federal courts apply the successorship analysis described above, regardless of the type of transactions creating the new employer. In some situations, however, the courts do not apply the successorship doctrine, but instead deem the new employer to be a "continuing employer" bound to the terms and obligations of the predecessor's collective bargaining agreements. Under this theory, the survivor is, in effect, the "same corporation" as the predecessor, "unaltered" by the business transaction. In EPE, Inc. v. NLRB, for example, Echlin

\[97\] See supra notes 61-64 and accompanying text.
\[98\] See supra notes 69-77 and accompanying text.
\[99\] 417 U.S. at 257 ("We have recognized that ordinarily there is no basis for distinguishing among mergers, consolidations, or purchases of assets in the analysis of successorship problems. . . .") (citing Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182-83, n.5 (1973)).
\[100\] Id. at 258-59.
\[101\] See supra notes 45-48 and accompanying text.
\[102\] See also Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 44 n.10 (1987) ("[T]he way in which a successor obtains the predecessor's assets is generally not determinative.").
\[103\] EPE, Inc. v. NLRB, 845 F.2d 483, 487 (4th Cir. 1988); see also Fasman & Fischler, supra note 91, at 26 ("In these circumstances, the business continues unchanged and remains bound to existing collective bargaining agreements because there has been no 'essential change in the business that would have affected employee attitudes toward representation.'") (quoting Premium Foods, Inc. v. NLRB, 709 F.2d 623, 627 (9th Cir. 1983)).
\[104\] EPE, 845 F.2d at 488.
\[105\] Id. at 487.
\[106\] 845 F.2d 483 (4th Cir. 1988).
acquired EPE through a stock acquisition.\textsuperscript{107} After the acquisition, EPE continued as an independent corporate entity and retained its plant manager, plant employees, and supervisors.\textsuperscript{108} New machinery was subsequently added to the operations of EPE, and minor changes were made to the product lines, but the business operations were otherwise unchanged.\textsuperscript{109} The Court of Appeals for the Fourth Circuit held that Echlin was a "continuing employer,"\textsuperscript{110} not a successor, because the "new" employer was not a "new corporate entity" and no employees were terminated through any hiatus of operations.\textsuperscript{111} Essentially, the continuing employer doctrine represents a "substance over form" analysis, for which a mere change of "substantial ownership," through a stock sale, for example, does not invoke successorship analysis.\textsuperscript{112} Instead, the business is deemed "unchanged" and bound to the prior and continuing labor agreements.\textsuperscript{113}

Similarly, the courts disregard the successorship doctrine when the new employer is really an "alter ego" of the old corporation.\textsuperscript{114} The "alter ego" doctrine with respect to labor obligations arises when business combination transactions are undertaken not for some legitimate business purpose,\textsuperscript{115} but merely to disguise substantially identical ownership\textsuperscript{116} in order to avoid the obligations of

\textsuperscript{107} Id. at 486.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 488.
\textsuperscript{111} Id. at 489.
\textsuperscript{112} See Fasman & Fischler, supra note 91, at 25-26.
\textsuperscript{113} See EPE, 845 F.2d at 490.
\textsuperscript{114} "Alter ego" typically refers to the doctrine wherein a court disregards a corporate entity to hold an individual responsible for "acts knowingly and intentionally done in the name of the corporation." BLACK'S LAW DICTIONARY 77 (6th ed. 1990). With labor obligations, alter ego status is commonly applied when a new employer is "merely a disguised continuance of the old employer." C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350, 354 (1st Cir. 1990) (quoting Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942)).
\textsuperscript{115} See Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942); NLRB v. Tricor Products, 636 F.2d 266, 270 (10th Cir. 1980); NLRB v. Scott Printing Corp., 612 F.2d 783, 786 (3d Cir. 1979).
\textsuperscript{116} Three elements are required for alter ego status: complete domination by the survivor of the finances, policy, and business practices of the two enterprises; fraud or intention to perpetrate a violation of statutory or other legal duty; and resulting harm. United Steelworkers of America v. Connors Steel Co., 855 F.2d 1499, 1507 (11th Cir.) (citing United Paperworkers Int'l Union v. Penntech Papers, 439 F.Supp. 610, 618 (D.Me. 1977)), cert. denied, 489 U.S. 1096 (1988); see also NLRB v. Allcoast Transfer, Inc., 780 F.2d 576, 581 (6th Cir. 1986) (An intent to evade collective bargaining obligations is one relevant factor to be considered by the NLRB along with substantially identical management, business purpose, operation, equipment, customers, supervision, and ownership); but see J.M. Tanaka Constr., Inc. v. NLRB, 675 F.2d 1029, 1034 (9th Cir. 1982) (The central inquiry is common control of labor relations, not common ownership).
collective bargaining agreements\textsuperscript{117} or labor laws.\textsuperscript{118} In *Central States, Southeast and Southwest Areas Pension Fund v. Sloan*,\textsuperscript{119} for example, Sloan Excavating (Excavating) executed a collective bargaining agreement with Local 26 of the International Brotherhood of Teamsters, under which Excavating agreed to pay pension contributions to Central States on behalf of Excavating's three covered employees.\textsuperscript{120} Soon thereafter, Excavating felt that it "couldn't stay in business under that contract" and transferred the three employees, and some of its equipment, to a new company it had formed called Sloan Enterprises.\textsuperscript{121} The district court held that the continuity of the organizations and the admitted intent to evade labor obligations, even though reasonably motivated by a desire to save the company and the jobs of its employees, was enough to deem Sloan Enterprises the alter ego of Excavating.\textsuperscript{122} Like the continuing employer doctrine, the alter ego doctrine emphasizes substance over form and binds the "new" employer to all of the terms, conditions, and obligations of the "old" employers' collective bargaining agreements.\textsuperscript{123}

In summary, when the new employer is actually a mere continuation or alter ego of the old employers, the obligations of the old employment relationship continue to bind the successor. If the employer is not a mere continuation or alter ego, the courts apply the successorship analysis. When none of these categories apply, the court will consider the new employer a separate employer with no obligations to the predecessors' bargaining units.\textsuperscript{124}

\textsuperscript{117} See C.E.K. Indus. Mechanical Contractors, Inc. v. NLRB, 921 F.2d 350, 354 (1st Cir. 1990) ("The focus of the alter ego doctrine... is on the existence of a disguised continuance of a former business entity or an attempt to avoid the obligations of a collective bargaining agreement."); Central States, Southeast and Southwest Areas Pension Fund v. Sloan, 714 F. Supp. 943, 946 (N.D. Ill. 1989) ("The intent to avoid labor obligations is the linchpin of the alter ego doctrine.").

\textsuperscript{118} See Howard Johnson Co. v. Hotel & Restaurant Employees Int'l Union, 417 U.S. 249, 259 n.5 (1974) ("Such operation might have continued under... a disguise intended to evade this provision [of the NLRA].") (citing Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942)); NLRB v. Tricor Products, 636 F.2d 266, 270 (10th Cir. 1980).

\textsuperscript{119} 714 F. Supp. 943 (N.D. Ill. 1989).

\textsuperscript{120} Id. at 944-45.

\textsuperscript{121} Id. at 945.

\textsuperscript{122} Id. at 947.

\textsuperscript{123} See NLRB v. Tricor Products 636 F.2d, 266, 269-70 (10th Cir. 1980) ("A second employer who is found to be the alter ego of the first employer... is bound by an agreement between the union and the first employer."); Sturdevant Sheet Metal & Roofing Co. v. NLRB, 636 F.2d 271 (10th Cir. 1980) (Alter ego employers must recognize the predecessors' unions and adhere to and work under the predecessors' collective bargaining agreements); see also Cohen, supra note 23, at 23 ("Transactions... involving few operating changes are likely to obligate the buyer not only to recognize the union, but also to honor its contract.").

\textsuperscript{124} See supra notes 28-29 and accompanying text.
new employment relationship, where the employees could not view their situation as "essentially unaltered," the federal doctrines allow the new employer and employees to establish their own employment relationship that is truly appropriate and independently negotiated. The federal doctrines demonstrate the NLRB and the federal courts' position that some business combination transactions require "carryover" of labor obligations, while others do not. This ability of the federal doctrines to deal equitably with individual situations provides benefits that a more rigid, categorically-defined or broader-reaching statutory arrangement would not.

3. The Benefits of the Federal Doctrines

Application of the federal doctrines provides at least three major benefits to those directly involved and to society in general: an equitable balancing of economic and social interests, a promotion of national consistency, and an internalization of otherwise external labor concerns during acquisition negotiations. The Supreme Court, in its four major decisions in this area, focused on the need to balance the business prerogatives of employers with the expected protections of employees. Employers must be able to implement competitive business changes, while employees must be protected from employers' disingenuous efforts to avoid their contractual labor obligations. The federal doctrines provide employers with the freedom to conduct business combination transactions, even if doing so results in the discontinuation of substantive collective bargaining provisions. In return, however, the new employer may have to bargain or even arbitrate with the employees' union if the new employment situation effectively "continues" the previous employment environment and relationships. Furthermore, if the transaction is a fraudulent attempt to avoid labor obligations, or represents a mere transfer of ownership with no substantive change to the business, the alter ego and continuing employer doctrines

125 Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 46 (1987); See supra notes 30-31 and accompanying text.
126 See John Wiley & Sons v. Livingston, 376 U.S. 543, 549 (1964) ("The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship."); NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272, 285-88 (1972) (acknowledging the interest of the successor in freedom to structure its business, and the interest of the employees in continued representation by the union); Howard Johnson, Co. v. Hotel & Restaurant Employees & Bartenders Int'l Union, 417 U.S. 249, 264 (1974) ("[P]rotection afforded [to] employee interests in a change of ownership . . . is to be reconciled with the new employer's right to operate the enterprise with his own independent labor force"); Fall River, 482 U.S. at 39-40 (citing and reaffirming the premises of Wiley, Burns, and Howard Johnson, supra).
127 See supra notes 57-60, 68, 77-78, 80-102 and accompanying text.
will ensure continuation of the preexisting labor agreements, thereby protecting the employees. Thus, the employer can conduct legitimate business transactions, while the employees retain a balancing measure of protection.

The federal doctrines also provide a means for maintaining national consistency with respect to labor obligations by essentially disregarding state law or procedures that would alter the federal analysis. In Wiley, for example, the Court recognized the "background of state law" that seemed to require the continuation of contractual obligations, but held that "federal law...controls" and "state law may be utilized [only] so far as it is of aid in the development of correct principles or their application in a particular case." The federal doctrines that evolved after Wiley focused on continuity of the employment relationship and disregarded state law when that law would alter the continuity analysis. The result is uniform treatment of labor obligations throughout the nation. National uniformity in the establishment and treatment of labor obligations is one of the basic cornerstones of the NLRA, and the development and evolution of the federal doctrines have preserved this congressional design.

Another benefit of the federal doctrines is that they force employers to consider otherwise "external" labor interests in their business combination negotiations. In general, externalities may arise from business combination transactions that are structured to maximize divisible financial gains without accounting for the full social costs inflicted on outside interests. With respect to labor obligations, the primary parties to the business transaction could easily impose costs on third party employees by agreeing to a transactional structure that would result in lost jobs or wages, merely to make the deal more profitable or to provide extra, divisible "bounty." Labor would suffer from these externalities were it not for legal checks on this type of behavior. The federal doctrines minimize this behavior in four ways: by disregarding transactional form; applying the continuing employer doctrine to avoid inequitable discontinuance of labor agreements; applying the alter ego doctrine to prevent fraudulent avoidance of labor agreements; or applying the suc-

128 See supra notes 103-23 and accompanying text.
129 See Howard Johnson, 417 U.S. at 257 (quoting Burns, 406 U.S. at 286).
130 Wiley, 376 U.S. at 548.
131 Id.
132 See infra notes 311-14 and accompanying text.
133 See OESTERLE, supra note 2, at 156-57.
134 See supra notes 88-102 and accompanying text.
135 See supra notes 103-13 and accompanying text.
136 See supra notes 114-23 and accompanying text.
cessorship doctrine to prevent a disregard of employees' bargaining rights. The federal doctrines force acquirors either to continue the employees' bargaining agreement or to bargain with the employees' union when the equities of the transaction so demand. Since these mandates will eventually affect the overall profitability of the transaction, the acquisition parties are economically "forced" to bring labor considerations into their negotiations. Through this mechanism, the federal doctrines force employers to consider otherwise external labor interests during acquisition negotiations.

Thus, the federal doctrines provide workable and equitable methods for dealing with labor obligations during business combinations through a nationally consistent equation that balances the economic and social effects of business combinations and internalizes otherwise external labor interests. These doctrines equally consider both business and labor interests by recognizing the realities of both the business environment and the employment relationship. These benefits would be lost if the federal doctrines were abandoned for a more rigid approach.

B. State Law

Despite the benefits of the federal doctrines, some state legislatures and judiciaries have attempted to deviate from this approach. This section discusses two areas where the states have attempted such departures. First, this section analyzes older state-code merger statutes, and how these statutes have been used to analyze labor obligations in business combination transactions. Second, this section presents the most recent state legislative efforts to structure a new approach to labor obligations in business combination transactions and discusses how these statutes attempt to change the face of labor and acquisitions law.

1. State Merger Statutes and their Application to Collective Bargaining Agreements

After a merger, the survivor generally assumes most, if not all, of the predecessors' debts, contracts, and liabilities. Many states have codified versions of this rule, including New York, California, and the three states that have enacted the recent legislation.

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137 See supra notes 51-87 and accompanying text.
138 See infra notes 140-58 and accompanying text.
139 See infra notes 159-71 and accompanying text.
140 See John Wiley & Sons v. Livingston, 376 U.S. 543, 550 n.3 (1964) ("[i]n the case of a merger . . . the [survivor] is liable for the debts and contracts of the [predecessor].") (citing FLETCHER, LAW OF PRIVATE CORP., supra note 13, at § 7121 (perm. ed.)).
141 N.Y. BUS. CORP. LAW § 906(b)(3) (Consol. 1983).
142 CAL. CORP. CODE § 1107(a) (West 1988).
which is the focus of this note: Delaware, Massachusetts, and Pennsylvania.143 No state, however, has extended this principle to asset sales, and these transactions are still governed by the general rule of nonassumption and its associated exceptions.144

Prior to the full development of the successorship doctrine, some state courts broadly interpreted the merger statutes as applying to collective bargaining agreements just as they would apply to ordinary contracts and obligations. In *Fitzsimmons v. Western Airlines, Inc.*,145 for example, Western Airlines agreed to merge into American Airlines, and American announced that upon completion of the merger it would refuse to recognize Western’s collective bargaining agreement with the International Brotherhood of Teamsters.146 The union filed a complaint in the Delaware Chancery Court against both Western and American, seeking a declaratory judgment that its collective bargaining agreement would pass to American upon completion of the merger.147 The airlines moved to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted, arguing that American had no statutory duty to assume the agreement.148

In denying the motion, the *Fitzsimmons* court drew support from the narrow holding of the Supreme Court’s decision in *John Wiley & Sons v. Livingston*.149 In *Wiley*, the Supreme Court considered a New York merger statute to be one factor in its decision to compel arbitration over the survivor’s duty to assume a collective bargaining agreement.150 In *Fitzsimmons*, the chancery court noted that Delaware had a similar merger statute and, quoting the holding of *Wiley*, stated that “the disappearance by merger . . . does not automatically terminate all rights of the employees.”151 The Chancery Court held that Delaware’s “statute [was] broad and certainly [did] not exclude from its purview a duty arising from a contract with a union,”152 and

144 See supra notes 13-14 and accompanying text.
146 Id. at 684.
147 Id. Plaintiffs also sought damages and injunctive relief.
148 Id. at 684-85.
149 376 U.S. 543 (1964). See supra notes 51-60 and accompanying text.
150 Wiley, 376 U.S. at 547-48; see supra notes 51-60 and accompanying text.
151 *Fitzsimmons*, 290 A.2d at 685 (quoting *Wiley*, 376 U.S. 543, 548 (1964)).
152 Id. at 685.
denied the motion to dismiss.\textsuperscript{158}

The holding in \textit{Wiley}, however, does not support an argument that merger statutes mandate the assumption of labor agreements. Because the Supreme Court's decision relied on numerous factors, the most important of which was "continuity,"\textsuperscript{154} \textit{Wiley} stands for the proposition that such a statute does not control, but merely "suggests [that assuming the agreements] may have been fairly within the reasonable expectations of the parties."\textsuperscript{155} After \textit{Wiley}, the successorship doctrine came to rely on "continuity," rather than the presence or absence of a state statute, to determine subsequent labor obligations.\textsuperscript{156} The broad holdings of the Supreme Court in \textit{Burns}, \textit{Howard Johnson}, and \textit{Fall River} seem to reverse the holding of the Delaware Chancery Court in \textit{Fitzsimmons},\textsuperscript{157} and no courts have applied the merger statutes to collective bargaining agreements subsequent to the full development of the successorship doctrine.\textsuperscript{158} At this point in time, these statutes do not, and should not, factor into judicial decisions regarding the imposition of collective bargaining agreements onto unwilling survivors.

2. \textit{Recent State Legislative Developments}

Recently, three state legislatures have enacted provisions requiring new employers to assume the substantive provisions of the predecessors' collective bargaining agreements, regardless of "successorship" or "continuity."\textsuperscript{159} Delaware moved first when, in 1988, it enacted legislation mandating that "no merger, consolidation, sale of assets or business combination shall result in the termination or impairment of the provisions of any labor contract covering persons engaged in employment in this State and negotiated by a labor organization or by a collective bargaining agent or other representative."\textsuperscript{160} This legislation broadly encompasses the whole gamut of business transactions: "'Business combination' includes any merger, consolidation, joint venture, lease, sale, dividend

\textsuperscript{158} \textit{Id.} at 689.
\textsuperscript{154} \textit{Wiley}, 376 U.S. at 551; \textit{see supra} notes 51-60, 95 and accompanying text.
\textsuperscript{155} \textit{Howard Johnson Co. v. Hotel \& Restaurant Employees \& Bartenders Int'l Union, 417 U.S. 249, 257 (1974).}
\textsuperscript{156} Federal courts and the NLRB usually either disregard state law in this area or apply it only to the extent that it furthers what is considered to be "the right policy." \textit{See supra} notes 129-32 and accompanying text.
\textsuperscript{157} \textit{See supra} notes 51-102, 129-32 and accompanying text.
\textsuperscript{158} If these statutes were applied to collective bargaining agreements, they would arguably be pre-empted by the National Labor Relations Act (NLRA) under the authority of the Supremacy Clause of the U.S. Constitution. \textit{See infra} notes 276-325 and accompanying text.
\textsuperscript{159} These statutes are hereinafter referred to as "collective-bargaining provisions," "recent state enactments," "recent enactments," or simply "enactments."
exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) whether with a subsidiary or otherwise." 161 In 1989, Massachusetts enacted similar legislation, 162 and Pennsylvania recently followed suit by including such a provision in its now famous antitakeover package of 1990. 163 Both the Massachusetts and the Pennsylvania statutes include not only many of the transactions listed in the Delaware statute but also "any transfer of a controlling interest in such business operation." 164

Although these recent enactments seem similar to the general merger statutes, 165 they are actually quite different. First, the general merger statutes apply only to mergers, while the recent enactments encompass all types of business combination transactions. No matter how a transaction is structured, the recent statutes deem the acquiror to have "assumed" the substantive provisions of the predecessors' labor contracts. Second, the general merger statutes codified a widely accepted principle that the survivor to a merger is responsible for many of the predecessor's obligations. 166 The re-

    No business combination transaction shall result in the termination or impairment of the provisions of any labor contract covering persons engaged in employment in the commonwealth negotiated by a labor organization or by a collective bargaining agent or other representative. Notwithstanding such business combination transaction, such labor contract shall continue in effect until its termination date or until otherwise agreed upon by the parties to such contract or their successors.... "Business combination transaction" [is defined as] any merger or consolidation, sale, lease, exchange or other disposition, in one transaction or a series of transactions, whether of all or substantially all the property and assets, including its good will, of the business operations that are the subject of the labor contract referred to in the first paragraph or any transfer of a controlling interest in such business operations.
164 Id. Section 2587 of the Pennsylvania statute specifically provides that:
    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 termination provision contained therein, or until otherwise agreed upon by the parties to such contract or their successors. The term "covered labor contract" is defined as:
    any labor contract if such contract: (1) covers persons engaged in the employment in this commonwealth; (2) was negotiated by a labor organization or by a collective bargaining agent or other representative; (3) relates to a business operation that was owned by the registered corporation (or any subsidiary thereof) at the time of the control-share approval with respect to such corporation; and (4) was in effect and covered such business operation and such employees at the time of such control-share approval.
165 See supra notes 141-43 and accompanying text.
166 See John Wiley & Sons v. Livingston, 376 U.S. 543, 550 n.3 (1964) (For mergers,
cent statutes, however, actually reverse the principles that apply to all transactions other than mergers; the recent statutes, for example, reverse the general rule of nonassumption in asset acquisitions.\textsuperscript{167} Third, whereas the general merger statutes apply broadly to "obligations," the recent statutes focus exclusively on collective bargaining agreements. Thus, while the merger statutes could be interpreted and applied by the courts to include or exclude specific categories of obligations, the recent statutes cannot, and the only "obligations" covered by these statutes are those arising from collective bargaining agreements.\textsuperscript{168}

The recent statutes change the whole environment of combinational transactions with respect to collective bargaining agreements and labor obligations. These statutes seem to negate the federal doctrines because they force new employers to assume substantive provisions of labor agreements in total disregard of the underlying considerations of each of the federal doctrines.\textsuperscript{169} The state statutes eliminate the benefits of the federal doctrines in balancing equities and promoting national consistency\textsuperscript{170} and while beneficial to some employees, are highly detrimental to others.\textsuperscript{171}

II
Analysis
The judicial doctrines discussed above analyze the passage of labor obligations during combinational transactions in light of the equitable demands of the particular situation and in pursuit of a broad balance between potentially competing social and economic interests. The recent state enactments, however, pursue totally different goals. These constitutionally questionable statutes were enacted to protect certain subsections of organized labor, to prevent many corporate combinations, or both, regardless of the impact on social and economic interests. This section argues that these recent state enactments not only yield unintended, detrimental results,\textsuperscript{172} but also are pre-empted under the Supremacy Clause of the United States Constitution as an infringement on federal power as exer-

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\textsuperscript{167} See supra notes 13-14 and accompanying text.
\textsuperscript{168} This factor is particularly relevant in assessing how these statutes fulfill their motivating intentions. See infra notes 200-04 and accompanying text.
\textsuperscript{169} See supra notes 126-28 and accompanying text.
\textsuperscript{170} Id.
\textsuperscript{171} See infra notes 205-14 and accompanying text.
\textsuperscript{172} See infra notes 174-275 and accompanying text.
A. The Recent Enactments Yield Unintended and Detrimental Results

This subsection analyzes the effectiveness of the recent state statutes in achieving their two implicit goals: labor protection and takeover prevention. The Pennsylvania statute, as part of a general package of statutory revision targeted at takeover activity, provides evidence of these motivations. The proponents of the act cited two policies. First, the Pennsylvania legislature wanted to avoid "such perceived harmful effects of hostile corporate takeovers as job losses and plant closings." Second, the legislature wanted to enhance efficiency by promoting a business environment where managers could focus on day-to-day business decisions without worrying about outside attacks from corporate raiders. This section argues that the actual legislation enacted is ineffective to achieve either of these goals.

1. Labor Protection

In protecting labor, legislators typically refer to three interests: community stability, employee expectations, and unions and union management. In fact, antitakeover legislation quite often explicitly declares as its purpose the preservation of local jobs, economies, communities, and cultural and charitable values, as well as the assurance of fairer treatment of resident shareholders. Even when leg-
islation is designed to provide other benefits, such as the maximization of target shareholder value, some commentators argue that the actual, unstated motivation is often labor protection.178 The general public perception is that business combination transactions, especially hostile takeovers, hurt labor179 and protecting labor is, therefore, an understandable motivation for antitakeover legislation. Such legislation, however, if not restrained, may become protectionism which is typically both inefficient and unconstitutional under the Commerce Clause.180 This is especially true when the assumption that labor needs broad protection from the harmful effects of acquisitions is partially incorrect or even entirely false.

a. Labor May not Need Protection from Takeovers

The proponents of protection for labor from the effects of combinatorial transactions include some renowned and high-level supporters. Former Senator William Proxmire, for example, argued that takeovers are quite detrimental to labor.181 Martin Lipton, a level sincerely see these statutes as necessary to protect the long-accepted allocation of claims against the corporation—not only those of management and shareholders, but those of employees and communities as well—from the disruptive effects of what is perceived as market caprice.


See Charles Brown & James L. Medoff, The Impact of Firm Acquisitions on Labor, in Corporate Takeovers: Causes and Consequences 10 (Alan J. Auerbach ed. 1988) (citing a 1987 survey by Louis Harris & Associates that found that 63% of the sampled public felt that "employees" were the single group that needed protection during takeovers). See also Gregg A. Jarrell et al., The Market for Corporate Control: The Empirical Evidence Since 1980, 2 J. Econ. Persp. 49, 57 (1988) ("Recent takeovers in the airline industry have involved conflict between acquiring-firm management and the (usually) unionized labor of the target firm. These conflicts have contributed to the popular generalization that shareholder premiums from takeovers come largely at the expense of labor.").

See infra note 315.


Takeovers have led directly to the elimination of jobs. AFL-CIO officials
well-known New York City corporate attorney, has maintained that
takeovers often threaten business operations which local employees
and communities have come to rely on for security. Many news-
paper reports and commentaries have also reported detrimental ef-
effects of takeovers on employees and their communities, namely
layoffs and forced retirements. Labor, however, does not necessarily warrant protection, de-
spite the widespread public fears. The assumption underlying
these fears is that an out-of-state bidder usually intends to break up
the target, dispense with the local jobs, and thereby destroy the lo-
cal economy, community and culture. Bidders, however, would not
pay such a price to achieve such counterproductive results. Ac-
cquirors are motivated by value; they seek the best bargain possible
to maximize the value of their acquisitions. Therefore, if the organi-
zation can generate wealth as it is, local interests should not be sub-
stantially harmed, and may actually be substantially enhanced by a
successful takeover. If the organization can not generate wealth
where it is, bankruptcy, which is the real danger to labor, may be in
the offing. In fact, mergers may actually supply needed protection
from bankruptcy, and disallowing a merger under these circum-
stances may prove to be the very "protection" that labor does not

estimate that takeovers have caused the loss of 80,000 union jobs. In the
aggregate some 500,000 jobs have been lost. Furthermore, American
workers are plundered even when they are not terminated. For example,
some $16 billion has been siphoned from private pension plans. In many
cases, the plundered funds went to firms attempting to fend off a bidder,
or even to successful bidders.

Id. (citing Hostile Takeovers: Hearings Before the Senate Committee on Banking, Housing and Urb
an Affairs, 100th Cong., 1st Sess. 262 (Mar. 4, 1987) (testimony of Thomas P. Donahue, Secretary-Treasurer, AFL-CIO)).

182 See Martin Lipton, Corporate Governance in the Age of Finance Corporatism, 136 U. Pa.
Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm.
of Rep. Oxley discussing how Mobil Corporation’s 1981 bid for Marathon Oil Company,
had it been successful, “would have spelled economic doom for the town of Findlay,
OH, population 38,000—2500 of them employees of Marathon Oil”).

183 See, e.g., Robert O’Brien & Richard Kline, An Rx for Jobs Lost Through Mergers, N.Y.
Times, Feb. 22, 1987, § 4, at 23 (discussing how Owens-Corning was forced to cut its
pretakeover bid workforce of 28,000 by approximately 13,000 as part of its restructuring
to defeat a bid by Wickes Corporation in late 1986); see also People Trauma in Mergers, N.Y.
Times, Nov. 19, 1985, at D1, D5 (discussing how corporate acquirors have discharged or
pushed into early retirement tens of thousands of people); Thomas F. O’Boyle & Susan
Carey, Gulf’s Departing Pittsburgh Would Deal a Harsh Blow to City’s Economy and Pride, WALL
St. J., Mar. 9, 1984, at 33; Norton Mintz, Community Dislocations: A Painful Side Effect of

184 See Coffee, supra note 177, at 440 (“[A]ny claim that these stakeholders ... de-
serve statutory protection may prove too much. ... [I]t is not clear that the extent of
their exposure is that great.”).

185 See Hook, supra note 177, at 293.
Although takeovers may at times appear to harm labor, recent factual evidence demonstrates that they do not systematically or even in the majority of situations disadvantage labor. In many situations, for example, postacquisition wage and employment growth actually outpaces the growth that would otherwise have been expected under the old management. Even when employees are laid off or relocated following an acquisition, no evidence supports a conclusion that the subsequent relocations are any more drastic than what would have been expected without an acquisition. If a business is in need of an economic restructuring, layoffs may be necessary even if there is no acquisition. Furthermore, when employees are laid off during or following an acquisition, management and midlevel support staff usually bear the brunt of the cuts, not rank and file workers. For example, in the case of Wells Fargo's acquisition of Crocker National Bank, 1600 managerial employees were fired, including nearly all of the Crocker top executives, while the non-managerial cutbacks were proportionately less. Finally, many seemingly “lost” jobs are really only relocated jobs that benefit workers in other geographical areas or other economic sectors, so

186 See, e.g., Ronald E. Shrieves & Donald L. Stevens, Bankruptcy Avoidance as a Motive for Merger, J. FIN. AND QUAN. ANAL. 501, 513 (1979) (“[M]any instances of severe financial crisis among large firms are resolved through merger [the] process. To the extent that this process contributes to the efficiency with which resources are reallocated to more productive ends, mergers serve a valuable function in our economy.”).

187 SeeJarrell et al., supra note 179, at 57; see also Steven Kaplan, The Effects of Management Buyouts on Operating Performance and Value, 24 J. FIN. ECON. 239, 41 (1989) (“More than three-fifths (61.5%) of [buyout] companies increase employment, with a median increase of 4.9%. . . . The results here do not support the view that buyout gains come from firing a large number of employees.”); Brown & Medoff, supra note 179, at 9 (discussing how a recent National Bureau of Economic Research study shows that employment in acquired firms actually increases).


190 See Jonathan R. Macey, State Anti-Takeover Legislation and the National Economy, 1988 Wis. L. Rev. 467, 478-79 (1988) (discussing how the misconceptions regarding widespread firings and wage cuts to rank-and-file workers following acquisitions are not supported by factual evidence: “Generally only the administrative positions of relatively high-level employees become redundant after a takeover.”); see also Jensen, supra note 188, at 427 (“The data indicate that, within three years of an acquisition, roughly half of the top level managers of acquired corporations are gone.”); Susan R. Sanderson & Lawrence Schein, Sizing Up the Down-Sizing Era, in ACROSS THE BOARD, Nov. 1986, at 17, 19-20 (“A direct consequence of mergers and acquisitions is the considerable loss of jobs at the executive level,” i.e., “nearly half” of the executives in large acquisition targets left their positions).

191 See Sanderson & Schein, supra note 190, at 20.
that the gains offset the losses to equalize the net global effect. In short, no evidence supports the conclusion that takeover activity systematically harms labor.

In fact, many acquisitions and takeovers actually benefit employees and local communities. New employers often have better access to the capital markets and can finance improvements in the organization to the benefit of all, including the employees. Furthermore, the acquisition itself may shock the organization into accepting new rules and procedures that improve productivity and efficiency, leading to long-term increases in employment and

192 See Macey, supra note 190, at 478.

At worst, the workers in a particular state will be displaced by workers in another state as the firm's assets are redeployed to that state. But when this happens, overall national employment is unaffected. The only effects are local. When state anti-takeover statutes prevent jobs from leaving one state for another, they result in discrimination against out-of-state workers in favor of local workers. See also Davis, supra note 177, at 522 ("[A] loss of jobs at the target's headquarters may be offset by new jobs at some other location. State takeover regulation therefore entails the serious risk that legislators will focus upon the in-state losses and ignore out-of-state gains."); Jensen, supra note 188, at 426 ("Divested plants and assets do not disappear, they are reallocated. . . . [T]hey are moving to uses that their new owners are betting are more productive. This is beneficial to society. . . . The change. . . can cause some people to lose their jobs [but] others gain jobs."); Wirth Subcommittee Hears Testimony on Community Impact of Tender Offers, 17 SEC. REG. & L. REP. (BNA) No. 24, at 1085 (June 14, 1985) (quoting Subcommittee Chairman, Representative Timothy E. Wirth:

[It is] important to weigh the potentially negative impact of takeovers on certain communities against the benefits to other communities. A takeover which results in a plant closing or a change in location of the principal office in one community may result in the opening of a new plant or a new headquarters in another community.

193 Many acquirors are able to become acquirors because they maintain ready access to the capital markets. Once a transaction is complete, acquirors retain sufficient capital to channel new funds into organizational improvements to increase the return on their investments. These improvements benefit the organization, the employees, and the community, through better working conditions, increased efficiencies, and growing profits that will support increased employment, compensation, and benefits. See Brown & Medoff, supra note 179, at 10.

Unfortunately, some acquirors "kill" this opportunity to make improvements by overleveraging their transaction. By financing their business combinations with too much debt, many acquirors exhaust their access to outside capital and leave little capital available to contribute to organizational improvements. Revco D.S. and Federated Department Stores are good examples of this. Revco, for instance, quadrupled its debt to $1.3 billion to finance its 1986 leveraged buyout. Stephen Phillips, Revco: Anatomy of an LBO that Failed, Bus. Wk., Oct. 3, 1988, at 62. Within two years, Revco's interest expenses exceeded its available cash flow, and Revco filed for chapter 11 protection in 1988. Id. Similarly, Federated assumed extraordinary debt to finance its acquisition by Campeau, and ended up in chapter 11. See infra note 222. Both companies took on a debt load that generated debt payments far exceeding the available cash flow. Obviously, if debt repayment depletes all available cash, little is left for organizational improvement.
wages. These factors undermine the argument that takeover activity supposedly poses some harm to labor. Simply stated, public perceptions that acquisitions always hurt labor are based on relatively few, highly publicized situations and are not supported by economic analyses or legitimate evidence.

Some acquisitions obviously do hurt small fractions of the labor force through layoffs and wage reductions; innovations that increase long-term efficiency, profits, and standards of living sometimes require certain short-term hardships. Fortunately, the evidence shows that harmful labor effects are uncommon. Therefore, labor protection mechanisms must provide real protection from those takeovers that are abusive and inefficient, but they should be structured to minimize interference in other situations. The federal doctrines provide this balance by preventing the rise of labor dislocations and hardships when fraud is evident, and by mandating bargaining in other situations. Legislative movement away from the federal doctrines runs the risk of upsetting the delicate balance of protection and efficiency.

b. These Enactments Provide No Real Protection

Certain forms of takeover abuse warrant labor protection, even though these situations are uncommon. The recent enactments, however, do not provide broad enough coverage to furnish adequate protection. Their limited focus on a discrete minority of the workforce minimizes their effectiveness and ignores the vast majority of the workforce that may suffer from abusive takeovers.

Any protection that these enactments offer flows only to union-

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194 See infra note 240-66.
195 Brown & Medoff, supra note 179, at 9 (noting how, at the mention of "takeovers," the public immediately thinks of "the elaborate history of Carl Icahn, Frank Lorenzo, and the airline industry.").
196 See Jensen, supra note 188, at 427 (The media creates an impression that is contrary to the evidence when, for example, "[i] only report[s] on the 100 warehousemen who were displaced in a conversion to a shopping center, and ignore[s] the thousands of new workers employed in the newly opened center.").
197 See Jensen, supra note 189, at 114.
198 See supra notes 126-37 and accompanying text.
199 Takeovers are motivated by both dubious and sensible rationales. Some of the dubious rationales are to diversify operations, build management empires, increase earnings per share by playing the "bootstrap game," or lower financing costs. See BREALEY & MYERS, supra note 11, at 799-803. Takeovers motivated by these rationales are economically and socially wasteful, and takeover legislation targeted at these specific motivations would be valuable. On the other hand, many takeovers are motivated by sensible rationales. The sensible motivations for takeovers include capitalization on economies of scale or vertical integration, combinations of complementary resources, utilizing unused tax shields or surplus funds, and eliminating inefficiencies. See BREALEY & MYERS, supra note 11, at 796-99; Jensen, supra note 188, at 426.
ized laborers,\textsuperscript{200} who usually do not suffer the brunt of acquisition cuts,\textsuperscript{201} and who do not represent the majority of today's workforce. Today, unionized employees comprise only a small fraction of the total labor force, and an even smaller fraction of the private sector labor force that would be subject to business combination transactions.\textsuperscript{202} Thus, even if all fifty states enacted this type of legislation, only a small percentage of the total nationwide workforce would be "protected" from any harmful effects of business combination transactions. Many acquisitions do not harm organized labor at all,\textsuperscript{203} and because many organized employees are employed by industries subject to other takeover protections,\textsuperscript{204} these statutes offer protection to only a very small segment of the labor force. With respect to those employees who may need some protection, the recent state legislation is underinclusive because it makes no effort to protect unorganized labor or unrepresented employees. In fact, these statutes may actually hurt more employees than abusive acquisitions themselves.

\textbf{c. These Statutes Hurt Both Organized and Unorganized Labor}

By deviating from the social and economic balancing allowed under the federal doctrines, these recent enactments may lead to detrimental and unintended results such as the mandated continuation of labor contracts in circumstances that would be detrimental to

\begin{itemize}
\item For details on protection available for employees under specific contracts, see \textit{supra} notes 160-64 and accompanying text.
\item See \textit{supra} note 190.
\item In 1989, only 16.4\% of employee workers were union members, and only 12.3\% of private employee workers were union members. See \textit{Bureau of Labor Statistics, U.S. Dep't of Labor, 42 Current Wage Developments}, Table 2 (1990) [hereinafter \textit{Wage Developments}]. In the three states enacting the recent legislation the percentages are not significantly higher; the percentages are actually lower in Delaware and Massachusetts. In 1988, only 16.7\% of Pennsylvania's privately employed workers were union members. At the same time only 11.7\% of Massachusetts' privately employed workers and only 10.8\% of Delaware's privately employed workers were union members. See Michael A. Curme et al., \textit{Union Membership and Contract Coverage in the United States, 1983-1988}, \textit{44 Indus. & Lab. Rel. Rev.} 5, Table 5 (1990). Furthermore, national private-sector union membership declined from 15\% in 1983, \textit{id.} at Table 1, to only 12.2\% in 1989; \textit{Wage Developments, supra,} at Table 2. Judging from this consistently declining national trend, the state percentages quoted \textit{supra} for 1988 are probably even lower today.
\item See \textit{supra} notes 181-98 and accompanying text.
\item Many industries are protected from transactional combinations due to either their very nature or existing barriers to takeovers. For example, two of the five most highly unionized industry segments are totally immune from takeover activity: the U.S. Postal Service (81.3\% unionized in 1988) and elementary & secondary schools (53.7\% unionized in 1988). See Curme et al., \textit{supra} note 202, at Table 4. In fact, over 20\% of all unionized employees work in industry sectors that are free from any threats of takeovers (schools and universities, libraries, social services, museums, religious orders, residential care facilities, etc.). \textit{Id.}
the very workers the legislatures were trying to protect. In some situations, these statutes would merely shift whatever negative effects might arise onto the employees and constituencies specifically left unprotected by the statutes. In other situations, they would actually cause even greater damage than they attempt to avoid by increasing the probability of bankruptcy.

Takeover activity often strikes at inefficient or financially insecure industries.205 Prior to any threats of a takeover, however, organized labor often has already agreed to drastic concessions in the hope of keeping the company afloat and preserving the existing jobs. In a takeover situation, the recent state enactments mandate that the employees continue to be bound to their old agreements, including the drastic concessions that they would not necessarily have made to the new employer.206 Thus, the new employer, who may be very profitable or financially sound, will gain a favorable labor contract, and labor will be unable to force a change.207

The employees may lose their opportunity to force a change even when they request contract renegotiations with the old management before the deal closes. In many situations, the potential acquiror may agree to the transaction only if the "favorable" labor contracts continue. In response, the previous management, in order to save the deal, may stall or even refuse to renegotiate and labor will be unable to change their contract. The deal will close with labor unable to intervene on their own behalf.

Thus, labor has no power to change the "unfavorable" contracts, with either the old management or the new management, and these contracts will continue to be enforced even though this would be detrimental to the employees. If the successorship doctrines were applied instead of these recent state enactments, the terms of the old contracts would not be automatically imposed and the or-

206 The Supreme Court has recognized the possibility of such an inequity. See NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272, 287-88 (1972) ("[H]olding... the union... bound to the substantive terms of an old collective-bargaining contract may result in serious inequities.... [A] union may have made concessions to a small or failing employer that it would be unwilling to make to a large or economically successful firm.").
207 It might be suggested that equity would demand that the employees be able to unilaterally shed their agreement under these circumstances. This is not, however, how the NLRA has been interpreted. See Central States, Southeast and Southwest Areas Pension Fund v. Sloan, 714 F. Supp. 943, 947-48 (N.D. Ill. 1989) ("Under section 8(d) of the National Labor Management Relations Act, neither party to a collective bargaining agreement may [unilaterally] modify [or sever] the agreement. ... "). aff'd, 902 F.2d 593 (7th Cir. 1990); Staffman's Org. Comm. v. United Steelworkers of America, 399 F. Supp. 102, 105-06 (W.D. Mich. 1975) ("Congress, in enacting [the National Labor Relations Act], indicated a broad concern with a procedure for making collective bargaining agreements enforceable in the courts by either party.").
ganized employees would be able to bargain with the new employer for a new agreement to remedy their unfavorable situation. In this way, the federal doctrines allow for a balancing of competing equities in order to protect labor while the recent state enactments do not.

Furthermore, unorganized employees would suffer from the rigid effects of these enactments in the reverse situation, when organized employees have previously procured very favorable collective bargaining provisions. Under the mandates of the recent state enactments, these provisions would continue, and the acquiring parties would have to account for the economic effects of these provisions in the pricing and structure of the acquisition. In order to accommodate the favorable agreement given to organized employees, and to balance the total package of wage and salary costs, unorganized employees, staff, and management would have to accept corresponding and offsetting reductions in wages and benefits to maintain the profitability of the transaction.

If the federal doctrines applied, however, the old employees and the new employer would bargain over a new agreement, disregarding the previously negotiated and now "unfavorable" provisions. This new agreement would probably reduce the burdens of the previous collective bargaining agreement, and balance the cost tradeoffs, to equally allocate the costs and benefits between organized and unorganized labor. Again, the federal doctrines balance competing equities while the recent state enactments do not; and successorship could resolve a potentially detrimental situation for unorganized labor, while the recent state enactments cannot.

Finally, in a situation where a corporation faces potential bankruptcy, both organized and unorganized employees may suffer under the mandates of the recent state enactments. If, for example, a financially troubled company seeks to be acquired in order to avoid financial ruin, potential acquirors may forgo the opportunity if state legislation forces acquirors to assume burdensome collective bargaining agreements. Thus, the financially troubled company will be unable to locate a buyer. With no other alternatives, the company would be forced into bankruptcy and the resulting dissolution

208 See supra notes 81-87 and accompanying text.
209 Id.
210 The Supreme Court recognized this reality and considered it a strong justification for constructing the balancing approach of the successorship doctrine:

[...holding... the new employer bound to the substantive terms of an old collective-bargaining contract may result in serious inequities. A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in...]

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would be detrimental to everyone, especially labor.\textsuperscript{211} Under the federal doctrines, however, the parties could renegotiate their agreement, save the company, and thereby preserve the jobs and the stability of the communities relying on those jobs.\textsuperscript{212} This again demonstrates that the federal doctrines can balance equities where the recent state enactments do not, and can resolve a detrimental situation where the recent state enactments cannot. If the recent enactments are allowed to override the federal doctrines, both organized and unorganized employees will suffer.

In summary, the recent enactments fail to protect employees and their respective communities. Even though some employees might benefit under the provision of these statutes, the majority of employees, and communities as a whole, would suffer. The only real protection provided by the statutes would flow to the actual labor contracts themselves. The contracts would survive even though any benefits at all would be slight and even though the contracting parties themselves would suffer.\textsuperscript{213} Thus, collective bargaining agreements would become more important than the actual constituencies that the agreements were supposed to protect. The NLRA never contemplated such an extraordinarily dominant position for collective bargaining agreements, and to accord these agreements such lofty status undercuts the very purposes of that Act.\textsuperscript{214} Undoubtedly, the Delaware, Massachusetts, and Pennsylvania legislatures could not have intended their legislation to result in such incongruities.

2. Takeover Prevention

Labor protection may not have been the only motivation for these enactments. These statutes also appear to be aimed at preventing or minimizing takeovers because all three states enacted their labor contracts statutes in the process of enacting broad antitakeover packages.\textsuperscript{215} Indeed, in Pennsylvania, the antitakeover

\begin{quote}
the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.
\end{quote}

\textit{Burns,} 406 U.S. at 287-88.

\textsuperscript{211} See \textit{infra} notes 235-37 and accompanying text.

\textsuperscript{212} See \textit{supra} notes 81-87 and accompanying text.

\textsuperscript{213} Union management, however, is protected: they still have their constituency and corresponding union dues. Therefore, protection of union management and the union organization itself may actually be the ultimate motivation. In Pennsylvania, for example, "[t]he insertion of [the] provisions [that mandated continuation of the labor contracts] was a major factor in securing the support of organized labor for the act's adoption." Klein \& Greenbaum, \textit{supra} note 175, at 8.

\textsuperscript{214} See \textit{infra} notes 276-325 and accompanying text.

\textsuperscript{215} See 1990 Pa. Legis. Serv. 36 (Purdon); \textit{see also} \textit{Hearings on Pennsylvania Senate Bill No. 1310, supra} note 175, at 1-311 (various witnesses testifying how the bill would restrict takeover activity in Pennsylvania); \textit{accord} Daily Report for Executives, July 19, 1989
One pair of commentators has stated that the resulting layers of legislation "may significantly hinder, if not completely halt, hostile takeover activity within Pennsylvania."\(^{217}\)

Obviously, some takeover legislation is necessary to limit abusive takeovers that serve no beneficial purpose.\(^{218}\) This section argues, however, that the recent state enactments unwittingly obstruct the policing effects that other antitakeover legislation directs at abusive takeovers.\(^{219}\) Indeed, these collective bargaining provisions totally disregard the valuable social and economic benefits provided by takeovers in general,\(^{220}\) and overbroadly restrict the beneficial effects of perfectly legitimate takeovers.\(^{221}\) In sum, this section argues that the legislatures should not have enacted these statutes if they were truly concerned with preventing or even minimizing the real problems associated with some recent takeovers.\(^{222}\)

("Gov. Michael S. Dukakis (D) signed into law July 18 legislation that would restrict the ability of corporations or individuals to engage in 'hostile' takeovers of firms incorporated in Massachusetts. . . . [Any] corporation formed as a result of [a] takeover would . . . be required to assume existing collective bargaining agreements.").\(^{216}\) Wallman & Gordon, supra note 176, at 38 (citing Raider, Raider, Go Away, TIME, May 14, 1990, at 75).

\(^{217}\) Id. Klein & Greenbaum, supra note 175, at 5.

\(^{218}\) Takeovers are motivated by both dubious and sensible rationales. See supra note 199. Those takeovers motivated by dubious rationales are often harmful to industry, the economy, and stakeholders alike. On the other hand, sensible takeovers fulfill important business and social functions, and should not be appraised with the same speculation that should be directed at truly wasteful takeovers. See infra notes 240-66 and accompanying text.

\(^{219}\) See infra notes 223-39 and accompanying text.

\(^{220}\) See infra notes 240-66 and accompanying text.

\(^{221}\) See infra notes 267-77 and accompanying text.

\(^{222}\) Instead of restricting takeovers and buyouts in general, perhaps legislatures should focus on the specific attributes of abusive acquisitions which cause the very problems they are currently attempting to address. Many takeovers and buyouts actually generate value and may provide the perfect opportunity for improving the organization. See infra notes 240-66 and accompanying text. If a transaction is overleveraged, however, the survivor may be forced to make operational cutbacks, asset divestitures, and even employee layoffs, in order to generate sufficient capital to cover its debt repayment obligations. Truly excessive leveraging may even lead to bankruptcy. The Federated Department Stores acquisition demonstrates this point.

In April of 1988, Campeau Corporation executed a highly leveraged "strategic acquisition" of Federated Department Stores. Steven N. Kaplan, Campeau's Acquisition of Federated: Value Destroyed or Value Added, 25 J. Fin. Econ. 191, 198-97 (1989). Campeau paid Federated's shareholders a 124% premium for their shares, resulting in total acquisition costs that exceeded $8 billion, including fees and expenses. Id. at 195-96. Campeau financed more than 97% of its costs with debt. Id. at 196. In order to cope with this heavy debt load, Campeau sold many of Federated's assets, including nine of Federated's fifteen previous operating divisions. Id. at 198.

Campeau's overall scheme actually generated economic value because once the divestitures and spin-offs were complete, the combined value of the separate "pieces" exceeded the value of Federated as a whole under pre-Campeau management. Id. at
a. The Labor Contract Statutes Interfere with other Takeover Statutes

The recent labor contract enactments would force corporations to favor organized employees over all other constituencies. Employees may need some protection, but the federal doctrines already protect labor in an equitable balance of corporate efficiency and employee expectations. Furthermore, many states have enacted constituency statutes that allow directors to fend off abusive takeover attempts, but the recent collective bargaining statutes conflict with the very nature of these constituency statutes.

Constituency statutes allow corporate directors to consider nonshareholder “stakeholder” interests as well as shareholder interests when analyzing the corporation’s overall “best interests.” In attempting to shift state corporate law away from a narrow focus on cash-poor and could not cover its debt repayment obligations. Id. at 191. On January 15, 1990, Federated filed for chapter 11 bankruptcy protection. Id.

The Federated scenario is one example of why legislatures should focus on excess leverage, not takeovers in general; to reduce the abusive and wasteful results of many recently failed acquisitions. Campeau’s takeover generated value and, therefore, was an economically beneficial acquisition. The problem, however, was the excess leverage. If Campeau had financed its acquisition with more equity and less debt, i.e., less leverage, Federated would not have ended up in chapter 11 and the acquisition would have successfully generated economic value. Id. at 211.

Delaware has not enacted a constituency statute, which makes the adoption of its collective bargaining statute particularly confusing. If the legislature intended to protect employees, it failed. See supra notes 181-219 and accompanying text. If the legislature intended to restrict takeovers, it would have been better off adopting a constituency statute, which would allow directors, in the exercise of their fiduciary duties as policed by the courts, to repel abusive takeovers but continue to transact legitimate combinational transactions in the best interests of the shareholders and other constituencies. This anomaly leaves this author wondering just who the Delaware legislature considers an important corporate constituency: shareholders? directors? or the very small sector of organized labor interests disparately served by these collective bargaining statutes?
shareholder interests, which might externalize the interests of other stakeholders, the constituency statutes allow corporate boards to consider all of the corporate constituencies when making corporate decisions. These statutes, which some commentators have described as a return to "broader social concerns," attempt to minimize the net social losses resulting from abusive acquisitions. The constituency statutes aim broadly at protecting "stakeholders," including employees and the communities in which they live and work.

The recent labor contract enactments, however, actually contradict the purposes and conflict with the intended benefits of the constituency statutes. In Pennsylvania, a major section of the 1990 Act established that directors "may, in considering the best interests of the corporation, consider to the extent they deem appropriate the effects of any corporate action upon any or all groups affected by such actions including shareholders, employees, suppliers, customers, creditors and communities [as well as] all other pertinent factors." On its face, such a provision seems to allow a board of directors, in full compliance with their fiduciary duties as policed by the courts, to consider all constituencies and all effects, in some form of a "corporate and social equation," before deciding whether and how to proceed with a business combination transaction. Obviously, such a net social equation of this type should include all relevant factors including collective bargaining agreements and their effects on corporate financial operations and combinational transactions. Under the mandates of the recent enactments, however, directors cannot terminate or even modify these agreements during or after a business combination transaction. Thus, the supposedly broad consideration of all "pertinent factors" can never include the very pertinent provisions and effects of labor agreements. Net corporate and social gain or loss will always be

226 See supra notes 133-37 and accompanying text for an explanation and discussion of externalities and how they are internalized.

227 See Johnson & Millon, supra note 178, at 848, 855; Millon, supra note 178, at 905-11, 925-26.

228 Proof of a net social loss, however, is particularly indeterminate because stakeholder opportunity losses seldom equal the face value of their apparent losses. See Coffee, supra note 177, at 448.


231 See Alan J. Auerbach, Introduction, to CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 1 (Alan J. Auerbach ed., 1988) ("[I]t is . . . extremely important that 'all' the costs and benefits of mergers be evaluated if their overall value is to be understood.").

232 See supra notes 160-64 and accompanying text.
miscalculated when the analysis is forced to leave out such important factors.  

Furthermore, continuation of collective bargaining agreements after the transaction may not serve "the best interests of the corporation" or even the best interests of the employees. In fact, continuation of these agreements may harm everyone. For example, a corporation may have negotiated and executed collective bargaining agreements when economic prosperity allowed the corporation to agree to relatively costly labor provisions. If economic conditions have changed to a point where the old agreements have become economically burdensome, the corporation may not be able to survive under the strictures of the old provisions. The "best interests of the corporation," in such situations, may be liquidation or sale. If the corporation's assets could be sold to other organizations, new labor agreements could be negotiated with the employees that eventually join those other organizations and valuable production assets could remain in production with the employees retaining their jobs.

The recent enactments, however, foreclose this result. Indeed, "no merger, consolidation, sale of assets or business combination, [including one transaction or a series of transactions], shall result in the termination or impairment of the provisions of any labor contract." Thus, even if the assets were sold piecemeal to numerous organizations, the provisions of the labor contracts would apparently follow along to each of those new organizations. Under this type of a requirement, many corporations in Delaware, Massachusetts, and Pennsylvania that face financial hardship would be unable to transfer their assets to a higher-valued user or group of users.

233 See Auerbach, supra note 231, at 1.
234 This was part of what allowed Carl Icahn to take over TWA. The management of TWA either would not, or could not, reduce the obligations arising under labor contracts with its highly paid employees. If it were not for Icahn stepping in to force these reductions, the company might have lost its competitiveness in the newly deregulated airline market. See Dale A. Oesterle, Delaware's Takeover Statute: Of Chills, Pills, Standstills, and Who Gets Iced, 13 Del. J. of Corp. L. 879, 892 n.60 (1988). Obviously, other problems subsequently developed at TWA, but nothing supports the conclusion that reducing waste at TWA contributed to these problems.
235 See Jensen, supra note 188, at 427 (discussing how when the processes for change are "too slow, costly, and clumsy" the market for corporate control brings about changes in strategy and in the organization itself to increase efficiency).
236 Del. Code Ann. tit. 19 § 706(a) (1990) (emphasis added); accord Mass. Gen. L. ch. 149 § 20E (1989); 15 Pa. Const. Stat. Ann. §§ 2586, 2587 (1991). Technically, the statutes do allow the parties to discontinue the contract upon mutual consent. Practically, however, few contracts will be discontinued when their provisions are favorable to either one side or the other and when the party holding the benefits refuses to give its consent out of fear that it might lose those benefits upon subsequent renegotiation.
237 See Jensen, supra note 188, at 427 ("If assets are to move to their most highly valued use, [business] must be able to sell off assets to those who can use them more..."
because the new owners would have the same problem as the old owner: inefficient and unprofitable assets. Thus, the corporation will be unable to find an acquirer, or even a group of acquirers, for their proverbial “sinking ship” and the corporation may be forced into bankruptcy much to the detriment of the corporation, its shareholders, creditors, customers, employees and local communities, not to mention our economy and society as a whole.

In order to avoid these problems, most legislatures have attempted to ensure that their constituency statutes would not require one set of stakeholder interests to totally displace the interests of other stakeholders or shareholders.238 The recent collective bargaining enactments, however, disallow terminations or even modifications of labor contracts during the course of a business combination and result in exactly what the legislatures were trying to avoid. Actions in the “best interests of the company” become heavily weighted in favor of union contracts and union management and heavily weighted against shareholders and other constituencies. Instead of eliminating the narrow focus on shareholders, which is what the corporate constituency statutes attempt,239 the recent collective-bargaining provisions force a narrow focus, not on labor, or even on organized labor, but on organized labor contracts. In fact, the statutes do not mandate that labor agreements continue when continuation would serve the best interests of the employees, the corporation, or even society in general. Instead, the statutes require unconditional continuation of labor agreements whether they are good or bad, for labor or for anybody.

b. Takeovers Perform a Valuable Function in our Economy

Those takeovers that are truly wasteful and harmful obviously warrant legislative controls.240 Many takeovers, however, provide valuable economic benefits. In fact, takeovers are a major component of the managerial labor market where alternative management

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238 Pennsylvania’s statute, for example, specifically states that directors are not required to consider any one constituency, including shareholders, as dominating a decision or displacing the interests of other constituencies in every instance. See 1990 Pa. Legis. Serv. 36 (Purdon); see also Wallman & Gordon, supra note 176, at 38 (discussing Pennsylvania’s constituency provisions).

239 See supra note 199.

240 See supra note 199.
teams compete for the rights to manage corporate resources. The efficient win, the inefficient lose. The benefits that flow from this battle include efficiency gains, through organizational improvement, and shareholder protection. These benefits bolster corporate and national competitiveness and should not be casually discarded in a vain attempt to satisfy the demands of a relatively small interest group. Takeovers increase efficiency by policing and dislodging harmful corporate practices, obligations, and structures. If, for example, an organization is party to labor contracts that stem from a protectionist age of regulation but have become burdensome in the age of some deregulation, a perceptive acquiror should be able to acquire control of that organization, rid it of its inefficiencies, and channel the recovered wealth into either shareholder dividends or productive investments. This type of restructuring benefits both the particular industry involved and the overall economy.

241 Jensen, supra note 188, at 427.
242 See Hal R. Varian, Symposium on Takeovers, 2 J. Econ. Persp. 3, 3 (1988) (“If the current managers fail to maximize value, a takeover offers a mechanism whereby shareholders can replace the current managers with managers who offer better performance.”).
243 See Jensen, supra note 188, at 426; Varian, supra note 242, at 8-4 (“To the extent that acquisitions encourage efficient operations by management, they can be an effective mechanism for enhancing economic performance.”); Andrei Shleifer & Robert W. Vishny, Value Maximization and the Acquisition Process, 2 J. Econ. Persp. 7, 11 (1988) (“[T]akeovers are probably the most effective way for shareholders to get rid of non-value-maximizing managers without bribing them.”).
244 See Jensen, supra note 188, at 429; Varian, supra note 242, at 5 (“To the extent that more trade is better, social policies that restrict voluntary exchanges of assets are bad policies. This maxim applies just as well to financial markets as to other sorts of markets.”).
245 See Macey, supra note 190, at 469 (“Takeovers generally maximize shareholder welfare by weeding out inefficient incumbent management and permitting new management teams to increase the value of the firm by redeploying the firm’s assets to more profitable uses.”); see also Jensen, supra note 188, at 426-29 (discussing how takeovers motivate the “efficient utilization of resources”).
246 See Oesterle, supra note 234, at 892 n.60 (discussing how Carl Icahn achieved this with TWA); see also Harris Colingwood, Icahn’s Incredible Shrinking Airplane, Bus. Wk., Feb. 19, 1990, at 42 (discussing how Icahn continued to seek union concessions to avoid having to “continue to shrink” the company). Other well-known “raiders” have instigated similar economic recapture in other industries, such as T. Boone Pickens in the oil industry. See Jensen, supra note 188, at 428-29.
247 See Jensen, supra note 188, at 429 (“The pressures created ... in the corporate control market are having very healthy effects on Corporate America. ... The result is a more productive and competitive economy.”); see also Michael C. Jensen, A Helping Hand for Entrenched Managers, WALL St. J., Nov. 4, 1987, at 36 (“The restructuring of corporate America ... by the takeover market is streamlining many of [our] corporations that are simply too large, too complicated and too unfocused to be efficient. Restructuring is bringing top-level managers closer to employees, customers and shareholders. We must not strangle these productive forces.”); cf. Macey, supra note 190, at 472 (“[T]ender offers are launched because the acquirer can realize gains by reorganizing the firm, re-
theory may be summarized as follows:

If the management of firm A is more efficient than the management of firm B, and if after firm A acquires firm B, the efficiency of firm B is brought up to the level of efficiency of firm A, efficiency is increased by merger. Note that this would be a social gain as well as a private gain. The level of efficiency in the economy would be raised by such mergers.\textsuperscript{248}

According to this theory, takeovers, and even the mere threat of takeovers, increase efficiency by forcing organizations to liquidate excess assets, to disburse the resulting surplus and free cash flow to the shareholders, and to initiate synergistic combinations of existing resources.\textsuperscript{249} The resulting efficiencies produce higher stock prices, enhanced capital flows, and increased investment;\textsuperscript{250} all of which benefit our economy.

Takeovers also help to protect shareholders from management entrenchment.\textsuperscript{251} Takeovers and the threat of takeovers serve to

placing existing management, or combining the target firm's assets with the assets of the bidding firm so as to create value.

\textsuperscript{248} COPELAND & WESTON, supra note 2, at 683; see also Michael C. Jensen, Takeovers: Their Causes and Consequences, 2 J. Econ. Persp. 21 (1988) (discussing how takeovers can improve efficiency). Former Senator William Proxmire has concisely and eloquently stated the theory, though at the time he did not fully endorse it:

[M]ergers are the product of a truly free market at work: if aggressive investors determine that a publicly held corporation is poorly managed, and if those investors believe they can buy control of the firm, discharge the inefficient management and manage the firm more profitably, they should do exactly that. According to this model, the result is a more efficient allocation of resources that benefits stockholders, and benefits the American economy as well, by assuring that the nation's resources are more efficiently used.

Proxmire, supra note 181, at 353.

\textsuperscript{249} See Jensen, supra note 188, at 427-29.

\textsuperscript{250} Some argue, however, that effects in the financial markets are not indicative of the true benefits or detriments to society. See Proxmire, supra note 181, at 354 ("In the real world, management of a successful corporation must be concerned with the firm's long-run growth and survival, not merely with the short-term stock price."). However, the distinction between maximizing firm value for the present versus maximizing firm value for the future is a false one. Share valuation is determined by the present value of both present and future earnings. Future earnings from current investments are reflected immediately in a firm's current share price as long as the relevant information is communicated to the markets. Arguments that hostile takeovers force management to focus on the short-term ignore this reality. Efforts to increase share value must necessarily take into account the long-term, since those earnings are critical to share valuation. See Macey, supra note 190, at 481; see also Jensen, supra note 248, at 26 ("There is much evidence inconsistent with the myopic markets view and no evidence that indicates it is true.").

\textsuperscript{251} See Shleifer & Vishny, supra note 243, at 11; Jensen, supra note 188, at 427. Corporate management has been accused of trying to protect its entrenchment motivations by pressuring for antitakeover legislation. See William Armstrong, In Defense of Takeovers, INSTITUTIONAL INV., April 1988, at 29 ("Just as kings built walls and moats to keep out their serfs, a number of executives from top companies have asked [legislatures] to build them a legal fortress that would stop takeovers.").
ensure that corporate managers pursue goals and investments that truly serve the best interests of the firm.\textsuperscript{252} When internal control mechanisms function properly, the corporate board of directors should ensure that management acts in the shareholders' best interests. If new managerial talent would do a better job in running the firm, the board should replace the old management in order to maximize the resulting value of the firm.\textsuperscript{253} When these internal control mechanisms break down, however, this may not happen, and the takeover market steps in to enforce shareholder and stakeholder interests by allowing alternative management to compete for the right to better run the company.\textsuperscript{254} Takeovers, therefore, and the mere threat of takeovers, force necessary rearrangements when the existing managerial policies result in inefficiency, irresponsibility, or actions not in the best interests of the shareholders and stakeholders.\textsuperscript{255} T. Boone Pickens, for example, forced a very beneficial shakeup of the oil industry by threatening and executing takeovers of inefficient oil companies that were wasting huge amounts of capital on wasteful drilling programs and production overcapacities.\textsuperscript{256} The Phillips restructuring, for example, resulted in a $1.2 billion increase in market value, while Arco's voluntary restructuring resulted in a $3.2 billion gain in market value.\textsuperscript{257} Thus, Pickens's takeover threats forced necessary rearrangements that significantly benefitted shareholder and stakeholder interests.

Takeovers also allow shareholders to assert their rightful control over the corporation. Corporate control ultimately lies with the corporation's shareholders because they bear the residual risk.\textsuperscript{258} The power to buy and sell shares of corporate ownership is a basic shareholder right,\textsuperscript{259} and corporate law should allow shareholders to reap the benefits and bear the burdens of their investments.\textsuperscript{260}

\textsuperscript{252} See Brealey & Myers, supra note 11, at 798-99; Jensen, supra note 188, at 427-29; Hearings on Pennsylvania Senate Bill No. 1310, supra note 175, at 208 (testimony of Professor Randell Woolridge).

\textsuperscript{253} See Jensen, supra note 189, at 119.

\textsuperscript{254} Id.

\textsuperscript{255} Id.

\textsuperscript{256} See Jensen, supra note 188, at 428.

\textsuperscript{257} Id.


\textsuperscript{259} See Henn & Alexander, supra note 258, at 451.

\textsuperscript{260} Corporations are generally structured to allow those individuals with the most invested ultimately to control the business decisions. Since majority owners have significant investments at stake, with only residual claimant rights, their risk of loss has to be balanced by a right to reap the financial benefits of good business decisions. The corporation is, effectively, the property of the shareholders, and these shareholders need to retain the right to change ineffective management to protect their property interests. See Theodore W. Grippo, In Defense of State Takeover Laws, 8 N. ILL. U. L. REV. 273, 275 (1988); Henn & Alexander, supra note 258, at 439-501.
Shareholders of a selling corporation typically realize a forty to fifty percent premium over the preacquisition trading price of their stock. The recent labor contracts provisions, however, restrict shareholders' ability to market their ownership in order to take advantage of such premiums. As labor contracts are granted the protection of the recent state enactments, acquirors will do one of two things. They will either totally forsake acquisitions or substantially reduce acquisition premiums to account for the additional cost of assuming the seller's collective bargaining agreements. This additional cost to the acquirer will necessarily reduce the acquisition premiums, at least partially, and shareholders will lose a portion of their expected return on their investment. The recent labor contract enactments, therefore, hurt shareholders by shifting corporate rights from a broad class of shareholders to a narrow class of employees, even though such a shift does not necessarily benefit the employees.

261 Jensen, supra note 188, at 426 (the approximate average is a 50% premium, with some acquisitions generating premiums exceeding 100%). The shareholders of RJR Nabisco, for example, ended up receiving roughly $109 for shares that were trading near $55 immediately preceding the buyout bidding; this increase yielded a 98% premium. See Curtis Vosti, RJR's $5.1 Billion Payoff, PENSIONS & INV. AGE, Dec. 12, 1988, at 1. Similarly, due to AT&T's acquisition interests, and, finally, to its hostile tender offer, NCR's shareholders saw the prices of their shares rocket from $48 at the close of trading on Nov. 7, 1990, to $81.50 at the close of trading on Dec. 3, 1990. See WALL ST.J., Dec. 3, 1990, at A3; WALL ST. J., Dec. 4, 1990, at A3. As of Apr. 22, 1990, NCR shares had risen to $102, as traders bet that AT&T would succeed at $110. See WALL ST.J., Apr. 12, 1991, at A4. Even at $102, NCR shareholders would realize a 112% premium over the price they would have received immediately prior to the disclosure of AT&T's interest on November 8, 1990.

262 In Pennsylvania, for example, enactment of the 1990 antitakeover package cost shareholders in Pennsylvania firms roughly four billion dollars. The Investors' Backlash, 25 Mergers & Acquisitions 20 (1991). It may be argued, of course, that many securities laws, state corporate codes, and other forms of legislation yield similar results. See Henn & Alexander, supra note 258, at 451-54. However, the mere fact that some shareholder rights are already eroded does not by itself justify further erosion. Cf. Armstrong, supra note 251, at 29. Shareholders that sell their shares to a bidder are, simply exercising their legitimate right to buy and sell corporate stock. . . . Enacting [certain types of] antitakeover legislation would be like telling someone who is selling a house that it is against the law to accept the highest offer. [Such] laws would restrict the sale of publicly held stock and balkanize America's heralded national markets and interstate commerce.

263 See Macey, supra note 190, at 471 (arguing that antitakeover statutes provide job protection for inefficient management and force jobs to remain in certain regions at the expense of other regions: "Such protectionism is costly not only to the shareholders of these firms, but also to consumers and workers."); but cf. Coffee, supra note 177, at 465 (agreeing that takeovers can "prune inefficient corporate empires" and thereby benefit shareholders, but arguing that "the new characteristic pattern of bidder losses also suggests that wealth transfers are endemic and interfere with the simple story of assets moving to their highest and best use."). According to Coffee, "the appropriate response
In summary, takeovers and the threat of takeovers promote efficiencies, generate necessary organizational changes, and protect and reward shareholder and stakeholder investments. Legislation that overly restricts takeover activity erodes these benefits. The NLRB and the federal courts have developed the federal doctrines with respect to labor obligations in accordance with the premise that corporate owners require freedom to "rearrange their businesses," via takeovers. In providing for an equitable balance, these federal doctrines allow businesses to conduct economically necessary takeover activity while the resulting effects on otherwise external labor interests are equitably policed by the NLRB and the courts. The recent state enactments totally disregard this balancing approach and place at risk the substantial benefits of an adaptable and equitable analysis.

c. The Recent Enactments Are Unnecessarily Overbroad

One of the usual motivations for antitakeover legislation is stopping the perceived threats of abusive acquisitions. In Pennsylvania, for example, recent antitakeover legislation was motivated by the legislature's desire to avoid "such perceived harmful effects of [abusive] corporate takeovers as job losses and plant closings."

should be not to bar takeovers, but to spread the premium so as to compensate the 'losers.'" Id. 

See Jensen, supra note 188, at 427.


See supra notes 126-28 and accompanying text.

See, e.g., Klein & Greenbaum, supra note 175, at 5 (discussing Pennsylvania's recent antitakeover package and its motivations).

Takeovers sometimes start with unexpected and unsolicited bids for control of the target. Acquisitions commencing with bids that were neither previously negotiated nor concurrently accepted by the target board are classified as "hostile" acquisitions. See Morck et al., supra note 205, at 102. Logically enough, acquisitions that are not classified as hostile are called "friendly." This section of the Note does not use the "hostile" or "friendly" terminology because those terms do not reflect the true economic and social value of various types of acquisitions. See supra notes 199, 218 and accompanying text. This Note, instead, refers to "abusive" or "beneficial" transactions that may include either hostile or friendly acquisitions, or both, depending on their economic and social value.

Quite often when legislatures attempt to specifically target antitakeover legislation, they enact statutes that focus on hostile takeovers rather than abusive takeovers. See infra note 268. Since there is not a direct correlation between "hostile" and "abusive" takeovers, this Note often uses "abusive" versus "beneficial" to avoid misconceptions.

The Pennsylvania antitakeover package of 1990 is a good example of legislators focusing on hostile takeovers instead of abusive takeovers. Many witnesses testifying at the Pennsylvania hearings on the Act spoke of the need to restrict hostile takeovers while leaving friendly takeovers unaffected. Steve Wallman, counsel to the Pennsylvania House of Representatives and closely involved in drafting the bill, stated that "friendly transaction[s] . . . [are] not covered by the bill. The bill is aimed specifically at raider type activities and the effects of raiders on corporations after [the] raid has occurred. So
Beneficial acquisitions, however, do not promote the same fears because they are usually synergistic restructurings\textsuperscript{269} that are less likely than abusive takeovers to lead to plant closings or breakups.\textsuperscript{270} These types of acquisitions are beneficial to both management and stakeholders, and should not be subject to the same harsh antitakeover legislation to which the abusive takeovers should be subject.

Mandating the continuance of collective bargaining agreements, however, will discourage beneficial acquisitions.\textsuperscript{271} For ex-

\[\text{as to the friendly type of transaction, there would be no effect.}\] \textit{Hearings on Senate Bill No. 1310, supra} note 175, at 32. State Representative Snyder stated that "the primary intent of this proposal is to put a crimp in the activities of those corporate raiders whose ultimate goal is a fast buck as opposed to acquiring a going concern in order to run it better." \textit{Id.} at 36. Bill Althaus, Mayor of the City of York, stated that "[i]f one is looking at legitimate corporate acquisitions . . . [there is nothing] in this legislation that is an impediment." \textit{Id.} at 10. The supporters and drafters of this legislation wanted it to protect Pennsylvania from the typical, detrimental effects of abusive takeovers. Simultaneously, however, they wanted "legitimate" acquisitions to continue. Unfortunately, the legislators based the statutes on a distinction between hostile and friendly takeovers, instead of on a distinction between abusive and beneficial takeovers. \textit{See supra} notes 218, 240-66 and accompanying text. Hostile takeovers were targeted as the "threat" to Pennsylvania interests even though that category overbroadly includes beneficial hostile acquisitions that do not yield the detrimental effects about which the legislators were concerned.

The legislation targeted hostile transactions by hinging many of its effects on a "control-share approval." \textit{See} 1990 Pa. Legis. Serv. 36, at 117 (Purdon) (enacting § 2585 to state that the collective-bargain provisions would apply only to transactions "owned by a registered corporation . . . at the time of a control-share approval."). This control-share approval mechanism effectively limits the restrictions of the statute to "hostile" transactions not agreed to by the target board. Once a shareholder obtains a controlling percentage of ownership in the target corporation, without approval, the shareholder loses the voting rights for these shares. The shareholder can only regain these voting rights by an affirmative majority vote. Thus, a "hostile" acquiror cannot gain voting control over the corporation without a "control-share approval" of the rest of the shareholders. \textit{See id.} at 101-06 (enacting §§ 2561, 2561-2563).

Tying this control-share approval to the labor contracts provision, however, apparently confused some of the Act's staunchest supporters. This confusion was clearly evidenced during the hearings in the testimony of George Becker, Vice President of United Steelworkers of America: "Protection of labor union contracts . . . would apply to both successful raids and friendly takeovers." \textit{See Hearings on Senate Bill No. 1310, supra} note 175, at 17.

According to the testimony of Mr. Wallman, and to the actual wording of the statute, Mr. Becker was wrong; the mandates of the statute only apply to hostile transactions. Therefore, even if a hostile transaction is structured so that renegotiating the labor agreement would actually be better for labor, or even if a friendly transaction is structured to avoid the labor agreements, the statutes provide no relief. \textit{See supra} notes 205-14 and accompanying text. In this light, they are both overbroad and underinclusive. One wonders if the unions would have supported the bill as written if they had known that the statute was directed only at hostile transactions and would provide no benefit to labor, and actually hurt labor, in many takeover situations.

\textsuperscript{269} "Synergistic" reflects "the possibility of benefits from combining the business of two firms". Morck et al., \textit{supra} note 205, at 101.

\textsuperscript{270} \textit{Id.} at 104.

\textsuperscript{271} \textit{See Fortress Pennsylvania, supra} note 18 (The recent Pennsylvania collective-
ample, forced continuation of collective bargaining agreements may cause a potential acquiror, "friendly" or not, to look elsewhere for acquisition candidates. Similarly, if a union does not want to continue agreements that contain unfavorable concessions made to the old employer, the potential acquiror, or even the potential seller, might shy away from a beneficial transaction for fear of future labor unrest or dissatisfaction. Under the successorship doctrine, acquirors could avoid or renegotiate burdensome collective bargaining obligations, but under the mandates of the recent enactments, they cannot. Therefore, forced continuation of unattractive bargaining agreements may deter even beneficial transactions.

In Pennsylvania, for example, corporations could opt out of many of the provisions of the recent Act, but they could not avoid the labor contract provisions. Thus, even though many corporations have opted out of some of Pennsylvania's antitakeover statutes, the collective bargaining provisions remain in effect against both abusive and beneficial transactions. Because these enactments discourage even beneficial transactions, they are overbroad and inappropriate as antitakeover provisions.

Beneficial acquisitions serve to benefit both business and labor. Labor protection should not be so overbroad as to restrict these legitimate and worthwhile transactions. The successorship doctrine allows for an equitable balancing of corporate control and job protection. The recent state enactments do not. Legislatures should not allow the presumed threats of a small portion of abusive acquisitions to motivate antitakeover measures that seriously discourage even beneficial, synergistic acquisitions.

In summary, the recent state enactments do not fulfill the intentions of the legislatures. Labor protection, though of questionable necessity, is, at best, weakly provided for by the provisions of these enactments; they propose to protect only a small minority of employees and communities in atypical situations, but instead harm the majority of employees and communities in typical situations. Take-bargaining enactments "intensify the financial risk of going after Pennsylvania companies.")

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272 See supra notes 103-25 and accompanying text.
273 See, e.g., 1990 Pa. Legis. Serv. 36 (Purdon) (amending, inter alia, 15 Pa. Cons. Stat. § 1721 (1990) to allow corporations to opt out of the changes to the state code permitting boards to consider constituency interests along with shareholder interests).
274 See Klein & Greenbaum, supra note 175, at 5.
275 Delaware and Massachusetts, unlike Pennsylvania, did not restrict their statutes to only one type of transaction. See supra note 268. Their statutes, therefore, are even more overbroad than Pennsylvania's. Transactions that are abusive, beneficial, friendly, or hostile are all treated the same. There is no attempt to restrict the effects only to abusive takeovers, and thus, the Delaware and Massachusetts statutes are overbroad.
over protection through these types of enactments, though sometimes necessary to prevent abusive takeovers, is both overbroad and inconsistent with other antitakeover mechanisms. Such protection is inconsistent because it conflicts with more effective and efficient takeover legislation, and is overbroad because of its restrictive effects on beneficial transactions. Since these statutes fail to accomplish what their supporters intended, and often accomplish the opposite, they should be repealed in favor of the more efficient and equitable federal successorship, continuing employer, and alter ego doctrines. Furthermore, even if these statutes did accomplish their intended purposes, they would still be ineffective because they are subject to pre-emption by congressionally enacted labor legislation.

B. The Recent Enactments are Pre-empted by Federal Labor Law under the Supremacy Clause of the United States Constitution

The Supremacy Clause of the United States Constitution states that "[T]he Laws of the United States . . . shall be the supreme Law of the Land."276 Under this definition, if a state statute "create[s] inconsistent duties" or "stand[s] as a substantial and unwarranted obstacle" to the objectives of a federal statute, the state statute must yield.277 The purpose, of course, is clear: to avoid the "disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls."278 This section demonstrates that, under the Supremacy Clause, the NLRA279 pre-empts the recent state enactments that attempt to control the passage of collective bargaining agreements during and after business combination transactions.280 Federal pre-emption of state law generally follows one or more of four confusing and overlapping theories, two of which do not apply here.281 The two theories that do apply here are often combined

276 U.S. Const. art. VI, cl. 2.
277 Air Line Pilots Ass'n v. UAL Corp., 874 F.2d 439, 445 (7th Cir. 1989).
280 One commentator has suggested this in passing. See William H. DuRoss III, Increasing the Labor-Related Costs of Business Transfers and Acquisitions-The Spectre of Per Se Liability for New Owners, 67 Wash. U. L.Q. 375, 409 n.185 (1989). This section of the Note develops this argument.
281 See Palmer v. Liggett Group, 825 F.2d 620, 624 (1st Cir. 1987) (Many court holdings "list, but do not describe, . . . [or] . . . define, any real distinctions among the various types of preemption."); see also Missouri Pacific R.R. v. Railroad Comm'n, 833 F.2d 570, 573 (5th Cir. 1987) ("these guides are easier to state than apply. . . .").

The first preemption theory applies when Congress has enacted legislation explicitly stating the extent to which it intends to preempt state law. See Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984) ("[I]n enacting the federal law, Congress may explicitly define the extent to which it intends to
into one theory. Under this combined theory, state law is preempted when it trespasses into an area of law with respect to which Congress intended to "occupy the field," or when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Even though the NLRA does not explicitly state that it occupies the whole field of labor relations, this Note argues that Congress intended to at least occupy the field of collective bargaining. The recent state enactments conflict with this dimension of the NLRA and with numerous objectives and policies underlying the Act and, therefore, should be pre-empted by the NLRA.

1. These Recent State Enactments Interfere with the Occupied Field of Collective Bargaining and Conflict with the Purposes and Objectives of Congress

One of Congress's main objectives in the passage of the NLRA was the promotion of collective bargaining. In fact, the findings and declarations of policy in the preamble to the NLRA explicitly state that its purpose was to "encourag[e] the practice and procedure of collective bargaining." Courts throughout the years have consistently reaffirmed that this was a fundamental purpose of the NLRA pre-empt state law.

The second theory applies when an explicit facial conflict exists between federal and state legislation. Id. at 747 (State regulation yields if "it conflicts with federal law."); see also Air Line Pilots Ass'n, 874 F.2d at 445 ("If a federal and a state statute create inconsistent duties, the state statute must of course give way."). This theory is also inapplicable to this Note because the NLRA does not explicitly mandate or disallow collective-bargaining agreements passing to the new employer in a business-control transaction.

The theories have been described as very similar and difficult to separate. See Paul Wolfson, Preemption and Federalism: The Missing Link, 16 HASTINGS CONST. L.Q. 69, 71 (1988) ("The Court's pronouncement that state laws must yield if they 'stand as an obstacle' to a congressional objective is functionally indistinguishable from the Court's holding that state laws are ousted when Congress 'occupies the field.").

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See Metropolitan Life, 471 U.S. at 747-48 (State legislation yields when the courts "discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States." (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 209 (1985))); see also Michigan Canners, 467 U.S. at 469 ("Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government.").


Allis-Chalmers, 471 U.S. at 208 ("Congress...has never exercised authority to occupy the entire field in the area of labor legislation...").

and accordingly have acted in furtherance of that purpose.287

One premise of collective bargaining is that neither party is compelled to agree to any substantive provision.288 The legislative history of the NLRA shows that Congress intended that parties remain free to decide whether or not to accept any or all provisions that arise out of a free and fair bargaining process.289 Governmental power was extended only to the supervision of the bargaining process, not to imposition of the substantive terms.290 This means that employers and employees are to bargain, without governmental imposition of terms,291 under normal considerations of contractual freedom,292 in order to arrive at an agreement based on "the free play of economic forces"293 without state "restrictions on economic weapons of self-help."294

The recent state enactments conflict not only with every aspect of this policy, but with the basic premise of the policy itself: to promote the practices and procedures of the collective bargaining pro-

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287 NLRB v. Norfolk S. Bus Corp., 159 F.2d 516, 519 (4th Cir. 1946) ("[O]ne of the purposes of [the NLRA] is to encourage collective bargaining."); cert. denied, 330 U.S. 844 (1947); NLRB v. Pincus Bros., Inc., 620 F.2d 367, 376 (3d Cir. 1980) ("[T]he fundamental policy of the Act [is] to encourage collective bargaining. . . ."); Houston Shopping News Co. v. NLRB, 554 F.2d 739, 745 (5th Cir. 1977) ("The purpose of the NLRA is to encourage collective bargaining. . . .").

288 Section 8(d) of the NLRA defines collective bargaining as the "performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . . , but such obligation does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d) (1988).

289 See S. REP. No. 573, 74th Cong., 1st Sess. 12 (1935) ("It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement, because the essence of collective bargaining is that either party shall be free to decide whether proposals made to it are satisfactory.").

290 H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) ("Allowing the [NLRB] to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.").

291 See NLRB v. Burns Int'l Sec. Serv., 406 U.S. 272, 287 (1972) ("Bargaining freedom means both that [employer and union] need not make any concessions as a result of Government compulsion and that they are free from having contract provisions imposed upon them against their will."); H.K. Porter, 397 U.S. at 108 ("[T]he fundamental premise on which the Act is based [is] private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract."); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937) ("The Act does not compel agreements between employers and employees . . . [or] any agreement whatever.").

292 H.K. Porter, 397 U.S. at 108 (1970) ("One of the fundamental policies of [the NLRA] is freedom of contract.").


cess. These statutes explicitly state that "[n]o . . . business combination shall result in the termination or impairment of the provisions of any . . . [organized] labor contract."\(^{295}\) The statutes impose on the respective parties contractual provisions to which they never agreed, which directly conflicts with the noninterference policies of the NLRA. Even though the statutes may promote collective bargains by continuing their substantive provisions, they deter collective bargaining by interfering with the practices and procedures of the bargaining process itself. The purpose of the NLRA was the promotion of collective bargaining, not the blind enforcement of collective bargains.

Under the provisions of these state statutes, however, collective bargaining will not occur at all unless both sides agree to bargain.\(^{296}\) In most situations, one side or the other will hold the right to enforce what it will consider beneficial contract provisions. Therefore, it will refuse to bargain and the other party will be powerless to object, bargain, or appeal.\(^{297}\) Because the parties are effectively restrained from bargaining, and because one party will usually have contractual provisions foisted upon it, the statutes restrict the invocation of "economic weapons of self-help" and disallow any "free play of economic forces." Economic forces enjoy no "free play" when states attempt to completely disallow any "play" whatsoever. Economic weapons of self-help can never be employed when states do not even allow the parties to get to the battlefield. These effects conflict with the policies of the NLRA to promote collective bargaining under principles of contractual freedom.

The burdensome economic effects of the recent state enactments also conflict with promotion of collective bargaining. These enactments place economic burdens on acquisitions, both friendly and hostile, and reduce the likelihood of a completed transaction.\(^{298}\) Management has incentives to leave open the opportunity for accepting future acquisition proposals. Therefore, it will attempt to avoid the absolute restrictions of these statutes. Although management cannot directly avoid these statutes, it can try to minimize its exposure to their effects in two ways. First, it can try to avoid collec-


\(^{297}\) Either labor or management can have the agreement imposed on them against their wishes. See supra notes 205-12 and accompanying text.

\(^{298}\) See supra notes 236-37, 267-72 and accompanying text.
tive bargaining altogether. If management can break its employees' union and avoid bargaining agreements altogether, it can minimize the risk of losing future opportunities to sell out. Management, therefore, has real incentives to avoid bargaining whenever and however possible.

Second, management can take serious steps to reduce the potency of its employees' bargaining agreements. The less oppressive the agreements are from a management perspective, the less threatening the agreements will appear to potential friendly acquirors. Management, therefore, will be under tremendous pressure to minimize the potency of any concessions that it has to make, and to avoid making any concessions at all. In effect, these statutes provide extra incentives for management to fight with labor over every single provision. This directly conflicts with the policy of the NLRA of "encouraging practices fundamental to the friendly adjustment of industrial disputes."

Thus, the effects of the recent state enactments directly and violently oppose the NLRA policies of promoting collective bargaining under principles of contractual freedom. The federal doctrines, on the other hand, as developed by the NLRB and the federal courts through interpretation and application of the NLRA, actually promote collective bargaining. Furthermore, the federal doctrines enforce collective bargains, but only when doing so furthers the policies underlying the NLRA. In contrast to the successorship doctrine that promotes bargaining in accordance with the policies of the NLRA, the recent state enactments actually deter collective bargaining and impose terms not agreed to by the employer or employees. In contrast to the continuing employer and alter ego doctrines that appropriately enforce collective bargains when the "new" employer is really the same entity, the recent state enactments en-

299 Refusal to conduct good-faith bargaining is of course illegal. 29 U.S.C. § 158(a)(5) (1988); see also STEVEN I. SCHLOSSBERG & JUDITH A. SCOTT, ORGANIZING AND THE LAW 97, 103 (3d ed. 1983) (discussing the illegality of employers refusals to bargain in good faith). Management can, however, attempt to disguise its activity or indirectly weaken the union, and the recent statutes will only promote such activities.

300 The counter argument is that management rushes out to bargain even more because it wants takeover protection for self-entrenchment. See supra notes 251-55 and accompanying text. Management, however, will want to waive or remove its takeover protections when a really attractive deal comes along or when management itself seeks to consummate a deal with a "wanted" suitor. For example, poison pill plans usually allow boards to redeem otherwise exercisable dilutive share rights if a deal is attractive. The recent state enactments do not allow for this flexibility, however, and management will not have extra incentives to bargain just to cover itself with the rigid takeover protections these enactments provide.


302 See supra notes 81-87 and accompanying text.

303 See supra notes 103-25 and accompanying text.
force collective bargains even when the new employer is a totally separate entity, providing a completely different employment environment that would not give rise to reasonable expectations of continued contract enforcement. Furthermore, the recent state enactments enforce collective bargaining agreements even when the enforcement of those agreements would actually harm the employees that the agreements were originally designed to protect.\textsuperscript{304} Therefore, the recent state enactments conflict with the policies of the NLRA by interfering with the practices and procedures of the collective bargaining process and by rigidly protecting collective bargains, even though new bargains and agreements would better serve the underlying policies of the NLRA. Consequently, the courts should strike these statutes down as directly conflicting with, and, therefore, pre-empted by the NLRA under the mandates of the Supremacy Clause.

2. These Recent State Enactments Interfere with the Establishment and Maintenance of Equal Bargaining Power and Conflict with the Purposes and Objectives of Congress

Another fundamental purpose of the NLRA was the establishment and maintenance of equal bargaining power between labor and management. The basic objective of the NLRA was to redress "[t]he inequality of bargaining power between employees ... and employers ..."\textsuperscript{305} by balancing "protection, prohibition, and laissez-faire."\textsuperscript{306} The Supreme Court has limited almost all state activity that alters this balance of bargaining power\textsuperscript{307} and recently has

\textsuperscript{304} See supra notes 209-14 and accompanying text.

\textsuperscript{305} 29 U.S.C. § 151 (1988); see also Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 753 (1985); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316 (1965) ("[A] primary purpose of the [NLRA] was to redress the perceived imbalance of economic power between labor and management. . ."); Fafnir Bearing Co. v. NLRB, 362 F.2d 716, 717 (2d Cir. 1966) ("The [NLRA] . . . was designed to overcome the inequality of bargaining power between employees and employers.").


upheld precedent that disallows states from altering this balance.\textsuperscript{308} Even more recently, the Court held that a city regulation was pre-empted under the NLRA because it destroyed the balance of power designed by Congress and frustrated congressional intention of allowing for the application of economic weapons of self-help.\textsuperscript{309}

The recent state enactments destroy the balance of bargaining power established by the NLRA because the balance shifts depending upon whom the agreements benefit. When the provisions benefit labor, it has all the power, but when the provisions benefit management, it has all the power.\textsuperscript{310} Total power vests in the party that has the most to gain. Therefore, these recent enactments should be pre-empted because their provisions upset the equitable bargaining balance established by Congress in the NLRA.

3. \textit{These Recent State Enactments Interfere with the Establishment and Maintenance of Uniform, Nationwide Treatment of Labor and Conflict with the Purposes and Objectives of Congress}

The establishment of uniform, nationwide treatment of both labor and labor agreements was another fundamental policy goal of the NLRA. Congress sought to obtain uniform application of the NLRA's substantive rules and to avoid the conflicts likely to result from a variety of local procedures.\textsuperscript{311} The recent enactments, however, would establish very different treatment of labor and labor agreements among the various states. In Delaware, Massachusetts, and Pennsylvania, labor agreements would pass to new employers in every business combination,\textsuperscript{312} but in other states, they would not.

For example, if an asset sale of a major corporation includes both a Pennsylvania manufacturing plant and a New Jersey processing plant, the Pennsylvania workers' agreement will be protected

\textsuperscript{308} Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985) ("Congress determined both how much the conduct of unions and employers should be regulated, and how much it should be left unregulated: 'The States have no more authority than the Board to upset the balance that Congress has struck between labor and management in the collective-bargaining relationship.' " (quoting New York Telephone v. New York Labor Dep't, 440 U.S. 519, 554 (1979)(dissenting opinion)).

\textsuperscript{309} See Golden State Transit Corp. v. Los Angeles, 475 U.S. 608 (1986).

\textsuperscript{310} See supra notes 205-14, 235-37 and accompanying text.

\textsuperscript{311} See Golden State Transit v. Los Angeles, 493 U.S. 103, 110 (1989) ("[S]tate jurisdiction over conduct arguably protected or prohibited by the NLRA is pre-empted in the interest of maintaining uniformity in the administration of the federal regulatory jurisdiction."); see also NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971) ("The purpose of the [NLRA] was to obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies.' " (quoting Garner v. Teamsters Union Local No. 7761, 346 U.S. 485, 490 (1953).

\textsuperscript{312} See supra notes 126-37 and accompanying text.
but the New Jersey workers’ agreement will not. Such a situation could easily incite labor unrest, especially because the two plants could be directly across the river from each other.\(^\text{313}\) As previously discussed, the federal doctrines promote the policies of the NLRA by treating all labor agreements equally and by balancing the competing equities to avoid industrial labor strife.\(^\text{314}\) The recent state enactments, however, actually contradict this policy of uniformity and threaten to promote labor strife; they should, therefore, be preempted by the NLRA.\(^\text{315}\)

\(^{313}\) Consider an even messier situation. Acquiror purchases the assets of both A and B and combines them into a new enterprise, at a new location, so that their origins are indistinguishable. Acquiror then hires approximately one quarter of both A’s and B’s former employees to comprise somewhat less than half of its new workforce and hires somewhat more than a half of its new workforce from outside the transaction. Under the requirements of the recent state enactments, A’s former employees retain their old contract and union, and B’s former employees retain theirs. In this situation, two employees, working side-by-side on possibly the same equipment, have different union representation under different contracts. Furthermore, the “outside” employees that make up more than half of the new workforce may want to form their own bargaining unit represented by another union. If they are allowed to do so, then there will be three unions, three contracts, and three times the confusion. Under the federal doctrines, this situation would be resolved according to majority status of the workforce with the result being one union and one contract for all the workers. See supra notes 47-50 and accompanying text. The policies and procedures of the NLRA will necessarily have to preempt the recent state enactments so as to retain uniformity of representation and to avert a splintering of labor power and the resulting labor discontent or unrest.

\(^{314}\) See supra notes 159-71 and accompanying text. See also notes 129-34 and accompanying text (The federal doctrines disregard state law that would alter the uniformity secured under the federal analysis.).

\(^{315}\) The nonuniform favor that these enactments grant to in-state labor might also be considered a form of state protectionism subject to Commerce Clause scrutiny. Protectionism is a policy of governmental economic protection that benefits domestic producers at the expense of nondomestic producers. See New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273-274 (1988). The Commerce Clause of the U.S. Constitution prohibits such protectionism unless the discriminatory results are “demonstrably justified by a valid factor unrelated to economic protectionism.” Id. at 269. Even when a state’s statute “regulates even-handedly to effectuate a legitimate local public interest, . . . [statutes will not be upheld if] the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

The recent state enactments discussed in this Note may be unconstitutional under the Commerce Clause due to their protectionist motivations and effects. The statutes were enacted to protect in-state employment. See Hearings on Senate Bill No. 1310, supra note 175, at 1-28 (various witnesses testifying how the statute would preserve the jobs of Pennsylvania employees). This in-state protection, however, may come at the expense of out-of-state employees. Thus, even though the statutes are not facially protectionist, they yield protectionist results. See also supra note 192.

These statutes burden interstate commerce because “[t]he reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered.” Edgar v. MITE Corp., 457 U.S. 624, 643 (1982). Since these statutes limit business combinations transactions, assets that could be used more efficiently in other parts of the country will either continue to be used inefficiently or be removed from productive use altogether. See supra notes 236-37 and accompanying text.

In order to withstand Commerce Clause scrutiny the putative local benefits related
4. The States' Power to Enact "Peripheral" Legislation Relating to "Deeply Rooted" Local Concerns is Not Applicable to These Recent Enactments

States can enact labor legislation when the effects of such legislation are "peripheral" to the NLRA or when the issue involved is such a "deeply rooted" local concern that it cannot be inferred that Congress intended to limit state powers in that area. Thus, the United States Supreme Court in Metropolitan Life Insurance Co. v. Massachusetts upheld a state enactment that defined and mandated that employers provide health insurance coverage to employees who were covered by the NLRA. The Court reasoned that the state legislation affected union and nonunion employees equally, did not alter the balance of power between the parties, and neither encouraged nor discouraged the collective bargaining processes controlled by the NLRA. Furthermore, the Court found that these laws were minimum standards "independent of the collective-bargaining process" and, therefore, not pre-empted by the NLRA.

The recent labor contracts enactments, however, are distinguishable from the state law at issue in Metropolitan Life. First, interference with collective bargaining agreements does not qualify as a "peripheral concern" of the NLRA and is not "deeply rooted in local to in-state job preservation will have to outweigh this burden. The benefits are protection of employee expectations, the local economy, the local community, and the local cultural and charitable values. See supra note 175 and accompanying text. These same benefits, however, are lost to the out-of-state employees and communities that will lose potential jobs and business development due to the restrictions of the recent state enactments. Therefore, the in-state benefits gained are offset by the out-of-state benefits lost, and the net global effect is equalized; there are little, if any, real benefits.

Furthermore, this Note argues that these recent statutes will not provide the in-state labor-protection benefits that they were intended to provide. See supra notes 199-204 and accompanying text. Therefore, "there is nothing to be weighed in the balance" to compensate for the burden they impose on interstate commerce. Edgar, 457 U.S. at 644. Under this analysis these statutes may not withstand Commerce Clause scrutiny. See Local 926, Int'l Union of Operating Eng'rs v. Jones, 460 U.S. 669, 676 (1983) ("When ... the conduct at issue is only a peripheral concern of the Act or touches on interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, it could not be inferred that Congress intended to deprive the State of the power to act, [the Court will] refuse to invalidate state regulation or sanction of the conduct."); Mayon v. Southern Pac. Transp. Co., 805 F.2d at 1250, 1252 (5th Cir. 1986) ("Preemption ... is not applied to state regulation that affects [the] federal scheme only peripherally or involves deeply held local concerns."); Sheet Metal Workers v. Carter, 212 S.E.2d 645, 647 (Ga. Ct. App. 1975) ([T]he States [have] the power to regulate any matter of 'peripheral concern' to the NLRA or ... conduct that touches interests 'deeply rooted in local feeling and responsibility.' " (quoting Taggart v. Weinacker's, Inc., 397 U.S. 223, 228 (1969), cert. denied 423 U.S. 1078 (1976)).

Id. at 754-55.
Id. at 755.
 Labor agreements are a direct concern of the NLRA and are to be regulated by Congress, not the states. Second, these enactments directly impinge on the collective bargaining process; they discourage collective bargaining, upset the balance of bargaining power among the parties, and disturb national uniformity within the labor system. Third, these enactments treat union and nonunion employees very differently by continuing the collective bargaining agreements of union employees but ignoring the privately bargained contracts of nonunion employees. In total, the recent enactments are not concerned with "peripheral" issues like "minimum labor standards," and therefore fall outside the pre-emption exception of Metropolitan Life.

In summary, these enactments encroach on an area of law that Congress intended to occupy and conflict with the inherent policies of congressional legislation. These enactments contradict NLRA policies by discouraging collective bargaining, by interfering with the establishment and maintenance of equal bargaining power between labor and management, and by interfering with the establishment of uniform nationwide treatment of labor and labor agreements. Finally, these enactments fall outside of the "peripheral concern" exception, the "local concern" exception, and the recently-developed "minimum standards" exception to pre-emption. Therefore, courts should strike down these enactments as unconstitutional infringements on validly exercised federal power under the pre-emption authority of the Supremacy Clause of the United States Constitution.

**CONCLUSION**

The NLRB and the federal courts have developed three theories to deal with labor responsibilities during and after business combinations. These theories look to "continuity" in the employment relationship to determine the post-transaction rights and responsibilities of employees and employers. The federal doctrines attempt to balance the employers' freedom to make business decisions and manage resources with the employees' reasonable expectations regarding job security and employment benefits.

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322 See supra notes 295-301 and accompanying text.
323 See supra notes 305-10 and accompanying text.
324 See supra notes 311-15 and accompanying text.
325 "Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 755 (1985).
326 See supra notes 22-125 and accompanying text.
States such as Delaware, Massachusetts, and Pennsylvania, however, are striking out on their own. These states have enacted legislation that mandate the continuation of collective-bargaining agreements regardless of the circumstances. These enactments are bold reversals of the federal judicial doctrines and, if enforced, would institute broad changes in the ways corporations and businesses will have to look at combinational transactions. Not only would acquiring businesses have to consider the content of the previous employers’ bargaining agreements, but they would also have to consider where the employees would be located and how the different laws of the different locations would affect the total transaction costs and consequences.

This Note has argued that states that have not enacted these recent statutes should not consider doing so, and states that have enacted them should repeal them. These enactments fail to effectuate their respective legislatures’ intentions. Instead, they unnecessarily interfere with legitimate business transactions and harm labor, business and society. Perhaps most condemning, these enactments directly conflict with the policies and principles of the NLRA. On this basis courts should strike down these enactments as unconstitutional intrusions on validly exercised federal power under the authority of the Supremacy Clause of the United States Constitution.

The federal doctrines of the NLRB and the federal courts provide a nationally consistent and equitably balanced method of dealing with labor obligations during and after business combination transactions. States should not enact, and courts should not allow states to maintain, protectionist legislation that abandons the policies, principles, methods, and results of federal labor policy.

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327 See supra notes 159-64 and accompanying text.
328 See supra notes 172-275 and accompanying text.
329 See supra notes 276-325 and accompanying text.

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