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Sufficient or Necessary?: The Role of "Substantial Continuity" in Determining a Duty to Arbitrate Under a Preexisting Collective Bargaining Agreement

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I. INTRODUCTION

When a corporation takes control of an existing business operation, optimally, the acquired operation's existing labor force continues business as usual for its new "successor employer." In this ideal scenario, the successor employer minimizes costs associated with training new labor, and existing employees clearly benefit by retaining their jobs. In the alternative, consider the "mild disaster" that occurred at a beef slaughter plant in Iowa, where a successor employer fired the existing labor force and hired untrained replacements.[1] During the new employees' first shift, production proceeded at an "exceedingly slow pace" and substantial amounts of beef were destroyed or damaged.[2] The costs inherent in hiring a new work force clearly reduce a successor employer's incentive to terminate its predecessor's employees.[3]

Yet, the recent holding by the United States Court of Appeals for the Second Circuit in *Local 348-S v. Meridian Management Corp.*[4] likely will cause more successor employers to reassess these costs and consider hiring a new work force. *Meridian* held that, based solely on a work force's "substantial continuity" from predecessor to successor operations, a successor employer must arbitrate under the terms of any existing collective bargaining agreement ("CBA") between the predecessor employer and the continuing work force's union.[5] In short, if a successor employer hires a majority of its predecessor's labor force, that successor employer unconditionally must arbitrate pursuant to the predecessor's CBA. The *Meridian* decision splits from the United States Court of Appeals for the Third Circuit's holding in *AmeriSteel Corp. v.*

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[1] Packing House and Indust. Servs., Inc. v. NLRB, 590 F.2d 688, 692 (8th Cir. 1978).
[2] *Id*.
[3] *See* Wilson McLeod, *Rekindling Labor Law Successorship In an Era of Decline*, 11 HOFSTRA LAB. & EMP. L.J. 271, 300 n.115 (1994).
[4] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65 (2d Cir. 2009).
[5] *See id*. at 76 ("[W]here there are sufficient indicia of substantial continuity of identity of the workforce, it is possible that a successor employer will be bound at least by some of the substantive terms of a pre-existing CBA. Determining the extent to which the successor employer is bound by the preexisting agreement, however, is a question for the arbitrator.").

International Brotherhood of Teamsters[6] that an unconsenting successor employer is not bound to arbitrate when the majority of the predecessor employer's work force is hired.[7] Not only does the Second Circuit's opinion have negative policy implications (*e.g.*, promoting circumvention of the arbitration requirement by not hiring a predecessor's existing work force), but the holding stands at odds with three United States Supreme Court decisions that dictate labor law successorship.[8]

The Court set forth the successorship doctrine in *John Wiley & Sons, Inc. v. Livingston*,[9] *NLRB v. Burns International Security Services, Inc.*,[10] and *Howard Johnson Co. v. Hotel and Restaurant Employees*[11] (collectively, the "Successorship Trilogy" or "Trilogy"). These cases outlined the duties imposed on a successor employer by an existing CBA between the predecessor employer and incumbent labor union.[12] Due to certain inconsistencies among the three holdings, the Successorship Trilogy has a "history of bedeviling courts" and wreaking havoc across many of America's unionized industries.[13]

In particular, *Wiley* and *Burns* have been viewed as standing in "direct conflict" with one another and have created a "tension . . . in this trilogy," which *Howard Johnson*, the final case of

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[6] *See* AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 266, 267 (3d Cir. 2001).
[7] *See generally* Martin Flumenbaum & Brad S. Karp, *Second Circuit Review; Successor Employers Bound By Prior Collective Bargaining Pact*, N.Y.L.J. (Online) (Oct. 28, 2009) (noting that *Meridian* creates a split with the Third Circuit).
[8] *See Meridian*, 583 F.3d at 81–82 (Livingston, J., dissenting).
[9] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (holding that a successor employer could be bound to arbitrate with an incumbent union if substantial continuity of identity in the business enterprise exists).
[10] NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972) (noting that a successor employer is not automatically bound to the substantive terms of the CBA between the predecessor employer and the incumbent union).
[11] Howard Johnson Co. v. Hotel and Rest. Emps., 417 U.S. 249 (1974) (holding that if substantial continuity of identity in the business enterprise does not exist, a successor employer will not be bound to arbitrate with an incumbent union).
[12] *See generally* Flumenbaum & Karp, *supra* note 7, at *1 (discussing successor employer obligations).
[13] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 79 (2d Cir. 2009) (Livingston, J., dissenting); Edward B. Rock & Michael L. Wachter, *Labor Law Successorship: A Corporate Law Approach*, 92 MICH. L. REV. 203, 203 (1993) ("Courts have struggled repeatedly to define the legal obligations of the buyer of a business that has unionized workers.").

the Trilogy, does not resolve.[14] The two main unresolved issues of the Trilogy are (1) whether an unconsenting successor employer has a duty to arbitrate any disputes with the incumbent union under the arbitration clause of the preexisting CBA (the issue on which *AmeriSteel* and *Meridian* diverge), and (2) "whether and to what extent" an arbitrator can impose any substantive terms of a preexisting CBA on an unconsenting successor.[15] Some scholars view an arbitration clause as a substantive term and, thus, conflate the duty to arbitrate with the adoption of the substantive terms of a prior CBA.[16] This Comment considers the two questions to be distinct and focuses upon and offers a solution solely regarding the duty to arbitrate.

With respect to the *AmeriSteel* and *Meridian* split, this Comment proposes that the Third Circuit arrived at the correct result (*i.e.*, the successor was not required to arbitrate when only substantial continuity is satisfied), but that the court's underlying logic, in reaching that result, "flatly contradicts the holding of *Wiley*."[17] In contrast, the Second Circuit relied too heavily upon the "substantial continuity of identity" factor established in *Wiley*.[18] In doing so, the

[14] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 268, 270 (3d Cir. 2001).
[15] *Meridian*, 583 F.3d at 66.
[16] Matthew M. McCluer, *Reading the Fine Print: Emerging Views on the Successorship Doctrine and Mandatory Arbitration Provisions*, 31 MISS. C. L. REV. 85, 105 (2012) (In determining whether a successor can be bound to arbitrate under a predecessor's CBA, the author contends that the arbitration clause is a substantive term. The article sets forth a "two-step analysis," which applies for imposing substantive terms of a predecessor's CBA, including finding a duty to arbitrate. First, there must be substantial continuity and, second, additional contractual justifications must exist. The article identifies two well-defined and non-controversial scenarios where such contractual justification exists: (1) where the successor is an alter ego of the predecessor; and (2) where the successor has expressly or impliedly assumed the obligations of its predecessor's CBA. The article, however, fails to propose any additional justifications for imposing a duty to arbitrate and other substantive terms. Rather, the author states that a duty to arbitrate cannot be imposed on an unconsenting, non-alter-ego successor employer and should be "limited to situations involving virtual identity of business operations between the predecessor and successor employers." Yet, the author does not articulate the meaning of "virtual identity of business operations" or develop a functional standard beyond the two well-defined scenarios.)
[17] *AmeriSteel*, 267 F.3d at 281 (Becker, C.J., dissenting).
[18] *See Meridian*, 583 F. 3d at 81 (Livingston, J., dissenting) ("The majority tries to justify its result by heavy reliance on [*Wiley*], but in so doing misreads *Wiley* and ignores several subsequent Supreme Court cases that have interpreted *Wiley* not to permit what the majority does today.").

Meridian court set a dangerous precedent that will incentivize "would-be successor employers to simply fire the unionized employees and start over."[19]

Forcing new employers to arbitrate under a predecessor's CBA whenever "substantial continuity of identity" in a workforce exists will cause employers to refrain from rehiring unionized employees to "elude the grasp of the successorship doctrine."[20] Under *Meridian*'s approach, employers must "weigh the benefits of retaining experienced workers with the possibly lengthy pitfalls of litigating, appealing, arbitrating, and potentially relitigating" when a duty to arbitrate is imposed on them.[21] Furthermore, choosing not to hire a predecessor's unionized workers will lead to inexperienced workers occupying these newly vacant positions, potentially resulting in inferior work product and a greater probability of liability arising from employee negligence.[22] As a consequence, more skilled laborers will be unemployed, leading to greater industrial strife and social turmoil.[23] Therefore, public and economic policy supports narrowly defining the instances in which successor employers are required to arbitrate.

This Comment proposes that, in a similar vein as Judge Livingston's dissent in *Meridian*, the federal courts impose a limited bright-line rule that successor employers arbitrate under the terms of a preexisting CBA in the following four scenarios: (1) when a successor employer has implicitly or explicitly assumed the CBA, (2) when a successor employer is an alter ego of the predecessor, (3) when a successor employer is a product of a merger with the predecessor (whereby the predecessor ceases to exist) *and* substantial continuity exists, or (4) when substantial continuity exists *and* state successor liability law supports a requirement to

[19] *Id.* at 86.
[20] Saks & Co. v. NLRB, 634 F.2d 681, 690 (2d Cir. 1980) (Meskill, J., dissenting).
[21] Kevin A. Teters, Case Note, *Successor Employer's Obligations Under a Preexisting Collective Bargaining Agreement: The Second Circuit Misinterprets Supreme Court Decisions and Sets a Harmful Precedent*, 76 J. AIR L. & COM. 143, 150 (2011).
[22] McLeod, *supra* note 3, at 299.
[23] *See, e.g.,* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964); *see also* NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 282 (1972).

arbitrate.[24] In developing this argument, Part II sets forth the policy of the National Labor Relations Act ("NLRA") and describes the collective bargaining process. This section also discusses the limitations placed on private employers and labor unions by the NLRA, the purpose and status of a CBA, and the impact of a successor employer's duty to bargain with an incumbent union. Part III then addresses the Supreme Court precedent on a successor employer's duty to arbitrate by discussing the Successorship Trilogy. Part IV turns to the current split between the United States Courts of Appeals and the existing conflict in the Trilogy. Finally, Part V urges the federal courts to adopt a bright-line rule when imposing a duty to arbitrate on successor employers.

II. BACKGROUND

A. Overview of the National Labor Relations Act and Collective Bargaining Agreements

The main body of labor law governing collective bargaining between private employers and employees is the National Labor Relations Act.[25] The NLRA grants employees the right to affiliate themselves with labor unions and to bargain collectively with employers via unions or self-chosen representatives.[26] The fundamental purpose of collective bargaining is to establish wages, hours of employment, and other conditions of employment.[27] These negotiated terms, rights, and duties of the parties are then organized into, and agreed to by both parties in, a written contract known as a CBA,[28] which governs the relationship between labor unions and employers.[29]

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[24] *See Meridian*, 583 F.3d at 84 (Livingston, J., dissenting).
[25] National Labor Relations Act, 29 U.S.C. §§ 151–69 (2006).
[26] § 157.
[27] § 159.
[28] § 158(d).
[29] Mark E. Zelek, *Labor Grievance Arbitration in the United States*, 21 U. MIAMI INTER-AM. L. REV. 197, 197 (1989).

CBAs are not treated like ordinary contracts; rather, they enjoy an exalted status.[30] A CBA is "more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."[31] The CBA covers the complete employment relationship and "calls into being a new common law – the common law of a particular industry or of a particular plant."[32] Despite the fact that a CBA is created by two parties, it is by no means "in any real sense the simple product of a consensual relationship."[33] Under normal contract principles, a successor employer would not be bound to a predecessor's contract without consent.[34] Under a CBA, however, a successor employer *can* be bound to a predecessor's CBA without consent because a CBA "is not an ordinary contract."[35]

In two well-defined scenarios, a successor employer is obliged to honor the preexisting CBA: first, when it has expressly or impliedly assumed the CBA[36] and second, when it is simply an "alter ego" of the predecessor employer.[37] A successor employer will be bound when it expressly assumes the CBA by voluntarily agreeing to the terms of the preexisting CBA.[38] Likewise, when there is sufficient evidence to support a finding that a successor employer has impliedly agreed to be bound by the CBA, the successor is bound by the predecessor's CBA.[39]

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[30] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964).
[31] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578–79 (1960) (citing Dean Shulman, *Reason, Contract, and the Law in Labor Relations*, 68 HARV. L. REV. 999, 1004–05 (1955)).
[32] *Id*. at 579.
[33] *Wiley*, 376 U.S. at 550.
[34] *See id.*
[35] *Id.* (emphasis added).
[36] Southward v. S. Cent. Ready Mix Supply Corp., 7 F.3d 487, 493 (6th Cir. 1993) ("[I]f a successor voluntarily assumes the obligations of its predecessor's CBA, then it will be bound by its predecessor's CBA.").
[37] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 79 (2d Cir. 2009) (Livingston, J., dissenting).
[38] *In re* Plaza Mission Bottling Co., 14 B.R. 428 (Bankr. E.D.N.Y. 1981) (president of the subsequent company expressly stated at a meeting held prior to the formation of the new company that he would continue to observe the terms and conditions set forth in the CBA); United Steelworkers v. Deutz-Allis Corp., No. 86-0166-CV-W-0, 1986 WL 6852, (W.D. Mo. Mar. 11, 1986) (successor announced in a letter that it had assumed the labor contract).
[39] *See, e.g.*, NLRB v. Pine Valley Div. of Ethan Allen, Inc., 544 F.2d 742 (4th Cir. 1976) (successor employer continued to deduct union dues and made contributions to union's welfare account from employee paychecks, therefore successor conformed to the terms of the CBA).

For example, in *Audit Services, Inc. v. Rolfson*,[40] a successor employer that continued to make trust fund contributions on behalf of union workers, but not non-union workers, was bound to the former CBA because it displayed a pattern of conforming to the terms of the former CBA.[41]

In the second scenario, under the "alter ego" doctrine, the successor employer is "merely a disguised continuance of the old employer."[42] Instances where a successor employer is in fact an alter ego of the predecessor "involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in ownership or management."[43] Courts consider whether the two entities have substantially identical stockholders, officers, directors, management, operations, equipment, and customers.[44] For example, consider a family-operated business passed from the patriarch to another family member who had been involved in operations and who attempts to establish the business as a new and separate entity.[45] The new entity is an "alter ego" of the original business because it shares the same management and is substantially identical to the predecessor.[46] Courts disagree, however, regarding duties of successorship in scenarios not encompassed within these two situations.[47]

B. Overview of an Employer's Duty to Bargain

In order to initiate the collective bargaining process that results in a CBA, the NLRA imposes on an employer a duty to bargain with labor union representatives when a majority of its

[40] Audit Servs., Inc. v. Rolfson, 641 F.2d 757 (9th Cir. 1981).
[41] *Id*. at 763–64.
[42] Southport Petroleum Co. v. NLRB, 315 U.S. 100, 106 (1942).
[43] Howard Johnson Co. v. Hotel and Rest. Emps., 417 U.S. 249, 259 n.5 (1974).
[44] R.R. Maint. Laborers' Local 1274 v. Kelly R.R. Contractors, Inc., 591 F. Supp. 889, 896 (N.D. Ill. 1984) ("Important factors to consider are whether the two entities have substantially identical management, business purpose, operation, equipment, customers, supervisors and ownership. The substantial continuity of the work force is frequently a major issue in alter ego determinations.") (internal citation omitted).
[45] *See generally* Midwest Precision Heating and Cooling, Inc. v. NLRB, 408 F.3d 450 (8th Cir. 2005).
[46] *Id.* at 459.
[47] *See, e.g.*, AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 271 n.2 (3d Cir. 2001) (finding that "no special significance should be attached to the fact that *Wiley* involved a merger[,]" and state law backdrop, which influenced the duty to arbitrate in *Wiley*, should not induce successor's labor law obligations).

employees are union members.[48] The obligation to bargain, however, does not end upon negotiation of a CBA; instead, it "unquestionably extends . . . and applies to labor-management relations during the term of an agreement."[49] For instance, an employer is not permitted to make a unilateral change to any condition or requirement included in the CBA without notifying the union and providing it with an opportunity to negotiate.[50]

Yet, successor employers are not always held to the duty to bargain when a predecessor employer transfers its business to the successor.[51] Beyond the two well-defined instances previously discussed, the duty to bargain as a successor employer only arises when an employer acquires an organized business and there is "substantial continuity of the business enterprise" between the old employer and new employer.[52] In *Fall River Dyeing & Finishing Corp. v. NLRB*,[53] the Supreme Court established a factor-based test to determine the "substantial continuity of identity of the business enterprise" standard.[54] The existence of "substantial continuity" in assessing a duty to bargain hinges upon:

> [(1)] whether the business of both employers is essentially the same; [(2)] whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and [(3)] whether the new entity has the same production process, produces the same products, and basically has the same body of customers.[55]

An employer may attempt to evade the duty to bargain by intentionally failing to satisfy this "substantial continuity" standard, most notably, by not hiring a majority of the predecessor's unionized employees.[56] The refusal to hire an employee because of union membership, however,

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[48] *See* 29 U.S.C. § 158(a)(5) (2006); *see also* 29 U.S.C. § 158(d) (2006).
[49] NLRB v. Acme Indus. Co., 385 U.S. 432, 436 (1967) (internal citation omitted).
[50] *See* Union-Tribune Pub. Co., 353 NLRB No. 2, at *19 (2008).
[51] *See* B. Glenn George, *Successorship and the Duty to Bargain*, 63 NOTRE DAME L. REV. 277, 279 (1988).
[52] *Id.*
[53] Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987).
[54] *Id.* at 43; *see also* Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 74 (2d Cir. 2009).
[55] *Fall River*, 482 U.S. at 43.
[56] George, *supra* note 51, at 290.

constitutes an unfair labor practice in violation of the NLRA.[57] Accordingly, unions frequently claim that the absence of a majority of the predecessor's employees in the successor's work force is a result of discriminatory hiring practices.[58]

C. Overview of Arbitration's Role in Labor Law

As comprehensive as a CBA may be, it is virtually impossible to provide for every contingency in the employer-employee relationship. Inevitably, disputes between the union and the employer will arise.[59] Usually, the parties acknowledge this reality and provide for an arbitration clause in the CBA, which allows these disputes to be resolved through a grievance process culminating in binding arbitration.[60] Arbitration has played a central role in effectuating national labor policy,[61] and it is federal policy to resolve labor disputes arising out of a CBA through arbitration.[62] The Supreme Court described arbitration as "the substitute for industrial strife," and as "part and parcel of the collective bargaining process itself."[63]

III. THE SUCCESSORSHIP TRILOGY

A. John Wiley & Sons, Inc. v. Livingston

In *Wiley*, the Supreme Court first introduced the idea that a successor employer could be bound by an arbitration clause in a CBA between the predecessor employer and its unionized

[57] 29 U.S.C. § 158(a)(3) (2006).
[58] George, *supra* note 51, at 290–91.
[59] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) ("Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement."); *see also* Jared S. Gross, Note, *In Search of* Wiley*: Struggling to Bind Successor Corporations to Their Predecessor's Collective Bargaining Agreement*, 29 OKLA. CITY U. L. REV. 113, 117 (2004).
[60] Paul Trapani, Note, *Old Presumptions Never Die: Rethinking the Steelworker's Trilogy Presumption of Arbitration in Deciding the Arbitratability of Side Letters*, 83 TUL. L. REV. 559, 559–60 (2008).
[61] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).
[62] United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960).
[63] *Wiley*, 376 U.S. at 549; *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.

employees.[64] In that case, Interscience Publishers, Inc. ("Interscience"), the predecessor employer, merged with John Wiley & Sons, Inc. ("Wiley"), the successor employer, and ceased to do business as a separate entity.[65] Prior to the merger, an AFL-CIO union entered into a CBA with Interscience, which covered half of the Interscience workers.[66] After the merger, Wiley retained all of Interscience's employees, but refused to recognize the union as a bargaining agent or fulfill any obligations under the Interscience CBA.[67] The union then brought suit against Wiley to compel arbitration under the CBA, claiming that Wiley was bound by the agreement's arbitration provision.[68] Wiley argued that it was never a party to the CBA and that the merger effectively terminated the Interscience CBA.[69]

The Supreme Court concluded that Wiley had a duty to arbitrate with the union under the preexisting CBA.[70] The Court's analysis in *Wiley* laid the groundwork for determining whether a successor employer has a duty to arbitrate. It held that "[s]ubstantial continuity of identity in the business enterprise" before and after the change must exist in order to require arbitration under the preexisting CBA.[71] The Court regarded the "wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty[,]" as satisfying the "substantial continuity" condition.[72] The Court, however, left the "substantial continuity" concept undefined, leaving lower courts confused as to whether a duty to arbitrate was limited to the merger context,

[64] *See Warrior & Gulf Navigation Co.*, 363 U.S. at 578 ("The present federal policy is to promote industrial stabilization through the collective bargaining agreement. A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement.") (internal citations omitted).
[65] *Wiley*, 376 U.S. at 545.
[66] *Id.* at 544.
[67] *Id.* at 545–46.
[68] *Id.* at 545.
[69] *Id.* at 547.
[70] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 68 (2d Cir. 2009).
[71] *Wiley*, 376 U.S. at 551.
[72] *Id.*

and as to what was "substantial" enough when a business continued after a change in ownership.[73]

In addition to "substantial continuity," state successor liability law helped buttress the decision to require Wiley to arbitrate.[74] The Court looked to New York's Business Corporation Law, which states that a merged corporation is liable on all contracts of both predecessor corporations.[75] While "the Supreme Court did not rely principally on common law successor liability rules in *Wiley*, it did refer to those principles as a partial explanation for its result."[76]

Wiley also reiterated general principles of national labor policy, the role of arbitration, and the status of CBAs in forming its opinion.[77] The Court held that national labor policy favored arbitration as the means of settling labor disputes,[78] and opined that arbitration protects against industrial strife and is a central component in the CBA relationship.[79] Thus, the *Wiley* Court believed that, in examining successor employer disputes, a balancing test that attempts equally to protect employees from a sudden change in the employment relationship and unconsenting employers from being bound to a contract to which they were not a party must be applied.[80] The Court stressed that a CBA is "not an ordinary contract" and that, unlike other contracts, an unconsenting successor may be bound by its terms.[81]

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[73] *See Meridian*, 583 F.3d at 74; *see also* AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 268 (3d Cir. 2001).
[74] *Wiley*, 376 U.S. at 548.
[75] *Meridian*, 583 F.3d at 80 (Livingston, J., dissenting)*; see also Wiley*, 376 U.S. at 548.
[76] *Meridian*, 583 F.3d at 81 (Livingston, J., dissenting).
[77] *See Wiley*, 376 U.S. at 549.
[78] *Id.*
[79] *Id.*; *see also* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960) ("[A]rbitration is the substitute for industrial strife. . . . [A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.").
[80] *See Wiley*, 376 U.S. at 549–50.
[81] *Id.*

B. NLRB v. Burns International Security Services, Inc.

In *Burns*, the Court did not address whether a duty to arbitrate existed; instead, it looked to whether a successor employer could be bound by the substantive terms of the previous CBA.[82] In that case, Wackenhut Corporation ("Wackenhut") provided security protection services for Lockheed Aircraft Service Co. ("Lockheed") at one of its plants under a one-year service agreement.[83] Once the contract expired, Lockheed called for bids from various companies supplying these services, and Burns International Security Services, Inc. ("Burns") outbid Wackenhut, winning the security contract.[84] Burns hired a majority of Wackenhut's employees already employed at the plant, but refused to honor the existing CBA between Wackenhut and the incumbent union.[85] The union filed unfair labor practice charges with the National Labor Relations Board ("NLRB"), and the NLRB ordered Burns to honor the Wackenhut CBA.[86]

In its decision, the Supreme Court first found that Burns had a duty to recognize and bargain with the incumbent union because it represented a majority of the employees hired by Burns.[87] According to the Court, "[t]he source of [Burns'] duty to bargain with the union is not the [CBA] but the fact that it voluntarily took over a bargaining unit that was largely intact."[88] Second, the Court held that Burns could not be bound against its will by the substantive terms of the preexisting CBA.[89] In reaching this decision, the Court stated that Section 8(d) of the NLRA[90] and legislative history of labor laws hold that "although successor employers may be bound to recognize and bargain with the union, they are not bound by the substantive provisions

[82] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 269 (3d Cir. 2001).
[83] NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 274 (1972).
[84] *Id.* at 275.
[85] *Id.* at 276.
[86] *Id.*
[87] *See id.* at 280–81.
[88] *Id.* at 287.
[89] *See Burns,* 406 U.S. at 282.
[90] 29 U.S.C. § 158(d) (2006).

of a [CBA] negotiated by their predecessors but not agreed to or assumed by them."[91] While recognizing the general principles underlying labor disputes, the Court held that the goal of preventing industrial strife did not override the "bargaining freedom of employers and unions."[92] It reasoned that binding a successor employer to the substantive terms of a preexisting CBA "may result in serious inequities."[93] One such inequity is the restraint on the flow of capital because potential employers would be unwilling to rescue failing businesses if they cannot negotiate their own CBAs.[94] Finally, the Court held that contract terms between employers and unions should "correspond to the relative economic strength of the parties."[95] Therefore, forcing successor employers into unconsented contracts would offset the "balance of bargaining advantage."[96]

Burns provided ambiguous direction for the lower courts because it partially contradicts *Wiley* and did not address whether an arbitration clause comprises one of the substantive terms of a CBA.[97] *Wiley* establishes that an unconsenting successor employer may have a duty to arbitrate with an incumbent union, thereby potentially imposing the substantive terms of the preexisting CBA on the successor.[98] In spite of this, *Burns* held that an unconsenting successor employer cannot be bound to the substantive terms of a preexisting CBA, even if "substantial

[91] *Burns*, 406 U.S. at 284 (internal citation omitted).
[92] *Id.* at 287 ("Preventing industrial strife is an important aim of federal labor legislation, but Congress has not chosen to make the bargaining freedom of employers and unions totally subordinate to this goal. . . . This bargaining freedom means both that parties 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.").
[93] *Id.*
[94] *See id.* at 287–88 ("A potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision. Saddling such an employer with the terms and conditions of employment contained in the old collective-bargaining contract may make these changes impossible and may discourage and inhibit the transfer of capital.").
[95] *Id.* at 288.
[96] *Id*.
[97] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 271 (3d Cir. 2001).
[98] *Id*. at 270.

continuity of identity" exists.[99] Such a holding left courts wondering if it is still acceptable to force successors to arbitrate and potentially be found liable for the CBA.[100]

Despite the glaring contradiction, *Burns*' opinion provided certain clues to reconciling the Trilogy. In *Burns*, the Court suggested that *Wiley* occurred against a backdrop of state successor liability law; thus, providing guidance on what is influential in compelling arbitration, in addition to substantial continuity.[101] Furthermore, the Court identified two levels of liability for successor employers: the duty to arbitrate and the obligation to adopt substantive terms of a previous CBA.[102] *Burns* provides guidance regarding the heightened duty to adopt a prior CBA, which typically occurs when the CBA provisions are assumed and when the alter ego doctrine applies, and distinguishes the substantial continuity factor and how it applies to the successor's duties.[103]

C. Howard Johnson Co. v. Hotel and Restaurant Employees

Two years after *Burns*, *Howard Johnson* took up the issue of labor law successorship, with scholars and practitioners hoping that the Supreme Court would resolve conflicting reasoning of *Wiley* and *Burns*.[104] They were disappointed, however, when the Court refused to "decide . . . whether there [was] any irreconcilable conflict between *Wiley* and *Burns*."[105] Instead, *Howard Johnson* simply answered the question of whether a new employer had a duty to arbitrate in a fact pattern that contrasted with *Wiley*.[106] Nevertheless, where *Howard Johnson*

[99] *See Burns*, 406 U.S. at 286–87.
[100] *AmeriSteel*, 267 F.3d at 270.
[101] *See Burns*, 406 U.S. at 286 ("[*Wiley*] dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation.").
[102] *See id.* (recognizing that a duty to arbitrate exists because *Wiley* established it, but also that the duty to arbitrate does not require the successor employer to honor the substantive terms of a predecessor's CBA).
[103] *See id*. at 282, 287.
[104] *See AmeriSteel*, 267 F.3d at 271.
[105] Howard Johnson Co. v. Hotel and Rest. Emps., 417 U.S. 249, 256 (1974).
[106] *AmeriSteel*, 267 F.3d at 271.

succeeds is in its ultimate outcome and reiteration of salient factors to be used in determining where a successor employer has a duty to arbitrate.

In *Howard Johnson*, Grissom, the predecessor employer, agreed to sell its equipment and transfer operation of its restaurant and motor lodge to Howard Johnson Co. ("Howard Johnson"), the successor employer.[107] Howard Johnson refused to assume the existing CBA between Grissom and the incumbent union, and hired only nine out of fifty-three of the union-represented, former Grissom employees.[108] The union then filed an action against Howard Johnson, seeking an order to compel Howard Johnson "to arbitrate the extent of [its] obligations to the Grissom employees under the bargaining agreements."[109]

In arriving at a decision, the Court chose to compare the leading distinctions between the facts presented in *Wiley* to the facts of the case at hand.[110] First, it emphasized the fact that *Wiley* involved a merger, "as a result of which the initial employing entity completely disappeared."[111] In contrast, *Howard Johnson* only involved the sale of some assets, and the original employer remained in existence.[112] This distinction was significant because, in *Wiley*, state successorship liability law "embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."[113] Recognition of such state liability law supports a finding of a duty to arbitrate because it "may have been fairly within the reasonable expectations of the parties."[114] Second, the Court emphasized that because the former employer continued to exist in *Howard Johnson*, the union "[had] a realistic remedy to enforce

[107] *Howard Johnson*, 417 U.S. at 251.
[108] *Id.* at 252.
[109] *Id.* at 252–53.
[110] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 71 (2d Cir. 2009).
[111] *Howard Johnson*, 417 U.S. at 257.
[112] *Id*.
[113] *Id.* (quoting NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 286 (1972)) (internal quotation marks omitted).
[114] *Id.*

their contractual obligations."[115] Whereas in *Wiley*, the former employer ceased to exist, thus making arbitration essential between the union and the successor employer.[116] Third, and most importantly, "in *Wiley* the surviving corporation hired *all* of the employees of the disappearing corporation[,]" whereas in *Howard Johnson*, the new employer "hired only a small fraction of the predecessors' employees."[117] Accordingly, the Court found that, based on these factors, there was no "substantial continuity of identity in the business enterprise" before and after Howard Johnson became the new employer.[118] Therefore, Howard Johnson had no duty to arbitrate under the CBA.[119]

Furthermore, the Court shed additional light on the scope of the "substantial continuity" requirement. It declared the critical issue in assessing "substantial continuity" is whether there is "a substantial continuity in the identity of the work force across the change in ownership."[120] The Court held that the requisite continuity of the work force was present in *Wiley* because a "wholesale transfer" of employees occurred between employers; however, *Howard Johnson* did not meet this requirement because the new employer only hired a minority of employees.[121]

Although *Howard Johnson* did little to clarify existing conflicts in the successorship doctrine, it nevertheless constructively underscored the importance of "substantial continuity" in determining a duty to arbitrate.[122] *Howard Johnson*'s main contribution is its holding that a lack of substantial continuity would place a case outside the ambit of *Wiley*.[123] *Howard Johnson*

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[115] *Id.*
[116] *Id.*
[117] *Howard Johnson*, 417 U.S at 250, 258.
[118] *Id.* at 263.
[119] *Id.*
[120] *Id.; see also* Century Vertical Sys., Inc. v. Local No. 1, 379 Fed. App'x 68, 70 (2d Cir. 2010); *see also* Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 74 (2d Cir. 2009).
[121] *Howard Johnson*, 417 U.S at 263.
[122] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 271 (2d Cir. 2001) ("The *Howard Johnson* Court, however, chose not to deal with [the conflict of *Burns* and *Wiley*], and instead walked a very narrow path.").
[123] *Id*.

merely applied the principles set forth in *Wiley* to a situation where substantial continuity was unequivocally recognized as not being present. The Court "simply pointed out that, consistent with *Wiley*, and on *Wiley*'s own terms, the lack of substantial continuity meant that the Court needed to look no further" in determining whether a successor must submit to arbitration against its will.[124] *Howard Johnson* acknowledged and reinforced the policy outlined in *Burns*, in maintaining that a successor may be bound to arbitrate but that it will not be automatically bound to the substantive provisions of the predecessor's CBA or have any obligation to hire the predecessor's employees.[125]

IV. THE CIRCUIT SPLIT

In the wake of the Successorship Trilogy, lower federal courts had no difficulty following *Burns*' mandate, finding that unconsenting successor employers are not bound by the substantive terms of their predecessors' CBAs.[126] Yet, the lower courts struggled to reconcile the holdings of the three Supreme Court cases in applying the duty to arbitrate to successor employers.[127] In *AmeriSteel*, the Third Circuit held that (1) "substantial continuity of identity" is necessary but not sufficient to find a duty to arbitrate, and (2) because *Burns* will not bind an unconsenting successor to the substantial terms of a prior CBA, any arbitration imposed by such a duty will be futile.[128] Later, the Second Circuit considered the same problem in Meridian and held that "substantial continuity of identity" alone was sufficient in finding a successor's duty to arbitrate, thus creating a circuit split.[129] The following section explains the current circuit split and how the lower federal courts interpreted the conflict in the Trilogy.

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[124] *Id*. at 272.
[125] *Id*.
[126] *See id.* at 275–76.
[127] *See generally*, *id.* at 277–78 (Becker, C.J., dissenting); *see also* Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 79 (2d Cir. 2009) (Livingston, J., dissenting).
[128] *AmeriSteel*, 267 F.3d at 265, 269.
[129] *Meridian*, 583 F.3d at 78.

A. AmeriSteel Corp. v. International Brotherhood of Teamsters*, Third Circuit*

In *AmeriSteel*, AmeriSteel Corporation ("AmeriSteel"), a successor employer, purchased various assets of Brocker Rebar, the predecessor employer, including a manufacturing facility.[130] A CBA existed between Brocker Rebar and its employees' union, but AmeriSteel insisted that it was not bound by the CBA, and therefore, it had no duty to arbitrate under its terms.[131] As AmeriSteel hired the majority of the union employees who had worked for Brocker Rebar, the court required the company to bargain with the union.[132] Bargaining broke down between the parties, and AmeriSteel refused to recognize the union.[133] Thereafter, the union requested arbitration pursuant to the arbitration clause in the CBA.[134] AmeriSteel refused and sought to enjoin the union from proceeding to arbitration with AmeriSteel as a party.[135]

The Third Circuit attempted to navigate the Successorship Trilogy by examining each decision individually.[136] In reviewing *Wiley*, the court found the holding to be limited to the merger context in which a predecessor employer disappears.[137] The Third Circuit then identified "substantial continuity of identity" as a necessary ingredient in finding a duty to arbitrate, yet not the sole factor in forcing a successor to arbitrate with the incumbent union.[138]

The *AmeriSteel* court held that *Howard Johnson* did not resolve the conflict between *Wiley* and *Burns*; rather, it revealed the Supreme Court's focus in the Trilogy.[139] According to the Third Circuit, *Howard Johnson* took "an expansive view of *Burns*, repeatedly extolling

[130] *AmeriSteel*, 267 F.3d at 265.
[131] *Id.* at 266.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *AmeriSteel*, 267 F.3d.at 268.
[137] *Id.* at 268–69.
[138] *Id.* at 272 n.3.
[139] *Id.* at 271–72.

[*Burns*'] reasoning" and "downplay[ing] the significance of *Wiley*."[140] In interpreting the Trilogy, "*Burns* . . . provides more persuasive guidance than the limited holding in *Wiley*."[141] The *AmeriSteel* court found that, if an unconsenting successor were held to arbitrate under an existing CBA, "the substantive terms of the CBA could be enforced, and thus *Burns* cannot survive intact."[142] In applying *Burns*, the court found that AmeriSteel could not be bound by the substantive terms of the CBA. Therefore, no arbitration award granted to the union could receive judicial sanction, because any award would be based on the substantive terms of the CBA. [143] Thus, AmeriSteel could not be obligated to arbitrate, as the arbitration would serve no purpose.[144] Since there is an inability to hold successor employers to the substantive terms of a former CBA, AmeriSteel was found to have no obligations under the Brocker Rebar CBA.[145]

B. Local 348-S v. Meridian Management Corp*., Second Circuit*

In *Meridian*, the Port Authority of New York and New Jersey awarded a contract to Meridian Management Corporation ("Meridian") to provide engineering and janitorial services at the Jamaica Air Train Terminal at John F. Kennedy International Airport.[146] Meridian elected to subcontract the janitorial services to Cristi Cleaning Services, Inc. ("Cristi") under a one-year contract.[147] At the time that Meridian and Cristi entered the subcontract, Cristi had an existing CBA with a labor union representing its janitorial employees.[148] Meridian later lawfully terminated its subcontract with Cristi and decided to perform the janitorial services itself.[149] In doing so, Meridian chose to retain the majority of the Cristi employees who had previously

[140] *Id.* at 272.
[141] *Id.* at 273.
[142] *AmeriSteel*, 267 F.3d at 272.
[143] *Id.* at 274.
[144] *Id.* at 265, 274.
[145] *Id.* at 277.
[146] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 66 (2d Cir. 2009).
[147] *Id.*
[148] *Id.*
[149] *Id.*

worked at the terminal.[150] The incumbent union then requested that Meridian recognize it as the bargaining representative for the employees.[151] Meridian declined to do so and, in addition, refused to make CBA-mandated contributions to the union's Health and Welfare Fund.[152] The union sought to compel Meridian to submit to arbitration as required by the CBA.[153] Meridian, however, argued that it was not a party to the CBA, and therefore, it should not be bound by any of its terms, including the arbitration clause.[154]

The Second Circuit followed *AmeriSteel*'s methodology in first analyzing each case in the Successorship Trilogy to find whether Meridian was required to arbitrate the issue of whether and to what extent it was bound by the former CBA.[155] Unlike *AmeriSteel*, however, the Second Circuit determined the emphasis of the Trilogy to be the "central role of collective bargaining and arbitration in furthering the goals of national labor policy – specifically by avoiding industrial strife and encouraging the peaceful resolution of labor disputes."[156] In particular, *Meridian* found protecting workers from sudden changes in the employment relationship to be of special significance when examining the successorship doctrine.[157]

When considering whether a duty to arbitrate exists, the majority in *Meridian* placed ultimate importance on the issue of whether there existed substantial continuity of identity of business enterprise, with a singular emphasis on the composition of the work force.[158] With this in mind, the court held that the duty to arbitrate should not be limited to mergers, as in *Wiley*, and

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[150] *Id.*
[151] *Id*. at 66–67.
[152] *Meridian*, 583 F.3d at 67.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 68.
[156] *Id.* at 72.
[157] *Id.* ("Although in *Howard Johnson* the Court declined to extend *Wiley* to the facts presented in that case, the Court's explanation for that refusal emphasized the importance of the workers' interest in being shielded from sudden changes in the employment relationship.").
[158] *Meridian*, 583 F.3d at 74.

contended instead that continuity of identity can occur in a variety of situations.[159] The court noted that Meridian hired the majority of Cristi's employees, who continued doing the same work in the same location that they had done for Cristi, and found that there was a "substantial continuity of identity" between Meridian and Cristi.[160] Further, the court emphasized that the employees had worked for Meridian the entire time, even though Meridian had no prior legal relationship with the workers, because Meridian was the general contractor when Cristi was performing under the subcontract between the parties.[161] Based on these facts, the court found that Meridian's status as a successor employer did not automatically bind it to the substantive terms of the preexisting CBA. The court, however, held that, because Meridian maintained "substantial continuity of identity of business enterprise" (including the composition of its work force), it was required to arbitrate with the union under the arbitration clause of the former CBA.[162]

The court declined to determine the extent, if any, to which a successor employer was bound by the substantive terms of a former CBA, and held that such issue constituted a question for the arbitrator.[163] The court held that once submitted to arbitration, the arbitrator is "to bring his informed judgment to bear in determining" which, if any, of the provisions of the CBA will be imposed on the successor employer.[164] The court did not suggest any criteria for deciding this question, but did note that the arbitration procedure will follow the terms of the arbitration clause in the predecessor's CBA, so long as one exists.[165] The court found that enforcing a duty to arbitrate is the "most effective way to balance those interests recognized by the Supreme Court[,]"

[159] *Id.*
[160] *Id.* at 74–75.
[161] *Id.* at 75.
[162] *Id.* at 66, 76.
[163] *Id.* at 76.
[164] Local 1115 v. B & K Invs., Inc., 436 F. Supp. 1203, 1208 (S.D. Fla. 1977); *see also* NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 286 (1972).
[165] *Meridian*, 583 F.3d at 76.

and is more effective than anything attempted or accomplished by the parties privately bargaining new terms to govern the relationship.[166] The court concluded by recognizing and rejecting the Third Circuit's reasoning in *AmeriSteel*.[167] According to the Second Circuit, *AmeriSteel* "eviscerates the protection of employees represented by incumbent unions" and contradicts the holding of *Wiley*.[168]

V. ANALYSIS

A. Reconciling the Circuit Split with the Successorship Trilogy and Establishing a Bright-Line Rule for the Duty to Arbitrate

While *Meridian* properly upheld the principle expressed in *Wiley* that an unconsenting successor employer can be bound to arbitrate under appropriate circumstances, the court erred in holding that a "substantial continuity of identity of business enterprise" is the only factor to consider when determining whether a duty to arbitrate exists. On the other hand, *AmeriSteel* ultimately provided the proper outcome in the circuit split, in holding that a successor is not bound to arbitrate when only a "substantial continuity of identity of business enterprise" exists. *AmeriSteel* correctly identified "substantial continuity" as a "necessary ingredient," yet not "the sole basis" for finding a duty to arbitrate in a successor employer.[169] *AmeriSteel*, however, failed to advance that logic when forming its ultimate solution – that no duty to arbitrate applies to unconsenting, non-alter-ego successor employers.[170] In doing so, *AmeriSteel* contradicts *Wiley* by forming an overbroad conclusion "that an arbitration clause of a CBA can never be enforced

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[166] *Id.*
[167] *Id.* at 78.
[168] *Id.*
[169] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 272 n.3 (3d Cir. 2001).
[170] *See id*. at 265 ("Because an unconsenting successor cannot be bound by the substantive provisions of its predecessor's agreement, we hold that the successor in this case, appellee AmeriSteel Corporation, cannot be forced to arbitrate the extent of its obligations under the agreement.").

against an [unconsenting] successor."[171] *AmeriSteel* finds that the duty to arbitrate, enforceable in *Wiley*, must not be ordered because unconsenting successors cannot be forced to arbitrate "when ultimately it can serve no purpose."[172] In holding that, as a consequence of *Burns*, a duty to arbitrate would be futile for unconsenting successors, *AmeriSteel* implies that *Howard Johnson* and *Burns* have overruled *Wiley*.[173] Yet, the Supreme Court did not expressly overrule *Wiley* in *Burns* or *Howard Johnson*, and only the Court or Congress may overrule its precedent,[174] not the federal appellate courts.[175] Therefore, *AmeriSteel* arrives at a proper conclusion in not imposing a duty to arbitrate, but does so using flawed reasoning.

On the other hand, *Meridian* properly recognizes *Wiley*'s continued vitality, but erroneously applies and interprets its holding. *Meridian* "confuses the circumstances in which a 'successor employer' has a duty to recognize and bargain with a labor union, with much more limited circumstances in which that employer is bound to arbitrate with a union under a [CBA] to which it has not agreed."[176] The court simply applies the *Fall River* factors, used to identify "the existence or non-existence of substantial continuity in the context of assessing the duty to bargain[,]" and examines continuity of work force to determine whether a successor employer has a duty arbitrate as well.[177] By conflating the duty to bargain with the duty to arbitrate, *Meridian* ignores the enhanced standards established in *Wiley* and *Howard Johnson*, and instead,

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[171] *Id*. at 281 (Becker, C.J., dissenting).
[172] *Id*. at 265 (majority opinion).
[173] *Id*. at 280 (Becker, C.J., dissenting).
[174] *See* Agostini v. Felton, 521 U.S. 203, 235 (1997) ("[*S*]*tare decisis* does not prevent [the United States Supreme Court] from overruling a previous decision . . . . '[I]f a precedent of [the United States Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the United States Supreme Court] the prerogative of overruling its own decisions.'").
[175] *See* State Oil Co. v. Khan, 522 U.S. 3, 20 (1997).
[176] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 78–79 (2d Cir. 2009) (Livingston, J., dissenting).
[177] *Id*. at 74 (majority opinion).

simplistically requires simply a showing of "substantial continuity" in applying either duty.[178] By melding the two separate levels of liability, Meridian creates a lower standard than the Supreme Court intended for determining a duty to arbitrate. Based on the Second Circuit's construction, the duty to arbitrate would effectively eclipse the duty to bargain and render it valueless to successor employers attempting to negotiate a new CBA.[179] As a result, unions would have no incentive to bargain toward a new CBA, when they can instead compel a successor employer to arbitrate whether, and to what extent, it must comply with the substantive terms of the predecessor's CBA. And, in other words, "all successor employers who hire the bulk of a predecessor's employees[,]" would have a duty to arbitrate the extent to which they are bound by the prior CBA.[180]

To determine whether successor employers should be obligated to arbitrate, the courts should first look to long-established scenarios, where successors have been held to the terms of the CBA.[181] In doing so, the courts should form a bright-line rule, which categorizes the various scenarios in which a duty to arbitrate will be found. To a large degree, a bright-line rule will remove the confusion of the lower courts in applying the successorship doctrine. Under such a rule, a duty to arbitrate should be found only: (1) when a successor employer has implicitly or explicitly assumed the CBA, (2) when a successor employer is an alter ego of the predecessor, (3) when a successor employer is a product of a merger with the predecessor (whereby the

[178] *See id*. ("We have previously used the *Fall River* factors to make a fact-specific finding that a successor corporation was bound by a predecessor's CBA, at least to the extent of its arbitration clause. Looking at those factors in this case, it is apparent that this particular employer, Meridian, should be required to arbitrate the degree to which it is otherwise bound by the CBA.").
[179] *See id*. at 80 (Livingston, J., dissenting).
[180] *Id*. at 80.
[181] *Id*. at 84.

predecessor ceases to exist) *and* substantial continuity exists, or (4) when substantial continuity exists *and* state successor liability law supports a requirement to arbitrate.[182]

Under the first two scenarios, the assumption of the CBA and the alter ego doctrine, the circuits widely agree that a successor employer must adopt the former CBA, and thus, a duty to arbitrate must naturally follow, along with all other obligations of the former CBA.[183] The last two categories of the bright-line rule, however, are not as established as the former categories, and have never been a primary basis for imposing the entirety of the CBA on a successor employer. Historically, however, such factors have been considered to be important circumstances in finding a duty to arbitrate.[184]

Absent a finding of an alter ego successorship or assumption of the CBA, the centerpiece of the Supreme Court's analysis of when a successor can be bound to arbitrate is a finding of "substantial continuity of identity of the business enterprise."[185] In *Wiley*, once the Court concluded that "substantial continuity" existed, it looked to other factors, such as common law successor liability rules, to support a duty to arbitrate.[186] Furthermore, nowhere in *Howard Johnson* does the Court state that "substantial continuity" is the sole basis for finding a duty to arbitrate.[187] Thus, the successorship doctrine treats "substantial continuity" as a "necessary *but not sufficient* condition for concluding that a successor employer is bound to arbitrate under a predecessor's CBA."[188] As previously mentioned, in analyzing "substantial continuity of

[182] *Meridian*, 583 F.3d at 84 (Livingston, J., dissenting).; NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 286 (1972) ("[The] narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation.").
[183] *Meridian*, 583 F.3d at 79 (Livingston, J., dissenting).
[184] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964).
[185] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 281 n.1 (3d Cir. 2001) (Becker, C.J., dissenting).
[186] *Wiley*, 376 U.S. at 550.
[187] Howard Johnson Co. v. Hotel and Rest. Emps., 417 U.S. 249, 256 (1974).
[188] *Meridian*, 583 F.3d at 83 (Livingston, J., dissenting).

identity of business enterprise," the *Fall River* factors must be satisfied and, as noted in *Howard Johnson*, a particular emphasis is placed on the "continuity of work force."[189]

Based on the Trilogy, in the merger context where the predecessor disappears, a successor employer always should have a duty to arbitrate if there is substantial continuity.[190] It is significant that the predecessor ceases to exist after the merger because, in the absence of the former employer, the union loses the party against whom they can bring employment disputes. The survival of the predecessor employer is key to protecting the interests of the workers because the union will have a "realistic remedy to enforce their contractual obligations" against the surviving former employer.[191] Thus, a merger, in this context, would erase the former employer and the workers' ability to resolve disputes. Therefore, the successor employer should retain a duty to arbitrate so that the workers' rightful expectations are preserved.

Finally, a duty to arbitrate should also be found when both (1) "substantial continuity" is met and (2) successor liability state law exists that supports a reasonable expectation that the successor employer would be liable for the CBA.[192] In *Wiley*, the Court emphasized that, in addition to "substantial continuity," state corporate law supporting continuing liability for successors was important to its result.[193] In the Court's view, such state laws, when sufficiently strong, could establish a reasonable expectation of continuing liability.[194] In fact, each case of the Trilogy referred to the state law background as support to "substantial continuity,"

[189] *Howard Johnson*, 417 U.S. at 263.
[190] *Wiley*, 376 U.S. at 549; *see also* Century Vertical Systems, Inc. v. Local No. 1, 379 F. App'x. 68, 70 (2d Cir. 2010) ("[I]n appropriate circumstances a successor employer can be bound by the arbitration provision contained in a CBA entered into by the predecessor employer. . . . These circumstances include, but are not limited to, those cases where the contracting employer disappears into another by merger[.]") (internal quotation marks omitted).
[191] *Howard Johnson*, 417 U.S. at 257; *see also Meridian*, 583 F.3d at 71.
[192] *Meridian*, 583 F.3d at 81 (Livingston, J., dissenting).
[193] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547–48 (1964).
[194] *See Meridian*, 583 F.3d at 84 (Livingston, J., dissenting).

demonstrating that the Court did not consider "substantial continuity" to be an exclusive factor in finding a duty to arbitrate.[195]

Therefore, where "substantial continuity" exists, but the successor is not an alter ego, has not expressly or impliedly assumed the CBA, or has not merged with and eliminated the predecessor, "[s]tate law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case[.]"[196] This does not mean, however, that the principles of law governing ordinary contracts will dictate the obligation to arbitrate, because it is well established that a CBA "is not an ordinary contract."[197] Instead, under this scenario, the state successor liability law that covers the type of transaction or business restructuring at hand (*e.g.*, merger, stock acquisition, or assets purchase) should be used as an additional factor in determining a duty to arbitrate.[198]

Generally, under state successor liability law, "if corporations merge or engage in a stock purchase or exchange, the successor corporation is . . . liable for the obligations of the predecessor."[199] "When one corporation purchases the assets of another, [however,] the purchaser is generally not liable for the obligations of the seller."[200] Therefore, when applying

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[195] *See, e.g., Wiley*, 376 U.S. at 548 ("State law may be utilized so far as it is of aid in the development of correct principles or their application in a particular case[.]"); NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 286 (1972) ("[*Wiley*'s] narrower holding dealt with a merger occurring against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation."); *Howard Johnson*, 417 U.S. at 257 ("[T]he merger in *Wiley* was conducted 'against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation,' which suggests that holding *Wiley* bound to arbitrate under its predecessor's collective-bargaining agreement may have been fairly within the reasonable expectations of the parties.").

[196] *Wiley*, 376 U.S. at 548.

[197] *Id*. at 550.

[198] *See Meridian*, 583 F.3d at 83 (Livingston, J., dissenting) ("Because the successorship doctrine is a creature of federal common law, federal courts must decide exactly which theories of successor liability to recognize."); *see also* William Meade Fletcher, *Fletcher Cyclopedia of the Law of Corporations*, § 41 (2012) ("The tests and factors that the courts consider to determine whether to disregard the corporate form differ from state to state.").

[199] Wendy D. Davis, *De Facto Merger, Federal Common Law, and* Erie*: Constitutional Issues in Successor Liability*, 2008 COLUM. BUS. L. REV. 529, 532 (2008).

[200] *Id*. at 538.

the fourth prong of the proposed rule in most jurisdictions, the state successorship liability laws provide support for a duty to arbitrate in a stock acquisition transaction or merger. Under these two scenarios, however, "substantial continuity" must remain the central focus, with the emphasis on "continuity of work force." Therefore, under the fourth prong, as long as "there is an accepted common law basis for imposing contractual successor liability" and "substantial continuity" is met, a successor employer will have a duty to arbitrate with the incumbent union because such a duty is "fairly within the reasonable expectations of the parties."[201]

Although the Court has denied formal recognition of the taxonomy of state corporate law transaction,[202] it has, in fact, implicitly "relied on the form of the transaction, that is, on the fact that *Howard Johnson* involved an asset sale rather than a merger [like *Wiley*]." [203] Further, it is worth noting that *AmeriSteel* and a recent Wisconsin district court case, *Freitas v. Republic Airways Holdings, Inc.*,[204] which both found the respective successor employers to have no arbitration obligations, involved the sale of assets as well. Thus, "[t]he Court's reliance on this corporate law distinction supports the claim that the corporate taxonomy provides a useful basis for . . . [the] labor law successorship doctrine."[205]

Chief Judge Becker, dissenting in *AmeriSteel*, offered an alternate reconciliation of the Trilogy, suggesting a "sliding scale" approach for determining what can be imposed on successors.[206] He proposed that by using the Successorship Trilogy as a guide, burdens ranging from no obligations to the imposition of an entire CBA should be imposed on successors based

[201] *Meridian*, 583 F.3d at 84 (Livingston, J., dissenting); *Howard Johnson*, 417 U.S. at 263.
[202] Golden State Bottling Co. v. NLRB, 414 U.S. 168, 182 n.5 (1973) ("The refusal to adopt a mode of analysis requiring the [NLRB] to distinguish among mergers, consolidations, and purchases of assets is attributable to the fact that, so long as there is a continuity in the 'employing industry,' the public policies underlying the doctrine will be served by its broad application.").
[203] Rock & Wachter, *supra* note 13, at 225.
[204] Freitas v. Republic Airways Holdings, Inc, No. 11–C–358, 2011 WL 5506679 (E.D. Wisc. Nov. 10, 2011).
[205] Rock & Wachter, *supra* note 13, at 225.
[206] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 285 (3d Cir. 2001) (Becker, C.J., dissenting).

on the corresponding strength of the successor relationship.[207] The dissent seems to base the "sliding scale" test mainly on the presence of a merger or sale of assets, not as much on continuity of work force, thus ignoring the central consideration in imputing a duty to arbitrate identified in *Howard Johnson*.[208] A "sliding scale" approach fails for multiple reasons. First, such a test is exceedingly imprecise, especially in such an unsettled area. Second, due to its malleability, a sliding scale can be easily abused and used as an excuse for pushing forward various policy agendas by either pro-labor union or pro-employer courts. Third, there are only three tiers in the sliding scale (*i.e.*, a duty to bargain, a duty to arbitrate, and an adoption of the terms of the predecessor's CBA); thus, the sliding scale ignores the standards for each of these obligations already established by the Supreme Court.

Other scholars have attempted to resolve the conflicting holdings of *AmeriSteel* and *Meridian*.[209] For example, in "Reading the Fine Print," the author provides that the duty to arbitrate is "limited to situations involving virtual identity of business operations between the predecessor and successor employers,"[210] but does not provide a clear standard of implementation for the courts. Rather, this commentator simply restates the two well-recognized situations – alter ego and assumption of CBA terms – in identifying when a successor employer will be bound to the substantive terms of its predecessor's CBA.[211] Further, like *AmeriSteel*, many of these articles have "emasculated *Wiley*" and downplayed its important role in the Trilogy.[212] Such critics of *Wiley* have stated that "substantial continuity analysis is only relevant to the issue of union recognition[,]" thereby supporting the erroneous view that *Wiley* is

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[207] *Id*.
[208] *Id*.; *Howard Johnson*, 417 U.S. at 263–65.
[209] *See* McCluer, *supra* note 16; *see also* Teters, *supra* note 21.
[210] McCluer, *supra* note 16, at 105.
[211] *Id.* at 106.
[212] AmeriSteel, 267 F.3d at 280 (Becker, C.J., dissenting); *see also* McCluer, *supra* note 16, at 106; *see also* Teters, *supra* note 21, at 149.

"virtually dead letter confined to its specific facts, essentially overruled" by *Burns*.[213] In forming these conclusions, these critics channel the same flawed logic as *AmeriSteel* in contending, "that an arbitration clause of a CBA can never be enforced against an [unconsenting] successor[,]" despite the fact that *Howard Johnson* and *Wiley* each recognized the existence of a successor's duty to arbitrate.[214]

B. The Practical Effects of Meridian

By imposing a duty to arbitrate on successor employers solely based on the "substantial continuity" factor, *Meridian* complicates an already widely recognized problem in successorship.[215] A finding of "substantial continuity" already imposes a duty to bargain on a successor; however, by *Meridian*'s holding, such a finding now imposes a duty to arbitrate. Imposing a duty to arbitrate in this context has a dangerous effect on the transactions by which a successor takes control of another business. An employer can become a successor and potentially become exposed to obligations via a variety of transactions, such as a partial acquisition or total acquisition of assets, a lease, a subcontract, a competitive bidding process, a leveraged buyout, or even a bankruptcy sale.[216] Thus, according to *Meridian*, in a multitude of common and frequent transactions, the heavier burden to arbitrate could now attach to a new employer, so long as "substantial continuity" is fulfilled. Even under the lesser burden to bargain, a trend of "union-avoidance" has previously been recognized in successor employer transactions.[217] Thus, by imposing a harsher duty to arbitrate on successors, *Meridian*

[213] McCluer, *supra* note 16, at 97; *see also* AmeriSteel, 267 F.3d at 280 (Becker, C.J., dissenting); *see also* Teters, *supra* note 21, at 149.
[214] AmeriSteel, 267 F.3d at 281 (Becker, C.J., dissenting); *see also* McCluer, *supra* note 16, at 106; *see also* Teters, *supra* note 21, at 149.
[215] McLeod, *supra* note 3, at 285.
[216] *Id*. at 291.
[217] *Id*. at 296–97.

exacerbates this risk and, in turn, hurts the same labor unions and workers it attempts to protect.[218]

Successor employers "have no legal obligation to hire the old unionized employees or to even give them preference in hiring – even if the entity plans to continue doing the exact same work."[219] So long as the successor hires a minority of the old unionized employees or less, the successor will not be bound by the CBA, nor will it even be compelled to recognize or bargain with the union at all.[220] In effect, *Meridian* "[increases] the incentives for would-be successor employers to simply fire the unionized employees and start over[.]"[221] Such an outcome "is hardly a manifest victory for the cause of organized labor[,]" since it effectively devastates the very industrial peace and employee interests that the court lauded as an overriding policy concern in all successorship circumstances.[222]

Further, the NLRA's antidiscrimination provision, Section 8(a)(3), which was designed to protect unionized workers from anti-union behavior, has been largely ineffective.[223] While "a new employer cannot refuse to rehire the old employees solely because they are in a union . . . employers will often be able to find ample business reasons to justify refusing to rehire old employees."[224] A mass non-hiring of predecessor union employees is typically not taken as sufficient in finding a discriminatory dismissal.[225] Instead, there must be direct and substantial evidence of anti-union sentiment by the successor employer, and this kind of evidence is seldom available from sophisticated employers.[226] Thus, although perhaps suspicious, a successor

[218] Local 348-S v. Meridian Mgmt. Corp., 583 F.3d 65, 86 (2d Cir. 2009) (Livingston, J., dissenting).
[219] *Id*. at 85.
[220] *Id*. at 85–86.
[221] *Id*. at 86.
[222] *Id.*
[223] McLeod, *supra* note 3, at 297–98.
[224] *Meridian*, 583 F.3d at 86 (Livingston, J., dissenting).
[225] McLeod, *supra* note 3, at 297–98.
[226] *Id.* at 297.

employer has the right to refuse to hire an experienced, unionized work force, in favor of unskilled employees without violating Section 8(a)(3).[227] Not only will such behavior displace skilled laborers causing industrial strife, strikes, and increased unemployment, but also will result in social turmoil and additional expenses for the employer.[228]

Even in avoidance of the lesser duty to bargain, successor employers have gone to great lengths by incurring added expenses and devising strategies to avoid hiring predecessor employees.[229] When skilled laborers have been dismissed in favor of a largely inexperienced work force, a greater number of laborers are needed to do the jobs of former employees, resulting in lower productivity and greater inefficiency.[230] For example (as mentioned earlier), at a meatpacking plant, where inexperienced laborers replaced union workers, the substitutes were almost 90% slower and "turned out to be so incompetent that the meat had to be destroyed."[231] Such problems can also result in unnecessary expenses for the successor in defending a variety of tort claims (such as product liability and workplace injuries), increased training expenses of inexperienced workers, and recruiting expenses in finding substitute employees. Thus, *Meridian* creates a greater incentive for anti-union hiring behavior, so that "substantial continuity" is not apparent, and all union obligations associated with a CBA, to which the new employer was not a party, can be avoided.

Moreover, a duty to arbitrate could deter employers from even venturing into a successor transaction. The imposition of a duty to arbitrate may discourage and inhibit the transfer of

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[227] *Id.* at 298; *see also* Saks & Co. v. NLRB, 634 F.2d 681, 690 (2d Cir. 1980) (Meskill, J., dissenting) ("Although it can be argued that discriminatory practices are condemned by and actionable under . . . the [NLRA], it is obvious that the perspicacious, well-counseled employer will hire just few enough of the subcontractor's employees to elude the grasp of the successorship doctrine."); *see also* Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 40–41 (1987) ("[T]o a substantial extent the applicability of *Burns* [, *i.e.*, the successor employer's obligation to bargain with the union,] rests in the hands of the successor.").
[228] McLeod, *supra* note 3, at 297–99.
[229] *Id.* at 299.
[230] *Id.*
[231] *Id.*; *see also* Packing House and Indust. Servs., Inc. v. NLRB, 590 F.2d 688, 692 (8th Cir. 1978).

capital.[232] Corporations may be reluctant to acquire other businesses if they believe they might be saddled with another company's CBA.[233] Additionally, by imposing a duty to arbitrate under the same standard used to find a duty to bargain, the obligations found in arbitration may not correspond to the relative economic strength of the parties.[234] Instead, when "substantial continuity" is satisfied, it is best to balance the bargaining advantage between employers and unions by the economic powers of the parties.[235] Labor policy is ill-served by binding parties to terms that do not correspond to the economic strengths of the parties.[236] For example, by imposing a duty to arbitrate, a union may be forced to retain terms that were made to a smaller employer, that are customized to those particular circumstances, and which it would not want imposed if a larger or more financially robust firm should acquire the business.[237] Under such a scenario, a duty to bargain would better serve both parties rather than a duty to arbitrate. Therefore, unwanted consequences likely will result from the imposition of *Meridian*'s erroneous holding, which imposes the more stringent duty to arbitrate under the same standard as a duty to bargain.

VI. CONCLUSION

The successorship doctrine has long proven itself to be difficult to navigate, causing courts to confuse successor obligations, standards used to impose requirements, and national labor policy responsibilities. Therefore, unless the Supreme Court revisits this unclear area of law, the lower courts should adopt a bright-line rule, which firmly establishes when a duty to arbitrate should be imposed on successors. A bright-line rule eliminates subjective, and

[232] *See* NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 288 (1972).
[233] AmeriSteel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 270 (3d Cir. 2001) (Becker, C.J., dissenting).
[234] *Id*.
[235] *Id*.
[236] *Burns*, 406 U.S. at 288.
[237] *Id*.

occasionally biased, pro-labor union or pro-employer interpretations of the Successorship Trilogy, which have further deepened the rift between the courts in applying a duty to arbitrate. Just as the Court set forth a factor-based test in imposing a duty to bargain, the same methodology should be applied to the duty to arbitrate, so that confusion can similarly be resolved. A bright-line rule serves to create and enforce expectations of both labor unions and successor employers, where the parties will then enter certain transactions with the understanding of the unavoidable duties and liabilities that come with the territory. Thus, unionized workers' interests will be preserved when changes present themselves in ordinary employer transitions, and successor employers will be fairly held to anticipated duties and liabilities. In turn, a great deal of the "union avoidance" gamesmanship, naturally resulting from *Meridian*, will be stopped dead in its tracks. Successors will continue to enjoy a symbiotic relationship with labor unions, where the employer gets the benefit of a highly productive and skilled labor force and the work force can fairly bargain the terms of their employment – all while avoiding an unnecessary hemorrhaging of secured union jobs.