UNION AFFILIATIONS AND COLLECTIVE BARGAINING

In May of 1974, a majority of the members of National Oil Workers Union (NOWU), Local 14, an independent labor organization, voted to affiliate with the Oil, Chemical and Atomic Workers, AFL-CIO (OCAW). In keeping with the local's bylaws, employees who were not members of the union were not allowed to participate in the voting. Questioning the existence of a certified bargaining representative, the employer declared the collective bargaining agreement void and discontinued dues deductions it had performed pursuant to the contract. The union responded by charging the employer with an illegal refusal to bargain, and the National Labor Relations Board, in accordance with its policy of honoring privately conducted union-affiliation elections that satisfy specified standards, found the employer guilty.¹ In Amoco Production Co.,² a subsequent decision in the same case, a divided Board held that the union's decision to exclude nonmembers from voting in the affiliation election did not invalidate the election nor did it absolve the employer of the duty to observe its contractual obligations. By so ruling, the Board explicitly overturned its decision in Jasper Seating Co.,³ issued only sixteen months before, in which it had declined to recognize an affiliation because nonmembers had not been given an equal opportunity to vote in the affiliation election.⁴

² 239 N.L.R.B. No. 182 (Jan. 3, 1979), appeal docketed, No. 78-1042 (5th Cir. Feb. 13, 1978). For a fuller discussion of the facts and procedural history of Amoco and the four opinions written by the various Board members, see notes 26-59 infra & accompanying text. The citation above correctly indicates that the petition for review was docketed nearly a year before the third and final Board decision. The petition filed by Amoco was for review of the second decision, Amoco Prod. Co., 233 N.L.R.B. 158 (1977). In 1978, the Court of Appeals for the Fifth Circuit granted the NLRB's request to withdraw the record and reconsider the case. The NLRB affirmed its earlier decision on January 3, 1979, and returned the record to the court. A Fifth Circuit panel heard oral argument on October 16, 1979. See text accompanying notes 39-44 infra.
⁴ In Jasper Seating, id., 35 union members voted in favor of affiliation, and three voted against. The nonmembers excluded from voting numbered 38, enough to have changed the outcome of the election. Although the number of ineligible employees in Amoco was too small to have affected the result, the Board expressly chose not to rest its holding on that fact. 239 N.L.R.B. No. 182, slip op. at 5 (Jan. 3, 1979), appeal docketed, No. 78-1042 (5th Cir. Feb. 13, 1978). But in Coca-Cola Bottling Co., 239 N.L.R.B. No. 183 (Jan. 3, 1979), appeal docketed, No. 78-1104 (6th Cir. Mar. 19, 1979), a companion case to Amoco, a panel of the Board upheld a union-conducted affiliation election even though the excluded employees outnumbered those actually voting in favor of affiliation by more than three to one.

In two affiliation cases since Amoco, the Board has followed its Amoco ruling and dismissed employer objections based on the ineligibility of nonmembers. Provi-
The affiliation of an independent with an international union, the scenario in *Amoco*, is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions. At the topmost level, there is occasional movement of the giant, overarching parent organizations—for example, the merger of the AFL and the CIO.\(^5\) International unions may shift affiliations among federations\(^6\) and may merge or divide to form new internationals.\(^7\) At the local level, affiliation\(^8\) and disaffiliation\(^9\) with an international, merger of one local into another,\(^10\) creation of a new local from part of an old local,\(^11\) and amalgamation of several locals into a new one\(^12\) are everyday events. Changes at all strata of union organization are a constant on the labor scene that must be accommodated in a sensible manner by national labor policy.

\(^{5}\) See generally A. Goldberg, AFL-CIO: LABOR UNITED (1956).

\(^{6}\) See, e.g., NLRB v. Pearson Candy Co., 471 F.2d 11 (9th Cir. 1972), cert. denied, 411 U.S. 982 (1973); NLRB v. Weyerhaeuser Co., 276 F.2d 865 (7th Cir. 1960); Continental Oil Co. v. NLRB, 113 F.2d 473 (10th Cir. 1940).

\(^{7}\) See, e.g., NLRB v. Pearl Bookbinding Co., 517 F.2d 1108 (1st Cir. 1975); NLRB v. Commercial Letter, Inc., 496 F.2d 35 (8th Cir. 1974); Union Carbide & Carbon Corp. v. NLRB, 244 F.2d 672 (6th Cir. 1957) (per curiam); Dickey v. NLRB, 217 F.2d 652 (6th Cir. 1954); Coca-Cola Bottling Co., 239 N.L.R.B. No. 183 (Jan. 3, 1979), appeal docketed, No. 78-1104 (6th Cir. Mar. 19, 1979); American Enka Co., Div. of Akzoa, Inc., 231 N.L.R.B. 1335 (1977).


\(^{11}\) See, e.g., Climax Molybdenum Co., 146 N.L.R.B. 508 (1964). This type of structural change occurred in NOWU, Local 14, prior to the events that gave rise to *Amoco*. See note 27 infra.

\(^{12}\) See, e.g., NLRB v. Commercial Letter, Inc., 496 F.2d 35 (8th Cir. 1974); Retail Clerks Int'l Ass'n v. NLRB, 373 F.2d 655 (D.C. Cir. 1967); Kentucky Power Co., 213 N.L.R.B. 730 (1974).
These fluctuations in union structure raise questions that sometimes find their way to the National Labor Relations Board, most often in refusal to bargain cases brought under section 8(a)(5) of the National Labor Relations Act (NLRA), and in amendment of certification cases. The former arise when, subsequent to an affiliation or merger, the employer refuses to recognize or bargain with the newly formed union and the union responds by filing an unfair labor practice charge. The latter cases involve a union's petition to amend its certification to reflect a change in name or affiliation.

In either procedural posture, the same substantive law applies: if the affiliation or merger complies with the standards developed by the Board and the courts, the new union succeeds to its predecessor's bargaining rights; if not, the employer has no duty to recognize the successor union nor to fulfill any obligations towards it under the collective agreement.

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In Cocker Saw Co. v. NLRB, 446 F.2d 870 (2d Cir. 1971), the employer filed a petition to amend a union's certification, claiming that a newly formed independent, not the certified representative, had the support of the majority of the employees. The petition was dismissed. In no other case found did an employer petition to amend a certification.

16 Retail Store Employees Local 428 v. NLRB, 528 F.2d 1225, 1227 (9th Cir. 1975) (per curiam); Newspapers, Inc., 210 N.L.R.B. 8, 9 nn.2 & 4, 10 n.13 (1974), enforced, 515 F.2d 334 (5th Cir. 1975).

The question of the validity of an affiliation or merger has also been raised in motions to amend and enforce outstanding bargaining orders, see William B. Tanner Co. v. NLRB, 517 F.2d 982 (6th Cir. 1975); Union Carbide & Carbon Corp. v. NLRB, 244 F.2d 672 (6th Cir. 1957); NLRB v. Harris-Woodson Co., 179 F.2d 720 (4th Cir. 1950); and petitions by the employer, employees, or a competing union requesting a Board-conducted representation or decertification election, see Fruhler Bakeries, 232 N.L.R.B. 212 (1977) (employees' petition); Baton Rouge Water Works Co., 163 N.L.R.B. 1070 (1967) (employer's petition); Waterway Terminals Corp., 120 N.L.R.B. 1788 (1953) (employer's petition); New Jersey Oyster Planters & Packers Ass'n, 101 N.L.R.B. 538 (1952) (intervening union's petition). The invalidity of a merger has also been raised, with ultimate success, as a defense to prior, unrelated unfair labor practices. Dickey v. NLRB, 217 F.2d 658 (6th Cir. 1954) (denying enforcement of order to bargain with successor union). An employer's attempt to seek an adjudication of a merged union's bargaining rights in federal court under § 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1976), failed for lack of jurisdiction. West Point-Pepperell, Inc. v. Textile Workers Union, 559 F.2d 304 (5th Cir. 1977) (per curiam).
To say that the Board's decisions in this area have been inconsistent would be a generous understatement, and the four opinions in Amoco do not portend a final resolution to the see-sawing on the issue of voter eligibility. Although one could not dismiss lightly an analysis that attributed these vacillations to shifts in the political and ideological make-up of the Board,\(^{19}\) such constant inconstancy may well indicate a problem that lies deeper than the identity of the decisionmakers.

In affiliation cases, and in union-successorship cases in general, the Board faces the difficult task of reconciling the two partly inconsistent goals of guaranteeing employees their free choice of bargaining representative and fostering stable collective bargaining relationships.\(^{20}\) Each of these policies is embodied in a set of Board standards for review of affiliations. Corresponding to the concern with stability is a test for "continuity of representation," by which the Board seeks to determine whether replacement by the successor union disrupts the bargaining relationship established by its predecessor.\(^{21}\) Second, the Board requires, consistent with the policy of free choice, that the election procedure be conducted in accordance with minimal standards of "due process" so that the outcome accurately reflects the employees' true desires.\(^{22}\) If either continuity of representation or due process is lacking, the Board will ordinarily invalidate the affiliation election.\(^{23}\)

This sharp separation of the fundamental policy concerns into two distinct tests may be commended because, at least in theory, it makes for administrative simplicity. In practice, however, the tests have not been applied independently. Rather, the Board's decisions give evidence of a tension between the two standards that renders the outcome of every case unpredictable and inexplicable.

Part I of this Comment explores the interplay between the continuity of representation doctrine and due process standards

\(^{19}\) Board Member Peter D. Walther, who voted with the majority in the 3-2 decision in Jasper Seating, 231 N.L.R.B. 1025 (1977)—a decision which over-turned precedent of long standing—was replaced in 1977 by Member John C. Truesdale, whose concurring opinion was decisive in the Amoco majority's over-ruling of Jasper Seating, 239 N.L.R.B. No. 182 (Jan. 3, 1979). A similar sequence of events occurred with respect to the Board's attitude toward misrepresentations in election campaigns: The Board's long-standing rule, announced in Hollywood Ceramics Co., 140 N.L.R.B. 221 (1962), and discarded in Shopping Kart Food Market, Inc., 228 N.L.R.B. 1311 (1977), has recently been restored in General Knit, Inc., 239 N.L.R.B. No. 101 (Dec. 6, 1978).

\(^{20}\) Hamilton Tool Co., 190 N.L.R.B. 571 (1971) (Miller, Ch., concurring).

\(^{21}\) See part II, comprising text accompanying notes 60-123 infra.

\(^{22}\) See part III, comprising text accompanying notes 124-80 infra.

by examining the facts and opinions in *Amoco*. Part II criticizes the doctrine of continuity of representation as currently applied by the Board and the courts, and offers a revised interpretation of continuity that restores its central function of guaranteeing stability in collective bargaining relationships.24 Part III reviews the Board’s due process standards for union-run elections and concludes that unions should not be required to allow nonmembers to vote in affiliation elections.25

I. Amoco Production Co.

The origins of the controversy in *Amoco* can be traced to 1972, when the National Oil Workers Union (NOWU), a national union, was dissolved.26 The NOWU National Board of Directors urged NOWU locals to affiliate with the Oil, Chemical and Atomic Workers International Union, AFL-CIO (OCAW), but the members of the Houston unit of NOWU, Local 14, rejecting that advice, decided instead to operate as an independent union.27 By early 1974, the officers and members of Local 14 were reconsidering their choice. A straw poll, taken by mail after meetings with representatives of OCAW, indicated that 216 members favored joining OCAW, while sixty were opposed.28 On April 3, the local’s Board of Directors unanimously agreed to proceed with a formal affiliation election. Prior to the vote, nine meetings on the issue were conducted by the local, with OCAW officials present to answer questions. Notices of the meetings were posted. Nonmembers were permitted to attend and participate in the discussion, but were told they would be ineligible to vote unless they signed dues deduc-
tion forms, which some of them did. The election was conducted by mail, and provisions were made for the security of the ballots. The tabulation showed 214 members for affiliation with OCAW and seventy-one against. Nonmembers excluded from participation in the voting numbered ninety-seven, too few to have possibly affected the outcome. The Board of Directors then adopted and sent a resolution to Amoco, notifying the employer of the change and of the local’s intention to continue as bargaining representative under its new name, Local 4-14, OCAW. With one exception, all members of independent Local 14’s Board of Directors assumed the corresponding posts in the new OCAW local.

The employer responded four months later by sending to each employee in the bargaining unit a letter announcing that dues deductions were discontinued, that the collective bargaining agreement with the former independent union was void, but that, as a matter of policy, the company would voluntarily carry out those provisions of the contract applicable to individuals. All parts of the contract pertaining to the rights of the union, such as the arbitration and dues checkoff clauses, were specifically repudiated. Amoco then filed a petition with the NLRB for a representation election, a petition that was blocked when the union answered with an unfair labor practice charge.

In the original proceeding, the administrative law judge found Amoco guilty of violating sections 8(a)(5) and 8(a)(1) of the Act. He dismissed the employer’s objection to the exclusion of nonmembers on the grounds that their votes could not have affected the outcome of the election, that all unit employees had had the opportunity to join the union, that no other union, no local officers, nor any unit employees had objected to the affiliation, and that no serious irregularities had tainted the conduct of the election. Finding that the independent Local 14 no longer existed, the judge

29 Id. 863. Amoco, alleging irregularities in the determination of eligible voters and in the tabulation of votes, has argued that those votes are suspect. Supplemental Brief for Petitioner at 10-11, Amoco Prod. Co. v. NLRB, No. 78-1042 (5th Cir., docketed Feb. 13, 1978).
31 The local President had been promoted to a supervisory position with Amoco and thus was no longer a union member. The local Vice President became president of OCAW, Local 4-14. Id. 863.
32 Id. 863-64.
33 Id. 862.
35 Id. 864.
was persuaded that unless Amoco was ordered to bargain with OCAW, Local 4-14, the employees would have lost their right to representation merely because they voted to affiliate with an international union. 36

A divided panel of the Board affirmed the judge's rulings, with Member Jenkins dissenting over the ineligibility of the 97 non-members. 37

In a second proceeding, 38 two years later, a panel of the Board unanimously issued a supplemental decision upholding the administrative law judge's enforcement of an order requiring Amoco to reimburse the union for $45,750 plus interest in uncollected dues. Amoco filed a petition with the Court of Appeals for the Fifth Circuit for review of the Board decision, 39 and the NLRB responded with a cross-application for enforcement. 40 On June 22, 1978, the court granted the Board's motion to withdraw the record on review. 41 The Board notified the parties of its intention to reconsider its decision and invited written statements of position. In a 3-2 decision that elicited four opinions, 42 the Board then affirmed its prior decision and found that "union affiliation votes limited to union members are valid," 43 this time expressly declining to rely on the fact that the non-member votes could not have changed the result of the election. 44 The record has been returned to the court of appeals, which is now reviewing the case. 45

The major premise of the plurality opinion, signed by Chairman Fanning and Member Murphy, was that union decisions to affiliate or merge are fundamentally internal, organizational matters involving neither the employment relation nor the representational status of employees. 46 Wages, benefits, and working conditions are unaffected, and the collective bargaining agreement remains in

36 Id. 865.
37 Id. 861.
40 Id.
41 Id.
43 Id., slip op. at 2.
44 Id. 5.
UNION AFFILIATIONS

As with strike votes, contract ratifications, and elections for stewards, officers, and negotiating committees, the decision to limit participation in an affiliation election to union members only is strictly the union's business and not the Board's. The union must, however, conduct the election with adequate procedural safeguards, including proper notice to all members, an orderly vote, and some reasonable precautions to maintain the secrecy of the ballot. The plurality, finding these conditions satisfied, observed that adequate discussion and time for reflection had been provided prior to the election, that meetings to discuss the affiliation had been open to members and nonmembers alike, and that nonmembers could have become eligible to vote by signing dues-authorization forms. The plurality also noted that even if all ninety-seven excluded nonmembers had voted against affiliation, the outcome of the election would not have been altered. They asserted, however, that this was "not dispositive of the issue." Member Truesdale concurred, basing his decision on the ground that affiliation is a matter of "exclusive concern" to union members, and expressly disclaiming reliance on the ability of nonmembers to attend discussion meetings and to join the union up to the last minute. He agreed with the plurality view that the election had been conducted with sufficient regard for due process.

47 Id. 3.
48 Id. 4-5.
49 Id. In Providence Medical Center, 243 N.L.R.B. No. 61 (July 27, 1979), appeal docketed, No. 79-7366 (9th Cir. Sept. 10, 1979), the eligibility list for the election, held in May, was compiled on the basis of dues records for the first quarter of the year, effectively precluding nonmembers from joining for the purpose of voting. Id., slip op. at 8 (Jenkins, M., dissenting in part). The majority, adhering to Amoco, dismissed this problem with the observation that the record contained no assertion "that any unit employee desiring membership was refused." Id. 4.
51 Id. 7 (Truesdale, M., concurring). Both the members of the plurality and Member Truesdale observed that affiliation does not result in "the dissolution of an already existing" labor organization Id. 2, 8. In Providence Medical Center, 243 N.L.R.B. No. 61 (July 27, 1979), appeal docketed, No. 79-7366 (9th Cir. Sept. 10, 1979), this reservation was repeated. Id., slip op. at 3. Although perhaps innocent enough, these remarks may indicate that the Board would reach a different result on the issue of nonmember eligibility in cases in which the affiliate "swallows up" the former independent. See text accompanying notes 150-52 infra. Both Chairman Fanning and Member Murphy, co-authors of the Amoco plurality opinion, appear to feel that dissolution of the predecessor union does not invalidate an affiliation or merger. See Quemetco, Inc., 226 N.L.R.B. 1398 (1976); Independent Drug Store Owners, 211 N.L.R.B. 701 (1974) (Fanning, M., dissenting), aff'd per curiam sub nom. Retail Store Employees Local 428 v. NLRB, 528 F.2d 1225 (9th Cir. 1975). See text accompanying notes 96-101 infra.
In dissent, Member Jenkins adhered to his opinion, set forth in earlier cases, that exclusion of nonmembers from an affiliation election violates minimum standards of due process. Emphasizing the impact of an affiliation election on all employees in the bargaining unit, Member Jenkins declared that a union membership requirement in an affiliation election was just as inappropriate as it would be in a Board-conducted representation election.

Member Penello based his separate dissent on his view that the affiliation resulted in a substantial change in the bargaining representative's identity, raising a question concerning representation that could be resolved only by a Board-conducted election in which all employees—union members and nonmembers alike—would be eligible to vote. Relying on the opinion of the Court of Appeals for the Third Circuit in American Bridge Div., United States Steel Corp. v. NLRB, Member Penello concluded that the affiliation of the 380-member independent with the 200,000-member international and the acceptance by the local of the international's constitution had altered the rights and obligations of all the employees in the unit, extinguishing the local's autonomy.

Because the plurality and concurring opinions differ only in minor respects, they may be treated, for purposes of this discussion, as expressing a single majority view. Although Member Jenkins

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55 Id. A fuller and more recent exposition of Member Jenkins's views is provided in his dissent in Providence Medical Center, 243 N.L.R.B. No. 61, slip op. at 7 (July 27, 1979) (Jenkins, M., dissenting), appeal docketed, No. 79-7366 (9th Cir. Sept. 10, 1979).

56 Amoco Prod. Co., 239 N.L.R.B. No. 182, slip op. at 11 (Jan. 3, 1979) (Penello, M., dissenting), appeal docketed, No. 78-1042 (5th Cir. Feb. 13, 1979). Member Penello has since expressed the view that nonmembers of the union must be eligible to vote in affiliation cases in which a Board-conducted election is not required. Providence Medical Center, 243 N.L.R.B. No. 61, slip op. at 12 (July 27, 1979) (Penello, M., dissenting), appeal docketed, No. 79-7366 (9th Cir. Sept. 10, 1979).

57 457 F.2d 660 (3d Cir. 1973).

58 Amoco Prod. Co., 239 N.L.R.B. No. 182, slip op. at 11-12 (Jan. 3, 1979) (Penello, M., dissenting), appeal docketed, No. 78-1042 (5th Cir. Feb. 13, 1978). Member Penello did not indicate what differences between the constitutions of NOWU, Local 14, and OCAW, Local 4-14, led him to conclude that the local's autonomy had been destroyed. The issue was never addressed in the prior opinions, but apparently had been raised by Amoco. Supplemental Brief for Petitioner at 11, Amoco Prod. Co. v. NLRB, No. 78-1042 (5th Cir., docketed Feb. 13, 1978). Amoco argued that the constitutions differed substantially with respect to the scope of union purpose, initiation fees, discipline of members, dues, strike procedures, amendment of bylaws, and removal of local officers. Id. 11-13.
wrote in dissent, his views substantially coincide with those of the majority. All four members agree that the affiliation of a small independent union with a powerful international does not present a question concerning representation nor does it require a Board-conducted election. They further agree that such an affiliation is valid if the election procedures accord with standards of due process. Their dispute concerns only the question whether due process requires that nonmembers of the union be eligible to vote. By contrast, Member Penello's dissent rejected the affiliation on an entirely distinct and independent ground—lack of continuity of representation.

Of the four opinions in Amoco, Member Jenkins's is perhaps the least compelling on its face. If continuity of representation is preserved and the identity of the bargaining representative is not changed substantially, why should nonmembers be permitted to vote on an internal union question that does not seriously alter their representational status? Member Jenkins's conclusion that affiliation has a significant impact on all bargaining unit employees and his resort to the analogy between Board-conducted representation elections and union-run affiliation votes, tend to contradict the assumptions he did not question in Amoco—that the bargaining representative did not change and that no question concerning representation existed.

Member Jenkins's position appears somewhat more sensible, however, if he is read, on the one hand, as acquiescing in the dubious fiction that the bargaining representative was unchanged by the affiliation, and, on the other, as compensating for the very real transformation of the independent by demanding voting procedures that approach compliance with the Board's high standards for representation elections. Because, contrary to the fiction of continuity, an important change in all the employees' representational status was actually at stake in the Local 14 affiliation vote, Member Jenkins would have required that all employees in the bargaining unit be eligible to participate, just as they would be in a Board-conducted representation election.

The tension found in Member Jenkins's dissent between the continuity of representation doctrine and due process standards is discernible as well in the opinions of the majority. If an affiliation election is exclusively an internal union matter, no different than a strike or contract ratification vote, then the Board has no business reviewing the election procedure for adequate notice, time for reflection and discussion, and secrecy. There is no reason to require
an election at all; the union ought to be free to decide the question however it sees fit. The majority’s insistence on an election with procedures that comport with due process indicates that, like Member Jenkins, the majority does not fully credit the continuity doctrine. Unlike the dissenter, however, the majority would not tighten the due process requirements so far as to require that non-members be allowed to vote. In order to assess the correctness of these two views, or of Member Penello’s opinion that a legally significant change took place in the identity of the bargaining representative, it is necessary to inquire further into the Board’s doctrine of continuity of representation.

II. THE CONTINUITY OF REPRESENTATION DOCTRINE

This part advances the thesis that the Board and the courts have unnecessarily infused into the concept of continuity of representation a metaphysical concern over the identity of the bargaining representative. This confusion is traced to two distinct sources: an unduly cramped reading of the Board’s freedom under the statute and a failure to scrutinize inherited common law doctrines in the light of the policies of the Act. Although the Board in practice has tempered the ill effects of its sins with a healthy disregard for its own doctrine, the potential for disaster has been fully realized in a trio of cases decided by the Court of Appeals for the Third Circuit, which has entered the lists of metaphysics with an awesome vengeance. Once stripped of metaphysical trappings, the continuity doctrine emerges well-suited for its important role of promoting stability in collective bargaining relationships.

A. The Continuity Doctrine and the NLRA

Under the authority of section 9(c)(1) of the National Labor Relations Act, the Board conducts representation and decertification elections upon petition, if an investigation finds that a “question concerning representation” exists. In order to promote stability in collective bargaining relationships, the Board has developed rules for the timeliness of election petitions. Generally, the Board will not entertain a petition received within one year of a valid election,
within one year of a certification, or during the life of a collective bargaining agreement.61

The Board's practice of giving effect to union-run affiliation elections constitutes an alternative to the statutory procedures that must be reconciled with the Act. In the Board's catechism, this accommodation is reached through the doctrine that an affiliation that preserves continuity of representation does not materially alter the identity of the bargaining representative and therefore does not raise a question concerning representation; because it is a change in name or affiliation only, it does not require a section 9(c)(1) election conducted by the Board.62 Provided that the affiliation-election procedure satisfies the standards of due process, the Board, upon validation of the results, will require the employer to continue to observe its contractual obligations to the union as if no change had occurred. Conversely, if an affiliation does not preserve continuity of representation, it raises a question concerning representation that can be resolved only by a Board-conducted election. Until the union establishes its majority in accordance with the statutory procedure, the employer is free to repudiate the contract and need not recognize the successor.

An important consequence of these canons is that the Board's rules for the timeliness of elections, adopted for petitions raising questions concerning representation, do not apply to union-conducted affiliation and merger votes.63 A finding of continuity thus serves, in effect, to lift the election-year, certification-year, and contract bars.64 This means that in *Amoco*, for example, had OCAW

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61 Section 9(c)(3) of the National Labor Relations Act, 29 U.S.C. § 159(c)(3) (1976), specifically prohibits representation or decertification elections in a bargaining unit within twelve months of a valid election. In addition, the Board has established two other bars to elections. Under the first, the certification-year bar, election petitions are dismissed if filed fewer than twelve months after a union victorious in an election has been certified. See R. Gorman, *Basic Text on Labor Law* 53-54 (1976). The Supreme Court approved the Board's rule in *Brooks v. NLEB*, 348 U.S. 96 (1954). Another such rule is the contract bar, which, roughly speaking, prevents elections during the life of a collective agreement. See R. Gorman, *supra* at 54-55. As long as the term of the contract is reasonable, generally three years or fewer, the Board will usually not conduct representation elections until the contract period nears its end. *Id.* Under certain conditions the rule is not given effect. *Id.* 55-59. (For instance, when there is a schism in a union, an election will be permitted. *St. Louis Bakery Employers Labor Council*, 121 N.L.R.B. 1548 (1958). *See notes 70 & 71 infra & accompanying text. In contrast, the Board's view is that a valid affiliation leaves the contract bar intact. *Hamilton Tool Co.*, 190 N.L.R.B. 571, 573 (1971).)

62 *Retail Store Employees Local 428 v. NLRB*, 528 F.2d 1225, 1227 (9th Cir. 1975) (per curiam); *North Elec. Co.*, 165 N.L.R.B. 942, 942 (1967).


64 See note 61 *supra*. 
petitioned the Board for a decertification election, the collective bargaining agreement between the independent union and the employer would have acted as a bar until the contract was expiring, some two years later. By voting on their own to affiliate with OCAW, however, the members of the independent local quickly accomplished a similar result, without having to comply with the Board's much more stringent election procedures.

The Board's doctrinal accommodation of its practice to the mandate of section 9(c)(1) is much more restrictive than it needs to be. The basic premise—that a change in the identity of an existing bargaining representative necessarily raises a question concerning representation—finds no support in the statute. Under the provisions of section 9(c)(1) for decertification petitions, a question concerning representation does not arise unless the majority status of the incumbent union is affirmatively challenged. Only if it is presumed that a change in the representative's identity automatically casts its majority support into doubt, does it follow that a question concerning representation is raised. But it is precisely that presumption which is belied by the facts of the typical affiliation effort. A successful affiliation vote means that a majority of the membership of the incumbent union has expressed support for the new, affiliated local. Moreover, it is the incumbent union's elected lead-

65 Under § 9(c)(1)(A)(ii) of the Act, 29 U.S.C. § 159(c)(1)(A)(ii) (1976), either the bargaining unit employees on their own, or OCAW in their behalf, could have petitioned the Board for an election to decertify NOWU, Local 14. If OCAW had petitioned, it would have been included on the ballot; if a majority of the eligible employees voting had chosen it, OCAW would have been certified by the Board as the new bargaining representative, and NOWU, Local 14, would have lost its certification. The Board's contract-bar rule, however, would have presented an obstacle to any petition to decertify while the collective bargaining agreement was still in effect. See note 61 supra. For decertification procedures generally, see R. Gorman, supra note 61, at 49-52.


67 Section 9(c)(1)(A)(ii) requires a decertification petition filed by employees or by a union in their behalf to "assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a)." 29 U.S.C. § 159(c)(1)(A)(ii) (1956). A "representative as defined in section 9(a)" is a majority representative.

Section 9(c)(1)(B), 29 U.S.C. § 159(c)(1)(B) (1976), which permits the employer to file a petition when presented with a demand for recognition, contains no express requirement that the petition allege a question concerning the union's majority support. But in United States Gypsum Co., 157 N.L.R.B. 632, 636 (1966), the Board overturned its earlier decisions and held that an employer's petition to decertify an incumbent union must be based on objective evidence supporting a reasonable belief that the incumbent lacks majority support. Thus, whether initiated by an employer or by employees, petitions to decertify an incumbent union must raise the question of the incumbent's loss of majority support.
ership that ordinarily proposes the affiliation and sets the election machinery in motion. Assuming that the election procedures accord with due process and that the predecessor union does not remain in existence and dispute the successor's claim to majority status, the election does not leave the successor union's majority status open to doubt and does not raise a question concerning representation under section 9(c)(1). Nor, once it is established that the Board's practice of crediting union-run affiliation elections does not contravene the Act, can there be much question of the Board's authority for doing so as a matter of administrative discretion.

According to this revised view of the Board's freedom under the statute, the doctrine of continuity need no longer focus on the irrelevant issue of change in the bargaining representative's identity. The essence of continuity of representation is uninterrupted governance by the law of the shop as expressed in the collective bargaining agreement. This understanding of continuity is borne out by the Board's consistent application of two requirements, both rooted in the basic policy of fostering stability in collective bargaining relationships. According to the first, when competing union factions lay claim to the title of bargaining representative, the attendant confusion and disruption of labor peace can be resolved only by a Board-conducted election, with all its safeguards. This branch of the continuity doctrine precludes recognition of affiliations and mergers in which a "schism" arises because of the continued existence of the predecessor union and its active opposition to the change.

68 See text accompanying notes 124-180 infra.
69 See notes 70 & 71 infra & accompanying text.
The second requirement is that the successor union honor the predecessor's collective bargaining agreement with the employer.\footnote{Hamilton Tool Co., 190 N.L.R.B. 571 (1971).} This condition follows from the inapplicability of the contract bar to mergers and affiliations. If a newly affiliated local were free to repudiate an existing contract, affiliation would become a means for subverting the Board’s contract-bar policy, with detrimental effects on labor-relations stability.

Underlying both of these requirements is a deep concern with the effect of the affiliation on administration of the collective bargaining agreement already in place. When a schism occurs, the employer is in a quandary because it cannot tell which faction has the right to administer the contract on behalf of the employees. No matter which union it chooses to treat as the legitimate employee representative, the other will protest and the labor peace for which the employer bargained will be lost. The same result obtains in the absence of a schism if the successor union repudiates the contract. Thus, both requirements are designed to safeguard the existing collective bargaining agreement.\footnote{A third requirement, also related to the policy of stability, can be found in the Board’s consistent refusal to entertain during the certification year amendment of certification petitions from unions that were defeated in the election conducted by the Board. Mosler Safe Co., 210 N.L.R.B. 934 (1974); United Hydraulics Corp., 205 N.L.R.B. 62 (1973); Bunker Hill Co., 197 N.L.R.B. 334 (1972); Bedford Gear & Mach. Prods., Inc., 150 N.L.R.B. 1 (1964); Gulf Oil Corp., 109 N.L.R.B. 861 (1954). The Board apparently believes that amendment of certification in this situation would negate the results of its earlier election and subvert the policies of the Act. United Hydraulics Corp., 205 N.L.R.B. at 62. The Board's practice here is not inconsistent with its recognition of affiliations during the certification year with unions that did not appear on the ballot in the representation election, see, e.g., Quemetco, Inc., 226 N.L.R.B. 1398 (1976); Emery Indus., Inc., 148 N.L.R.B. 51 (1964); or with its decisions to grant a union that lost the representation election an amendment of certification after the expiration of the certification year, see, e.g., North Elec. Co., 165 N.L.R.B. 942 (1967). The policy underlying the certification-year bar, see note 61 supra, would be violated if the loser in the representation election were able to gain representation rights by the affiliation route. If that practice were allowed, certification would not have its intended stabilizing effect as a final decision laying the opposing claims of competing unions to rest. The losing union would instead be encouraged to continue its efforts to rally the support of the bargaining unit employees. These same concerns are not present once the certification year ends, and are much less urgent, if present, when the union with whom affiliation is sought was not involved at all in the representation election.}
cited are retention of the predecessor union's leadership and preservation of its autonomy. 74 Among the other factors are the change, or lack of change, in the union membership, 75 the dues structure, 76 the constitution and bylaws, 77 the rights and obligations of union members, 78 the day-to-day relations between the union and the employer, 79 the mode of grievance processing, 80 the identity of the union negotiator, 81 and the use of the predecessor union's books, accounts, property, and address. 82 These indicators are applied as if the relevant inquiry were not continuity of representation in the sense of stability, but rather in the sense of metaphysical identity. 83

The excess baggage of the continuity doctrine is attributable, in part, to the Board's unduly restrictive reading of its statutory authority. An historical inquiry reveals a second source in the unexamined legacy of the common law.

B. Common Law Origins of the Continuity Doctrine

The origins of this metaphysical approach 84 to continuity of representation can be traced to early cases in which the Board and

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74 E.g., J. Ray McDermott & Co. v. NLRB, 571 F.2d 850 (5th Cir.), cert. denied, 439 U.S. 893 (1978); Retail Store Employees Local 428 v. NLRB, 528 F.2d 1225 (9th Cir. 1975) (per curiam); Good Hope Indus., Inc., 239 N.L.R.B. No. 90 (Dec. 6, 1978); New Orleans Pub. Serv., Inc., 237 N.L.R.B. No. 134 (Aug. 25, 1978); Emery Indus., Inc., 148 N.L.R.B. 51 (1964).


77 E.g., Sun Oil Co. v. NLRB, 576 F.2d 553 (3d Cir. 1978); NLRB v. Pearl Bookbinding Co., 517 F.2d 1108 (1st Cir. 1975); Fluhrer Bakeries, 232 N.L.R.B. 212 (1977).


80 E.g., NLRB v. Commercial Letter, Inc., 496 F.2d 35 (8th Cir. 1974); Good Hope Indus., Inc., 239 N.L.R.B. No. 90 (Dec. 6, 1978).


83 See NLRB v. Harris-Woodson Co., 179 F.2d 720, 723 (4th Cir. 1950).

84 In Harris-Woodson Co., Judge Parker observed: Metaphysical arguments as to the nature of the entity with which we are dealing should not be permitted to obscure the substance of what has been done or to furnish a smoke screen behind which the company may with impunity defy the requirements of the statute that it bargain with the representative that its employees have chosen.

Id. 723.

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the courts drew uncritically on the common law of contracts and of unincorporated associations to resolve emerging problems in the application of the Wagner Act. State courts had confronted the problem of union successorship primarily in disaffiliation cases in which the disposition of the predecessor union's assets was in dispute or in suits growing out of labor agreements between the employer and the union. Not infrequently, the courts were called upon to determine whether the successor union was the same legal entity as the predecessor, and accordingly various criteria of identity were relied upon to decide the question. One principle that emerged was that a mere change in name or affiliation does not alter a union's legal identity. The clear implication was that a change in name and affiliation accompanied by changes in the union's constitution, membership, or leadership can indeed add up to a change of legal identity.

This common law mode of analysis was absorbed, for the most part, into federal law. In M & M Wood Working Co., for example, the Board faced an employer's contention that its contract with the union terminated when the union withdrew from the American Federation of Labor, affiliated with the Committee for Industrial Organization, and altered its name to reflect the change. Although the Board managed to sidestep the issue, it foreshadowed the course of its decisions by quoting approvingly and extensively from a New York case espousing the maxim that changes in name and affiliation do not in themselves signify a change of legal identity. Shortly thereafter, in American-Hawaiian Steamship Co., the Board adopted the very same rule as its own, observing that the successor local

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86 C. Summers, *supra* note 71, at 262. E.g., Kelso v. Cavanagh, 137 Misc. 653, 656-57, 244 N.Y.S. 90, 94 (Sup. Ct. 1930); Shipwrights Local 2 v. Mitchell, 60 Wash. 529, 111 P. 760 (1910).
89 6 N.L.R.B. 372 (1938), *enforcement denied*, 101 F.2d 938 (9th Cir. 1939).
91 10 N.L.R.B. 1355 (1939).
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has the same members, membership records, officers, and funds, and performs the same functions as did the Union under its former name . . . . It is plain that nothing more than a change in name and affiliation took place, and we find that the labor organization certified by us did not cease to exist because of its transfer of affiliation.\textsuperscript{92}

There is much to recommend the simple rule that a mere change in name or affiliation does not alter a union's legal identity. Indeed, it is difficult to imagine how collective bargaining could survive without it: if employers were free to repudiate labor agreements whenever the contracting union changed its name or shifted its allegiance, labor strife of nightmarish dimensions could well be the result. However, the corollary to this simple rule—that changes in name or affiliation, when accompanied by changes in other indicia of legal identity, can alter the union's legal identity and thereby dissolve the employer's duty to honor the collective bargaining agreement—is not so obviously beneficial. Its incorporation in the continuity of representation doctrine must therefore be subjected to searching scrutiny.

As a general rule, doctrines derived from the common law of yesteryear are ill-suited for coping with the complexities of contemporary labor union structure. Displacing such outmoded and inadequate rules was one of Congress's major aims in creating the regulatory scheme of the National Labor Relations Act.\textsuperscript{93} With its origins in the common law of contracts and of unincorporated associations, the metaphysical approach to continuity of representation is not likely to foster the policies of the Act. Indeed, to deny effect to an affiliation freely chosen by a majority of the union membership merely because of a change in the dues structure or in the union's constitution is to transgress two fundamental principles of

\textsuperscript{92} Id. 1362.

labor law. First, because such a result frees the employer from its obligation to observe the contract, the immediate result is to destroy an established collective bargaining relationship. Second, a legal rule that requires courts to examine and pass judgment on fluctuations in the union's internal structure violates "the basic premise of judicial restraint in interfering with union self-government." 94

When no schism occurs and the successor union pledges to honor the contract already in place, continuity of representation is established in the only sense meaningful to the national labor policy. No other factors should be considered. Additional measures of continuity, inherited from common law sources and pressed into the service of an unnecessarily strict statutory interpretation, work merely to destabilize collective bargaining relationships and to invite unwarranted intrusion into internal union affairs.

It may be, however, that some of the additional criteria habitually employed to assess continuity of representation are meaningful, not in themselves, but for the purpose of determining whether or not a schism has occurred. The carry-over of officers from an independent to an affiliated local, for example, is probative of the fact that the independent is defunct and does not oppose the affiliation.05 Perhaps, too, the requirement that the local preserve its autonomy is predicated on an assumption that autonomy is the natural desire of all labor organizations, and its voluntary abdication a cause for suspicion.

This approach to the continuity doctrine explains the Board's decision in Quemetco, Inc.,96 in which a divided panel overruled the administrative law judge and upheld an affiliation despite a complete lack of what is usually called "continuity of representation." 97 In that case, the vote to affiliate was unanimous, and the record indicated that the officers of the independent "simply wanted to get out of the union business." 98 Thus, the facts clearly belied any tacit assumption of a desire for autonomy. No officers of the independent were retained, and the independent did not survive as an autonomous unit after the affiliation. Denying that the carry-over of officers is of supreme importance in an affiliation case, the Board announced that it was

94 C. Summers, supra note 71, at 262.
much more concerned with giving effect to the employees' free choice of bargaining representative than with the so-called "continuity of representation" which might be disrupted by such election. For it is the employees' freedom to select a bargaining representative of their choice which is of paramount importance under the Act.99

Noting that no employee objected to the discontinuity of union leadership, the Board overruled the employer's objections, stating that the employer's legitimate interest in continuity was limited strictly to the honoring of contractual commitments.100

Quemetco makes good sense. It strikes an appropriate balance between the Act's policies of guaranteeing the freedom of employees to choose (or repudiate) their representatives and of providing for "some measure of repose" and stability in collective bargaining.101 When established collective bargaining relationships are not in jeopardy, every reason exists for giving effect to the employees' freedom of choice. Unfortunately, Quemetco is the exception, rather than the rule. Both the Board102 and the courts103 have tended to insist on additional evidence of continuity of representation without seriously considering whether that evidence has any bearing, positive or negative, on the stability of collective bargaining relationships.

C. The Third Circuit View and the Triumph of Metaphysics

American Bridge Div., United States Steel Corp. v. NLRB104 is perhaps the leading case on this subject. In American Bridge, an independent association with some 300 members, pursuant to a

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99 Id.

100 Prior to affiliation with the Teamsters, the employees in the bargaining unit had been represented by the Chemical Workers. The employees petitioned for a decertification election and asked the Teamsters to intervene. Id. See note 65 supra. The Teamsters refused because of a no-raiding pact with the Chemical Workers. The independent was successful in the decertification election and sought out the Teamsters within a few months, this time successfully. 226 N.L.R.B. 1398, 1399 (1976).


103 See, e.g., NLRB v. Bernard Glicker N.E. Co., 540 F.2d 197 (3d Cir. 1976); Union Carbide & Carbon Corp. v. NLRB, 244 F.2d 672 (6th Cir. 1957).

104 457 F.2d 660 (3d Cir. 1972).
unanimous resolution by its executive committee, voted, 111 to eighty-five, to affiliate with the United Steelworkers of America, whose membership numbered 1,120,000. The association was subsequently chartered as a local of the Steelworkers, and the officers of the association became officers of the local. Bank and checking accounts were also transferred to the affiliated organization.

The Court of Appeals for the Third Circuit, overturning the Board's finding of continuity of representation, concluded that the affiliated local was "a far different organization because the people who conduct a substantial part of the unit's dealings with management are no longer the association's officers, and the power of the unit's members to control those agents has radically changed." As evidence for this proposition, the court relied solely on the Steelworkers' International Constitution, which required strikes to be approved by the international president, vested control of the grievance procedure in the international as well as the local, made the international the contracting party in collective bargaining, and provided that dues deductions be remitted to the international secretary-treasurer. Observing a "change in the fulcrum of union control and representation," the court questioned whether the interests of the officers of the giant International and the interests of the 300-odd employees of the association would necessarily coincide.

Because the court went on to find that the affiliation election was procedurally deficient and because it strongly endorsed the safeguards of a Board-conducted election when substantial changes in the rights and duties of employees create a potential for "serious

105 In denying enforcement, the court overturned a finding of fact. Such Board findings must be sustained if supported by substantial evidence on the record as a whole. J. Ray McDermott & Co. v. NLRB, 571 F.2d 850 (5th Cir.), cert. denied, 439 U.S. 893 (1978); Retail Store Employees Local 428 v. NLRB, 528 F.2d 1225 (9th Cir. 1975) (per curiam); NLRB v. Commercial Letter, Inc., 496 F.2d 35 (8th Cir. 1974).
106 457 F.2d at 663.
107 Id. 664 & n.3.
108 Id. 664.
109 The court's exclusive reliance on the change in the bargaining representative brought about by the International's constitution, if pursued to its logical end, would terminate the collective bargaining relationships of an international's locals whenever significant changes were made in the international's constitution.
110 After notice of the affiliation-vote meeting had been mailed, a former officer of the independent presented a petition signed by more than 100 members requesting a special meeting for the purpose of discussing the affiliation issue. Although the petition met the requirements of the local's constitution for calling special meetings, the request was denied. 457 F.2d at 662. The court also found fault with the secrecy of the ballot. Id. 665.
discontent" or "labor unrest," American Bridge might well have been interpreted as turning primarily on the procedural issues, rather than on the question whether continuity of representation had been preserved. Such tension between the due process and continuity branches of the union successorship doctrine has already been noticed in the opinions in the Amoco case. Subsequent decisions by the same court of appeals preclude this interpretation, however.

In Sun Oil Co. v. NLRB, no question of election procedure arose, but the court flatly held that

when a local independent labor union affiliates with and becomes a local unit of an international union and transfers control over the rights of its members to the international whose constitution and by-laws make substantial changes in the rights of employees to the contract, affects their obligations to management and links their concerns with thousands of other members of the international throughout the country, a change is effected in the bargaining agent . . . .

Because a new bargaining representative was created by such an affiliation, the court found that the existing collective bargaining agreement was terminated and that the employer had no duty to comply with its terms. Further, the employer was not obligated to recognize or bargain with the affiliated local until the latter was certified by the Board as the result of a Board-conducted election.

Sun Oil stands the continuity doctrine on its head. No realistic observer of labor relations would differ with the judgment that an important change took place in the bargaining representative of Sun Oil's employees. By focusing solely on this change, the court failed to understand the function of the continuity doctrine in preserving industrial stability. The effect of the court's decision in Sun Oil is that any affiliation by an independent with an international destroys the independent's certification, terminates the contract, and frees the employer of its duty to bargain. A result more destructive of industrial stability can hardly be imagined.

111 Id. 664.
112 See text accompanying notes 58-59 supra.
113 576 F.2d 553 (3d Cir. 1978).
114 Id. 558.
115 Id.
116 Although the opinion in Sun Oil spoke of "specific factors" indicating the substitution of a new bargaining representative, it is hard to imagine an affiliation that the court's expansive holding would fail to embrace. Every international worth
As there was no doubt that the employees freely chose to affiliate, the Sun Oil court could not base its decision on the policy of employee free choice. Nor did it appeal to the policy of preserving industrial stability, at least in the sense of honoring contractual commitments. The court's opinion did suggest, however, that another aspect of stability—preserving the balance of power between union and employer—figured in its decision. Citing its earlier opinion in NLRB v. Bernard Gloekler North East Co.,\(^1\) in which it had attached "particular significance" to a substantial increase in the union's economic power, the court lamented that Sun Oil was being ordered to bargain with an international union of 200,000 members that could "flex considerably more bargaining muscle" than could the unaffiliated local with its paltry membership of thirty.\(^1\)\(^8\)

In Gloekler, the court's concern for the erosion of the employer's bargaining strength relative to the union's was even more marked. Noting the increased economic resources of the union as a result of affiliation, the court expressed concern that strike benefits paid by the international would make the employees more autonomous in the event of a work stoppage and fretted that the power of the international "could be used aggressively to affect Company contracting-out decisions."\(^1\)\(^9\)

The view that the preservation of industrial stability includes protection of the employer from increases in the union's bargaining clout has been expressly repudiated by the Board on a number of occasions\(^1\)\(^2\)\(^0\) and has no basis in the Act. According to the Board, the employer's interest in continuity of representation extends no farther than the successor union's commitment to honor existing contractual obligations.\(^1\)\(^2\)\(^1\) Even assuming that the employer has a cognizable interest in preventing shifts in the balance of power in the union's favor, certainly the employer's private interest is not so great as to outweigh the combined public interest in giving effect to employees' desires and in preserving the stable bargaining relationships based on existing collective agreements.

affiliating with is likely to have a constitution giving the international a degree of control over its locals. And it is only by virtue of the "linked concerns" of the international's thousands of members that it possesses the economic resources that an independent seeks.

\(^1\)\(^7\) 540 F.2d 197 (3d Cir. 1976).
\(^1\)\(^8\) 576 F.2d at 557.
\(^1\)\(^9\) 540 F.2d at 202.


\(^1\)\(^2\)\(^1\) Quemetco, Inc., 226 N.L.R.B. 1398 (1976).
The preceding review of the continuity of representation doctrine attempted to show that the doctrine's proper function should be to trigger Board disapproval of affiliations or mergers that jeopardize the stability of collective bargaining relationships. If no schism is involved and if the successor union pledges to honor the existing contract, the employer should be required to recognize and bargain with the successor and to honor its contractual obligations, provided that the affiliation represents the majority will. This requirement should hold whether or not the identity of the bargaining representative is substantially changed by the transaction.

From this vantage point, Member Penello's dissent in *Amoco* requires little further discussion. His assertion that the local's duty to follow the international's constitution brought about a change in the rights and obligations of the employees and substantially altered the bargaining representative's identity is immaterial to the issue of continuity of representation, as defined here. No real question of the affiliated local's majority status was raised. Member Penello did not assert that the independent was still in existence or opposed to the affiliation, or that the election procedures were inadequate. The successor local sought to honor the existing collective bargaining agreement, not to avoid it. Indeed, the nub of the dispute was the attempt by the union to enforce the contract in the face of the employer's repudiation. The Board's order to the employer to recognize the affiliated local and honor its contract thus served the twin goals of giving effect to the employees' free choice of bargaining representative and promoting industrial stability. In contrast, Member Penello's dissent, if followed, would frustrate both these ends, while serving only the employer's private interest in maintaining its bargaining advantage over a small and relatively powerless unaffiliated local.

III. Due Process and the Ineligibility of Nonmembers

Once the irrelevant aspects of the continuity doctrine of continuity of representation have been discarded, the affiliation in *Amoco* cannot be questioned on that score. Remaining, however, is the question whether the decision to affiliate accorded with due process, the second prong in the analysis of affiliations.

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122 See text accompanying notes 56-58 supra.


124 See text accompanying note 22 supra.
The revised interpretation of continuity of representation advanced in part II yields a rationale for this second prong that the Board's view is incapable of providing. Under the Board's official doctrine, which holds that affiliation is merely an internal union matter and denies that material changes are taking place in the identity of the bargaining representative, there is no intelligible reason why the Board should review affiliation elections for due process. Such review, moreover, contravenes the Board's general policy of not intruding on internal union affairs. This anomaly vanishes once it is acknowledged that affiliation often does result in a significant alteration of the bargaining representative. Given the strong national policy favoring democratically chosen bargaining representatives, the Board would be remiss if it left affiliation procedures entirely up to the unions.

The new approach to continuity offered here also explains why the standards of due process required in union-run affiliation elections need not be as stringent as the Board's standards for the decertification elections it conducts pursuant to section 9 (c)(1) of the Act when a question concerning representation has been raised. Strict procedures are necessary in these Board-conducted elections because the majority status of the bargaining representative has been challenged. By contrast, in a union affiliation that preserves continuity of representation, no evidence of the union's loss of majority support has been presented and no question concerning representation exists. Thus, the standard of review ought to be whether the procedural irregularities are so great that they raise a suspicion of foul play and thereby trigger a question concerning representation. If it appears that the election accurately reflects the desires of a majority of the union membership, the exact procedures followed are immaterial. This flexible standard has in fact been embraced by the Board and largely approved by

125 See text accompanying note 59 supra.


Considerations of administrative economy would justify the Board in dispensing with due process review altogether for changes in union structure at the international and federation level; such changes are too indirectly related to representational issues to merit the Board's attention.
the courts.129

A flexible standard for review of affiliation-election procedures is necessary if the Board's practice of honoring union-conducted elections is to have any meaning. Union leaders, especially at the local level, naturally take an unsophisticated view of what constitutes proper procedure and so should not be held to standards of legal precision. Adoption of rigid procedural requirements would thus undermine the utility of the Board's approach by increasing the number of elections disapproved. By encouraging employers to litigate, rigid procedural rules would also tax the Board's resources and frustrate that administrative economy which is one of the major advantages of the Board's practice of giving effect to privately conducted elections rather than conducting its own.

A. The Indicia of Due Process

The Board and the courts evaluate affiliation decisionmaking procedures in light of two general requisites of due process: the accurate recording of employee desires and the opportunity to make an informed and reasoned decision. The primary and most frequently considered criteria are adequacy of notice, opportunity for discussion, secrecy of the ballots, and integrity of the balloting and tabulating process. On occasion, other issues, such as compliance with the union constitution and bylaws and timeliness of the election, are also addressed.

One of the hallmarks of due process is adequate notice. All employees eligible to participate in the affiliation decision must be notified that affiliation is being considered. The notice requirement guards against the possibility of action by a minority of union members without the prior knowledge of their fellows. Notice procedures approved by the Board in affiliation cases have varied. In some, the union posted notices prominently, distributed more by hand, and even mailed them to all members.130 In others, signs were posted only on the plant bulletin board.131 A notice left on each employee's desk has also been found to be sufficient.132

means by which employees are notified are not crucial, as long as
they are adequate to assure a general awareness that the issue will
be debated or decided at a given time and place.

Opportunity for discussion is also demanded by the Board and
the courts. The opportunity need not be extensive: a few
minutes of discussion just prior to a vote is enough. When a
substantial number of union members seek a formal discussion of
the affiliation issue in accordance with established procedures, how-
ever, the union leadership's refusal to provide a forum may be a
denial of due process.

Provisions for the secrecy of the ballot need not be as stringent
as in Board-conducted elections; precautions designed to ensure
a reasonable expectation of privacy usually suffice. Indeed, non-
secret votes have been sustained in two cases involving mergers be-
tween locals of the same international, which suggests that the
Board's secrecy standards may vary with the nature of the case.

Although a membership list at the polling place for the purpose
of checking voter eligibility is not essential, an election conducted
without adequate safeguards against double balloting will be dis-
approved. Ambiguously labeled ballots, consumption of beer
during the voting process, and informal polling in place of a
formal election are all factors that have been relied upon to in-
validate an election. The Board has consistently held that the
presence of an impartial observer at the election is unnecessary.

Employers often raise objections to the union's failure to
comply with its own constitution or bylaws, but the Board, in keep-
ing with its policy of not intruding into the union's self-government,
will not overturn an affiliation election on these grounds absent "a

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133 See, e.g., American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660
(3d Cir. 1972); Peco, Inc., 204 N.L.R.B. 1036 (1973).
137 Good Hope Indus., Inc., 239 N.L.R.B. No. 90 (Dec. 6, 1978); New Orleans
138 Samuel P. Katz, 231 N.L.R.B. 1194 (1977); Kentucky Power Co., 213
139 See text accompanying notes 150-53 infra.
142 Id.
143 Id.
145 Hamilton Tool Co., 190 N.L.R.B. 571, 574-75 (1971). See Samuel P. Katz,
clear showing . . . of substantial irregularity.” 148 On occasion, the courts have been less cautious.147

More often than not, the Board has given its endorsement to elections conducted after the affiliation or merger has taken place.148 In a number of older cases involving realignments within the same international union, the requirement of an election apparently was dispensed with altogether.149

This brief overview of the criteria of due process employed in reviewing union-affiliation elections suggests that a double standard exists. Specifically, a less stringent standard is applied to mergers between locals of the same international union.150 One commentator has generalized this observation: “Seemingly in evaluating the adequacy of the approval vote . . . , the Board has placed the facts of the case on a mythical spectrum reflecting the degree of change in the certified representative.” 151 Whether or not that characterization of the Board’s practice can account for all of the case law,152 it appears to be largely correct.

Despite the prevailing mythology that affiliations and mergers preserving continuity of representation do not result in a change in the bargaining representative’s identity, in fact they do. Cognizant of the absurdity of the fiction and wary lest the perceived requirements of the Act be evaded, the Board and the courts have attempted to allay their discomfiture through stricter review of union decision-making procedures. The greater the change in the bargaining representative, the greater the resemblance to a question concerning representation which the Act requires to be resolved by an election

146 Gate City Optical Co., 175 N.L.R.B. 1059, 1060 n.3 (1969).
149 See cases cited in note 59 supra.
conducted by the Board. Hence the tendency to require election conduct that more closely approximates the stringent standards applicable in representation and decertification elections.

Under the analysis of continuity of representation presented in part II, this sliding-scale approach must be rejected. The Board's understanding of its statutory authority to endorse union affiliations is unnecessarily narrow; section 9(c)(1) does not prevent the Board from giving effect to affiliations in cases in which the identity of the bargaining representative changes, and such changes are irrelevant to the question whether continuity has been preserved. If no schism occurs and the successor union pledges to honor the existing collective bargaining agreement, no question concerning representation arises. Once continuity is established in accordance with these criteria, no reason exists for resurrecting the ghost of identity to haunt due process review. A single flexible standard of due process is possible, one to be applied to all affiliations and mergers that preserve continuity of representation: whether the outcome of the election accurately reflects the membership's true desires.

By the criteria analyzed in this section, the procedures followed by the local in Amoco were sufficient to satisfy the requirements of due process. Extensive notice was given and multiple opportunities for discussion were afforded. The strictures of the local's constitution were followed. The election procedures—while possibly not perfect—appear to have been sufficient to assure reasonable accuracy. Finally, the balloting, done by mail, was secret and without serious irregularity. There is therefore no basis for concluding that the employees' choice was not freely made and accurately determined.

One question remains, however: that of voter eligibility.

B. Eligibility of Nonmembers

The Amoco case poses the difficult question whether voter eligibility for union nonmembers ought to be mandatory in affiliation elections. Three distinct arguments can be advanced in favor

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153 See text accompanying notes 67-70 supra. But see note 128 supra.
154 See text accompanying notes 28-30 supra.
155 See text accompanying note 2 supra.
of requiring eligibility: (1) that nonmembers have a statutory right to participate in the affiliation election; (2) that excluding nonmembers may affect the outcome of the election and thus create doubt about the successor union's majority; and (3) that nonmembers have an important stake in the outcome.

As a preliminary matter, it should be noted that the weight of precedent supports the Amoco decision not to require eligibility. Until the 3-2 decision in Jasper Seating Co., the Board's policy was to affirm affiliation elections from which nonmembers had been excluded. The only precedent that the Jasper Seating majority was able to cite was a dissenting opinion in a case decided ten years before. The Board's reversal of Jasper Seating in Amoco thus marks a return to its well-settled doctrines.

The only appellate court to consider the question appears to agree in substance with this line of cases. In NLRB v. Commercial Letter, Inc., two international unions merged to form a new international. Subsequently, two locals of the new international merged to form a new local. The employer's workers voted on neither merger because they were not yet members of the union. Looking to the Board's prior cases, the court concluded that "a mere prospective interest in union affairs does not mean that an employee who is not a union member need be given the chance to vote on internal union restructuring, absent a showing, at least, that the votes of those employees could have changed the result of the election." The court cited approvingly a decision by another court of appeals upholding an amendment of certification in a merger case even though there was no evidence that the merger had been approved by a vote of the members.

The view that nonmembers have a statutory right to vote in affiliation elections is apparently inspired by the similarity of the results that flow from an affiliation election and a Board-conducted decertification election in which all bargaining unit employees can

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162 496 F.2d 35 (8th Cir. 1974).
163 Id. 40.
164 Retail Clerks Int'l Ass'n v. NLRB, 373 F.2d 655 (D.C. Cir. 1967).
Simply put, the idea is that if nonmembers have a right to vote in one type of election, they must be allowed to vote in the other. It does not follow from the similarity in result, however, that the Act requires the relevant electorate in affiliation elections and decertification elections to be the same. Although in both types of elections the fate of an existing bargaining representative hangs in the balance, important differences exist.

A petition to decertify can be filed by thirty percent of the employees in the bargaining unit, or by a union in their behalf, and must allege that the bargaining representative lacks the support of a majority of the bargaining unit employees. If the employer files a petition, it must produce objective evidence to support its belief that the union no longer enjoys majority status. The bargaining representative may, and usually will, oppose the petition, and other unions may intervene to seek a place on the ballot. In a decertification election, the incumbent representative's majority status is on trial. The outcome may be to de-unionize altogether (a vote for no union) or to decertify the existing representative and simultaneously to certify an entirely new, and opposing, union.

By contrast, in the affiliation situation, the union's majority status is not in question. The procedure cannot be instigated by the employer or any union other than the incumbent. The only question to be decided is whether the membership desires to affiliate; if the affiliation is defeated, the status quo remains unchanged.

In the decertification context, when the incumbent union's majority status has affirmatively been cast into doubt and a question concerning representation has been raised, the Act requires that all employees in the bargaining unit be eligible to vote, whether or not they are members of the incumbent union. To exclude nonmembers would defeat the very purpose of the election: determining which union, if any, represents the majority of the employees. Accordingly, when the issue of the successor union's majority has

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165 See, e.g., Hamilton Tool Co., 190 N.L.R.B. 571, 576 (1971) (Miller, Ch., concurring).
169 See Cocker Saw Co. v. NLRB, 446 F.2d 870 (2d Cir. 1971).
been injected into an affiliation situation by the predecessor union’s opposition, creating a schism, the Board has consistently declined to validate the affiliation and declared instead that a representation question has been raised.\textsuperscript{171}

But a different rule is appropriate when the affiliation represents the uncontroverted desire of the union organization—as corroborated by the majority of its voting membership—and no thirty-percent showing of interest nor any objective evidence raising a positive doubt of the union’s majority support exists. In such a case, no question concerning representation arises and the dictates of the Act do not apply. That no real issue of majority rule is present is confirmed by the fact that in the typical contested affiliation, the employer alone opposes the affiliation and is unable to muster even one employee with objections to the change.

The exclusion of nonmembers from affiliation elections does not in any way diminish their rights under the Act. The decertification route remains available, guaranteeing to all employees—members and nonmembers alike—the right to repudiate their bargaining representative. If the Board’s ratification of an affiliation leaves the unit with a bargaining representative that lacks majority support, the possibility of decertification ensures that the error may be easily remedied.\textsuperscript{172}

A second argument for requiring voter eligibility of nonmembers in affiliation elections is that the exclusion of a number of nonmembers large enough to have affected the outcome of the election places in doubt the successor union’s majority status. In other contexts, however, the Board has required, in the interest of stability, a showing of much more than a mere possibility before finding that a union’s majority status has been successfully questioned. Thus, employers relying on a heavy turnover of personnel to raise a doubt about the incumbent union’s continuing majority have not met with success; the Board assumes that the new employees support the union in the same proportion as the employees they replace.\textsuperscript{173} Even a showing that fewer than half of the employees are union members will not suffice to create a doubt of the union’s majority.\textsuperscript{174}

\textsuperscript{171} See notes 70 & 71 supra.

\textsuperscript{172} Because the Board has ruled that a valid affiliation does not result in a new certification, no certification-year bar arises to shield the successor union from attempts by the employees or by the employer to win decertification. See note 61 supra.

\textsuperscript{173} Harpeth Steel, Inc., 208 N.L.R.B. 545 (1974); R. Gorman, supra note 61, at 111.

\textsuperscript{174} Bartenders Ass’n, 213 N.L.R.B. 651 (1974); R. Gorman, supra note 61, at 111.
because nonmembers may support the union but not wish to pay the costs of membership.

This reluctance to doubt the union's majority status absent convincing evidence is equally appropriate in the affiliation context. It cannot be assumed that every nonmember excluded from the election would vote if given the opportunity, nor can it be assumed that if allowed to vote, every nonmember would cast his vote against the affiliation. Disenchanted employees who have refused membership in the predecessor local may welcome a change in affiliation. Finally, the desires of union members ought not be frustrated because of the possibility that some nonmembers who may object to the affiliation have chosen not to incur the expense associated with a voice in union affairs.

The third argument for allowing nonmember participation in affiliation votes carries little weight. Although nonmembers certainly have a stake in the outcome of the affiliation, the same is true of many other union decisions. Nonmembers have no right to vote on decisions to ratify contracts, to strike, to elect union officers, to raise dues, or to adopt a new constitution. If a nonmember's stake in affiliation is great enough to require his vote, it is fair to assume that he will take the plunge and join the union.

Practical considerations also warrant treating the union membership as the relevant electorate in affiliation decisions. Although internal union organization sometimes corresponds exactly to the Board's designations of bargaining units, as in Amoco, it is not uncommon for the primary organizational unit of the union to encompass several bargaining units. If a majority in each unit were mandatory, then the affiliation of a multi-unit independent could well throw into doubt its bargaining status with respect to each unit because a vote by the employees as a whole would not necessarily reflect the desires of the employees in any individual bargaining unit.


176 For example, if an independent local representing 100 employees in ten units of ten employees each voted 94-6 in favor of affiliation, every one of the ten employers could refuse to recognize the affiliated local by questioning whether a majority of the employees in its bargaining unit had voted to affiliate.

In William B. Tanner Co., 212 N.L.R.B. 566 (1974), enforcement denied, 517 F.2d 982 (6th Cir. 1975), the Board, over the dissenter's objections, declined to accept the employer's bargaining unit as the group within which a majority was required and looked instead to the overall vote in the multi-unit local. The court of appeals appeared to agree with the dissent. See also NLRB v. Canton Sign Co., 457 F.2d 832, 842 (6th Cir. 1972) (Celebrezze, J., dissenting) (criticizing majority opinion's use of bargaining unit electorate); Montgomery Ward & Co., 188 N.L.R.B. 551 (1971); United States Gypsum Co., 164 N.L.R.B. 831 (1967).
This problem could be avoided if the Board required that affiliation votes be conducted on a unit-by-unit basis. But the Board has never set itself up as an arbiter of internal union structure, and to do so here would clearly paralyze a union’s ability to act as a unified entity. A union contemplating affiliation would have to reckon with the risk of losing several of its bargaining units in the process. The risk would be huge if the rule were extended to mergers consummated at the international level and could well result in disruption of collective bargaining relationships throughout the nation. The Board ought not set up unnecessary obstacles to the constant and inevitable shifts in intra-union and inter-union relationships.

Although the Board does not require a showing that any of the employees in a bargaining unit actually voted, the result may be different when the entire unit is ineligible to vote in the union election. In amendment of certification cases in which none of the employees in the employer’s bargaining unit were allowed to vote on the affiliation or merger, the Board withheld its endorsement. Factory Serv., Inc., 193 N.L.R.B. 722 (1971); Rinker Materials Corp., 162 N.L.R.B. 1698 (1967); M.A. Norden Co., 159 N.L.R.B. 1730 (1966); Yale Mfg. Co., 157 N.L.R.B. 597 (1966). When, however, the nonmember status of the entire unit has been attributable to the employer’s illegal refusal to bargain, the employer has not been permitted to profit from its unlawful refusal and the affiliation or merger has been upheld. NLRB v. Commercial Letter, Inc., 496 F.2d 35, 41 n.2 (8th Cir. 1974); Goodfriend W. Corp., 232 N.L.R.B. 527, 528 (1977). In the latter cases the employees’ ineligibility for union membership resulted from a common union policy of not accepting membership applications until a collective bargaining agreement has been signed.

The amendment of certification cases need not be construed as an exception to the Board’s rule against requiring unions to permit nonmembers to vote on affiliations or mergers. In each case the petition to amend certification was dismissed without prejudice, with the clear understanding that a post-hoc ratification vote by those unit employees who later became union members would satisfy the Board’s due process requirements. Thus the rule in these cases is not that unions must allow nonmembers to vote, but rather that NLRB recognition of the affiliation or merger must await the nonmembers’ ability to join the union.

Given that the illegal refusal to bargain in both Commercial Letter and Goodfriend predated the union mergers, it is interesting to speculate what approach would be adopted if the employer’s refusal to bargain were predicated upon the invalidity of the merger. In such a case, the employer would not be responsible for the original ineligibility of its employees, but it would be responsible for their continuing ineligibility. Were the Board to decline recognition of a merger in these circumstances, it would, in effect, be requiring the union to permit nonmembers to vote. On the other hand, the employer’s refusal would be justified by analogy to the amendment of certification cases and the Board’s doctrine that the same substantive law applies to amendment of certification and refusal to bargain cases. See cases cited in note 16 supra.

The optimal solution would be to require the employer to bargain and to demand that the union demonstrate the employees’ consent in a merger-ratification vote after the contract is signed. The election would be reviewed by the Board through the amendment of certification procedure. Such an approach would minimize the disruptive effects of mergers and affiliations on collective bargaining, while respecting the union’s interest in conducting its own affairs free from outside interference and protecting the unit employees’ interest in not submitting to a change in representative without an opportunity to express their consent.
In addition to these reasons for respecting the integrity of the union's internal structure, requiring that nonmembers be allowed to participate in affiliation and merger elections would adversely affect the union's capacity for self-government. Because the Board requires ample time for discussion of the affiliation question prior to the vote, \(^{178}\) participation by nonmembers would mean opening up union meetings and union halls to those who have voluntarily declined the privileges associated with union membership. It might also mean yielding the floor to statements and resolutions of nonmembers, in violation of the constitution or bylaws of those unions that understandably permit only members to participate in the conduct of union business.

As a matter of equity, a certain unfairness is worked by forcing union members to open affiliation votes to nonmembers. The decision to affiliate with a powerful international is often based on the independent's perception that affiliation will strengthen its bargaining power and add depth to its resources in the constant struggle with management. \(^{179}\) The employee who takes a free ride has, by his decision not to join, declined to participate in the affairs of the union or to bear his share of the costs of collective bargaining. In the very act of refusing to be counted as a member, to attend meetings, to pay dues, or to vote for officers, stewards, strikes, or contract ratification, the nonmember is himself a cause of the independent's weakness that affiliation often is meant to remedy. To allow nonmembers an equal say in these circumstances does an injustice to union members, who have accepted the costs as well as the benefits of collective bargaining and have earned a voice in the internal affairs of the union.

As long as membership is open to all on a nondiscriminatory basis, no reason appears for requiring nonmember eligibility to vote in affiliation elections. It is, of course, ordinarily only the employer who objects to the exclusion of nonmembers; no case on record yields evidence of a nonmember objecting to his inability to vote. Indeed, the cases are rare in which the vote of nonmembers could possibly have affected the outcome. \(^{180}\)

The exclusion of nonmembers from the affiliation election in Amoco, therefore, does not render the affiliation invalid. The nonmembers had no statutory right to vote, nor could their numbers

\(^{178}\) See text accompanying notes 133-35 supra.


\(^{180}\) See note 4 supra.
have affected the outcome. Even if those excluded could have altered the result, the claim of OCAW, Local 4-14, to majority support would not thereby be undermined. Especially because nonmembers were eligible to join the union until the election and no nonmember, but only the employer, was heard to object, the limitation on voter eligibility imposed by the local in Amoco should be sustained.

CONCLUSION

Permutations in union structure have been a constant on the labor scene for many years, as unions have responded to shifting economic and political forces. Frequently called upon to define the effect of union affiliations and mergers on collective bargaining, the National Labor Relations Board has steered a pragmatic course, adopting rules that, for the most part, leave established collective bargaining relationships intact. By allowing the successor union to step into the shoes of the predecessor without undergoing the trial of a Board-conducted election, and by requiring the successor to honor the existing collective bargaining agreement, the Board's approach has contributed significantly to stability in labor-management relations, while at the same time conserving scarce administrative resources.

Such a feat has not been accomplished without some sacrifice in candor. Operating under the mistaken belief that a change in the identity of the bargaining representative necessarily raises a question concerning representation and must be resolved by a decertification election, the Board has considered itself bound in principle to reject any union affiliation or merger that materially alters a representative's identity. Thus, according to the official mythology, affiliations will be countenanced only if they preserve "continuity of representation" and leave the bargaining representative's identity unchanged. Strict obedience to that rule, however, would disqualify many affiliations and thereby defeat the very purpose of the continuity doctrine—to preserve established collective bargaining relationships. Cognizant of these facts, the Board has made a mockery of its own doctrine and, in the interests of industrial stability, regularly found apples and oranges to be identical.

In addition to the requirement that union affiliations preserve continuity of representation, the Board has also insisted that the union members involved be given the opportunity to vote on the affiliation in an election that satisfies certain procedural standards
of "due process." Although in theory the Board adopts a single, flexible standard of due process review, those affiliations that achieve a substantial change in the bargaining representative are in practice subjected to a stricter scrutiny. Here, too, the discomfort with the fiction of identity results in a distorted application of articulated legal standards.

This Comment has proposed that the Board and the courts discard the fiction of identity altogether and reconstruct the continuity of representation doctrine so that it promotes the basic policies underlying the Act. The Board's perception that a change in the bargaining representative's identity destroys continuity of representation is based in part on an unduly restrictive interpretation of the statute. Contrary to the Board's belief, a question concerning representation requiring the Board to conduct a decertification election does not arise under section 9(c)(1) whenever the bargaining representative changes, but only when the incumbent union's majority status has affirmatively been cast into doubt. In the typical affiliation setting, no question concerning representation arises because the incumbent union's unchallenged majority status carries over to the successor union by virtue of the affiliation election. Under this reading of the Act, the Board is free to recognize affiliations or mergers whether or not they result in a "new" bargaining representative.

The metaphysical approach to continuity is rooted also in common law doctrines of contract and the law of unincorporated associations. Absorbed into federal law during the early days of the Act, that mode of analysis has little to recommend it in the modern statutory environment governed by the policies of employee freedom of choice and industrial stability rather than by freedom of contract. Examined in this light, the continuity doctrine's purpose of promoting stability is fully served by two requirements—(1) that no schism occur whereby the predecessor union remains in existence and actively opposes the change, and (2) that the successor union agree to honor the existing collective bargaining agreement. Additional criteria of continuity are unnecessary and serve to frustrate rather than promote stability in collective bargaining.

Acceptance of this revised doctrine of continuity allows the law of union affiliations to operate with clarity and consistency. Once the fiction of identity is discarded as irrelevant, it is no longer necessary to articulate one standard and apply another. The sliding-scale approach to due process can also be jettisoned in favor of a single but flexible standard for determining in every case whether
the election result accurately registers the desires of the union membership.

No issue more fully exposes the bankruptcy of the Board's paper doctrines in this area than the eligibility of nonmembers of the union to vote in affiliation elections. Of the four opinions in *Amoco Production Co.*, none is able to furnish a convincing analysis because each relies in some way on the metaphysical approach to continuity. Eligibility determinations in union affiliation elections are not strictly internal union matters, as the majority view in *Amoco* would have it. Rather, because affiliation may result in a new representative, the question of eligibility involves the Act's fundamental policy of the freedom of employees to choose their bargaining representatives. But the Act's command that all employees in the bargaining unit be allowed to vote in a decertification election does not necessitate the same result in the affiliation context. Because no dispute over the incumbent union's majority status occurs in the ordinary affiliation effort, the Act does not require eligibility for nonmembers. Nor does the possibility that the excluded nonmembers might affect the outcome make any difference.

Consistent with the Act, the *Amoco* rule is favored by both practical and equitable considerations. Requiring a majority vote of the employees in each bargaining unit would strain union structures that do not correspond to the Board's own unit determinations, and possibly lead to undesirable intervention in internal union affairs. Mandatory participation by nonmembers would also impinge on union self-government and would dilute the privileges associated with union membership. Finally, a requirement of eligibility for nonmembers is unnecessary because the interests that such a rule seeks to protect are already served by the Act's decertification procedures.

The Board's pragmatic approach to union affiliations has long been in need of a rationale that respects both the letter and the spirit of the Act. Whether one slights the prevailing fictions as the Board itself has done, or takes them seriously, as has the Court of Appeals for the Third Circuit, the rule of law is undermined. When, however, the continuity of representation doctrine is reduced to its essence, freely chosen union affiliations that do no harm to the stability of established collective bargaining relationships may be recognized without affront to the dictates of the Act.