ACCRETION ELECTIONS: MAKING EMPLOYEE CHOICE PARAMOUNT

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It is declared hereby to be the policy of the United States to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . .\(^1\)

Employers and unions have long engaged in legal wrangling over the size and parameters of the bargaining unit, believing that these attributes will often determine whether a union can initially get its foot in the door and later remain a viable entity within the workforce. Generally unions initially prefer smaller bargaining units,\(^2\) for obvious reasons: the union needs a consensus among workers that adoption of the union is in their best interests, and the probability of the union achieving this consensus is inversely proportional to the number of parties involved.\(^3\) The smaller the unit, the fewer the employees the union needs to convince to vote for the union. The fewer the votes needed, the greater the chances of an election victory. Furthermore, it is often less expensive to proselytize a smaller group, and the union that can expand inexpensively can devote its

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2. See Samuel Estreicher, Labor Law Reform in a World of Competitive Product Markets, 69 CHI.-KENT L. REV. 3, 10 (1993) ("[U]nions seek elections on the basis of the smallest organizing unit . . . ."). Or, as Professor Estreicher has also observed, "unions seek the largest possible unit that they can organize effectively." Id. Thus, they are not opposed to large units, so long as they can prevail in organizing them. See JULIUS G. GETMAN ET AL., LABOR MANAGEMENT RELATIONS AND THE LAW 28 (2d ed. 1999) ("When a union organizes, it almost invariably limits itself to a portion of the employer's work force. . . . Most unions will choose the largest unit in which they think they will be successful.").
3. Cf. Stewart J. Schwab, Collective Bargaining and the Coase Theorem, 72 CORNELL L. REV. 245, 267 (1987) ("The largest impediment to reaching an efficient agreement, according to many scholars, is coordinating the desires of multiple parties."). The probability of reaching a consensus also decreases as the scope of the proposed action increases, which is frequently a function of the size of a given group of individuals. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 67 (1994). The larger the group, the more varied are the interests that seek representation in the union.
economic resources to battling rival unions or the employer. Not surprisingly, then, employers initially favor larger bargaining units for converse reasons:4 they would prefer not to bargain with the union, and it is more difficult and expensive for unions to organize larger units.5 Because the employer’s chances of prevailing in a representation election increase as the size of the unit increases, employers will generally argue that a larger unit is the only appropriate unit in any given case.6

Because the size of the bargaining unit is often a determining factor in the unionization of the workforce, the contours of the bargaining unit are obviously important to employers, employees, and unions.7 An accretion—the addition of a small group of employees to an established bargaining unit without first holding an election—often results in modification of the union’s, the employers’, and employees’ initial preferences as to unit size. Once a bargaining unit is up and running, the union is frequently happy to expand its domain; after all, more employees bring more tribute in the form of union dues, and increased size usually means increased strength. But this is true only so long as the new employees will swear fealty to the existing union, rather than to some competing union. Therefore, unions will often support accretions when they will result in the addition of loyal union members, but will oppose them when there is a real possibility of losing majority status. Employers, never blind to their own interests,

4. See, e.g., Hamilton Test Sys., New York v. NLRB, 743 F.2d 136, 138 (2d Cir. 1984) (stating that after the regional director decided that the appropriate bargaining unit would consist of five groups of non-clerical employees at one site, the employer objected that the unit should be larger, encompassing four sites, while the union objected that the unit should be smaller, encompassing only three groups of non-clerical employees at one site).
5. Cont’l Web Press Inc. v. NLRB, 742 F.2d 1087, 1090 (7th Cir. 1984) ("[S]mall, homogenous units usually are cheaper to organize than larger ones, and often are more effective. Fewer workers have to be contacted, and there is less danger that conflicts of interest will prevent the formation of an effective majority coalition.").
6. Getman, supra note 2, at 31-32 ("Thus the larger the unit that the Board insists on, the better off employers are.").
7. Judge Posner has explained the general view on preferences for larger or smaller units.

In general, the larger the unit the better off the employer is, and the smaller the unit the better off the union is. The larger the unit is—that is, the more employees it has—the more difficult it will be for the union to obtain the majority vote that it needs in order to be designated the exclusive bargaining representative for the unit. This is not only because it takes more resources in absolute terms to get more votes (a national political election is more costly than a local one), but also because the members of the unit are more likely to have divergent interests with respect to tradeoffs among wages, fringe benefits, job security, and workplace safety. This will make it difficult for the union to appeal to a majority and, even if it gets a majority, will make it difficult for the union to formulate a coherent set of demands and enforce those demands by an effective strike threat.

consider some of these same factors, although from a different perspective. They will frequently support accretions that will weaken an unpopular union, place the accreted employees safely in a unit that isn’t too demanding (as opposed to a competing unit that will fight for higher wages), or result in the employer having to bargain with fewer unions (thereby decreasing expenditures of both time and money).  

In assessing the propriety of accretions, the National Labor Relations Board ("NLRB") has addressed these competing interests through its "community of interest" balancing test. Unfortunately, however, the test provides nothing more than rough guidelines for the Board to follow; it can lead to entirely different results in nearly identical cases; and it is frequently perceived as a tool used by the Board to expand the population of a bargaining unit according to the whims of the prevailing union. Although the balancing test is ostensibly designed to ensure that no accretion will occur unless all the employees of the newly created unit have substantially the same interests, the test is tortured by its inherent vagueness, and the multiplicity of its factors make the test easy to manipulate. Perhaps because unions and employers are the only private parties to litigate accretion cases, it often seems that the community of interest test ends up serving primarily the unions’ interests, and only in rare instances does the test serve the interests of employers or the self-

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8. "The employer can be expected to prefer units drawn along the same lines as the company’s internal divisions." Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1043 (9th Cir. 1978). The Ninth Circuit also suggested that "this preference should be accommodated if feasible." Id.

9. In applying the community of interest test the employer "also has an interest which should be considered." Id.

10. This is in part due to the fact that Congress intentionally left its mandate vague, thereby delegating to the Board broad power to define an "appropriate" unit. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 590 (5th ed. 1998) ("The costs of legislative enactment imply that statutes will often by ambiguous. After all, one way to reduce the cost of agreement is to agree on less—to leave difficult issues for future resolution by the courts," or administrative agencies.).

As to Congress’s choice of the word “appropriate,” Judge Danny Boggs has noted that "'Appropriate' is one of the most wonderful weasel words in the dictionary, and a great aid to the resolution of disputed issues in the drafting of legislation. Who, after all, can be found to stand up for 'inappropriate' treatment or actions of any sort?" Cleland v. Bronson Health Care Group, Inc., 917 F.2d 266, 271 (6th Cir. 1990) (Boggs, J.) (discussing the Emergency Medical Treatment and Active Labor Act's mandate that emergency rooms provide "appropriate" screenings of patients); see also Fed. Election Comm’n v. Nat’l Conservative Political Action Comm., 470 U.S. 480, 507 (1985) (White, J., dissenting) ("'Appropriate' is not an ideal statutory term.").

11. "It can readily be seen that community of interest is a vague standard which does not lend itself to mechanical application. It is a multi-factor criterion, and it is rare in any give case that all of the factors point conveniently in the direction of the same size unit." ARCHIBALD COX ET AL., LABOR LAW 276 (12th ed. 1996).
determination rights of employees. The most important parties, the employees, are frequently left without a direct and independent voice in the community of interest balancing. Only when the employees' interests coincide with those of the union or the employer do their interests get championed, and then only secondarily and to the extent deemed financially prudent by the union or the employer. In cases where there are two competing unions and the employer elects to ally itself with one of them, employees whose bests interests would be served by the denial of any accretion have no way to make their voices heard, even though the accretion decision may have a profound affect on the means by which they earn their livelihood and support their families.

Because the prevailing accretion procedure has substantial defects—including the fact that it denies employees basic freedoms of association and self-determination that Americans hold dear—this article proposes that the Board abandon the overwhelming community of interest balancing test, and replace it with a system of secret ballot elections. Under the proposed election system, an accretion could only occur if a majority of the voters in both the group to be accreted and the established unit cast their ballots in support of the accretion. As discussed more fully below, an election system has many advantages, not the least of which is showing respect for employee autonomy and the right of employees to choose for themselves the outcome that best serves their interests. An election system that empowers employees to decide whether to join any of the existing bargaining units or remain autonomous will prove beneficial to labor-management relations. The proposed election system also gives employees of the preexisting unit a voice in the accretion, thereby ensuring that the union or the employer does not jeopardize their interests in permitting an accretion. Finally, the election system will provide employees in the preexisting unit with an effective means of voicing any concerns about their union's performance as the employees' representative.

To demonstrate the need for a revised accretion standard, Part I of this article outlines the present system by which accretions are presently analyzed. This section focuses on the substantial community of interest

12. The Board and the courts claim that they have tried to minimize this problem. According to the Ninth Circuit, it will ignore an employer's suggestions for defining the bargaining unit where they are designed to thwart unionization:

Of course, when the employer seeks to disavow its own internal structure and instead proposes a unit which joins the subject employees with employees uninterested in union representation, we accord almost no weight to the employer's claimed administrative interest. A unit gerrymandered to serve the employer's self-interest is no better than one gerrymandered to serve the union's organizational objectives.

Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1043 n.18 (9th Cir. 1978).
test utilized by the NLRB, discussing each factor as it has been treated by the Board and the courts. Part I easily demonstrates the manipulability of the balancing test, and shows its inability to provide certainty or predictability in accretion cases. Part II introduces another system, based on employee choice, whereby accretions are determined by secret ballot elections. Because different concerns arise where accretions are sought by employers, employees, and unions, this proposal sets out election rules that vary slightly depending on the proponent of the particular accretion. In each case, however, an accretion can be accomplished only if a majority of both the group to be accreted and the preexisting unit vote to support the accretion.

Part III discusses the advantages of this proposed election system, including its promotion of employee choice, the rescuing of accretion cases from potential biases of the Board, and its superiority to the community of interests test in ensuring that the employees’ interests are served by accretions. In Part IV, the article considers theoretical shortcomings of an election system. These include the potential for creating units where the employees have conflicting interests, and its failure to take into account the hardships to employers, unions, and the employees themselves that an unwise but popularly supported accretion might entail. Despite potential shortcomings of the proposed system, the article concludes that an election system is workable and preferable to the community of interest balancing test presently utilized by the Board.

I. THE ACCRETION DOCTRINE: AN OVERVIEW

Among the fundamental freedoms granted to employees by the National Labor Relations Act (“NLRA”) is the right to organize a union and to bargain collectively through that union.\(^1\) Recognizing that there is strength in numbers, and aiming to prevent internecine rivalries among competing unions and “divide and conquer” tactics by employers,\(^1\) the

\(^1\) See 29 U.S.C. § 157 (1994) (“Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”). Of course, employees had these rights even before the enactment of the NLRA, and certainly by 1935 mainstream judges did not seriously question these rights. See Hadley Arkes, The Return of George Sutherland: Restoring a Jurisprudence of Natural Rights 145 (1994) (“None of the so-called conservatives or laissez-faire judges had questioned the right of workers, as free men, to form into unions or to engage in any legitimate association.”). What the NLRA did was provide the government with a mechanism for punishing employers who refused to hire, retain, or bargain with union employees. See 29 U.S.C. § 158(a)(1), (a)(3) (1994).

\(^1\) As William Gould observed:
The essential concern of the courts has been that the collective interest should
NLRA permits each unit to retain only one union to act as its agent for purposes of collective bargaining with the employer. Once in place, this union acts as the exclusive bargaining agent for all employees in the unit—at least with respect to mandatory subjects of bargaining—even when a substantial minority of employees prefer another union or no union representation at all.

A union can become an employee's designated collective bargaining agent through various means. These include a union's victory in a secret ballot election conducted by the regional director of the NLRB; voluntary recognition by the employer that the union has majority support; a Gissel bargaining order issued by the Board; a successorship, or an accretion.

govern over individual advantages once the majority of workers in an appropriate unit have designated the union as their bargaining representative. In large part, this rule exists because individual contracts could serve as an obstacle to organization and permit employers to "divide and conquer."

WILLIAM B. GOULD, A PRIMER ON AMERICAN LABOR LAW 64-65 (2d ed. 1986).

15. 29 U.S.C. § 159(a) (1994) ("Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . "). This "majority rules" concept may seem unfair to the minority that does not want representation by the union. Nevertheless, it is similar to the manner in which the American political system works. See JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 6 ("[O]nce the Constitution was ratified virtually everyone in America accepted it immediately as the document controlling his destiny. Why should that be? Those who had opposed ratification certainly hadn't agreed to such an arrangement. It's quite remarkable if you think about it, and the explanation has to be that they too accepted the legitimacy of the majority's verdict.") (footnotes omitted).

It's worth noting, however, that the Supreme Court has given union members the ability to opt out of paying dues for other than essential services provided by the union. Communication Workers of Am. v. Beck, 487 U.S. 735 (1988).

16. This exclusivity is the rule even where a union fails to represent the employees' interests or where an employee simply would prefer to deal directly with his employer. See Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975) (two black employees sought to bypass the union and deal directly with the employer about working conditions for blacks). Because of the contract bar, election bar, and certification year bar, a union can remain the exclusive bargaining agent for a unit while these bars are in place, even where not a single employee supports the union.


19. See NLRB v. Gissel Packing Co., 395 U.S. 575, 596 & nn.7-8 (1969). The board will issue an order for the employer to bargain with a union under Gissel where the employer committed unfair labor practices that purportedly prevent the holding of a free and fair election.

20. An employer must recognize and bargain with a union that represented the employees of a unit acquired by the employer where the union employees are a substantial
This article focuses only on the latter process, accretion.

Simply put, an "accretion occurs whenever new employees are added to an existing bargaining unit." More precisely, accretion is a process by which employees considered to have common interests with an existing bargaining unit are deemed to be part of that bargaining unit, without first having the opportunity to voice their opinion in an election. As the Seventh Circuit explains it:

An accretion is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity. The additional employees are then absorbed into the existing unit without first having an election and are governed by the unit’s choice of bargaining representative.

Although an accreted employee can agitate for a decertification election under §9 (but only within the overall unit), this is no substitute for the right to choose not to be accreted in the first place.

Accretions frequently occur when an employer with a unionized unit acquires another plant where the new employees have similar interests with their brethren in the preexisting, unionized unit. "Typically, a union will represent employees at one facility. Then, the employer will acquire an additional nearby facility, and the union will argue that the contract should extend automatically to the workers at the additional facility." Similarly, where an employer opens another plant or store, its new employees might

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23. Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 756-57 (7th Cir. 1982); see NLRB v. Illinois-American Water Co., 933 F.2d 1368, 1377 (7th Cir. 1991).

24. Boire v. Int’l Bhd. of Teamsters, 479 F.2d 778, 798 (5th Cir. 1973) ("Nor does the procedure for decertification under section 9 of the Act provide an adequate remedy for these employees.").

25. Illinois-American Water Co., 933 F.2d at 1377 ("The common accretion situation occurs when new employees are absorbed into an existing unit because of the similarity of their job duties to those of the unit employees."); I THE DEVELOPING LABOR LAW 404 (Patrick Hardin ed., 3d ed. 1992) ("An employer’s acquisition or construction of an additional operation or facility after the execution of the contract frequently gives rise to a claim of accretion."); see, e.g., Armco, Inc. v. NLRB, 832 F.2d 357, 359 (6th Cir. 1987) ("This case arises from Armco’s acquisition of an Allied Chemical coke plant . . .").

be accreted to the collective bargaining unit already in existence at its primary location, and thus the new employees inherit whatever union represents the existing employees.  

Accretion can raise important issues for employers, unions, and employees. The accretion question will determine which union (if any) represents the accretable employees, whether the preexisting collective bargaining agreement extends to the group to be accreted, whether the employer has a duty to bargain, and with which union it has this duty. Distinct problems arise where employees of an acquired shop could be accreted to more than one existing unit represented by different unions, and the respective unions each fight for control. Determining whether an accretion occurred, and which unit sustained the accretion, is particularly important for the employer in this situation: if there has been an accretion to one of the units, the employer must bargain with the union for that enlarged unit, and it commits an unfair labor practice if it bargains with the “wrong” union. 

Because there is no direct judicial review of unit determinations and accretions, when an employer is not sure whether the reviewing Court of Appeals will concur in the Board’s finding of an accretion, its only recourse is to refuse to bargain with respect to the accreted employees; or, if the employer is asserting the accretion, to decline to bargain with the rival union that claims to represent the accretable group. Cases involving

27. THE DEVELOPING LABOR LAW, supra note 25.
28. See, e.g., NLRB v. Masters-Lake Success, Inc., 287 F.2d 35 (2d Cir. 1961) (per curiam) (employer violated § 8(a)(1), (2), and (3) by recognizing and bargaining with the union where the union and employer mistakenly believed that a new branch store was an accretion, rather than a new bargaining unit).
29. See, e.g., NLRB v. Security-Columbian Banknote Co., 541 F.2d 135 (3d Cir. 1976) (enforcing cease and desist order where employer acquired an operational plant, and committed an unfair labor practice by bargaining with the Graphic Arts Union that represented its original plant, when it should have bargained with the Pressmen’s Union that previously represented some of the employees of the acquired plant).
31. Parties can sometimes obtain judicial review of an accretion issue by seeking an injunction. See Kaynard v. Mego Corp., 633 F.2d 1026 (2d Cir. 1980) (affirming the district court’s injunction as modified); Boire v. Int’l Bhd. of Teamsters, 479 F.2d 778 (5th Cir. 1973) (affirming district court’s injunction under 29 U.S.C. § 160(j)). Also, some courts “have held that a district court deciding a section 301 case may determine whether a bargaining unit is appropriate where a decision of that issue is essential to a resolution of a breach of contract claim...” Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 523 (5th Cir. 1982).
32. Accretion questions may be arbitrated if the parties agree to this course of action. But the Board will only defer to the arbitrator’s determinations if they are consistent with the Board’s own accretion standards. Boire, 479 F.2d at 794. As discussed more fully below, the Board’s standards are vague and case-specific, thereby requiring an arbitrator to have supernatural powers to divine what the Board would do if presented with the facts of a particular case. Employers can obtain Board review of accretion questions by petitioning to
A union-supported accretion arise when an employer refuses to recognize a union as the exclusive representative of a group of employees (the purportedly accreted employees), and the Board charges the employer with a violation of § 8(a)(5).\textsuperscript{33} Similarly, employer-supported accretions come to the Board through an unfair labor practice charge when the employer bargains with a union as the representative of the purportedly accreted employees. The employer must assert his accretion arguments as a defense to the unfair labor practice charge, which is usually initiated by the neglected union.\textsuperscript{34}

That’s exactly what the employer was forced to do in \textit{NLRB v. Security-Columbian Banknote Co.}, where Security operated a plant that designed and engraved stocks and bonds.\textsuperscript{35} A unit of eight employees was represented by the Pressman’s Union, while another unit performing offset printing was represented by the Graphic Arts Union. When Security acquired another plant, whose offset printers were represented by the Pressmen’s Union, both the Pressman’s Union and the Graphic Arts Union claimed that they were the exclusive bargaining representative for the newly acquired offset printers. In this situation, the employer was forced to decide whether: (1) an accretion to the existing unit of offset printers had occurred, in which case the Graphic Arts Union would be the new employee’s agent; (2) an accretion to another existing unit had occurred, in which case whatever union represents that unit would be the new employee’s collective bargaining agent; or (3) no accretion had occurred, in which case the new unit would inherit the Pressman’s Union as the representative of the employees under the successorship doctrine.

The resolution of this dilemma obviously has profound implications for the accreted employees, not to mention the various competing unions and the employer. As it was, Security-Columbian Banknote Co. guessed wrong: it thought that the acquired unit was accreted to the existing unit of seek clarification of an existing bargaining unit. See Archer Daniels Midland Co. 333 N.L.R.B. 81 (2001).

33. Int’l Ass’n of Machinists & Aerospace Workers v. NLRB, 759 F.2d 1477, 1478 (9th Cir. 1985). A union might seek an accretion pursuant to an accretion clause in a collective bargaining agreement. “[T]he situation usually posed in the accretion clause cases is a union majority already established in one area which seeks to swallow up another separate group of employees without the need for an election.” \textit{Pratt-Farnsworth, Inc.}, 690 F.2d at 525 n.17 (5th Cir. 1982). The Board “has taken an extremely narrow view of permissible contractual accretions.” \textit{Boire}, 479 F.2d at 796. The Board “has refused to find the contract a bar to a petition without its own independent determination that the new facilities represented an accretion to the contract unit.” \textit{The Developing Labor Law, supra} note 25, at 406.

34. Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1035 n.3 (9th Cir. 1978) (“Direct review of a unit determination is unavailable. The employer must refuse to bargain and then raise the issue in the subsequent unfair labor practice proceedings.”).

offset pressmen, and thus was represented by the Graphic Arts Union. However, the Board found that no accretion had occurred, and that Security had committed an unfair labor practice by bargaining with the Graphic Arts Union. Accretion can be a sticky business, and the Board has not made life any easier for employers, employees, or unions to determine whether an accretion has occurred.

Because the Act grants the Board the power to determine "the unit appropriate for the purposes of collective bargaining," it must decide when small groups of employees are accreted to unionized bargaining units. Although it has broad discretion to determine the appropriate unit and thus whether a group should be accreted, the Board has arguably cabined this discretion through its use of the so-called "community of interest" balancing test. As the discussion below demonstrates, however, it is intellectually dishonest to label the Board's accretion analysis a "test." The only thing tested is credulity, by the Board's assertion that it uses the "substantial community of interest" analysis to decide accretion cases consistently and impartially.

A. The "Overwhelming Community of Interest" Balancing Test

As the name of the inquiry suggests, the overwhelming community of interest balancing test is designed to ascertain whether the employees to be joined have a sufficient level of mutual interest with the existing unit, such that combining the two groups for purposes of collective bargaining is warranted. As the Ninth Circuit has put it, to be accreted, the new employees must "have no separate identity, and therefore nothing approaching a distinct community of interests, apart from the larger group." Or as the First Circuit has observed: "A group of employees is properly accreted to an existing bargaining unit when they have such a close community of interests with the existing unit that they have no true identity distinct from it." The party asserting the accretion doctrine has the burden of proving its applicability, because this party is attempting to

37. NLRB v. Lundy Packing Co., 68 F.3d 1577, 1579 (4th Cir. 1995) (discussing how discretion is based on the Board's expertise in labor matters and the need for flexibility in shaping the bargaining unit in particular cases).
38. Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1041 n.16 (9th Cir. 1978); see Consolidated Papers, Inc. v. NLRB, 670 F.2d 754, 756-57 (7th Cir. 1982) ("An accretion is the addition of a relatively small group of employees to an existing bargaining unit where these additional employees share a sufficient community of interest with unit employees and have no separate identity.").
alter the status quo. But in most cases, the assignment of the initial burden is irrelevant.

The factors used by the Board to determine whether a legitimate accretion has occurred are generally the same factors employed to determine the appropriateness of a bargaining unit in representation proceedings. On the surface, this makes sense, since both accretions and initial determinations of the appropriate bargaining unit are comparable decisions that involve similar issues. When deciding whether a proposed unit is appropriate or a proposed accretion would be proper, the Board is supposed to ensure an outcome that maximizes employee freedom of association and which furthers industrial peace. To achieve this goal, the Board utilizes the community of interest balancing test, whether dealing with unit determination or an accretion. The only difference is the degree of affinity that must be demonstrated in the two types of cases. In unit determination cases, employees must share a simple community of interest, but for an accretion, the movant must show the existence of an overwhelming community of interest.

This added scrutiny in accretion cases is deemed necessary to effectuate the purposes of the Act. If parties seeking accretions only had to show a “community of interest” between co-employees, they would almost never fail, as the Fourth Circuit has observed:

Certainly, there is a “community of interest” in the limited sense that . . . employees are paid by the same employer, work in generally the same geographical area, and exert their efforts to serve the interests of their employer. However, consideration of only these factors in determining the necessary “overwhelming community of interest” required for accretion would mean that every employee, from the president to the janitor, would

41. NLRB v. Am. Seaway Foods, Inc., 702 F.2d 630, 633 (6th Cir. 1983) (per curiam) (“[T]he rate of interchange between office and plant clericals is low.”); Kaynard v. Mego Corp., 633 F.2d 1026, 1030 (2d Cir. 1980) (explaining that the factors used by the Board to determine whether an accretion is legitimate are usually the same as those employed in determining the appropriateness of proposed bargaining units in representation proceedings).

42. NLRB v. Illinois-American Water Co., 933 F.2d 1368, 1377 (7th Cir. 1991); Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 759 F.2d 1477, 1482 (9th Cir. 1985) (Kennedy, J., concurring).

43. “It is hereby declared to be the policy of the United States” to maintain the free flow of commerce “by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . .” 29 U.S.C. § 151 (1992). That may be the statute’s stated goal, but as everybody knows, the legislature and executive can have many unstated reasons for its enactments. One unstated goal of the Roosevelt Administration was the imposition of unions on even small enterprises, and the NLRA was a step in that direction. See Arkes, supra note 13.

44. A purported accretion is assessed on the facts that existed at the time the union made a demand for recognition, not at the time the ALJ or Board hears the case. Gould, Inc., 263 N.L.R.B. 442, 446 (1982).
fit into a category deserving of accretion. Certainly, the case law looks to more than these factors in determining the extent of the community of interest.\(^{45}\)

Unlike a straight unit determination case, the accreted employees will be denied their statutory right to vote for or against a union.\(^{46}\) Thus, the Board must make sure that the accreted employees and the unit employees are substantially similar in all respects material to collective bargaining and union representation. "In accretion cases . . . new employees are added to an existing bargaining unit without a representation election; therefore, the showing of shared characteristics must be higher to protect employee interests."\(^{47}\) Absent such protection, the accreted employees might end up being represented by a union whose priorities differ substantially from their own.

The primary difference between accretion and unit determination analyses is one of degree rather than kind. Accretion requires an overwhelming community of interests between a smaller group of employees and a larger unit, because accretion casts the smaller group, against its will, into the larger unit. Accretion therefore applies only if one group of employees has no identity distinct from the other. Unit determination, by contrast, requires only a substantial community of interests among a group of employees to support casting them as a unit.\(^{48}\)

To successfully gauge mutual interests, the community of interest test is a multi-factored one, with some factors receiving greater weight than others.\(^{49}\) The number of factors used also differs from case to case and from circuit to circuit, particularly because some factors encompass others, or have only minor differences. Fourteen factors are discussed here. They include: (1) the functional integration of the business; (2) centralization of administrative and managerial control; (3) centralization of supervision, particularly as to labor relations, hiring, discipline, and control of day-to-day operations; (4) similarity of compensation and working conditions; (5) the degree of interchange among and contact between the two groups; (6) the geographic proximity of the original unit and the site to be accreted; (7) similarity of job classifications, skills, functions, and products; (8) the size

\(^{45}\) Westvaco, Va., Folding Box Div. v. NLRB, 795 F.2d 1171, 1178 (4th Cir. 1986).

\(^{46}\) Illinois-American Water Co., 933 F.2d at 1377 ("To a certain extent, an accretion interferes with the employees' freedom to choose their own bargaining agents.") (internal quotations omitted).

\(^{47}\) NLRB v. Lundy Packing Co., 68 F.3d 1577, 1581 (4th Cir. 1995).

\(^{48}\) Staten Island Univ. Hosp. v. NLRB, 24 F.3d 450, 455 (2d Cir. 1994); see Illinois-American Water Co., 933 F.2d at 1377 ("We note that the Board's decision of accretion is comparable to a determination of an appropriate bargaining unit.").

\(^{49}\) Nightingale Oil Co. v. NLRB, 905 F.2d 528, 535 (1st Cir. 1990) ("the weight assigned by the agency to each factor it has fairly considered is a matter for it to determine") (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)).
of the group to be accreted relative to the size of the existing unit; (9) whether the group of employees to be accreted independently constitutes an appropriate unit; (10) prior accretions to the existing unit, and their size and frequency; (11) the desires of the employees to be accreted; (12) the collective bargaining history of the groups; (13) the extent of union organization in the group to be accreted; and (14) whether the group to be accreted existed at the time the existing bargaining unit was recognized, and was excluded from the unit. Each factor is discussed below, with an emphasis placed on the manipulability of the community of interest balancing test.

1. Functional Integration of the Business

Among the factors the Board considers is whether there is functional integration of the new employees and the existing unit; that is, whether the work done by the group is dependent upon or closely related to the product or services of the preexisting unit. Little or no functional integration between two sites suggest that accretion is inappropriate. Thus, where two groups make completely unrelated products, their functions are not integrated and, under this factor, these groups are not well-suited for an accretion. In contrast, employees that work on different components of the same product, even though they have different jobs and skills, are considered to be better suited for assimilation. This is partly due to the fact that a successful strike by one group would necessarily affect the other. Therefore, their economic interests are significantly intertwined, or at least do not overtly conflict.

An example of functional integration can be found in Safeway Stores, Inc., where the ALJ found that the store’s bakery and delicatessen departments were functionally integrated because the deli department’s products were made with materials produced in the bakery department. Or, to put it in technical terms, sandwiches were made with bread baked in the bakery, and the bakery was also the point of origin of the pastries and

50. See generally THE DEVELOPING LABOR LAW, supra note 25; ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW, UNIONIZATION AND COLLECTIVE BARGAINING 69 (1976).
51. Under a consideration of functional integration, the Board considers how the work of each employee blends in with the overall work of the proposed unit. GOLDER, LABOR AND EMPLOYMENT LAW: COMPLIANCE AND LITIGATION § 2:7, p. 2-18 (1999). Some courts ask whether there is physical, functional, and administrative integration of the units. JOSEPH A. JENKINS, LABOR LAW, § 3.62 (1968) (posing this question as a single factor in the community of interest matrix).
52. Progressive Serv. Die Co., 323 N.L.R.B. 183 (1997) (explaining that among the questions the Board will ask to determine functional integration is whether one facility could be operated without the existence of the other).
54. Id. at 926.
other snacks displayed in the deli department.\textsuperscript{55} Another example of functionally integrated workers are those who work on the same assembly line.\textsuperscript{56} Workers on the end of the line are dependent on workers at the beginning for material on which to work, while the workers at the beginning of the assembly line will have little utility to the employer if there are no workers manning the latter portions of the line. Because a significant work slowdown or stoppage (perhaps due to a strike) along any point of the assembly line will affect all workers on the line, assembly-line workers are usually considered to share a strong community of interest.

2. Centralization of Administrative and Managerial Control

The Board also considers whether the administrative and managerial control is centralized or local.\textsuperscript{57} "Centralized administration favors an employer-wide unit."\textsuperscript{58} Where employees are controlled by the same administrators, they often face similar treatment from supervisors, and similar working conditions. They are also likely to be subject to the same hiring, termination, and disciplinary policies. Thus, this factor overlaps with at least two others in the community of interest test: "similarity of working conditions" and "centralized supervision."

Consideration of this factor is in part a concession to the needs of employers. By apportioning units according to the natural divisions a company has set up, it makes the employer's tasks related to unionization (such as bargaining and implementing the dues checkoff) much simpler. Yet this is simply one factor in the analysis, and other factors may (and frequently do) outweigh it.

3. Centralization of Supervision, Particularly as to Labor Relations, Hiring, Discipline, and Control of Day-to-Day Operations

Like the centralized administration factor just discussed, the presence of common supervisors strongly suggests that accretion might be appropriate,\textsuperscript{59} particularly where supervisors have the authority to hire and fire employees.\textsuperscript{60} Conversely, "site-specific supervision favors separate units."\textsuperscript{61} For example, in \textit{Local 620 v. NLRB},\textsuperscript{62} both the Board and the

\textsuperscript{55} \textit{Id.} at 926.
\textsuperscript{56} \textit{Cf.} Cont'l Web Press Inc. v. NLRB, 742 F.2d 1087, 1091 (7th Cir. 1984) ("It is as if the Board had said that the workers at the beginning of an assembly line belong in a different bargaining unit from the ones at the end . . . .")
\textsuperscript{57} \textit{The Developing Labor Law}, \textit{supra} note 25.
\textsuperscript{58} \textit{Staten Island Univ. Hosp. v. NLRB}, 24 F.3d 450, 455 (2d Cir. 1994).
\textsuperscript{59} \textit{Golder}, \textit{supra} note 51.
\textsuperscript{60} \textit{NLRB v. Stevens Ford, Inc.}, 773 F.2d 468, 475 (2d Cir. 1985).
\textsuperscript{61} \textit{Staten Island Univ. Hosp.}, 24 F.3d at 455.
Court of Appeals held that no accretion had occurred where, among other things, each site "has its own plant superintendent and industrial relations director and does its own hiring, handles its own payroll and administers its own grievance procedures."\(^{63}\)

The lack of common supervision militates against an accretion because "the day-to-day problems and concerns among the employees at one location may not necessarily be shared by employees who are separately supervised at another."\(^{64}\) Different supervisors frequently exercise their discretion differently,\(^ {65}\) especially as to those decisions that most concern employees. Where employees have common supervisors they are more likely to have common concerns, particularly with respect to terms and conditions of employment.\(^ {66}\) Conversely, where employees answer to different supervisors, they have much less in common, and may not share interests with respect to their common employer. For example, where one group of employees answers to an ogre, they may need to stand together and form a union or face adverse employment consequences. But where their counterparts are supervised by a different, more compassionate supervisor, they may feel less affinity for their suffering colleagues and may be less willing to shake things up by joining a union or a strike.

This factor weighs even more strongly in favor of accretion if the supervisors play a part in the labor relations and collective bargaining.\(^ {67}\) This is in part a concession to management, so that it is not burdened with too many units, each of which could conceivably require a separate bargaining agreement.\(^ {68}\) It also serves the union's interests, however, as

\(^{62}\) Local 620 v. NLRB, 375 F.2d 707 (6th Cir. 1967).
\(^{63}\) Id. at 709.
\(^{64}\) Stevens Ford, Inc., 773 F.2d at 475
\(^{65}\) Cf. Radue v. Kimberly Clark Corp., 219 F.3d 612, 615 (7th Cir. 2000) (ADEA) ("different supervisors may exercise their discretion differently"); Stanback v. Best Diversified Products, Inc., 180 F.3d 903, 910 (8th Cir. 1999) (Title VII) (explaining that when "different decision-makers are involved, two decisions are rarely similarly situated in all relevant respects").
\(^{66}\) Not surprisingly, then, the questions of common supervision and the commonality of the respective employees' terms and conditions of employment is sometimes stated as a single factor in the analysis. See JENKINS, supra note 51 (explaining the Board considers similar "terms and conditions of employment and common supervision.").
\(^{67}\) NLRB v. Illinois-American Water Co., 933 F.2d 1368, 1376 (7th Cir. 1991).
\(^{68}\) This is particularly the case where each unit is represented by a different union. As Judge Posner noted:

It is costly for an employer to have to negotiate separately with a number of different unions, and the costs are not borne by the employer alone. The different unions may have inconsistent goals, yet any one of the unions may be able to shut down the plant (or curtail its operations) by a strike, thus imposing costs on other workers as well as on the employer's shareholders, creditors, suppliers, and customers.

unions similarly have limited resources. Where they can minimize the number of separate units, and maximize the number of employees in each unit, they can minimize the expenditures for collective bargaining and spread those costs over a greater body. Larger units also mean more power for the union, as the more employees the union can commandeer in a strike, the more the employer is at the union's mercy in the event an impasse is reached.

4. Similarity of Compensation and Working Conditions

A basic principle of the accretion doctrine is that only employees with strong common interests should be joined in the same unit, lest a conflict of interest arise or the group disintegrates into powerless fragments. "The greatest conflicts of interest among workers are over wages, fringe benefits, and working conditions." Therefore, the similarity between the compensation and working conditions of the unit to be accreted and the established unit is highly relevant and a particularly important factor in the accretion analysis. Indeed, the "primary concern or 'touchstone' of a bargaining unit determination is the question of whether all the members have a mutual interest in wages, hours, and other terms and conditions of employment.

Dissimilarities in compensation and working conditions strongly suggest a lack of significant mutual interest and cut against the propriety of an accretion. Where the employees who seek to be consolidated have excellent working conditions, they may have little in common with the established unit, and may have even less interest in joining such a group. Conversely, approximate parity of working conditions weighs strongly in favor of shared interests and the suitability of an accretion. However, because employers often have the ability to manipulate similarities and differences between wages and working conditions in order to thwart or promote an accretion, the courts will discount any such orchestrated

69. Allied Chem. & Alkali Workers of Am. v. Pitt. Plate Glass Co., 404 U.S. 157, 172-73 (1971) ("[A] mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees from being submerged in an overly large unit."); Floriana Bartosic & Roger C. Hartley, Labor Relations Law in the Private Sector § 7.03(c)(1), p. 153 (2d ed. 1986) ("[T]he Board seeks sufficient homogeneity regarding a group's employment relationship to minimize internal conflicts impairing the unit's bargaining effectiveness.").

70. Cont'l Web Press, Inc., 742 F.2d at 1091.

71. Goldner, supra note 51; The Developing Labor Law, supra note 25; Bartosic, supra note 69.

72. NLRB v. Catherine McCauley Health Ctr., 885 F.2d 341, 345 (6th Cir. 1989) (citing Uyeda v. Brooks, 365 F.2d 329 (6th Cir. 1966)).
Where the employees to be accreted suffer inferior working conditions, joining a unit with better conditions might present the accreted group with a substantial advantage, as they might be reaping the benefits that their counterparts previously achieved through hard bargaining. Although a windfall for the new arrivals, this may not be in the best interests of the established unit, as the equalization of working conditions may require the expenditure of employer wealth that otherwise would have inured to the benefit of the established unit’s employees. Similarly, the unit’s valuable bargaining leverage might be squandered on simply improving the working conditions of the new members, at the expense of the original members’ overall interests. Furthermore, unit employees might resent the new arrivals for reaping a harvest they did not sow. Absent a substantial dose of munificence, the accretion might create a disharmony that could destroy the union by pitting unit members against each other. Accordingly, significant differences in working conditions can lead the Board to conclude that the two groups lack an overwhelming community of interest.

Thus held the Board and the Sixth Circuit in *Armco, Inc. v. NLRB*, where the employer attempted to accrete coke workers from a newly acquired plant into a preexisting unit of steelworkers. In concurring with the Board that no accretion occurred, the Sixth Circuit noted that coke workers “work in a more hazardous environment than most steel workers.” “[T]he carcinogenic conditions existing in the coke plant are a constant hazard to the coke workers, and, therefore, constitute a legitimate ground for separate bargaining.” The malleability of this factor, however, was displayed in *Staten Island University Hospital v. NLRB*, where the unionized and non-union nurses received the identical wages for the same type of work. Nevertheless, the Board held that the employment conditions were significantly different simply because the unionized nurses enjoyed seniority and benefits packages superior to those of their non-

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73. *Armco Inc. v. NLRB*, 832 F.2d 357, 364 (6th Cir. 1987) (“the uniformity in wages, hours, and terms of employment is the result of the disputed conduct: the application of the Steelworkers’ contract to the coke plant employees”).
74. As de Tocqueville observed, self interest is “the only immutable point in the human heart.” *ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA*, 255 (Francis Bowen, ed., Vintage Books, 1958).
76. *Armco Inc.*, 832 F.2d at 357.
77. *Id.* at 363.
78. *Id.*
79. *Id.*
81. *Id.* at 455 (denying review of the Board’s finding of no accretion).
union comrades.\textsuperscript{82}

Among the conditions that the courts consider under this factor are the methods employers use to fix compensation (e.g., hourly wage, commission, or salary), the pay scale,\textsuperscript{83} the similarity of pension and retirement plans available to each group,\textsuperscript{84} and whether employees receive stock options or have the ability to participate in a stock ownership plan.\textsuperscript{85} Also relevant are the disability, medical, and retirement benefits,\textsuperscript{86} hours of work,\textsuperscript{87} working conditions,\textsuperscript{88} vacation periods,\textsuperscript{89} and other terms and conditions of employment.\textsuperscript{90} Demonstrating that no punctilio is too insignificant when the Board and courts are looking for grounds to support their accretion decisions, one court considered the fact that certain employees were prohibited from utilizing certain ingresses and egresses at the employer's plant, while their counterparts enjoyed full use of all exits and entrances.\textsuperscript{91} Not to be outdone, another court considered whether the two groups of employees used the same lunch room or, shudder, ate separately.\textsuperscript{92} Although these actors may have played only a small part in the courts' decisions, were hardly all of the considerations, under the overwhelming community of interest balancing test, nothing is too trivial to place on the scale, as even one ounce can appreciably alter the balance.

\textsuperscript{82} Id.
\textsuperscript{83} Auto. Club of Mich. v. NLRB, 631 F.2d 82, 85 (6th Cir. 1980).
\textsuperscript{84} Westvaco, Va., Folding Box Div. v. NLRB, 795 F.2d 1171, 1176 (4th Cir. 1986).
\textsuperscript{85} Id.; Stevens Ford, Inc., 773 F.2d at 475.
\textsuperscript{86} Westvaco, Va., Folding Box Div. 795 F.2d at 1176.
\textsuperscript{87} Mercy Hosp. of Buffalo v. NLRB, 730 F.2d 75, 81 (2d Cir. 1984).
\textsuperscript{88} NLRB v. J.W. Rex Co., 243 F.2d 356, 360 (3d Cir. 1957) (finding that the Board did not abuse its discretion in recognizing an accretion).
\textsuperscript{89} Westvaco, Va., Folding Box Div., 795 F.2d at 1175.
\textsuperscript{90} NLRB v. Lundy Packing Co., 68 F.3d 1577, 1580 (4th Cir. 1995). A good, though underinclusive, rule of thumb is that any factor that is relevant to an adverse employment action under Title VII merits consideration as a term or condition of employment. Thus, it is relevant to the accretion analysis whether the two groups of employees share the same standards for demotion, Crady v. Liberty Nat'l Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993); are evaluated according to similar standards and procedures, Brooks v. City of San Mateo, 214 F.3d 1082, 1094 (9th Cir. 2000); and share similar levels of responsibility, Galabya v. New York City Bd. of Educ., 202 F.3d 636, 641 (2d Cir. 2000), since an employer can commit an adverse employment action by discriminating on a prohibited basis with respect to any of these factors.
\textsuperscript{91} Westvaco, Va., Folding Box Div. 795 F.2d at 1176 ("[T]he utilities technicians may use any door in the plant when coming to or leaving work, unlike the production and maintenance employees who are required to use a specified door. Utilities technicians may take their breaks and meal periods anywhere in the plant, while the members of the bargaining unit are required to take their breaks and meal periods in the plant cafeteria.").
\textsuperscript{92} Id.; Mercy Hosp. of Buffalo, 730 F.2d at 82; NLRB v. Am. Seaway Foods, Inc., 702 F.2d 630, 633 (6th Cir. 1983) (per curiam). This facet of working conditions is also relevant to the next factor, which considers the amount of contact between employees of the respective groups.
5. The Degree of Employee Interchange and Contact Among the Groups

The Board also considers the frequency of contact and interchange among employees to be one of the most important factors in the accretion analysis. In considering this subject, the Board looks for routine interchange and meaningful contact between a large percentage of employees from the preexisting group and the group to be accreted. Thus, a complete "lack of employee interchange between plants militates against a finding of functional integration." Occasional, temporary, and sporadic movements among small groups usually does not suggest a strong community of interest, and in fact, some courts also consider sporadic and infrequent interchange to be a mark against accretion.

The relevance of this sporadic contact was demonstrated in Pacific Southwest Airlines v. NLRB, where a few clerical employees on the margin of the unit occasionally telephoned production workers as part of their job. The Ninth Circuit held that this interchange was too narrow and superficial to support an accretion. Similarly, where ten workers transferred to another plant for only a month, and there was no other interchange, the Board and the Sixth Circuit believed that this was insufficient contact to support an accretion. In Armco Inc. v. NLRB, the Sixth Circuit held that this factor militated against finding an accretion of coke workers into a preexisting unit of steelworkers where "out of 2700 steelworkers, only 24 maintenance employees have any contact with the coke workers. Such a small, one-way exchange fails" to support an accretion. The court also considered it relevant that the hazardous conditions in the coke plant would discourage steel plant workers to seek a transfer to coke plant jobs.

In one case involving affiliated health care facilities, where employees from one facility assisted at another hospital when business demanded, the Second Circuit agreed with the Board that this did not support an accretion. In another case where registered nurses could voluntarily

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93. Lundy Packing Co., 68 F.3d at 1580; NLRB v. Catherine McCauley Health Ctr., 885 F.2d 341, 345 (6th Cir. 1989); Am. Seaway Foods, Inc., 702 F.2d at 633 (per curiam); GOLDER, supra note 51; BARTOSIC, supra note 69.
94. JENKINS, supra note 51.
95. Armco Inc., 832 F.2d at 363.
96. Pac. Southwest Airlines, 587 F.2d at 1042.
97. Id.
98. Id. at 1042-43.
100. Armco Inc. v. NLRB, 832 F.2d 357, 363 (6th Cir. 1987).
101. Id.
102. Id.
transfer between two sites, the Board likewise held that no accretion occurred, particularly where such transfers were discouraged by management.\textsuperscript{104}

In short, the more integrated the units and the greater the contact among blocks of employees, the greater their community of interest. But because this factor, like all the other factors, is emphasized or ignored depending on other relevant facts and the proclivities of the Board, in some cases even a low level of steady interchange may support an accretion.\textsuperscript{105} For example, in \textit{NLRB v. Coca-Cola Bottling Co.},\textsuperscript{106} the Second Circuit held that an accretion was proper even though employee interchange was minimal. The case involved a beverage distributor who initially operated out of a warehouse in Tonawanda, New York, but later spun-off part of his operations to a second location twenty-one miles away in Orchard Park, New York. The only interchange among employees involved a single employee punching a time clock at the Tonawanda warehouse before delivering material to the Orchard Park site, his primary duty station. Realizing that this was particularly minimal interchange, the Court stressed that the Orchard Park site had only three or four employees at this time, and many other factors strongly militated in favor of an accretion. In such a case, the court held that “even a low level of interchange may have significance.”\textsuperscript{107}

Hiring procedures and preferences are also considered under this factor. Thus, if employees can leave one group and join the other without having to apply for the position, or if they receive a preference in hiring, this suggests a certain continuity among the two entities.\textsuperscript{108} On the other hand, a complete lack of employee interchange between groups, and the need to follow application procedures to change jobs, militates against joining employees from different work sites.\textsuperscript{109} Cases falling in the wasteland between complete autonomy and constant interchange can go either way. Consider, for example, \textit{NLRB v. Heartshare Human Services},

\begin{itemize}
  \item[104.] Staten Island Univ. Hosp. v. NLRB, 24 F.3d 450, 453 (2d Cir. 1994).
  \item[105.] See NLRB v. Coca-Cola Bottling Co., 191 F.3d 316, 323 (2d Cir. 1999); NLRB v. Carson Cable TV, 795 F.2d 879, 885 (9th Cir. 1986).
  \item[106.] Coca-Cola Bottling Co., 191 F.3d at 323.
  \item[107.] Id.
  \item[108.] See \textit{Heartshare Human Servs., Inc.}, 108 F.3d at 471 (confirming that the absence of a formal application process can imply continuity).
  \item[109.] See \textit{Id.} at 471 (indicating that the requirement of formal procedures in a job-shifting situation is evidence of insufficient employee interchange); NLRB v. Stevens Ford, Inc., 773 F.2d 468, 473 (2d Cir. 1985) (suggesting that there are limits to the accretion doctrine); Town Ford Sales, 262 N.L.R.B. 1331, 1334 (1982) (expressing that a certain amount of employee interchange is necessary to join employees from different work sites); Combustion Eng'g, Inc., 195 N.L.R.B. 909, 912 (1972) (reaffirming that employees in new jobs should not be added to an existing bargaining unit if there is a complete lack of employee interchange).
\end{itemize}
ACCRETION ELECTIONS

Inc., a unit determination case involving the organization of workers at a private social service organization that assisted developmentally disabled adults. Consistent with the typical union strategy of starting small, the union sought a bargaining unit consisting of only one site, even though the employer operated two other similar facilities within ten miles of one another. The Second Circuit agreed with the Board that, for various reasons, the single-site unit was appropriate. In considering the minimal employee interchange, the court explained:

The employee interchange factor supports the NLRB’s decision. Each facility has its own staff and there is no routine interchange of employees among the three sites. Not surprisingly, if one facility becomes particularly busy, an employee from another center may lend a hand, but usually only for a day or two. This is the exception not the rule. Additionally, if there is a job opening at one facility, employees from another facility may apply, however, they are required to follow the same procedures as non-Heartshare applicants. Selections are based on merit, and employees from related facilities are given no preference, unless all else is equal.111

Accordingly, the court agreed with the Board that this and other factors supported the union’s position that the various sites should be kept separate for the purpose of the initial representation election. The court so held even though there was more employee interchange at the Heartshare facilities than at the Buffalo Coca-Cola warehouses where the court found an accretion. One key difference was that the employer in Heartshare wanted a unit consisting of all three facilities, while the employer in Coca-Cola Bottling Co. opposed the accretion. In each case the Board did exactly what the union wanted: a single-facility unit in Heartshare and an accretion in Coca-Cola. This demonstrates, yet again, the manipulability of the community of interest balancing test and its use to assist unions at the expense of employers and possibly their employees.

6. Geographic Proximity

The physical distance between the preexisting unit and the group to be accreted is also considered by the Board.112 This factor is closely related to the degree of interchangeability; employees are considered much more interchangeable if their worksites are relatively proximate. The court considers this to be a facet of employee or functional interchange. Because

111. Id.
112. See NLRB v. Lundy Packing Co., 68 F.3d 1577, 1580 (4th Cir. 1995) (noting that physical distance is a consideration when deciding whether accretion is appropriate); GOLDER, supra note 51; THE DEVELOPING LABOR LAW, supra note 25, at 405; JENKINS, supra note 51.
the Board does not even discuss this factor in many of its accretion decisions, it is reasonable to believe that geographic proximity is considered irrelevant to many cases. Indeed, this factor has proven to be noteworthy only in the extremes: close proximity, which suggests the appropriateness of an accretion, and extreme remoteness, a factor militating against accretion. Even in these extreme cases, however, this factor often bears little weight and is seldom, if ever, decisive. For example, in *NLRB v. Stevens Ford, Inc.*, where two commonly owned car dealerships were *directly adjacent to one another*, the Second Circuit refused to enforce the Board's accretion order on its own analysis of the other community of interest factors. Although both the Board and the Second Circuit seemed to agree that this proximity favored accretion, the Court of Appeals obviously found other factors more compelling.

With respect to the consideration of geographic proximity, the *Stevens Ford* case is hardly an aberration. Both the Board and the Court of Appeals have denied accretions in cases where the two sites were directly adjacent to each other in the same plant, where they were across the street from each other, were three miles apart, five to ten miles apart, eight miles apart on the same island, ten miles apart, twenty-one miles apart, and forty-five to fifty miles apart. Yet in another case, *St. Regis Paper Co.*, where the union sought the accretion, the Board acquiesced even though the sites were *seventy-five miles apart*. Of course, because distance between sites is simply one among many factors the Board considers, and because this factor has no fixed weight, *St. Regis Paper Co.* essentially has little or no precedential value as to geographic distance and accretions.

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113. *NLRB v. Stevens Ford, Inc.*, 773 F.2d 468, 475 (2d Cir. 1985). In particular, the Second Circuit focused on different working conditions, different supervisors, lack of functional integration, lack of interchange among employees, the facts that the group was itself an appropriate unit, that they were previously excluded from the unit, and that the employees expressed disapproval of the union that would represent them if they were accreted.


115. *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 759 F.2d 1477, 1480 (9th Cir. 1985).


Perhaps the extreme distance should have been given greater weight by the Board, or perhaps even then it would have been overcome by the combined mass of the other community of interest factors. Perhaps the case turned on the fact that the employees were mechanics who traveled extensively to various logging sites anyway.\textsuperscript{123} Maybe the Board considered geographic distance to be a strong factor, but because the case involved the forests of Maine, where seventy-five miles might be, from a relative perspective, considered close, this factor actually favors an accretion.\textsuperscript{124} Cases like \textit{St. Regis Paper Co.} show, yet again, the difficulty of predicting which factors the Board will consider important, and thus how it will decide even a "simple" accretion case.

7. Similarity of Job Classifications, Skills, Training, Functions, and Products

One of the most important factors in the balancing test is the similarity of job classifications, employment skills, training, the functions of employees, and the similarity of the services they perform or the type of goods they produce.\textsuperscript{125} These are important because employees who have similar jobs and skills generally have common interests with respect to their employers, particularly where they produce the same type of goods or provide similar services. These factors are also relevant to working conditions, as general working conditions are often identical among plants in the same industry and among specific occupations in those industries. For example, the heat and safety concerns involved with blast furnaces are generally common to the steel industry, regardless of whether an employee is in an accretable group or an established unit. The similarity of skill, education, and function also suggests common interests in that these employees will share a common benefit if they can organize substantially all of their prospective competitors in the labor market. If this occurs, the union members need not worry about being undercut by similarly skilled workers in non-union plants.

But even this factor, which the Ninth Circuit calls the "most reliable

\textsuperscript{123} \textit{Id.}

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} NLRB v. Lundy Packing Co., 68 F.3d 1577, 1580 (4th Cir. 1995); Westvaco, Va., Folding Box Div. v. NLRB, 795 F.2d 1171, 1173-74 (4th Cir. 1986). As the Ninth Circuit has observed: "The most reliable indicium of common interests among employees is similarity in their skills, duties, and working conditions." Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1042 (9th Cir. 1978). \textit{See GOLDER, supra note 51}, (indicating that similarities between workplaces are crucial factors); \textit{BARTOSIC, supra note 69, § 7.03(c)(1)}, at 153 (citing factors that have a "direct relevancy to the circumstances within which collective bargaining is to take place."); \textit{JENKINS, supra note 51} (listing specific factors that must be considered in accretion situations).
indicium of common interests among employees,” provides no bright lines. Thus, in light of the Ninth Circuit’s endorsement of this factor, one might suppose, conversely, that employees with unique job skills and functions which differ substantially from their co-workers do not share a sufficient community of interest to warrant an accretion. But this is not always so. Many employees in a given unit do not have identical skills and functions, yet they frequently share similar interests vis-à-vis their relationship with their common employer. So even when this factor is emphasized by the Board, complete identity is certainly not required for an accretion. This raises an interesting question. If this factor, like the other community of interest factors discussed thus far, is considered, ignored, or slighted by the Board according to no discernable standard or rule, why even bother with the community of interest balancing test? Instead of paternalistically forcing employees to associate with those whose interests may or may not be consistent with their own, why not instead, let the parties in the best position to judge their interests (the employees) decide whether their interests sufficiently coalesce with those of the preexisting unit to warrant an accretion? This proposition is discussed more fully below, but it is worthwhile to keep it in mind as the next seven community of interests factors are considered.

126. Pac. Southwest Airlines, 587 F.2d at 1042.
127. See, e.g., Sears, Roebuck & Co., 319 N.L.R.B. 607, at 607 (1995) (stating that maintenance agreement sales employees were sufficiently similar to service technicians, technician helpers, installers, support specialists, and truck mechanics).
128. Id.
129. Of course, Congress gave the Board the responsibility of determining appropriate bargaining units, but nothing in the NLRA prevents the Board from allowing employees to decide accretion decisions in the first instance through a secret ballot vote, with the Board simply overseeing those decisions to ensure that no aberrations occur (assuming, arguendo, that a statement of the employee’s desires as to whether they want to associate with the established unit could ever be an aberration). Indeed, the Board is authorized to make unit determination decisions so as to “ensure the employees the fullest freedom in exercising their rights guaranteed by this Act.” 29 U.S.C. § 159(b). One of those rights is the right to freely associate, or not, with other employees, and to be represented by unions (or not) of their own choice. 29 U.S.C. § 151, ¶ 5. In the First Amendment context, policies that infringe communicative and associative interests to serve paternalistic purposes are viewed with skepticism. Anderson v. Celebrezze, 460 U.S. 780, 798 (1983) (explaining that a law which restricts the flow of information primarily to serve paternalistic interests “must be viewed with some skepticism”); Krislov v. Rednour, 226 F.3d 851, at 852 (7th Cir. 2000) (“[T]here is no per se bar to paternalistic laws, but they are highly suspect when they also burden speech.”); Cf. 44 Liquormart, Inc. v. R.I., 517 U.S. 484, 507 (1996) (expressing that the state cannot prohibit commercial speech in an effort to serve paternalistic purposes where the chosen means has not been shown to serve the state’s goal). Likewise, the Board’s paternalistic practice of forcing employees to associate through an accretion should be viewed with added scrutiny.
8. The Size of the Group to be Accreted Relative to the Size of the Existing Unit

The Board and the courts also consider the size of the unit to be accreted relative to the magnitude of the established unit, as the added group could jeopardize the majority status of the existing union.\textsuperscript{130} "[T]he larger the size of the accreted group relative to the unit, the more doubt there is as to the wishes of the employees in the enlarged unit."\textsuperscript{131} As the Second Circuit has explained it:

When a new group of employees is added en masse to an existing unit without an election... there is no reason to presume the bargaining representative’s majority status among the new group, and the logical strength of the presumption of a continuing majority in the unit as a whole is weakened. Where the accreted group is small relative to the unit, the danger of the accretion resulting in overall minority status is minimal. Where the size of the accreted group is relatively large, however, the danger of minority status in the enlarged unit is greater. The need to determine the views of the group to be accreted thus varies directly with its size relative to the existing group.\textsuperscript{132}

As this excerpt demonstrates, consideration of this factor is primarily designed to protect employees of the preexisting unit and the incumbent union, and to a lesser extent, the captive employees whom the Board paternalistically forced into the accretion. It prevents two related scenarios: (1) accretion of so many employees opposed to the union that the union will lose its majority status and might eventually be voted out; and (2) accretion of so many employees opposed to the union that a new majority is created, which is forced to put up with unwanted union representation until a decertification election can be held. As to the first concern, some circuits consider the loss of the union’s majority support separate from the community of interest test. These courts will bar an accretion any time an

\textsuperscript{130} Local 144, Hotel, Hosp./Nursing Home & Allied Servs. Unison v. NLRB, 9 F.3d 218, 223 (2d Cir. 1993) (affirming that the sizes of the group to be accreted and the existing group are relevant factors); NLRB v. Stevens Ford, Inc., 773 F.2d 468, 473 (2d Cir. 1985)(noting that relative group sizes affect the ability to measure employee wishes); Universal Sec. Instruments, Inc. v. NLRB, 649 F.2d at 255 (4th Cir. 1981) (suggesting that accreted groups that are much larger than existing groups could be problematic); Local No. 3-193 Int’l Woodworkers v. Ketchikan Pulp Co., 611 F.2d 1295, 1299-1300 (9th Cir. 1980) (reiterating that the majority status of the existing group could be jeopardized by a larger accreted group); Spartan Indus., Inc. v. NLRB, 406 F.2d 1002, 1005 (5th Cir. 1969) (discussing the implications of accreted groups that are larger than existing groups).

\textsuperscript{131} Stevens Ford., Inc., 773 F.2d at 474.

\textsuperscript{132} Id.
existing union’s majority support will be overcome by an accretion, regardless of the other community of interest factors.\textsuperscript{133} This is understandable, as one goal the Board must keep in mind in making unit determination decisions is the stabilization of labor-management relations,\textsuperscript{134} and the destruction of a union’s majority status is assumed to be contrary to this goal.\textsuperscript{135} The second scenario also concerns fundamental policies of the NLRA: the freedom of employees to select the bargaining agent of their choice or no representative at all. This right of self-determination ostensibly receives consideration in another “community of interest” factor: the views of the employees to be accreted.\textsuperscript{136} So whether considered as a separate bar or as another factor in the “community of interest” test, these considerations are highly relevant to the accretion analysis, and are sufficiently substantial to preclude an accretion.

9. Whether the Group of Employees to be Accreted Independently Constitutes an Appropriate Unit

Another relevant factor is whether the group of employees to be accreted has a separate and discernable identity such that it could constitute its own appropriate unit.\textsuperscript{137} The Board has described its treatment of this factor: “[T]he Board has found an accretion only when the additional employees have little or no separate group identity and thus cannot be considered to be a separate appropriate unit.”\textsuperscript{138} Accordingly, when a group could be its own appropriate unit, this, in itself, precludes a forced accretion.\textsuperscript{139} The reasoning behind this practice has some plausibility, as

\textsuperscript{133} Cent. Soya Co. v. NLRB, 867 F.2d 1245, 1248 (10th Cir. 1989) (“Once the Board has concluded that the above factors favor the accretion of the former Cooper employees, the sole question is whether, when these employees are added, the majority status of the bargaining representative is cast into doubt.”).

\textsuperscript{134} NLRB v. Illinois-American Water Co., 933 F.2d 1368, 1375 (7th Cir. 1991).

\textsuperscript{135} In the short term, this assumption is probably correct. But a new union, or even a decision by the employees not to be represented by a union at all, might, in the long run, be more conducive to stable labor-management relations.

\textsuperscript{136} The employees’ views may be ascertained, before accretion by examining authorization cards. Kaynard v. Mego Corp., 633 F.2d 1026, 1032 (2d Cir. 1980).

\textsuperscript{137} Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Unison v. NLRB, 9 F.3d 218, 223 (2d Cir. 1993); Westvaco, Va., Folding Box Div. v. NLRB, 795 F.2d 1171, 1173 (4th Cir. 1986); Stevens Ford, Inc., 773 F.2d at 473; Int’l Ass’n of Machinists & Aerospace Workers v. NLRB, 759 F.2d 1477, 1479 (9th Cir. 1985). Of course, a group of employees could have a separate identity and still not be an independently appropriate unit. But to be an appropriate unit, the group must have a separate identity. Once a group is an appropriate unit (and thus has a separate identity negating an accretion) it might later decide to voluntarily combine with another preexisting unit, thus surrendering elements of its separate identity.


\textsuperscript{139} Conversely, the fact that a group of employees cannot themselves constitute an
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the community of interest test is designed to determine whether the new employees “have such a close community of interests with the existing unit that they have no true identity distinct from it.”\(^{140}\) Where substantial common interest is lacking, there should be no accretion but rather an election. Conversely, where “the group to be accreted does not constitute its own appropriate unit,” the Second Circuit has held that “the employees should be accreted so long as accretion does not cast into doubt that majority status of the bargaining representative.”\(^{141}\)

Analysis under this factor can lead to a little circularity, however, because the Board also uses the community of interest factors to determine whether a group constitutes an appropriate unit.\(^{142}\) The circularity appears as follows. When faced with an ostensibly accretable group, the Board applies the overwhelming community of interest balancing test. One factor in the overwhelming community of interest test is whether these employees constitute their own appropriate unit. To make that determination, the Board applies the community of interest balancing test, one factor of which is whether the group of employees constitutes its own appropriate unit, and round and round we go. To avoid this circularity, therefore, some courts do not even consider this “independent appropriateness” factor as part of the community of interest test, but rather as a completely separate question that should be asked only in accretion cases.\(^{143}\) For them, when a group has a separate identity and can be its own appropriate unit, there is no need to

appropriate unit is a sufficient, but not a necessary cause for finding an accretion. *Int'l Ass'n of Machinists & Aerospace Workers*, 759 F.2d at 1481. This is so particularly because the employees might be accretable to another preexisting unit, or should be permitted to express their own opinion as to whether they favor accretion or nonrepresentation. *Compare with Stevens Ford, Inc.*, 773 F.2d at 473 (offering that where the accreted group cannot constitute an independent appropriate unit, “it seems clear that that group ought to be part of the existing unit for unit determination purposes, and the sole question is whether, when it is added, the majority status of the bargaining representative is cast into doubt”).

\(^{140}\) NLRB v. St. Regis Paper Co., 674 F.2d 104, 108 (1st Cir. 1982) (emphasis added). See NLRB v. DMR Corp., 795 F.2d 472 (5th Cir. 1986); Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1041 n.16 (9th Cir. 1978).

\(^{141}\) Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Unison, 9 F.3d at 223 (2d Cir. 1993). “[T]he Board has traditionally been reluctant to find an accretion even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would be appropriate and the § 7 rights of the accreted employees would be better preserved by denying the accretion.” Boire v. Bhd. of Teamsters, 479 F.2d 778, 795 (5th Cir. 1973).

\(^{142}\) Notably, the Board’s refusal to accrete the employees does “not require any explicit and unequivocal finding that they constituted a separate unit.” *Int'l Ass'n of Machinists & Aerospace Workers*, 759 F.2d at 1481. There may be other reasons for not accreting them.

\(^{143}\) Central Soya Co. v. NLRB, 867 F.2d 1245, 1248 (10th Cir. 1989) (“When the new employees share a 'community of interest' with unit employees and have no separate identity, they are then properly accreted into the bargaining unit . . . .”) (emphasis added).
accrete the group,\textsuperscript{144} since the employees can unionize their group of their own volition.\textsuperscript{145} In such a case, these employees can petition for a union election in their own appropriate unit, and if the same union is elected, it can seek to combine the two units.

Because of the circularity involved in this factor, it sometimes adds nothing to the accretion analysis, for in those cases where the group cannot be its own separate unit (because it lacks a community of interest among its own members), it will seldom have a sufficient community of interest with the preexisting unit, thereby precluding an accretion. Thus, if the group could be a separate appropriate unit it will not be accreted,\textsuperscript{146} and if it cannot be a separate appropriate unit (because it lacks common interests) it also will not be accreted.

10. Prior Accretions to the Existing Unit, and their Size and Frequency

Prior accretions to the existing unit are also considered relevant to the community of interest analysis,\textsuperscript{147} especially where previous large accretions have occurred, because they call into question the union’s continuing majority support. Furthermore, adding a new group to a unit that is already considering whether to reject its union might provide the catalyst that triggers the ousting of the union. Because a union’s dismissal is thought to be contrary to labor-management stability, at least in the short term, the Board will not permit such accretions.\textsuperscript{148} Also, the desirability of holding an election is thought to increase as the number of employees denied the right to vote for or against the union increases. Thus, where “a substantial portion of the unit is the result of prior accretions, further additions should be allowed only after an election.”\textsuperscript{149} Where a prior, sizable accretion has already occurred, “a second sizable accretion would lead to a unit in which the only election held would be virtually irrelevant

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  \item \textsuperscript{144} Stevens Ford, Inc., 773 F.2d at 473 (“[C]ourts have held that accretion may occur only when the accreted group does not constitute an appropriate unit.”).
  \item \textsuperscript{145} Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Unison, 9 F.3d at 223 (“Where the group does constitute a separate bargaining unit, the employees of that unit have a right to choose whether or not they wish to elect a different bargaining representative or no representative.”).
  \item \textsuperscript{146} Id. at 223; Central Soya Co., 867 F.2d at 1248; Stevens Ford, Inc., 773 F.2d at 476. “[I]n recent years the Board has been extremely protective of the employees' free choice in those situations where the accreted unit could stand on its own.” Boire, 479 F.2d at 797.
  \item \textsuperscript{147} Local 144, Hotel, Hosp., Nursing Home & Allied Servs. Unison, 9 F.3d at 223; Stevens Ford, Inc., 773 F.2d at 474.
  \item \textsuperscript{148} As a side note, a vast accretion to the bargaining unit may sometimes persuade the Board to relieve an employer of its duty to bargain with a union during the certification year. NLRB v. Lexington Cartage Co., 713 F.2d 190, 192 (6th Cir. 1983).
  \item \textsuperscript{149} Stevens Ford, Inc., 773 F.2d at 474.
\end{itemize}
to the present majority status of the bargaining representative.  

A failure to consider prior accretions also could result in a "domino effect" whereby "the unit expands one group at a time along tangents remote from the unit's nucleus."  

The amount of time that has elapsed since the occurrence of prior accretions is also relevant because certain rules preclude an election for a given period of time (such as a blocking charge, the certification bar, the contract bar, and the election bar). If the requisite time has not yet elapsed, the unit created by previous accretions has not yet had an opportunity to vote against the union, or for a competing union. In such instances there is insufficient evidence that the unit employees still support the union, since they haven't had a recent opportunity to voice their opinions. It would therefore be foolish to force even more employees into this void of voicelessness. This is not a permanent bar to the accretion, however, and once the unit employees have had a chance to make their opinions known, the accretion may occur.

11. The Desires of the Employees to be Accreted

Because the employees' right to choose their own bargaining representative is frequently at issue in accretion cases, the views of the employees to be accreted are highly relevant. Presumably nobody understands the interests of the group to be accreted better than the

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150. Id. at 476.
151. Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1043 (9th Cir. 1978).
152. See Bishop v. NLRB, 502 F.2d 1024, 1028-1029 (5th Cir. 1974). Under the Board's "blocking charge" policy, the Board will not conduct an election while an unfair labor practice charge affecting the unit is pending, unless the charging party seeks to lift the bar.
153. NLRB v. Paper Mfrs. Co., 786 F.2d 163, 167 (3d Cir. 1986) ("For one year after the date of a Board certification a certified bargaining representative enjoys an irrebuttable presumption of continuing support from a majority of the employees in the bargaining unit.").
154. See Cind-R-Lite Co., 239 N.L.R.B. 1255, 1255 (1979). Under the so-called "contract bar," the execution of a valid collective bargaining agreement will preclude a union election during the period it is effective for up to three years.
155. 29 U.S.C. § 159(c)(3) (1994) ("No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.").
157. NLRB v. Lundy Packing Co., 68 F.3d 1577, 1580 (4th Cir. 1995); Local 144 v. NLRB, 9 F.3d 218, 223 (2d Cir. 1993); NLRB v. Stevens Ford, Inc., 773 F.2d 468, 474 (2d Cir. 1985); Sheraton-Kauai Corp. v. NLRB, 429 F.2d 1352, 1357 (9th Cir. 1970); United States Food & Commercial Workers, 267 N.L.R.B. 891, 894 (1983); GOLDEN, supra note 51; NICHOLAS S. FALCONE, LABOR LAW 236 (1962).
employees themselves. They are often in the best position to know whether they share an overwhelming community of interest with the employees of the preexisting unit. But the Board faces the problem of gauging the desires of the employees without holding a referendum on the accretion issue, the most accurate means of assessing employee sentiment. The Board disfavors accretion elections presumably because it doesn't want to be bound by the employees' choice, especially if they vote not to join the unionized unit. After all, it would become readily apparent where the Board's loyalties lie if it forced an accretion even after the affected employees voted against this course of action. Not wanting to embarrass itself in this way, or surrender the power it wields, the Board and the courts look to other methods of ascertaining employee choice, since these other methods are more ambiguous than elections and readily lend themselves to creative interpretations.

Evidence of the employees' preference vis-à-vis an accretion is sometimes available where competing unions are engaged in organization efforts, or where an informal poll has been taken. The Second Circuit has looked to a union's support during a strike to gauge its popularity with employees. Thus, in Stevens Ford, the court considered it significant that during a strike by the employees of the established unit, nine of the eleven employees of the accretable group reported for work, suggesting that they did not support the union during the strike, and similarly didn't support it at the time of the purported accretion. Likewise, in a fight between two competing unions, the Second Circuit ascertained employee support for the accretion by considering that one union obtained ten authorization cards while its competitor obtained fifty. In stark contrast to these approaches, the Sixth Circuit explicitly and consistently refuses to consider this factor in its accretion analysis. This is perhaps a testament to the fact that the employees to be accreted really have no say in the matter, even when their desires are purportedly considered as one factor in the overwhelming community of interest balancing test.

12. Collective Bargaining History

When considering an accretion, the Board also ostensibly will

159. Id. at 476.
160. Id.
162. NLRB v. Catherine McCauley Health Ctr., 885 F.2d 341, 345 (6th Cir. 1989) ("Employee desires, an additional factor frequently included in other circuits, is not a relevant factor in this circuit."); Armco, Inc. v. NLRB, 832 F.2d 357, 362 (6th Cir. 1987) (same); NLRB v. Am. Seaway Foods, Inc., 702 F.2d 630, 633 n.3 (6th Cir. 1983) (per curiam); NLRB v. Pinkerton's, Inc., 428 F.2d 479, 484 (6th Cir. 1970).
consider the history of collective bargaining in the unit, among the group to be accreted, and in the industry.\textsuperscript{163} "Bargaining history is given substantial weight largely because continuing an established unit structure is viewed as promoting stability, one of the purposes of the NLRA."\textsuperscript{164} "The history of collective bargaining engaged in between the employer and a unit of employees, while not determinative of the question, is ordinarily not disturbed unless 'compelling circumstances' preclude its application."\textsuperscript{165} Thus, where the unit to be accreted had a long history of being its own independent bargaining unit, this "fact alone suggests the appropriateness" of it remaining separate from another preexisting unit.\textsuperscript{166} Where the bargaining history is short—say, a year—the Board is less deferential.\textsuperscript{167} This factor obviously dovetails with the ninth community of interest factor (whether the group to be accreted independently constitutes an appropriate unit), since a group that has a collective bargaining history almost certainly was an appropriate unit.

Frequently the group of employees to be accreted will have no collective bargaining history,\textsuperscript{168} which sometimes suggests that their interests are separate and distinct from the organized unit, especially where the units existed side by side with each other for a considerable period of time. Where the two units once shared the same union, a further commonality is shared, although this might also indicate that substantial differences arose, since one group decided it no longer wished to be affiliated with the union representing the other. On the other hand, where the two groups are or were represented by different unions, there is a suggestion that the groups have some differences of interest or opinion that impede an accretion.\textsuperscript{169} Because the Board does not wish to foment discord among competing unions, it will not impose an accretion where such

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\bibitem{163} \textit{NLRB v. Lundy Packing Co.}, 68 F.3d 1577, 1580 (4th Cir. 1995); \textit{Armco Inc.}, 832 F.2d at 363 (examining the bargaining histories of both the preexisting unit and the one denied accretion). \textit{See} Bay Med. Ctr., Inc. \textit{v. NLRB}, 588 F.2d 1174, 1177 (6th Cir. 1978) ("Courts have long recognized that the Board may take bargaining history into account when determining whether a proposed unit is appropriate."); \textit{The Developing Labor Law, supra} note 25 (the Board considers collective bargaining history); \textit{Falcone, supra} note 157, at 236 (The Board "considers the history of collective bargaining in the plant and in similar plants of the industry . . .").
\bibitem{164} \textit{Getman, supra} note 2, at 100 n.45 (citing Buffalo Broadcasting Co., Inc., 242 N.L.R.B. 1105 (1979); Marion Power Shovel Co., Inc., 230 N.L.R.B. 576 (1977)).
\bibitem{165} \textit{Morris D. Forkosch, A Treatise on Labor Law} 690 (1953) (footnotes omitted). Although Professor Forkosch was writing about the determination of the appropriateness of a unit generally, his words hold true as to accretions.
\bibitem{166} \textit{Armco Inc.}, 832 F.2d at 363.
\bibitem{167} \textit{Forkosch, supra} note 165, at 691.
\bibitem{168} \textit{See} Westvaco, Va., Folding Box Div. \textit{v. NLRB}, 795 F.2d 1171, 1177 (4th Cir. 1986) (discussing the lack of collective bargaining history as a factor barring accretion).
\bibitem{169} Staten Island Univ. Hosp. \textit{v. NLRB}, 24 F.3d 450, 456 (2d Cir. 1994).
\end{thebibliography}
rivalry exists unless one union clearly predominates in popularity and strength.\textsuperscript{170}

13. Extent of Union Organization in the Unit

In assessing accretions, “[l]ike-mindedness about the union movement is one common interest the Board may weigh in determining an appropriate grouping of employees.”\textsuperscript{171} Under this factor, the Board considers the extent of union support and organization in the group to be accreted.\textsuperscript{172} Of course, the union will seek an accretion where it has organized, or can reasonably expect to organize, the accreted employees, or at least where they won’t jeopardize its present majority status.\textsuperscript{173} Therefore, a union frequently will support or oppose an accretion depending on the extent to which it has organized those employees, and the Board will give great deference to the union’s desires. Previously, in making unit determinations, the Board made no secret that it often considers this factor to be dispositive.\textsuperscript{174} In effect, it ceded its responsibility for making unit determination decisions to unions. In response, Congress added § 9(c)(5) to the NLRA, which provides that the Board should no longer rely solely on this factor in making unit determinations, nor should it give this factor controlling weight.\textsuperscript{175} But the Board still considers the extent of union organization:

So long as the Board gives less than controlling weight to the extent of organization, its unit determination does not contravene the statute. It may even treat extent of organization as a determinative factor which tilts the balance in favor of a particular unit and still comply with the statutory command that extent of organization not be a controlling factor.\textsuperscript{176}

Old habits die hard, so the Board has found ways to get around § 9(c)(5) in unit determination cases. One way is to require an “overwhelming community of interest” (the test for accretions) before it


\textsuperscript{171} Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1044 (9th Cir. 1978).

\textsuperscript{172} Goldier, \textit{supra} note 51. See NLRB v. Lundy Packing Co., 68 F.3d 1577, 1580 (4th Cir. 1995) (citing the twelve factors for an appropriate unit among which the extent of union organization is a factor).

\textsuperscript{173} Laidlaw Waste Sys., Inc. v. NLRB, 934 F.2d 898, 900 (7th Cir. 1991).

\textsuperscript{174} Lundy Packing Co., 68 F.3d at 1580.

\textsuperscript{175} Id.; Kaynard v. Mego Corp., 633 F.2d 1026, 1032 (2d Cir. 1980); 29 U.S.C. § 159(c)(5) (1994) (“In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.”).

\textsuperscript{176} \textit{The Developing Labor Law}, \textit{supra} note 25.
will expand a union-approved unit. The Fourth Circuit saw through the Board’s practice and correctly labeled it a violation of § 9(c)(5), but only in straight unit determination cases. But the Fourth Circuit conceded that the Board may give this factor a preeminent position in accretion cases, purportedly because the magnitude of harm from a potential error is greater in accretion cases (due to the employees’ inability to vote for or against union representation), and so the Board is free to use any device that will ensure the accreted employees are substantially similar to their counterparts in the preexisting unit. This is a de facto concession that the Board frequently bases its accretion decisions on whether the accretion will assist the union already in place in the organized unit. Even without the Board’s thumb on the scale, under this factor a presumption arises that where an employer acquires a bargaining unit that is already represented by a union, the employees prefer a continuation of this representation over an accretion to another unit with a competing union. In many cases this presumption may accurately reflect employee views. But in other instances it may be erroneous; yet there is no mechanism for rebutting the “union preference” presumption. A system that permits employees to vote on proposed accretions, like the one proposed below, may be the only way to extricate employees from this mess and allow them to determine their own futures.

14. Whether the Group to be Accreted Existed at the Time the Existing Bargaining Unit was Recognized, and Whether it Was Excluded From the Unit

The Board also looks to see whether the group to be accreted existed at the time the existing bargaining unit was recognized, and if so, whether it was intentionally excluded from the bargaining unit either by the union or the employer. Like other factors, the Board has sometimes labeled this the “overriding” factor in an accretion case, such that it is often not considered to be a factor in the community of interest test at all, but rather an independent bar to an accretion. Under the Board’s Loconia Shoe

177. Lundy Packing Co., 68 F.3d at 1581.
178. Id.
179. Id. (“The Board’s ruling thus exhibits the indicia of a classic § 9(c)(5) violation.”).
183. Teamsters Nat’l United Parcel Serv. Negotiating Comm. v. NLRB, 17 F.3d 1518, 1520-21 (D.C. Cir. 1994) (discussing how the Board declined to apply the community of interest test because the employees in question were previously excluded from the bargaining unit). See Local 144 v. NLRB, 9 F.3d 218, 223 (2d Cir. 1993) (discussing the lack of incorporation to other existing bargaining unit when the added employees constitute a separate bargaining unit); Stevens Ford, Inc., 773 F.2d at 474 (commenting on the overriding factor in an accretion case being whether the group wanting to be accreted had
rule, if "the group was in existence and excluded from an election, then accretion should not normally be permitted." 184

There may be several rationales for this rule. First is a presumption that historically excluded employees lack a community of interest with the unit employees. "[I]f neither the Company nor the Union insisted upon including a particular group of employees in a bargaining unit at its formation, then the excluded employees are thereafter conclusively presumed to lack a community of interest with those in the bargaining unit." 185 A second rationale is that the group did not initially join the unit because its members were not interested in union representation, perhaps explaining why the union did not push for their initial inclusion. 186 Exclusion casts "doubt upon the Union's majority status" among the group's employees. 187 In such a case, it would be particularly unfair to foist a union upon the employees, as they have previously voiced their opposition to the union by declining to join the unit. Accreting them to the unit they declined to join, after the unit has had its own election, serves the union's interests by increasing the size of the unit, and it may likewise serve the employer's interests by ensuring that it will not have to bargain with more than one union. But these benefits come at the expense of the employees' freedom, particularly their right to decline association with the preexisting unit and its union. As the Second Circuit observed:

If groups of employees may be permissibly accreted to a bargaining unit after they have been earlier excluded from an election in that unit, strategic selection of one group for election purposes followed by accretion will lead to a larger bargaining unit in which the bargaining representative does not have majority status. Such bootstrapping violates the Act's policies favoring the free choice of employees. 188

Thus, where the accreted group was previously excluded from the unit, the accretion is improper. 189

The NLRB and the courts sometimes place great emphasis on this

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186. Id. at 1524 ("[I]t is reasonable for the Board to presume that, absent some indication to the contrary, the majority of a group that has historically been excluded from a bargaining unit does not support the union that represents that unit.").

187. Id.

188. Stevens Ford, Inc., 773 F.2d at 474.

189. Id.
factor. The Board has observed: "When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an election or a showing of majority among them even if no other union could obtain representative status for them." Notably, this rule applies regardless of whether the union intentionally excluded the group from the existing unit or whether it was mere negligence or an oversight.

In some circuits the union can rebut the presumption that it lacks majority support among the group to be accreted by presenting substantial evidence to the contrary. Allowing this presumption to be rebutted indicates that a history of exclusion is simply one factor in the analysis and not absolutely conclusive of the accretion question. While the Board has not listed the types of evidence that will rebut the presumption of a lack of majority support, the evidence obviously must be more than opinion and conjecture. Because a union can obtain an election merely by obtaining a sufficient number of union authorization cards, this would certainly be sufficient to rebut the presumption. Other evidence might include survey or poll results, or a substantial number of affidavits from group employees stating that they support the union and believe that a majority of their colleagues do also.

B. Balancing the Community of Interest Factors

In almost all accretion cases, some of the fourteen community of interest factors will suggest that an accretion is proper, while others will point in the opposite direction. This conflict necessitates a balancing of the factors. When performing this balancing, the Board should keep in mind the competing policy considerations that inhere in an accretion determination. On the one hand, the doctrine is designed to preserve industrial stability by allowing adjustments to the bargaining units to conform to changing industrial conditions without requiring an adversary


191. *Teamsters Nat'l United Parcel Serv. Negotiating Comm.*, 17 F.3d at 1522 (discussing how conscious exclusion was treated as additional evidence of the employees' historical exclusion).

192. *Id.* at 1521 (a group's historical exclusion "is determinative against their later accretion absent evidence of the majority's preference") (internal quotations omitted).

193. *Id.* at 1524 (stating the evidentiary standard: clear and cogent evidence of "good faith reasonable doubt" as to the union's majority status.).

194. *Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 759 F.2d 1477, 1480 (9th Cir. 1985) (commenting on the necessity of balancing the "stability of labor relations and employees' freedom to choose their own bargaining agents.").
election every time new jobs are created or other alterations are made. On the other hand, employees have a § 7 right to choose their own bargaining agent, or not to affiliate with a union at all. Because the existing accretion doctrine restricts the employees' fundamental right to choose their own bargaining representative, in considering an accretion, concern for employee freedom must be paramount. Accordingly, the Board and most circuits have several specific rules against accretions involving particular types of employees, and they generally give the accretion doctrine a restricted application. For example, the Ninth Circuit correctly holds that close accretion cases—those in which the variable weight of the fourteen factors almost evenly balance the accretion scale—should be resolved against the accretion and in favor of a vote by the employees, as this preserves the employees’ § 7 rights. "Refusing accretion in doubtful cases is preferable because it protects the employee’s freedom to choose his bargaining representative." Other courts also probably follow this rule, as judicially approved accretions are somewhat rare. The Board, however, generally is willing to permit accretions even in close cases when the accretion is supported by a union. The Board takes

196. 29 U.S.C. § 157 (1994) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . and shall also have the right to refrain from any or all of such activities . . . .") (emphasis added).
197. Local 144, 9 F.3d at 223 ("[A]ccretion can preclude self-determination and therefore should be narrowly applied to situations where the smaller group has lost its separate, independent identity.").
198. Int'l Ass'n of Machinists and Aerospace Workers, 759 F.2d at 1480.
199. For example, the Board has a policy that office and plant clerical employees should not be joined in the same bargaining unit, absent some agreement between the parties. This policy is based on the presumption that these employees do not share the community of interest necessary for the creation of a single bargaining unit. NLRB v. Am. Seaway Foods, Inc., 702 F.2d 630, 632 (6th Cir. 1983) (per curiam). This policy "serves as a guide in defining appropriate bargaining units." Id.
200. Kaynard v. Mego Corp., 633 F.2d 1026, 1030 (2d Cir. 1980); Boire v. Int'l Bd. of Teamsters, 479 F.2d 778, 795 (5th Cir. 1973) ("[T]he Board has traditionally been reluctant to find an accretion, even where the resulting unit would be appropriate, in those cases where a smaller unit, consisting solely of the accreted unit, would also be appropriate and the § 7 rights of the accreted employees would be better preserved by denying the accretion."). See THE DEVELOPING LABOR LAW, supra note 25, at 405 ("The Board has consistently indicated a somewhat restrictive attitude toward accretions in deference to the important statutory policy of employee free choice.").
201. Int'l Ass'n of Machinists & Aerospace Workers, 759 F.2d at 1480.
203. Despite their initial preference for a smaller unit, unions often seeks accretions. See, e.g., Int'l Ass'n of Machinists & Aerospace Workers, 759 F.2d at 1478 (relating facts concerning a union-supported accretion). This seems rational, as accretions allow the union to acquire new members without having to expend resources to carry out an organizing
a different approach when an employer seeks an accretion. Indeed, among published Courts of Appeals decisions, there are few in which the Board or Courts of Appeals have permitted an employer-supported accretion.\textsuperscript{204} In any event, the few pro-employer accretions pale in comparison to the number of union-supported accretions permitted by the Board.\textsuperscript{205} Perhaps campaign or election. Furthermore, in such a case a union need not face the possibility, no matter how insignificant, that it will lose an election. Unions might also “be better off with larger units because this would facilitate the mediation of conflicts among subgroups of employees.” Posner, supra note 7, at 1009 (citing Douglas Leslie, Labor Bargaining Units, 70 VA. L. REV. 353, 50 (1984)).

204. There are many cases where an accretion inures to an employer’s benefit, and in such cases the employer will battle for the accretion. See, e.g., Staten Island Univ. Hosp. v. NLRB, 24 F.3d 450, 451 (2d Cir. 1994); Kaynard, 633 F.2d at 1027; NLRB v. Security-Columbian Banknote, 541 F.2d 135, 138 (3d Cir. 1976). For example, employers will support accretions where they would result in imposing terms and conditions of employment favorable to the employer. Similarly, where an employer would prefer one union over another, or an existing union over a newcomer, it will often fight to have the Board find an accretion. See, e.g., Kaynard, 633 F.2d at 1029 (employer and Teamsters claimed that accretion resulted in a single unit represented by the Teamsters, rather than two units, one of which the International Brotherhood of Craftsmen sought to organize). Along these same lines, an employer might support an accretion where it is relatively happy with the existing union and fears that a more vociferous bargaining agent might later organize the accretable unit and perhaps eventually spread to other units.

An employer might also favor an accretion to minimize transaction costs where an accretion would entail having to deal with only one union. See, e.g., Staten Island Univ. Hosp., 24 F.3d at 451 (employer and Nurses Association argued that the merger of two hospitals resulted in an accretion resulting in a single unit represented by the Nurses Association, rather than two units, one of which was represented by the United Federation of Teachers). Uniformity of terms and conditions of employment might also be a strong selling point for an employer that seeks a “one size fits all” relationship with employees. Also, where the employer suspects that the accretable employees might provide it with a majority of non-union votes in a subsequent election, it might also find accretion palatable. Finally, an employer might support an accretion when threatened or when it fears vandalism and violence from a union. For a discussion of union-sponsored violence see Witt v. Roadway Express, 136 F.3d 1424, 1428 (10th Cir. 1998) (black truck driver who elected not to pay union dues received notes written on Ku Klux Klan letterhead which said: “Pay your dues, n—”; he was later called into a motel room where several drivers attempted to coerce him into dropping his complaint against the union); Standifer v. Gen. Teamsters Union No. 460, No. 97-2037, 1998 WL 229553, at *3 (D. Kan. Apr. 13) (union picketers repeatedly yelled racial epithets at black workers, including “slave boy,” “boy,” and “black nigger”; after forcing a truck driven by one plaintiff off the road, and while pounding on the disabled truck, the strikers yelled “[k]ill the nigger” and “hang the nigger”; the union mob struck the driver with a weapon; on other occasions, the mob yelled: “Nigger boy, remember that you have to leave tonight and we can’t wait to get your nigger ass. We’re going to mess you up bad.”).

205. Ogden Entm’t Servs., Inc. v. NLRB, 105 F.3d 666, Nos. 95-70777, 95-70867 1997 WL 14361 (9th Cir. 1997) (unpublished order) (enforcing NLRB’s order in which it found that an accretion was warranted); Cent. Soya Co., Inc. v. NLRB, 867 F.2d 1245 (10th Cir. 1989) (per curiam) (agreeing with the NLRB that accretion was proper); NLRB v. DMR Corp., 795 F.2d 472 (5th Cir. 1986) (same); NLRB v. St. Regis Paper Co., 674 F.2d 104 (1st Cir. 1982) (same); NLRB v. J.W. Rex Co., 243 F.2d 356 (3d Cir. 1957) (same).
this is because the union is more in tune with the community of interest shared by employees, but more likely it indicates pro-union bias in the balancing of the accretion factors.206

In practice, a balancing is required in almost every case.207 Because the factors are broad and varied, it is a rare case where at least some of the relevant factors don’t point in opposite directions.208 Because the community of interest factors can exist to varying degrees and can be assigned variable weights by the Board, there is certainly no requirement that all or even most of the community of interest factors point to an accretion before the Board will countenance such a course of action,209 only that the balance of factors supports this result.210 Accordingly, “a strong showing on just a few of the factors may suffice to sustain the Board’s decision.”211

When performing this balancing, the Board and the courts stress the importance of different factors, depending on the case involved. The Board has candidly admitted that many accretion cases involve close, factual questions, providing few fixed rules of application.

Because the various factors are weighted differently by the Board from case to case,212 an accretion may sometimes be found even where only a few of the factors support it. Of course, the Board’s “differential weighting” of factors can result in inconsistency in accretion decisions, with little hope for future correction so long as the community of interest balancing test is in place.213 Furthermore, parties have not met with success

206. Cont’l Web Press Inc. v. NLRB, 742 F.2d 1087, 1092 (7th Cir. 1984) (noting that the Board in every previous case held that preparatory employees and pressmen should be part of the same unit and that, contrary to the employer’s wishes, but the Board suddenly departed from this longstanding rule without giving any reason). Such pro-union bias hardly serves the employees. “Union representation is not always the right choice for workers; if it were, the law would simply mandate a union for every plant.” Samuel Estreicher, The Dunlop Report and the Future of Labor Law Reform, 12 LAB. LAW. 117, 127 (1996).
207. “[I]t is rare in any given case that all of the factors point conveniently in the direction of the same size unit.” Cox, supra note 11.
208. Gould, Inc., 263 N.L.R.B. 442, 445 (1982) (“In the normal situation some elements militate toward and some against accretion, so that a balancing of them is necessary.”).
209. Int’l Ass’n of Machinists & Aerospace Workers, 759 F.2d at 1480.
210. JENKINS, supra note 51.
211. NLRB v. Heartshare Human Servs., 108 F.3d 467, 472 (2d Cir. 1997).
213. Matthew S. Miner, Note, Reforming Accretion Analysis Under the NLRA: Supplementing a Borrowed Analysis with Meaningful Policy Considerations, 31 U. MICH. J.L. REFORM 515, 522 (1998) (“[T]he present framework lacks clarity and is inconsistently applied.”) (footnotes omitted). Miner agrees that the Board’s use of the community of interest test is flawed, especially insofar as it fails to give employee preference any meaningful consideration. He suggests reforming the community of interest balancing test
when they have complained about the weight the Board has assigned to particular factors case or the Board's unprincipled reliance on whatever factors it considers most important on a given day, \(^{214}\) such that the Board ignores other relevant factors that militate in favor of a different result. \(^{215}\) Because the Board relies on the factual minutiae of accretion cases in making its accretion decision, few binding principles or rules can be extracted for application in future accretion cases, which is a recurring defect in multi-factored balancing tests. \(^{216}\) This, in turn, makes it almost by explicitly requiring a consideration of employees' views on the particular accretion. He also thinks that the employer's motive for opposing or promoting an accretion is important to a proper analysis of accretion cases, and therefore proposes that this be another factor considered in the balancing test.

Although these suggestions have some merit, tinkering with the balancing test is not a real solution to the problem, particularly because the various factors have no fixed weight and thus can be emphasized or ignored depending on the whims of the Board or the courts that apply this balancing "test." Even requiring the Board to give employee views greater weight is insufficient to protect their § 7 rights. Assume that in a certain case the employees unanimously agree that they do not want to be accreted and that an accretion is contrary to their interests. Even if this were given great weight, there is nothing to prevent the Board from assigning greater weight to other factors, and finding that the sum of all other factors supporting the accretion is weightier.

Statutes like the NLRA assigned great discretion to administrative agencies like the NLRB, because legal scholars of their age, influenced by legal realism, believed that the courts placed too much emphasis on individual rights. Administrative regulation, the New Dealers thought:

[H]ad the potential to reduce the power of the judges the legal realists had taught them to suspect. Instead of allowing courts, which venerated individual rights, to decide issues, they hoped to increase the authority of administrative agencies whose officials would make hard choices on an ad hoc, continuing basis to promote the common good.

Laura Kalman, Abe Fortas 32 (1990) (footnote omitted). They have succeeded insofar as nobody can accuse the NLRB of protecting individual rights in accretion cases, especially those of the workers, and the Board certainly makes accretion decisions on an ad hoc, if biased, basis, as opposed to a principled one. It is doubtful, however, that this promotes the common good.

214. Statutes like the NLRA assigned great discretion to administrative agencies like the NLRB, because legal scholars of their age, influenced by legal realism, believed that the courts placed too much emphasis on individual rights. Administrative regulation, the New Dealers thought:

215. Int'l Ass'n of Machinists & Aerospace Workers v. NLRB, 759 F.2d 1477, 1480 (9th Cir. 1985) ("The Union argues . . . that the Board erred by not effectively balancing all the factors, in that it relied heavily upon two of the factors.") (internal quotations omitted).

216. Some clear-cut rules are certainly possible in the accretion context, and would be particularly helpful to employers, unions, and the courts. Nevertheless, the Board, as usual, elects not to exercise its rule-making power. In the accretion context, as in many others, "the rule-making power is preferable to case-to-case decisions because it tends to promote, not to undermine, evenhanded justice." Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry 165 (1971). "Unfortunately, even when rule-making procedure is clearly required by statute, some agencies refuse to follow the prescribed procedure. The outstanding example of such a federal agency is the National Labor Relations Board, which has illegally and inexcusably used the procedure of adjudication for rule-making . . . ." Id. at 68 n.17; see generally Cornelius Peck, The Atrophied Rule Making Powers of the National Labor Relations Board, 70 Yale L.J. 729 (1961) (concluding that the NLRB's view of the need for substantive rule-making is untenable).
impossible for the Board's accretion decisions to have any precedential effect. Among other things, this means that the Board's power remains unchecked by the citizenry, because litigants cannot tell whether the Board's accretion decisions are the result of arbitrary will or sound reasoning. Because the Board is only loosely bound by its own precedent in this area, it has substantial freedom to alter the analysis from case to case, thereby making accountability and predictability highly elusive features in accretion cases. Beyond the basic assault on the rule of law that this produces, the Board's accretion decisions result in needless litigation, especially where the relevant facts are substantially identical to those of cases previously decided by the Board. It is highly inefficient for the Board members to constantly "rethink a question they have once resolved to their own satisfaction." Unfortunately, the litigants, and not the Board, pay the costs of this mostly unnecessary litigation.

These problems stem from the NLRB's extremely broad discretion in balancing the accretion factors and its largely unrestrained power to decide

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217. Thus, it is unlikely that the Board's accretion decisions adhere to the doctrine of precedents. "The doctrine of precedents means that causes are to be judged by principles reached inductively from the judicial experience of the past, not by deduction from rules established arbitrarily by the sovereign will. In other words, reason, not arbitrary will is to be the ultimate ground of decisions." ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 182-83 (1921).

218. "Lacking the democratic legitimacy of legislatures, agencies do not have the same freedom to base decisions on arbitrary grounds ..." United States v. Tomasino, 206 F.3d 739 (7th Cir. 2000) (Posner, C.J.).

219. As Justice Cardozo noted: "It will not do to decide the same question one way between one set of litigants and the opposite way between another." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1920).

220. NLRB v. Lundy Packing Co., 68 F.3d 1577, 1583 (4th Cir. 1995) ("We recognize that bargaining unit cases are fact-sensitive and that decisional law will seldom travel a straight-line course."). See International Longshoremen's Ass'n, AFL-CIO v. Davis, 476 U.S. 380, 407 (1986) (Blackmun, J., dissenting) (noting the need for uniformity in labor cases).

221. "The rule of law is not quite a law of rules, but it is a law of rules, principles, customs, practices, and understandings. It is law responsible to criteria that in the end we can learn and communicate to others. It may be as definite as a rule, or as tacit as the understanding of language by a native speaker. Still, it always has an important measure of definiteness; the law is something one can come to know; and knowledgeable people can tell good from bad law." CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION 60 (1991) (emphasis added).

222. "People are entitled to know the legal rules before they act, and only the most compelling reason should lead a court to announce an approach under which no one can know where he stands until litigation has been completed. Litigation is costly and introduces risk into any endeavor; we should struggle to eliminate the risk and help people save the costs." Sec'y of Labor v. Lauritzen, 835 F.2d 1529, 1539 (7th Cir. 1987) (Easterbrook, J., concurring).

223. DAVIS, supra note 216, at 108.
whether new employees should be considered an accretion to an existing bargaining unit. The only requirement the appellate courts impose on the Board is that it not abuse its discretion in making accretion decisions. In theory, this means that the Board cannot act arbitrarily in deciding accretion cases. As the Fourth Circuit observed:

Although broad, the Board's discretion is not without limit. In particular, when the Board adopts a policy to guide it in the exercise of its discretion, the original very broad discretion is to some extent narrowed, and subsequent decisions must be reasonably consistent with the expressed policy. If the Board chooses to depart from established policy, it must explicitly announce the change and its reasons for the change.

Thus, ideally the Board must apply with reasonable consistency the standards it adopts to guide its accretion decisions. But because it is so easy to distinguish previous accretion decisions (especially where the reasoning behind the decision is utterly ambiguous), the Board in fact has substantial freedom to do whatever it wants, unencumbered by the results and rationale of prior decisions. In theory, once the Board has selected criteria to guide its discretion, it must apply these principles consistently from case to case. In reality, inconsistency abounds.

This problem is entirely attributable to the Board and its decision not to tie itself to a definite standard of judgment. Addressing the Board's practices in the context of unit determinations, Judge Posner has eloquently described the Board's treatment of the community of interest test, which similarly applies to the Board's accretion decisions:

The Board has a standard: it will approve a unit if but only if the members have a "community of interest." But the words provide little direction. There is a sense in which all people employed in the same firm, the same craft, or even the same industry share a community of interest, and there is a sense in which every worker is a separate "community of interest" because workers differ in age, in the value they place on leisure, in their preferred trade-off between present and future consumption, in their attitude toward risk, and in other dimensions, which, when all are added together, make every worker unique. It would have been helpful, therefore, if the Board had tried to give "community of interest" a precise meaning, or

224. Int'l Ass'n of Machinists & Aerospace Workers, 759 F.2d at 1478.
225. Westvaco, Va., Folding Box Div. v. NLRB, 795 F.2d 1171, 1173 (4th Cir. 1986); see Cont'l Web Press Inc. v. NLRB, 742 F.2d 1087, 1089 (7th Cir. 1984) ("About all the court can do—recognizing that section 9(b) is a broad delegation of power to the Board—is to insist that the Board apply with reasonable consistency whatever standard it adopts to guide the exercise of its delegated power.").
226. See NLRB v. Lundy Packing Co., 68 F.3d 1577, 1583 (4th Cir. 1995) (explaining that bargaining-unit cases are fact specific and that decisional law is likely to be somewhat ambiguous).
at least had explained the purpose behind the formula. The Board has done neither of these things.\textsuperscript{227}

The Board has modified the "community of interest" test in accretion cases by requiring an "overwhelming community of interest." But simply adding one word to the name of the test adds nothing helpful to courts or litigants. Zero multiplied even an "overwhelming" number of times is still zero.

Despite Judge Posner's recognition of the NLRB's failure to give intelligent meaning to the "community of interest" test, some courts claim to have distilled some guiding principles from the Board's accretion decisions. When examined closely, however, these claims appear overly optimistic. For example, in one case, the Ninth Circuit perceived two factors to be particularly important in determining whether an overwhelming community of interest was present: (1) employee interchange; and (2) overlapping day-to-day supervision.\textsuperscript{228} True, where both of these are absent, it is more difficult for the Board to find an overwhelming community of interest, and thus it is unlikely that it will permit an accretion in such a case.\textsuperscript{229} In another case, however, the Ninth Circuit found a different factor to be paramount. It suggested: "The most reliable indicium of common interests among employees... is similarity in their skills, duties and working conditions."\textsuperscript{230}

Things become more complicated as other Circuits weigh in. Taking a slightly narrower view, the Sixth Circuit focused only on wages, benefits, and working conditions, finding these to be the most important factors: the "primary concern or touchstone of a bargaining unit determination is the question of whether all of the members have a mutual interest in wages, hours, and other terms and conditions of employment. This key factor assumes special prominence in any bargaining unit determination."\textsuperscript{231} The

\textsuperscript{227} Cont'l Web Press, Inc., 742 F.2d at 1089-90.

\textsuperscript{228} Int'l Ass'n of Machinists & Aerospace Workers, 759 F.2d at 1480. The Board similarly has identified these as the two most important factors. Towne Ford Sales, 270 N.L.R.B. 311 (1984); New England Tel. & Tel. Co., 280 N.L.R.B. 162 (1986).

\textsuperscript{229} Int'l Ass'n of Machinists & Aerospace Workers, 759 F.2d at 1480 (finding no accretion where there was a lack of employee interchange and separate day-to-day supervision); Bryan Infants Wear Co., 235 N.L.R.B. 1305, 1306 (1978) (finding no accretion in situations where there was a lack of employee interchange and independent day-to-day supervision).

\textsuperscript{230} Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1042 (9th Cir. 1978). It may be that in different cases different factors take on great importance, and so the Ninth Circuit decisions may be reconcilable on this basis. However, the attempt to reconcile the cases demonstrate a central thesis of this article: that the community of interest balancing test is so case-specific as to be useless in attempting to predict the outcome of even closely similar cases. Furthermore, it shows that "importance" is not based on any external, objective criteria.

\textsuperscript{231} NLRB v. Catherine McCauley Health Ctr., 885 F.2d 341, 345 (6th Cir. 1989)
Seventh Circuit largely agrees with the Sixth Circuit, noting that the "greatest conflicts of interest among workers are over wages, fringe benefits, and working conditions," and because the overwhelming community of interest test is designed to minimize these conflicts, the test's foremost concern should be with the similarity of wages and working conditions. As the previous discussion of the community of interest factors demonstrates, the Board and the courts characterize many different factors as "important" and "substantial," depending on the factual intricacies of individual cases. This shows, yet again, that when applying the "overwhelming community of interest" balancing test, importance is in the eye of the beholder. Mere mortals are incapable of divining which factors the Board will find controlling in any particular case.

II. ACCRETION ANALYSIS: A NEW APPROACH

Perhaps the time is now ripe for a new approach for deciding accretion cases. After appreciating the magnitude of the defects associated with the "overwhelming community of interest" balancing test, it's easy to see that any replacement system must meet five criteria. An improved method of analyzing accretions should (1) be based on objective criteria; (2) be easy to apply; (3) protect employee freedom of choice, including both the employees to be accreted and their counterparts in the established unit; (4) ensure that the employees' interests are served; and (5) protect unions and preexisting units from destabilizing accretions. A system that meets these prerequisites is presently available. It is a ballot system that requires majority support for all substantial accretions.

Under the proposed ballot system discussed below, an accretion would be initiated much as it is now. First, either the union representing the preexisting unit or the employer would move to accrete the group. This would be accomplished by the union demanding that the Collective Bargaining Agreement (CBA) apply to the new group of employees, or by insisting that it is the bargaining representative of the group, based on the accretion. Similarly, the employer could attempt an accretion by applying the unit's CBA to the accreted group. If nobody objects, a successful and

(internal citation omitted). Of course, to the extent that daily supervision is a component of "other terms and conditions of employment," the Sixth Circuit's observation is not inconsistent with the Ninth Circuit's. Also, it may be that the Sixth Circuit considers the employee's duties to be a part of the "terms and conditions of employment," as this comports with some definitions under Title VII.


233. Besides the factors just discussed, the degree of employee interchange and contact among the two groups of employees is also considered one of the "most important" factors in the accretion analysis. See NLRB v. Lundy Packing Co., 68 F.3d 1577, 1580 (4th Cir. 1995)
uncontested accretion has occurred. More likely, though, a proposed accretion will be opposed by the unit's bargaining representative, another union, the employer, or the accreted employees. In these instances employee voting would come into play. Where an accretion is contested, the Board would follow alternative voting procedures, which depend upon the party seeking the accretion. Of course, in all instances, an accretion would occur only if it were in accordance with the limitations on appropriate units set forth in § 9 of the NLRA.\footnote{234. 29 U.S.C. § 159(b)(2001)("[T]he Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer . . . ").}

A. Employer-Supported Accretions

Like unions, employers sometimes seek recognition of accretions.\footnote{235. The Developing Labor Law, supra note 25. As noted below, usually an employer seeks an accretion only where the reconstituted unit will be represented by a union that supports the accretion. It is possible, however, that an employer could seek an accretion opposed by the union that presently represents the preexisting. An employer might do this where it hopes to add union opponents to a unit already full of discontent with the union. This is essentially what the employer attempted in Serramonte Oldsmobile, Inc. v. NLRB, 86 F.3d 227, 236 (D.C. Cir. 1996).}

Frequently this occurs when the employer has an accretion clause in a CBA in which it agreed to support one of two rival unions,\footnote{236. In such cases, an accretion election would be particularly useful, as the Board has held that an employer need not honor an accretion clause unless the union seeking to apply the clause presents proof of its majority support. The Developing Labor Law, supra note 25.} or when, even though no accretion clause exists, two rival unions are fighting over employees and the employer agrees to aid one of the unions.\footnote{237. See, e.g., Serramonte Oldsmobile, Inc., 86 F.3d at 236 (explaining the employer's argument that technicians were accredited to a bargaining unit, and that a majority of the reconstituted unit opposed the union); Staten Island Univ. Hosp. v. NLRB, 24 F.3d 450, 451 (2d Cir. 1994) (describing the argument between an employer and the Nurses Association about a merger of two hospitals that resulted in an accretion which created a single unit represented by the Nurses Association, rather than two units, one of which had been represented by the United Federation of Teachers); Kaynard v. Mego Corp., 623 F.2d 1026 (2d Cir. 1980) (explaining employer's and Teamsters' claim that accretion resulted in a single unit represented by the Teamsters, rather than two units, one of which the International Brotherhood of Craftsmen sought to organize); NLRB v. Security-Columbian Banknote, 541 F.2d 135, 135 (3d Cir. 1976) (arguing that accretion resulted in a single unit of offset printers, so that it properly bargained with the Graphic Arts Union rather than the Pressman's union). Often the employer may consider accretion to be the lesser of two evils where two rival unions seek to represent the new employees. Similarly, an employer may have had a tolerable relationship with one union, and figuring that dealing with a known entity is better than the uncertainty of the alternative union, it may seek an accretion to the unit represented by the preferred union.} Where the...
employer is the party seeking the accretion (whether on its own initiative or at the behest of a union), it is essential to ensure that the accretion does not destabilize the unit, and that it is not simply part of an employer's scheme to destroy a union that has the popular support of employees. The proposed ballot system is designed to ensure that this does not happen, while at the same time making certain that the desires of the employees are held paramount and their § 7 rights are maximized. It does this, first, by requiring a showing of minimal support among both the employees to be accreted and those of the preexisting unit, as it would be senseless to burden the parties with an election campaign if the accretion lacks even minimal support from the rank and file.

To obtain an accretion election, then, the employer would be required to obtain signed statements of support for the accretion from thirty percent of the members of the group to be accreted, and thirty percent of the employees in the preexisting unit. If, at this preliminary stage, an employer cannot obtain the requisite signature cards from either group, he is temporarily out of luck, but remains free to make another attempt in the future. This "minimal support" rule, which mirrors that imposed on unions seeking to organize a unit, protects a union that opposes the accretion from having to expend its precious resources to carry out a full-fledged election campaign. This policy also preserves the Board's resources by precluding an election where the employer cannot show even minimal employee support for an accretion. Requiring an initial showing of support also protects the interests of the employees in the preexisting unit by allowing them to block an accretion they consider to be detrimental to their interests, or the interests of their union.

If, however, the employer obtains the requisite statements of support

238. Both certification and decertification elections require a showing of at least thirty percent support:

[I]t is the policy of the Board to require that a petitioner requesting an election for either certification of representatives or decertification show that at least 30% of the employees favor an election. The showing of interest must be exclusively by employees who are in the appropriate bargaining unit in which the election is sought. Typically a union filing a petition (RC) will submit its showing in the form of union authorization cards where the employee signs and dates a card indicating that he or she wishes to have that union represent him for purposes of collective bargaining. When a group of employees file an "RD" petition, the same 30% qualification attaches but the showing will typically be in the form of a list of employees signatures and dates on a letter or petition indicating that the undersigned employees non longer wish to have the certified or existing bargaining agent represent them.

GOLDER, supra note 51, at § 2:9, p. 2-22; GETMAN, supra note 2, at 28 ("When it begins to organize, a union seeks to obtain pledges of support from employees in the unit. These pledges customarily take the form of authorization cards signed by the employees designating the union as their bargaining representative.").
from both thirty percent of the accretable group and thirty percent of the preexisting unit, the Board would then conduct a secret ballot election among both of these groups. Both the employer and the union would be free to campaign for or against the accretion according to the rules already in place for representation elections. Thus, a union opposing the accretion would have the benefit of Excelsior lists and other benefits that the Board mandates in representation elections. For the employer to prevail in the election, a majority of the voters from each group would have to vote in favor of the accretion. If the employer cannot persuade a majority of the voters from each group that the accretion is in their best interests, the proposed accretion will be defeated, and there will be no accretion for at least one year, after which time the employer is free to try again. If a majority of votes are cast in favor of the accretion, however, the Board would accept their decision as final, and would hold that the combined unit is an appropriate one. Of course, this would do away with the overwhelming community of interest balancing test and the unprincipled weighing of indeterminate factors. But it would not do away with a careful consideration of those factors by the people in the best position to assess them: the employees themselves. Instead of the Board doing the balancing, the employees themselves would be empowered to

\[239.\] This incorporation of NLRB election law is not an endorsement of the archaic rules promulgated by the Board and the courts, as these rules tend to suppress free speech and the ideas expressed therein. See, e.g., NLRB v. Exchange Parts, Inc., 375 U.S. 405, 405 (1964) (holding that conferring economic benefits on employees during a representation election period in an attempt to induce employees to vote against the union interferes with the protected right to organize). For a criticism of the Exchange Parts decision and a general discussion of representation elections, see Derek C. Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 Harv. L. Rev. 38, 112-15 (1964). But because these rules are already in existence, and the Board and labor attorneys are intimately familiar with them, their incorporation in accretion elections furthers the goal of simplifying labor law, or at least does not increase its complexity. Velasquez v. Frapwell, 160 F.3d 389, 394 (7th Cir. 1998) ("[T]here is much to be said for simplicity in law; it is a value to which American courts give too little weight."). vacated in part, 165 F.3d 593 (7th Cir. 1999); Davis, supra note 216, at 158 (1971) ("[F]rom the standpoint of a good system of justice, the extreme complexity is much more harmful than it is helpful.").

240. Excelsior Underwear, Inc., 156 N.L.R.B. 1236, 1236 (1966) (requiring the employer to provide to the union the names and addresses of eligible voters).

241. A majority of the votes cast, rather than support from a majority of the employees, would be required under the proposed system. Mandating the approval of a majority of employees might be too onerous, as many employees might be too apathetic or uncommitted to either side to even bother voting. Mere apathy should not be permitted to block an accretion.

242. Thus, the election bar of § 9(c)(3) would be equally applicable to accretion elections. 29 U.S.C. § 159(c)(3)(2001) ("No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held.").
assess their own interests, those of their co-workers, and the common good, and would be free to decide if in their particular situation they might be willing to lay some interests aside to gain the greater benefits that an accretion might entail. And they wouldn't be consigned to a consideration of only fourteen factors, either. Also gone would be the overwhelming uncertainty and extensive litigation that comes with the overwhelming community of interest balancing test.\textsuperscript{243}

This proposed voting procedure ensures that no accretion will occur unless a majority of the employees—both in the accretable group and the preexisting unit—believe that an accretion is consistent with their interests and desires. This system safeguards their § 7 right to be the masters of their bargaining representative. Although Section III of this article contains a full discussion of the benefits of the proposed accretion election system, it's important to note at this point that the election system is superior to the community of interest balancing test in at least five respects.

First, under the present system, the Board and various courts do not always consider the views of the accreted employees in balancing the community of interest factors.\textsuperscript{244} The election system effectively rectifies this problem by making accretions utterly dependent upon employee choice. Second, even when the Board is inclined to consider the employees' views, there is often no available data concerning their opinion of the accretion. By providing a system for clearly expressing their views, the proposed election system obviously cures this defect too. Third, presently, even when the Board considers the employees' views, and there is reliable information available on this subject, this is merely one of fourteen or so factors that the Board considers. This hardly gives employee

\textsuperscript{243} As discussed more fully below, there is no real need for the Board or the parties to waste their time and resources considering the community of interest balancing test where the employees have voiced their views in an election. Since their interest in effective representation is at stake, their decision should be final and should not be second-guessed by the Board. Obviating the need for the community of interest test is one of the chief advantages of the proposed election system. Nevertheless, if for some reason the Board refused to countenance a system that completely discarded the community of interest balancing test, the election system could be modified slightly to accommodate the Board's concerns. For example, after the election, the Board could permit the parties to present evidence that the accretion was contrary to the common interests of the employees. It might simplify matters by distilling the present 14 factor test to, say, consideration of three essential factors. Under this modified system, however, the Board should contravene the will of the employees only when the party opposing the accretion carried its burden of showing by \textit{clear and convincing evidence} that the two groups do not share a community of interests.

\textsuperscript{244} Sometimes this is the implicit practice of the Board, but recall that the Sixth Circuit has explicitly declined to consider the desires of the employees to be accreted. NLRB v. Catherine McCauley Health Ctr., 885 F.2d 341, 345 (6th Cir. 1989); Armco, Inc. v. NLRB, 832 F.2d 357 (6th Cir. 1987); NLRB v. Am. Seaway Foods, Inc., 702 F.2d 630, 633 n.3 (6th Cir. 1983) (per curiam); NLRB v. Pinkerton's, Inc., 428 F.2d 479, 484 (6th Cir. 1970).
choice the preeminent consideration it deserves. Moreover, the Board can capriciously elect to weigh this factor heavily or lightly without having to justify this caprice. Indeed, it need not assign the various factors any quantitative value. The proposed election system rectifies these problems by ensuring that the views of the employees not only have a fixed weight, but a controlling one.

Fourth, even when data about employee desire is available and the Board is willing to consider it, unless a secret ballot election is held, and the employees have an opportunity to hear arguments for and against the accretion, there exists substantial doubt about whether the employees are making an informed decision. Similarly, the data concerning the employees' views may be inherently misleading. Consider cases where employees sign authorization cards. While these might accurately reflect support for a union, they might instead be the product of employees reluctantly acquiescing to coercive requests for signatures. More than one employee has signed an authorization card when pressured or coerced by union supporters or employers. The proposed election system helps prevent coercion by making ballots cast in secret the only evidence of employee support for an accretion. The election procedure saves employees the trouble of having to run the gamut of authorization card solicitors and maximizes their free will. Also, the election process permits the employer and the unions to educate the employees about the benefits and detriments that the accretion would likely entail, so that employees can make an informed decision.

Fifth, under the overwhelming community of interest balancing test, the views of the unit employees are never directly considered by the Board or the employer. Thus, if the Board refuses to countenance an accretion,

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246. Indeed, secret ballot elections for the selection of bargaining representatives were initiated to prevent coercion of employees in making their selection:

In earlier times the union resorted to the strike for recognition as a means of gaining bargaining rights. Congress sought to end that method by including in the Act procedures for an orderly election process. A fundamental aim was to assure employees of a free choice in the selection process and to avoid any aspect of coercion or interference with that choice.


247. It is true that the union representing the unit employees has a voice in accretions, and it might express the sentiments of the employees it represents (assuming that there is a consensus among employees and that the union can ascertain this consensus). However, that may not be universally true.

As discussed more fully below, by granting the unit employees an absolute right to block the accretion, the proposed election system provides them another means of exercising control over the union and of expressing any dissatisfaction with the union's
the employees of the preexisting unit may be denied the right to engage in concerted activity and associate with other employees without having their views on this subject heard. Similarly, if the Board approves an accretion unit employees may have an accretion forced upon them, all without ever having had an opportunity to be heard, which is a basic civil right. The proposed election system also corrects this oversight. It gives these employees a right to support or oppose the accretion, perhaps by campaigning among themselves or the group of employees to be accreted. The election system also gives them the power to veto an accretion when a majority of the voting unit members cast their ballots against the amalgamation of units. Therefore, it is far superior to the present community of interest balancing test.

B. Union-Initiated Accretions

Union-initiated accretions are the most common type of accretions, and have a greater chance of success under the skewed analysis generally conducted by the Board. These accretions present dangers similar to those of employer-initiated accretions, particularly because most employer-supported accretions are also desired by at least one union. So a similar set of rules would apply when a union seeks an accretion to a bargaining unit that it already represents. Since it is reasonable to presume initially that a union will not seek an accretion that would harm either itself or the unit employees to whom it owes a duty of loyalty, there is no reason to initially require a showing of support from thirty percent of the preexisting unit's employees. Because the employees to be accreted are substantially affected by the proposed accretion, however, the union would be required to obtain written statements of support from thirty percent of the group to be accreted, just as an employer must do in an employer-initiated accretion. If it is unsuccessful in doing so, no accretion would occur. If it obtains the

performance. Because the unit employees are often in the best position to know when their union is performing poorly or corruptly, see Kinslow v. Am. Postal Workers Union, 222 F.3d 269, 273 (7th Cir. 2000) ("[U]nion members are often in the best position to discover union corruption"), by exercising their veto power they can spare the accretable employees the ordeal of being represented by a lackluster union.

248. "It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government" including the right to "notice and an opportunity of being heard ...." Holden v. Hardy, 169 U.S. 366, 389-90 (1898) (Brewer, J.).


250. In cases where this presumption proves wrong, the unit employees could later seek to decertify the union. Although this is not a perfect remedy, it eventually does provide some relief in egregious cases.
requisite statements of support, a secret ballot election would be held, just as in the case of an employer-initiated accretion: the union would have to carry a majority of the votes from both the group to be accreted and the unit employees. Where a majority of each group votes in favor of the accretion, the Board would defer to their wishes and the two groups would be joined into one unit. As with an employer-supported accretion that fails to garner a majority of votes, no accretion would occur and a subsequent accretion election could not be held for at least one year.

C. Union- and Employer-Supported Accretions

As noted above, sometimes a union and an employer will agree to accrete a group of employees to the existing union-organized unit, and no other union objects. In such situations, there is special cause for concern for the rights of the employees that will be accreted, as the union-employer coalition might suggest a mutual lack of concern for the employees’ interests. Accordingly, in these situations, the rules governing employer-initiated accretions should apply, as they are slightly more protective of employee interests. Specifically, the union and employer would be required to obtain signed and written statements of support for the accretion from 30 percent of both the group to be accreted and the preexisting unit. If these are successfully obtained, the accretion question would then be presented to both sets of employees in a secret ballot election, with the question being decided by a majority of votes from each group.

251. Some might argue that deference to employee-choice would unlawfully cede the Board’s § 9 authority to employees. It’s important to remember, however, that the Board’s § 9 authority exists “in order to assure the employees the fullest freedom in exercising the rights guaranteed by this Act . . . .” National Labor Relations Act 29 U.S.C. §154(b) (2002). So any reasonable Board practice that accomplishes this goal is not unlawful.

Because even under the community of interest balancing test the Board claims to consider the employees’ desires as one factor in the analysis, and these factors have no fixed weight, one can look at accretion elections as simply the Board doing the balancing test, and giving the “employee desire” factor a determinative and controlling weight. Nobody seems to think that the present balancing test constitutes unlawful delegation of power, so it may be helpful to see the propriety of accretion elections in the construct of the balancing test. Thus, if the Board wanted to be abundantly cautious, after the election it could go through the motions of analyzing the accretion according to the overwhelming community of interest balancing test, all the while giving the “employee choice” factor the greatest weight, a practice it is free to adopt even without accretion elections.

252. There may be nothing sinister about this cooperative endeavor, and that it might reflect an understanding that the employees’ financial success is inextricably tied to the employer’s financial fate. When dealing with the employees’ fundamental rights, however, it is better to err on the side of caution.
D. Rival Unions Seeking Different Accretions

Sometimes two competing unions each seek to accrete a group of employees to their respective units,\(^2\) often with one union obtaining the support of the employer.\(^3\) Under the proposed election system, the same rules that apply to employer-supported accretions would apply to rival-union accretion cases. Thus, to obtain an accretion election, either union would be required to obtain authorization cards from thirty percent of both sets of employees. For example, consider a scenario where Union A represents the employees in Unit A, and Union B represents the employees in Unit B, and nobody represents Group C, the accretable group. To obtain an accretion election to accrete Group C to Unit A, Union A would have to obtain written statements of support from thirty percent of the employees in Unit A and thirty percent of the employees in Group C, the group to be accreted. For the competing union, Union B, to be placed on the ballot alongside its competitor, it would simply have to show support from one Group C employee and one Unit B employee, just as in a normal representation election.

The election would then be conducted among all three groups, permitting the Group C employees to choose accretion to Unit A, Unit B, or no accretion at all. Where both a majority of Unit A voters and Unit B voters support the accretion, the question will come down to the sentiments expressed in the votes of Group C. Where none of the three choices receives a majority,\(^4\) a re-run election would be held between the two leading choices. As with other elections, in the runoff balloting the majority wins.\(^5\) If the majority elects not to join either Unit A or Unit B, another accretion election could not be held for at least one year.

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253. See, e.g., Staten Island Univ. Hosp. v. NLRB, 24 F.3d 450 (2d Cir. 1994).
255. The accretable employees actually have four choices, but the third and the fourth appear on the ballot only as “no accretion.” The four choices are: (1) accretion to Unit A; (2) accretion to Unit B; (3) no accretion, but the founding of a new unit-specific union; or (4) no accretion and no collective bargaining.
256. It could be argued that under the proposed election system the employer is left without a voice or veto. It is true that the employer has no veto, but it certainly has a voice insofar as it can campaign against a proposed accretion. True, an accretion that would prove disruptive to the employer would be permitted so long as a majority of employees of the group to be accreted support it. Making the employer’s interest another factor in the calculus unnecessarily complicates matters in light of the employers’ demonstrated success in opposing unions. See Samuel Estreicher, Labor Law Reform in a World of Competitive Product Markets, 69 Chi.-Kent L. Rev. 3, 5-6 (1993) (“[E]mployers are resisting union organizing drives, demanding wage concessions, and exploiting weaknesses in the labor law that have existed from the very beginning (such as the right to hire permanent replacements for economic strikers).”).
E. Employee-Initiated Accretions

Frequently, newly acquired employees will be the first to realize the benefits of union representation, if there are any to be gained in that particular product market. When they perceive that employees performing similar jobs are obtaining higher wages, they will likely seek out a union, or union organizers, never known for their bashfulness, will find the disgruntled employees. In that case, the respective union would serve as their champion, and initiate the process of an accretion election or the formation of a separate unit. The rules for union-initiated accretions would therefore apply. Similarly, where the employer sees the benefits of the accretion and supports it, the rules applicable to employer-initiated accretions would apply.

It is also conceivable, however, that a rare situation will arise where neither the union representing an established unit nor the employer desire an accretion of a new group of employees. Perhaps the union barely has support and fears that new employees will eventually tip the balance in favor of decertification, or maybe the union objects to the expansion of the workforce, believing that its members will receive less overtime pay, and therefore it hopes eventually to force ouster of the accretable employees through collective bargaining. As for employer opposition, perhaps the employer does not want an accretion because he would be forced to pay the accretable employees the higher wages required under the unit’s CBA. In these situations, the group will be unable to obtain an accretion under the proposed election system. Although this may seem unfair, it is similar to the result that would occur under the present system, as a union has no duty to.

257. Sometimes, despite their best efforts, unions cannot elicit additional benefits from the employer due to circumstances beyond the control of unions or employers. Because many employers must offer their goods or services at a competitive rate, and the profit margin generated by this competitive rate does not allow for the wages and working conditions that the union might otherwise hope to obtain, unionization will often make no (positive) difference in the terms and conditions of employment.

Unions are most successful in raising wages and working conditions in non-competitive markets, i.e., those markets where the employer has a monopoly or near monopoly. In these instances, union gains come at the expense of consumers. See Estreicher, supra note 255, at 21. ("[U]nion wage gains at the expense of profits are largely confined to industries sheltered from vigorous competition.").

258. After all, the “main purpose of labor unions is to raise wages by suppressing competition among workers . . . .” RICHARD A. POSNER & FRANK EASTERBROOK, ANTITRUST 31 (2d ed. 1981). What better way to suppress competition than to coerce an employer not to deal with a group of non-union employees.

259. If it is any consolation to these employees, unions often find themselves in the same boat. “Simply to get its foot in the door, the union must either find an unhappy workforce or help stoke unhappiness in an organizing campaign.” Estreicher, supra note 255, at 125. If it fails to accomplish either of these goals, a union will not be able to obtain majority support, and will remain an agent without a principal.
to seek an accretion of employees it does not represent.\textsuperscript{260} Similarly, the law does not impose a duty on employers to comply with their employees’ desire for an accretion in cases where the union is not willing to accept the accretion. As under the present system, any unfairness is minimized by the group’s ability to form its own union, assuming it has a separate identity and the Board will certify it as an appropriate unit. Thus, such employees may still be able to bargain collectively with their employer.\textsuperscript{261}

III. THE ADVANTAGES OF AN ELECTION SYSTEM FOR ACCRETIONS

A. Utilization of an Objective Criterion

Deciding accretion contests by means of employee elections presents a number of advantages over the Board’s present practice of utilizing the overwhelming community of interest balancing test. For starters, it provides an objective criterion for deciding accretion cases—majority support—which is far superior to the present system where it’s anyone’s guess as to how an accretion case will be decided.\textsuperscript{262} Under the present system, even when all of the circumstances relevant to the “community of interest” test are known, it is difficult to predict how the Board will decide an accretion case.\textsuperscript{263} Under an election system, the outcome is easily ascertained: the majority rules.\textsuperscript{264}

\begin{itemize}
\item 260. The union is the agent for its principals (the employees of the unit) and its only duty is to serve its principals’ interests in a lawful manner.
\item 261. It should be noted, however, that even unorganized employees enjoy § 7 rights. So even if the employees never form a union, they are not left unprotected by the NLRA.
\item 262. FORKOSCH, supra note 165, at 689 (“The standards set up in the Act . . . are so broad that, without more, it is conceivable that any set of facts could become 'appropriate' so as to certify any kind or type of unit.”). Of course, in ordinary unit determination cases, the malleability of the “appropriateness” is less burdensome on employees to the extent that they have the power to vote either for or against the proposed union. If a union is defeated, the parties can eventually seek another unit determination that more fully comports with employee interests.
\item 263. See, e.g., Cont’l Web Press, Inc. v. NLRB, 742 F.2d 1087, 1089 (7th Cir. 1984) (“The Board has a standard: it will approve a unit if but only if the members have a ‘community of interest.’ But the words provide little direction.”); THE DEVELOPING LABOR LAW, supra note 25, at 452. (“Community of interest is not susceptible to precise definition or to mechanical application.”); Strom, supra note 26, at 81 (“Such a complex multi-part test inevitably means that different individuals will reach different results.”).
\item 264. Besides the pure benefit of permitting employees to exercise a right of self-determination, accretion elections have the additional advantage of keeping the Board’s acknowledged biases at least one step removed from the accretion decision. Also, government has consistently proven itself “spectacularly unqualified for guiding a modern economy,” and that includes the labor component of the economy. GEORGE F. WILL, “The Fatal Conceit”, in THE LEVELING WIND: POLITICS, THE CULTURE AND OTHER NEWS 314 (1994). By moving the Board further away from the nucleus of the accretion decision,
Board) manipulate the evidence to obtain the desired result. For example, under the present system employers sometimes alter their internal structure and policies so as to increase their chances of prevailing in an accretion battle.\textsuperscript{265} Where the Board perceives these shenanigans, it will remove them from the accretion calculus,\textsuperscript{266} but there is always the chance that the Board will not detect them, or that the employer can supply a pretextual justification that will insulate its misdeeds. Because of the amorphous nature of the balancing test, it is possible for an employer—or a union—to prevail in an accretion case based on its deceit.

Under an election system, however, this would be impossible, unless the employer were able to stuff the ballot box without being detected. Elections make victory by deceit more difficult. In contrast, the multi-factored balancing creates numerous opportunities for the parties to manufacture evidence in support of their respective positions. One of the chief virtues of the election system, therefore, is its ability to prevent parties from distorting the result of an accretion case. True, as in all elections, the interested parties simply re-target their deceit machines at the electorate, but the employees, better than anyone else, are in the best position to ascertain a "snow job" when they encounter one. As they are well connected to their own interests, they should be the ones to decide who is telling the truth. Furthermore, there already exists a system of labor election law that is designed to enhance the viability of truth. Since it is already applied to representation elections, it could easily be applied to accretion elections.\textsuperscript{267}

While this democratic system may not be a perfect one, it does have the advantage of setting forth an objective criterion for accretions (the majority prevails); importantly, the weight of this one criterion never fluctuates and thus is not subject to manipulation. Unions, employers, and employees also know in advance what they must do to obtain or prevent an accretion, making all parties equal, at least in this one respect. Compare these aspects of the proposed election system to the present "community of interest" analysis, where it often seems that the Board is reciting post hoc justifications for a pre-ordained accretion decision.\textsuperscript{268} To the extent that the elections protect accretion decisions from government incompetence.

\textsuperscript{265} Armco Inc. v. NLRB, 832 F.2d 357, 363 (6th Cir. 1987).
\textsuperscript{266} \textit{Id.} at 364 ("The uniformity in wages, hours, and terms of employment is the result of the disputed conduct: the application of the Steelworkers’ contract to the coke plant employees" and was discounted accordingly).
\textsuperscript{267} The Board already has experience with unit determination elections, which are similar to the proposed accretion elections. See, \textit{e.g.}, Hamilton Test Sys., Inc. v. NLRB, 743 F.2d 136, 140 (2d Cir. 1984) ("Under certain circumstances, the Board conducts 'self-determination' elections that allow the employees to determine the unit."). So it would not need to create a whole new system to deal with accretion elections.
\textsuperscript{268} This has led various courts to criticize the Board. As the Ninth Circuit stated:
present system is susceptible to being hijacked by Board bias, an accretion election will create confidence in the system. No longer can a thumb—or a fist—be placed on the scale. An accretion will succeed or fail based on its ability to achieve majority support, and at the end of the day, regardless of the final result, employers, unions, and employees will know that they received fair treatment.

B. Ease of Application, Reduced Expense

To put it mildly, "The Board's test for whether an accretion has occurred is by no means straightforward."\[269\] "If one utilizes the present accretion analysis . . . the answer one arrives at will depend on a myriad of factors, the sum of which is not predictable even to the most experienced labor lawyers."\[270\] Indeed, it is the difficulty of application and the lack of predictable results that has resulted in so much criticism of the Board's accretion analysis. Accretion elections can change that. Holding an accretion election would prove far less cumbersome than the present system of balancing a host of factors, the weight of which nobody can fathom until the Board announces its decision. Even then, it is impossible to determine the weight each factor was given, much less the meter by which their weight was measured.

Furthermore, the present system of litigating accretions can prove expensive, which can have substantial consequences for impecunious unions or employers. Under an election system, because the Board conducts the election, the parties need not waste their time and money gathering evidence relating to the fourteen community of interest factors. True, they will probably expend money to "educate" the electorate, but

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It would . . . be helpful to reviewing Courts of Appeals if future Board decisions of this sort would more carefully analyze the competing considerations involved, including the claims of previous decisions for some precedential value. It is true that "whether or not a particular operation constitutes an accretion or a separate unit turns, of course, on the entire congeries of facts in each case." That truth does not, however, preclude the need for rational and reasonably consistent assessments of such factual situations.

NLRB v. Food Employers Council, Inc., 399 F.2d 501, 505 (9th Cir. 1968).

\[269\] To this extent, accretion by popular election might also encourage unions to be more responsive to the needs of its members. Because it will require their explicit support to grow by accretion, conscientious employees will only permit accretions when they believe they have been well-served by their union.

\[270\] Strom, supra note 26, at 80. Mr. Strom argues that the Board should give greater deference to accretion clauses in CBAs, and arbitration decisions interpreting the application of these clauses. Although this would obviate some of the problems associated with the community of interest balancing test, accretion clauses theoretically allow employers and unions to decide accretion questions without input from the affected employees.

\[271\] Miner, supra note 213, at 516.
those expenses can be minimized, and certainly do not require expensive litigation attorneys. For example, union members can volunteer to get the message about unions out to their co-workers.

C. Maximization of Employee Freedom

A system of accretion that utilizes elections is also superior to the present system in that it more directly serves employee freedom, "the primary consideration of union determination." Instead of simply paying lip service to the employees' desires, and instead of diluting those desires in the complex stew of a multi-factored balancing test, elections allow employees to have the maximum freedom to determine whether to associate with other employees for the purpose of collective bargaining. The right of expressive association is one of the fundamental freedoms of Americans, such that it is safeguarded by the First Amendment of the Constitution.

It is constitutionally protected because the right to communicate, particularly group speech concerning labor matters, is considered a fundamental right and essential to the survival of civilized society.

Although private unions are not constrained by constitutional provisions, the ideals expressed in the First Amendment manifest themselves in particular provisions of the NLRA. Specifically, §1 provides that the NLRB is designed to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing ...." Similarly, §7 provides that employees have the right "to bargaining collectively through representatives of their own choosing ...." "One of the principal policies of the national labor laws—that embodied in § 7—is the protection of the exercise by workers of full freedom of association, self-organization, designation of representatives of their own choosing for the purposes of

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272. Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1043 (9th Cir. 1978).
273. Recall that at least the Sixth Circuit does not even consider the desires of employees in making accretion decisions. NLRB v. Catherine McCauley Health Ctr., 885 F.2d 341, 345 (6th Cir. 1989) ("Employee desires,' an additional factor frequently included in other circuits, is not a relevant factor in this circuit."); Armco, Inc. v. NLRB, 832 F.2d 357 (6th Cir. 1987); NLRB v. Am. Seaway Foods, Inc., 702 F.2d 630, 633 n.3 (6th Cir. 1983) (per curiam); NLRB v. Pinkerton's, Inc., 428 F.2d 479, 484 (6th Cir. 1970).
274. See Roberts v. U. S. Jaycees, 468 U.S. 609, 623 (1984); see Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233 (1977) ("Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments.").
negotiating the terms and conditions of their employment."\textsuperscript{278} The right to select their own bargaining representative "is the predominant consideration under § 7 of the Act and is to be restricted only under 'compelling conditions.'"\textsuperscript{279} Employee choice as to whom will be their representative should be jealously protected by the Board and the courts. In deciding accretion cases, then, the Board must "'assure to employees the fullest freedom in exercising the rights guaranteed' by the National Labor Relations Act."\textsuperscript{280} Yet "in some circumstances the Board permits an accretion where majority status is not demonstrated at the new unit,"\textsuperscript{281} and in many others it doesn't even bother to consider the employees' opinions or desires.\textsuperscript{282}

There could be no better way to prevent this from occurring—and at the same time preserve § 7 freedoms—than by allowing employees to determine their own fate vis-à-vis their selection of a collective bargaining agent.\textsuperscript{283} In accordance with § 7 and its corollaries, where a group of employees seeks, through an accretion, to join its voice with an established unit, it should have the right to do so, regardless of what the Board thinks about any particular case.\textsuperscript{284} Just as the government cannot prohibit expressive associations, so too the Board should not be permitted—through its vague overwhelming community of interest balancing test—to prevent employees from associating with an organized unit for purposes of collective bargaining. An accretion system that relies on elections ensures that employees enjoy the fundamental right to associate with others for purposes of advancing their shared beliefs and interests, and thereby serves a key purpose of the NLRA.\textsuperscript{285} Just as important, it prevents accretable employees from having to associate with a union they would rather avoid, or at least allows them to voice their opinion on the matter.

\textsuperscript{278} Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 512 (5th Cir. 1982).
\textsuperscript{279} Boire v. Bhd. of Teamsters, 479 F.2d 778, 797 (5th Cir. 1973).
\textsuperscript{280} NLRB v. Catherine McCauley Health Ctr., 885 F.2d 341, 344 (6th Cir. 1989) (quoting Indianapolis Glove Co. v. NLRB, 400 F.2d 363, 368 (6th Cir. 1968)).
\textsuperscript{281} Boire, 479 F.2d at 797. The Fifth Circuit goes on to note that these cases are rare. Nevertheless, to the employees affected, these decisions are hardly minor.
\textsuperscript{282} See, e.g., Scripps Newspaper Corp., 329 N.L.R.B. 854, 1999 NLRB LEXIS 740, at *17-18 (1999) (listing the factors the Board considers in accretion cases; "employee desire" is noticeably absent).
\textsuperscript{283} Of course, the Board might think, paternalistically, that it knows better than employees.
\textsuperscript{284} This presumes that the employees of the established unit are amenable to this joiner.
\textsuperscript{285} See 29 U.S.C. § 151 (1994)(noting that it is the policy of the United States to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ").
D. **Greater Protection of the Unit Employees' Rights**

The election system proposed above serves to protect the rights, not only of the group to be accreted, but also of the employees of the preexisting unit. Presently, such employees don’t have a direct hand in the accretion decision. The Supreme Court has held in the First Amendment context that: “There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”\(^{286}\) "The forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”\(^{287}\) Although these are general principles of constitutional law—which are qualified in some ways in the labor context—the reasoning behind these principles is equally applicable to unions. Just as the government should not be able to force groups founded to express particular points of view to accept members who don’t share those same opinions, a unit of employees—acting in concert to represent a particular bargaining position—should not be forced to accept an accretion that would disrupt their expressive activities, including their right to bargain effectively with their employer. They should have the right to exclude an accretable unit when addition of the accretable unit would not serve the goals of the preexisting unit’s employees.

Under the present “community of interest” balancing test, this concern is merely one factor that the Board will consider, and rather obliquely at that. It can easily be overlooked, or overborne by a strong showing on the other factors. The election system proposed above, however, empowers the members of the established unit to veto proposed accretions.\(^{288}\) By entrusting the employees of the unit with the power to block an accretion, they have the ability to prevent accretions that otherwise would destroy the unity of the bargaining unit. In doing so, the election system is superior to the overwhelming community of interest balancing test, which, as demonstrated above, has proved unwieldy and unpredictable.

Furthermore, by placing this authority to block an accretion in the unit employees—as opposed to just the union representing them—the ballot system gives the unit employees greater power and autonomy, not only

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288. It is true that the “collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit.” Vaca v. Sipes, 386 U.S. 171, 182 (1967). This does not mean, however, that an employee should have no say in the way the union conducts its affairs, particularly in its decision to expand greatly the size of the bargaining unit.
with respect to the accretion, but also with respect to control over their union representatives. Thus, if a union desires an accretion, it will be forced to obtain the consent of the employees. Perhaps in some instances, the union will discover that unit employees have not been particularly happy with the union's leadership or its efforts. The ballot system allows employees to voice their disapproval by vetoing a union-endorsed accretion. By blocking the accretion, they have the ability to express their lack of confidence in the union through a means less drastic than a decertification election, thereby furthering one of the goals of the NLRA: industrial stability. "Bargaining unit employees in the real world have limited opportunities to police their bargaining agent." The right to vote in accretion elections gives union members an opportunity to patrol the union hierarchy and inflict a minor punishment for unsatisfactory representation. They can utilize this veto power to warn union leaders of the organization's impending demise if it fails to change course. By doing so, the employees also protect the interests of the group that was to be conjoined, as these employees will be saved from joining a unit that is unsatisfied with its bargaining representative. In short, the freedom of choice intimately connected to the proposed accretion elections can serve many of the interests that the NLRA was designed to protect, and to a much greater extent than the Board's present use of an archaic and unfair balancing test.

IV. THE DOWNSIDE OF AN ACCRETION ELECTION SYSTEM

A. Overinclusive and Heterogeneous Units

An election system is the best system available to judge the propriety of accretions, and is certainly superior to the present community of interest balancing test. That is not to say, however, that strong arguments cannot be marshaled in opposition. Perhaps the best argument against an election system for accretions is that it might not ensure that there is a community of interest between the group to be accreted and the established unit. Under the present system, an accretion cannot be approved by the Board unless an overwhelming community of interest is shown, although it is not clear exactly when this level of community exists. The requirement of showing substantial similarity of interest is supposed to prevent the


290. But recall that the accretion can occur even when such a strong affinity is not shown, so long as it occurs with the employees' consent. In this sense, the present system is no different from the proposed election system.
creation of overinclusive units:

When the unit is overinclusive, several dangers exist. A conflict in interest may develop... the likely result is that the interests of the minority will be overlooked or intentionally discounted. The conflict might also lead to instability in employer-employee relations. Thus, conjoining employees who lack the necessary community of interests threatens both employee rights and industrial peace.\(^\text{291}\)

It is the fear of this overinclusiveness that spurs unions to oppose large units. Accretions, even those with the popular support of the employees, can create the danger of overinclusive unions and the destructive effects that they can entail. It is for this reason that employees’ wishes cannot supplant all other considerations; as the Board has pointed out

in other contexts, the parties cannot by consent override the Act’s policies or the Board’s authority. Employee choice cannot

be used to justify a gerrymandered unit, particularly when ... it may not reflect the employees’ judgment of their common interests, but may simply evince employee self-interest.\(^\text{292}\)

But these fears of election-generated overinclusiveness are exaggerated and largely unfounded. Because unions will have a full opportunity to oppose employer-instigated accretion elections, they can communicate any concerns about conflicting interests to both non-unit and unit members. They retain the power of education and persuasion, which, if properly exercised, will sufficiently protect against overinclusiveness. Notably, the dangers associated with overinclusiveness have not materialized where the Board has officially adopted accretion elections as the means by which it judges community of interest. If an employer or another union seeks to accrete the group to a “gerrymandered” unit, the employees of the group to be accreted can: (1) vote to reject joining it; (2)

\(^{291}\) Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1045 (9th Cir. 1978).

[T]he more homogenous the group of workers composing a proposed unit is with respect to the terms and conditions of employment—the greater, in other words, the community of interest among those workers is—the more likely they are to be well served by a single, exclusive bargaining representative, and the less likely there is to be a dissatisfied minority.

Cont’l Web Press, Inc. v. NLRB, 742 F.2d 1087, 1090 (7th Cir. 1984). But as Judge Posner also notes, homogeneity comes at a price: reduced size and power. At some level, heterogeneity is accepted because this acceptance permits a larger and more powerful unit.

\(^\text{292}\) Pac. Southwest Airlines, 587 F.2d at 1044.
agree to join it where they believe it will serve their best interests; (3) seek to form their own unit; or (4) seek accretion to another unit. Because the majority rules, there is no danger—as there is under the present system—that the Board will railroad the employees into an objectionable unit or one that won’t protect their interests. Under the accretion election system, the employees’ interests are safeguarded by the body most capable of zealously defending them: the employees themselves.

The community of interest test is only “necessary in order to preserve the employees’ § 7 rights.”293 When those rights are protected—to a greater extent than the community of interest test protects them—through secret ballot elections, there is little need to bother with the community of interest test. Because the Board defers to the employees’ determination of what is an appropriate unit in other types of cases, there is no reason why it should not do so in accretion cases. An election system that adequately protects employee interests should not be criticized simply because it fails to incorporate a less predictable balancing test.

Of course, some employees might be lured into voting to join a unit with which they have little in common simply because they expect higher wages and better benefits if they join that unionized unit.294 The objection might arise that these employees are not making their decision on the basis of the community of interest they share with the unit, but on the basis of their desire to obtain better wages. The problem with this objection is that the desire for better wages and benefits is a common interest that binds all unionized workers, and indeed, all workers. Indeed, it is this desire that brings together many workers who otherwise would have little in common. So a unit that is bound primarily by this common interest is not necessarily a weak organization. The desire for better wages and working conditions can be a remarkably cohesive force.

If employees are willing to join together to obtain better wages and working conditions, they should be permitted to do so, despite the fact that they don’t share a complete commonality of interests. If a broad interest such as opposition to taxation without representation was sufficient to compel the people of thirteen diverse colonies to unionize,295 the desire to obtain better terms and conditions of employment should be sufficient for diverse employees to unionize through an accretion where, like the colonists, they vote to support this confederation.

293. Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., 690 F.2d 489, 521 (5th Cir. 1982).
294. At the core, it is presumably this desire for better terms and conditions of employment that motivated all union members to join.
295. JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 39 (1996) (“Opposition to taxation without representation provided a common denominator for the colonies.”).
As Judge Posner has noted, all employees of a firm can be said to share some community of interest.296 "There is a sense in which all people employed in the same firm, the same craft, or even the same industry share a community of interest..."297 The Board has never specified the level of homogeneity required for an accretion, but there is no reason to believe that employees cannot ascertain the appropriate level of community at least as well as the Board's balancing test. Once employees make this assessment, they can cast their vote accordingly. True, they may err, but the probability of error is no greater for the employees than for the Board whose members, after all, don't work day in and day out with the relevant employees. The effected employees have primary access to the relevant information. Furthermore, unlike the affected employees, the Board members never suffer the consequences of an erroneous accretion determination. Presumably, then, the employees have greater incentive to carefully weigh the competing interests relevant to the "community of interest" question.

Finally, although the proposed system of accretion elections adequately protects against overinclusiveness and ensures that a community of interest exists, if the Board believed that elections do not sufficiently safeguard unit cohesion, it could always modify the election proposal to include an application of the community of interest test as a second step in the accretion analysis, after also modifying it to favor accretions that were supported by the majority of employees in the proposed secret ballot election. Under such a system, if the employees voted for an accretion sponsored by their employer, the Board would then ask whether the employees of the respective groups had so little in common that they shared no reasonable community of interest.298 The union opposing the accretion would have the substantial burden—perhaps by clear and convincing evidence—of proving that the employees do not share a community of interest. The Board would operate under the presumption that a popularly supported accretion was appropriate unless there were a strong showing under the community of interest test that the employees had almost no common interest with respect to collective bargaining. Of course, inclusion of this post-election challenge procedure would resurrect some of the same problems and inefficiencies that plague the Board's present use of the community of interest test. So it should be adopted reluctantly, used sparingly, and then only when there are substantial doubts about the common interests of the two groups.

297. *Id.*
298. This determination could be made before an election too, so long as the Board uses the same presumptions and assigns the burden of proof to the party opposing the accretion.
Another objection to the accretion election system is that it constitutes an improper delegation of the Board’s power to determine an “appropriate unit.” As the Ninth Circuit has explained: “Before any self-determination election is had, regardless what type of employees are involved, the Board must first determine what units would be appropriate. The Board cannot delegate this preliminary duty to the employees.”\textsuperscript{299} But the Ninth Circuit is only partially correct.

It’s true that Congress entrusted the Board with the duty to determine which units are “appropriate.”\textsuperscript{300} Congress, however, did not instruct the Board as to how it was to make that determination, leaving it instead to the Board’s discretion.\textsuperscript{301} So, if the Board exercised its discretion to make accretion determinations according to the wishes of the employees in the affected groups, it seems that this would be permissible under the Act. As it stands now, under the community of interest test, “[e]mployee choice can tip the balance in determining which of two equally appropriate units should be preferred.”\textsuperscript{302} If that’s so, then employee choice is already the deciding factor in some accretion cases. And if it already serves as the sole factor the Board considers in deciding whether there is a substantial community of interest among two groups of employees.

It seems likely that the Board has the discretion to adopt the wishes of the affected employees as the sole factor it considers in its community of interest analysis. As the Ninth Circuit noted: “Although it may consider other factors, the Board’s discretion is broadest when exercised in favor of employee freedom.”\textsuperscript{303} Nothing is more conducive to employee freedom than asking the employees themselves what they would prefer, and what they believe is in their best interests. Furthermore, it’s worth noting that the Board has utilized secret ballot elections to decide accretion cases in the past:

\begin{quote}
[T]he Board has held that even though it might have found an overall unit appropriate on a representation petition, and thus have given all employees at all locations an equal voice in the initial representation decision, it would not “under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit
\end{quote}

\textsuperscript{299.} Pac. Southwest Airlines v. NLRB, 587 F.2d 1032, 1038 n.10 (9th Cir. 1978).
\textsuperscript{300.} 29 U.S.C. § 159(b)(1994).
\textsuperscript{301.} Cont'l Web Press, Inc., 742 F.2d at 1089 (“[S]ection 9(b) is a broad delegation of power to the Board”).
\textsuperscript{302.} Pac. Southwest Airlines, 587 F.2d at 1044.
\textsuperscript{303.} Id.
without allowing those employees the opportunity of expressing their preference in a secret election or by some other evidence that they wish to authorize the Union to represent them.\textsuperscript{304}

This practice of ensuring support through secret elections makes perfect sense, and therefore should be expanded through the system suggested above. After all, who is more qualified than the employees themselves to determine whether they share a substantial community of interest with employees in an organized unit?\textsuperscript{305} Thus, relying on employee voting to determine the question of whether employees share a community of interest is neither novel nor prohibited under present law. It is simply underutilized.

The permissibility of using majority elections to determine accretion cases is also supported by the National Labor Relations Act itself. The Act already requires the Board, in some instances, to defer to the wishes of the majority of employees when determining appropriate units. For example, the Act provides that the Board cannot decide that a unit composed of both professional and non-professional employees is appropriate "unless a majority of such professional employees vote for inclusion in such unit.\textsuperscript{306} Similarly, the Board shall not "decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.\textsuperscript{307}

These provisions demonstrate several things relevant to accretion elections. First, Congress perceived elections as a sufficient way to settle which units were "appropriate units." Because Congress explicitly made elections a means of determining appropriate units, it is certainly within the Board’s discretion to use elections in determining the appropriateness of an accretion. Second, these provisions demonstrate the importance Congress placed on employee choice in determining appropriate units. Although it didn’t require elections in all circumstances, Congress wanted elections to govern the more difficult cases, demonstrating that employee choice was

\textsuperscript{304} Boire v. Int’l Bhd. of Teamsters, 479 F.2d 778, 798-99 (5th Cir. 1973) (quoting Melbet Jewelry Co., 180 N.L.R.B. No. 24 (1969)).

\textsuperscript{305} It might be argued that the Board is more qualified to make this determination, based on its particular expertise in this area. But as many prominent jurists—such as Learned Hand and Abe Fortas—have recognized, the expertise of administrative agencies is overemphasized, exaggerated, and is indeed non-existent in many cases. Hand “repeatedly doubted the political neutrality and genuine expertise of the administrative agencies . . . .” GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 473 (1994). Demonstrating the ignorance of even basic facts related to their “area of expertise,” Abe Fortas “enjoyed telling the story of his fellow AAA lawyer Lee Pressman, who thought farmers grew macaroni.” KALMAN, supra note 114, at 30-31 (footnote omitted).


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paramount. Requiring elections in accretion cases similarly puts employee choice in that exalted position. It permits members of the unit and the group to be accreted to decide whether the accretion would result in the formation of an appropriate unit.

V. CONCLUSION

The present system used by the Board to decide accretion cases—the overwhelming community of interest balancing test—has proved unpredictable and is easily manipulated by the parties and the Board itself. It leads to no clear rules or standards to guide litigants, and therefore foments further litigation. Accordingly, the Board should discard the balancing test in accretion cases. In its place, the Board should adopt a secret ballot election system.

Because the Board has broad discretion in unit determinations and accretions, adopting an election system is well within its power. There is no statutory requirement that the Board use the community of interest balancing test. An election system would be a great improvement over the present test, as it would simplify accretion cases, make them subject to objective criteria, and maximize the employees' § 7 freedom to bargain collectively according to their own associational interests.

The accretion election system outlined above also protects existing unions from destabilizing accretions, and ensures that accretions occur only with the consent of the established unit. In short, an election system would better preserve employee freedom and industrial stability, and would do so with less expense and trouble for the Board and the affected parties.

308. Consol. Edison Co. of N.Y. v. McLeod, 302 F.2d 354, 355 (2d Cir. 1962) ("[T]he Board's action in disregarding its own 'accretion' doctrine is clearly not unconstitutional nor violative of any specific command of the statute.").