

RECONSIDERING BROWN UNIVERSITY MORE THAN A DECADE LATER

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I. Introduction

Graduate students at Brown University, Cornell University, The New School, Yale University, and Columbia University have initiated unionization drives within the last year. At Columbia, the student group who initiated the unionization drive claimed that it had gotten 1,700 of Columbia's 2,800 graduate teaching and research assistants to sign forms declaring that they wanted a union to represent them and had petitioned the regional office of the National Labor Relations Board for an election.¹ However, despite a majority of Columbia's graduate students expressing a desire to be represented by a union, the regional office refused to recognize the bargaining unit because of National Labor Relations Board precedent holding that graduate students are not employees under the National Labor Relations Act, and therefore cannot unionize.²

Graduate students often take on multiple roles while enrolled in their programs of study. In addition to completing the required coursework and writing, graduate students are often asked to carry out a significant portion of the teaching and research load for their universities. As teaching assistants, graduate students typically teach lecture courses for a professor or preside over smaller discussion sections, whereas research assistants conduct field and laboratory research under the supervision of a professor and aid in furthering that particular professor's research.³ Graduate students generally receive some form of compensation, tuition remission or both in return for performing these duties.⁴

Similar to other workers, graduate students are concerned about wages, hours, and other working conditions and have sought to engage in collective bargaining under the National Labor Relations Act ("NLRA") in order to address these

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1 Steven Greenhouse, *Columbia Graduate Students Push for a Labor Union*, N.Y. Times, March 4, 2015, at A23.

2 Columbia Univ., 02-RC-14301 (2015).

3 Adelphi Univ. 195 NLRB 639, 640 [(1972) (categorizing graduate students into teaching assistants and research assistants and differentiating their respective roles).

4 For example, graduate students at Columbia University receive stipends varying between \$20,000-\$40,000 depending on the department. Greenhouse, *supra* note 1.

concerns.⁵ Efforts by graduate students to gain union representation under the NLRA are complicated due to the employee status issue – specifically, whether an individual can simultaneously be a student and employee and therefore covered under the NLRA.⁶ While the issue of whether a graduate student can be both a student and an employee is not new,⁷ it has taken on greater significance as universities are increasingly relying on graduate students as a cost effective way of avoiding the higher wages demanded by full-time faculty.⁸

For much of the National Labor Relations Board’s history, it has either side-stepped the issue of whether graduate students at private universities were employees under the National Labor Relations Act or has ruled for one reason or another that graduate students could not simultaneously be employees. However, in 2000, the National Labor Relations Board (“NLRB” or “the Board”) reversed nearly three decades of precedent regarding graduate student status when it addressed the issue in *New York University*.⁹ There, the Board determined that graduate students were employees under the NLRA. The *New York University* decision had the effect of allowing graduate students at all private universities the possibility of forming a union in order to engage in collective bargaining. However, the *New York University* decision was short-lived. Four years later, the Board reverted to its prior doctrine in *Brown University*, denying graduate students the right to unionize on the rationale that they were primarily students and not employees.¹⁰ Currently, the holding articulated in *Brown* remains good case law and the precedent by which all graduate student unionization efforts are evaluated.

This note begins with an overview of the Board’s history and structure. Part III discusses a series of cases in which the Board gradually adopted jurisdiction over private universities and incrementally developed its community of interest doctrine as that doctrine relates to graduate students. Part IV provides an in-depth history of the NLRB’s jurisprudence as it grappled with whether graduate students were employees under the meaning of the NLRA. Part V addresses the Board’s turnaround in *New York University* and Part VI examines the Board’s most recent decision in *Brown*. Part VII entertains criticisms of *Brown* and argues that *Brown* was wrongly decided because it deviated from prior interpretations of the statute and previous Board precedent.

5 Grant M. Hayden, “The University Works Because We Do”: Collective Bargaining Rights for Graduate Assistants, 69 *Fordham L. Rev.* 1233, 1237 (2001).

6 Robert A. Epstein, Note, *Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus*, 20 *St. John’s J. Legal Comment.* 157, 162 (2005); *Brown Univ.*, 342 NLRB 483, 483 (2004) (declaring that the issue to be decided was whether or not graduate student assistants must be treated as employees for purposes of collective bargaining).

7 Graduate student unionization was first addressed in *Adelphi University* in 1972. *Adelphi Univ.*, 195 NLRB 639 (1972).

8 Epstein, *supra* note 6 at 181.

9 *New York Univ.*, 332 NLRB 1205 (2000).

10 *Brown Univ.*, 342 NLRB 483 (2004).

II. The National Labor Relations Board's History, Structure, and Jurisdiction

A. History

With the passage of the National Labor Relations Act in 1935, Congress created the National Labor Relations Board.¹¹ The NLRA was the second attempt by the Roosevelt administration to create a nationwide uniform right to organize. It displaced a complex body of state common law governing labor relations which emanated from judicial doctrines of conspiracy and tortious conduct.¹² The previous legislation, the National Industrial Recovery Act, had been struck down by the Supreme Court the preceding year holding it exceeded Congress' authority under the Commerce Clause.¹³ The constitutionality of the NLRA was also challenged, but this time the Court upheld the law as a legitimate exercise of Congressional authority under the Commerce Clause.¹⁴

The NLRA delegated to the NLRB two distinct functions: the prevention and remedying of unfair labor practices¹⁵ and the determination of questions concerning representation.¹⁶ In both kinds of cases, the processes of the NLRB are begun only when requested. These requests must be made in writing and filed with the proper Regional Office. Further, while performing these functions, the NLRB is to represent the public rather than any particular private right or interest.¹⁷ In enacting the NLRA, Congress sought to "obtain 'uniform application' of its substantive rules and to avoid the 'diversities and conflicts [which were] likely to result from a variety of local procedures and attitudes toward labor controversies.'"¹⁸ Therefore, Congress submitted NLRB actions and decisions to judicial review by federal courts of appeal only.¹⁹ When reviewing Board decisions on appeal, the Supreme Court has articulated that appellate courts should give

11 Modjeska ET AL, Federal Labor Law: NLRB Practice §1:1 (2015).

12 Raymond L. Hogler, The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions, 23 Hofstra Lab. & Emp. L.J. 101, 104 (2005).

13 A.L.A. Schlechter Poultry Corp. v. United States, 295 U.S. 495 (U. S. 1935).

14 NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (U. S. 1937).

15 "Congress ensured that collective bargaining would go forward by creating the Board and giving it the power to condemn as unfair labor practices certain conduct by unions and employer that it deemed deleterious to the process. . . ." First Nat'l Maint. Corp. v. NLRB, 452 U.S. 666, 674 (U. S. 1981).

16 Modjeska, supra note 11.

17 Id.

18 NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (U. S. 1971) (quoting Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776 (A.F.L.), 346 U.S. 485, 491 (U. S. 1953)).

19 Modjeska, supra note 11.

the Board's decisions great deference.²⁰ This deference is due in large part to the Board's composition of experts who have specialized knowledge of labor law.²¹

B. Structure

The National Labor Relations Board includes the Board, the General Counsel, and the regional and sub-regional offices. The NLRB has a bifurcated structure consisting of the General Counsel and the Board. The General Counsel is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the thirty-three NLRB field offices.²² The General Counsel is appointed by the President, with consent of the Senate, to a four-year term. The Board is the NLRB's judicial branch and is comprised of five members who serve five-year terms and are nominated by the President and confirmed by the Senate.²³ Each member is appointed to a staggered, five-year term.²⁴ The process allows each administration to have the opportunity within one term to almost entirely reshape the membership of the Board and to align the Board's views on labor relations policy with that of the administration.²⁵ Consequently, the nomination process has taken on enormous significance and has become increasingly politicized.²⁶ This process, coupled with a high turnover rate of the Board, makes decisions unpredictable and may help to explain why the Board recently has reversed itself within short periods of time.

The Board hears appeals from unfair labor practice cases and challenges pertaining to the elections process. These appeals are derived from decisions in representation cases by Regional Directors and cases prosecuted by NLRB regional field office attorneys around the country and adjudicated in front of an NLRB administrative law judge.²⁷ In order for the Regional Office to process a representation petition for an election, workers must establish that at least thirty

20 See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (U. S. 1990); *NLRB v. J Weingarten, Inc.*, 420 U.S. 251, 266 (U. S. 1975) (stating the Board's "special competence in this field is the justification for the deference accorded its determination.").

21 *Modjeska*, supra note 11; *Lechner, Inc. v. NLRB*, 502 U.S. 527, 536 (U. S. 1992).

22 National Labor Relations Board, General Counsel, <https://www.nlr.gov/who-we-are/general-counsel> (last visited Nov. 5, 2015).

23 29 U.S.C. §153 (2015).

24 *Modjeska ET AL*, *Federal Labor Law: NLRB Practice* §2:1 (2015).

25 Ryan Patrick Dunn, Comment, Get a Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities Are Not "Employees" under the National Labor Relations Act, 40 *New Eng. L. Rev.* 851, 861 (2006).

26 See, e.g., *NLRB v. Noel Canning*, 134 S.Ct. 2550 (U. S. 2014), in which an employer challenged a ruling by the Board which consisted of three members who had been appointed by the President using his recess appointment powers. The employer challenged the ruling on grounds that the Board lacked a quorum because the three members were inappropriately appointed. The Senate had met in pro forma sessions in order to thwart the appointment process.

27 National Labor Relations Board, The NLRB Process, <https://www.nlr.gov/resources/nlr-process> (last visited Nov. 5, 2015).

percent²⁸ of the individuals within an appropriate bargaining unit^{29,30} have signed authorization cards or some other indicia which proves that the employees have an interest in having a particular entity serve as the employees' sole representative for purposes of collective bargaining. If there is a thirty percent showing of interest, the NLRB Regional Director will process the petition and determine issues which may arise concerning the election process. In order to become the bargaining unit's sole representative, the union must receive a majority of the votes cast from an appropriate bargaining unit. If the union obtains such a majority and there are no valid objections to the conduct of the election, the Regional Director will certify the union as the unit's representative.³¹ Following certification, the employer and union are required to meet and confer and to bargain in good faith over wages, hours, and other terms and conditions of employment.³² The failure to bargain with the union at this point would constitute an unfair labor practice.³³

C. Jurisdiction

As noted above, Congress legitimized its authority to enact the NLRA under its commerce power. In order for an employer to fall under the purview of the NLRB, it must be demonstrated that the employer engages in a minimum amount of interstate commerce.³⁴ The NLRB's jurisdiction is very broad and covers a great majority of non-government employees within the workplace. Thus, in the college and university setting, the ability of graduate students to organize will depend on whether the university is engaged in interstate commerce and is public or private. The NLRA regulates only private sector employers; state law governs the organizational rights of graduate students at public universities.³⁵

28 29 U.S.C. §159(e)(1) (2015).

29 29 U.S.C. §159(b) (2015).

30 In determining the appropriate bargaining unit, the Board often looks at whether the employees have a "community of interests." A community of interests analysis will look at whether the employees in the proposed bargaining unit share: similarity in the scale and manner of determining earnings; similarity of employment benefits, hours of work and other terms and condition of employment; similarity in the kind of work performed; similarity in the qualifications, skills and training of the employees; frequency of contact or interchange among the employees; geographic proximity; continuity or integration of production process; common supervision and determination of labor relations policy; relationship to the administrative organization of the employer; history of collective bargaining; desires of the affected employees; extent of union organization. *NLRB v. St. Francis Coll.*, 562 F.2d 246, 249 (3d Cir. 1977).

31 National Labor Relations Board, Conduct Elections, <https://www.nlr.gov/what-we-do/conduct-elections> (last visited Nov. 12, 2015).

32 29 U.S.C. §158(d) (2015).

33 See National Labor Relations Board, *supra* note 21.

34 There are varying dollar thresholds depending on the type of business the employer engages in. For example, retailers must have an annual gross volume greater than \$500,000 and non-retailers' inflow and outflow of goods across state lines must exceed \$50,000 in order for the Board to have jurisdiction; the NLRB also has a "special categories" which includes transportation, health care, and child care facilities. The threshold for colleges, universities, other schools, museums, or symphony orchestras is \$1 million annually. National Labor Relations Board, Jurisdictional Standards, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Nov. 12, 2015).

35 The NLRA excludes from its coverage employees of the United States and of any State or political division. 29 U.S.C. §152(2); see also Neal Hutchens & Melissa Hutchens, *Catching the Union*

State labor laws vary greatly in their permissibility of collective action by employees. Some states have recognized graduate student as employees as well as their right to organize and negotiate collective bargaining agreements.³⁶ Currently, approximately fourteen states permit public university graduate students to engage in collective bargaining.³⁷ In approximately eleven states, public university employees are allowed to collectively bargain, but the eligibility of graduate students has yet to be determined.³⁸ In these instances, state statutes are usually silent and the determination of whether graduate students are employees eligible to unionize has been left to the courts and state labor boards.³⁹ In another twenty-three states, collective bargaining rights are denied to all university employees, including graduate students.⁴⁰ Given the significant variation among state labor laws, graduate students must look to the specific statutory scheme of the state where their institution is located in order to determine which policies and procedures govern their right to organize for purposes of collective bargaining.

Unlike public universities which are governed by their state labor laws, private universities fall under the domain of the NLRB. However, the NLRB has historically refused to recognize graduate students at private universities as employees.⁴¹ As the following cases demonstrate, the NLRB was slow to extend its jurisdiction to include private universities *per se*, much less students at such universities.

1. Columbia University

In the decades following its enactment, the NLRB refused to extend collective bargaining rights to anyone employed by private universities under the theory that colleges and universities were not engaged in interstate commerce, and therefore were beyond the reach of the Board. This view was first expressed in 1951 concerning Columbia University. In *Columbia University*, a group of clerical employees for the various libraries at the university sought recognition as a unit. The Board acknowledged that the activities of the university sufficiently affected commerce “to satisfy the requirements of the statute and the standards established by the Board for normal exercise of its jurisdiction. . . .”, however, it was deeply concerned about extending jurisdiction to a not-for-profit educational institution.⁴² The Board had identified a Senate Committee Conference Report which explained that not-for-profit corporations and associations operating as hospitals were not meant to be covered by the NLRA.⁴³ It reasoned that extending jurisdiction to a

Bug: Graduate Student Employees and Unionization, 39 Gonzaga L. Rev. 105, 108 (2004).

36 Id.

37 Id. at 108.

38 Id.

39 Hayden, *supra* note 5 at 1243.

40 Hutchens, *supra* note 24 at 108.

41 Rogers ET AL, Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom and Pay, 66 Indus. & Lab. Rel. Rev. 487, 488 (2013).

42 Trustees of Columbia Univ., 97 NLRB 424, 425 (1951).

43 Id. at 427.

not-for-profit university would not effectuate the policies of the NLRA, “where the activities involved are not commercial in nature and intimately connected with the charitable purposes and educational activities of the institution.”⁴⁴

2. Cornell University

This doctrine persisted for nearly twenty years until the Board revisited the issue in Cornell University. In Cornell University, the Board reversed its holding in Columbia University and extended the NLRB’s jurisdiction to include private universities. Similar to Columbia University, Cornell did not involve graduate students, but rather was an attempt by Cornell and Syracuse University employees to obtain bargaining rights under the NLRA. The Board began its opinion by noting the aggregate operating budget of each institution, its expenditures, government appropriations, and profits from ancillary services provided by the University – each exceeded hundreds of thousands or millions of dollars. It also noted each universities’ significant interactions outside the state. The Board then acknowledged its previous holding in Columbia, but asserted that “the Board’s discretionary standards for asserting jurisdiction [are] not fixed. . . .”⁴⁵ Congress was content to “leave to the Board’s informed discretion . . . when to assert jurisdiction over nonprofit organizations whose operations have a substantial impact on interstate commerce.”⁴⁶

The Board explained that the dividing line between purely commercial and noncommercial activity, as it related to university activity, had not been easily defined. While universities’ primary goals were still educational in nature, in order to carry out their educational functions, universities had “become involved in a host of activities which [were] commercial in character.”⁴⁷ Consequently, it was no longer appropriate to extend universities the same exemptions as not-for-profit hospitals. Despite determining that the universities had engaged in commercial activity affecting interstate commerce, the Board refused to establish a precise threshold for when it would exercise jurisdiction and left such a determination for a later date.⁴⁸

With their newly expanded jurisdiction, the NLRB was now able to hear challenges from graduate students at private universities seeking to unionize.

3. Adelphi University

Two years after Cornell, the Board decided a case involving graduate students in Garden City, New York, who attempted to join a faculty union in order to collectively negotiate their working conditions. The Board began its analysis in the same way it began its Cornell opinion, by noting that the University had gross revenues exceeding \$1 million and had purchased materials valued in excess of

44 Id.

45 Cornell Univ., 183 NLRB 329, 331 (1970).

46 Id.

47 Id.

48 Id. at 334.

\$50,000 from sources outside the State of New York. Given these factors, the Board concluded that the university had “engaged in commerce within the meaning of the Act. . . [and] it [would] effectuate the purpose[] of the Act to assert jurisdiction.”⁴⁹

The Adelphi University graduate students received free tuition in addition to receiving a stipend, which ranged from \$1,200-\$2,900. In exchange for the stipend, the graduate students were required to perform various duties for approximately twenty hours per week which included teaching classes, preparing examinations, and grading.⁵⁰ Because the graduate students sought to join the same bargaining unit as faculty, the Board performed a “community of interest” analysis in which it highlighted the differences between faculty and graduate students.

The graduate assistants are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such. They do not have faculty rank, are not listed in the university’s catalogs as faculty members, have no vote at faculty meetings, are not eligible for promotion or tenure, are not covered by the University personnel plan, have no standing before the University’s grievance committee. . . Unlike faculty members, graduate assistants are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned.⁵¹

Thus, the Board determined that there were significant differences between the type of work and functions performed by graduate students and faculty. These disparities were significant enough that a bargaining unit comprised of graduate students and faculty would not share a similar “community of interest”, but rather they would likely have divergent interests, making it nearly impossible for a single labor organization to represent the interests of both faculty and graduate students in one unit. These divergent interests existed because the Board determined that the graduate students were “primarily students” and therefore it was inconceivable that they could have a sufficient community of interest with the regular faculty.⁵²

III. Refinement of the NLRB’s Jurisdiction and the Community of Interest Doctrine

The decisions in Cornell and Adelphi firmly established the NLRB’s jurisdiction over private universities as it relates to collective bargaining. In a series of early 1970’s decisions, the Board began to articulate which members performing which job functions qualified as workers under the NLRA for purposes of joining a faculty union. At the conclusion of these cases, one thing was apparent – all students were

49 Adelphi Univ., 195 NLRB 639, 639 (1972). See 29 C.F.R. §103.1: “The Board will assert jurisdiction in any proceedings. . .involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than \$1 million.”

50 Id. at 640.

51 Id.

52 Id.

excluded for purposes of collective bargaining.

C.W. Post Center was the first case in the series to address graduate students' ability to be included in a collective bargaining unit.⁵³ In that case, the Board had to determine the appropriate bargaining units for a number of traditional employees within the university system, including: full-time faculty, associate and adjunct professors, librarians, a research associate, laboratory personnel, and guidance and admissions counselors. The Board ultimately found that all professional employees constituted an appropriate bargaining unit but explicitly excluded "student assistants" and "graduate students".⁵⁴ However, the Board's rationale for permitting the lone "research associate" to join the collective bargaining unit was most telling. The research associate position was distinct from that of graduate students because he had already obtained a doctoral degree and did not teach classes. Rather, he conducted research supported by a grant given to the university. The position was similar to faculty in that he was able to receive tenure and therefore had a sufficient community of interest with other faculty members.⁵⁵ C.W. Post Center solidified the distinction between graduate students and faculty for purposes of joining the same bargaining unit – they had different qualifications and different interests in pursuing collective-bargaining, which meant that the two groups would never have a sufficient community of interests.

College of Pharmaceutical Sciences in New York was the second case in the early 1970s in which the Board fleetingly addressed graduate students' ability to join a faculty union.⁵⁶ The bulk of the Board's opinion addressed the appropriateness of including extended faculty, instructors in the institutional and clinical programs, and laboratory assistants to join a full-time faculty bargaining unit. In the course of that opinion, the Board did take time to refute the notion that graduate students would share the same community of interests as faculty because "their continued employment depends upon satisfactory academic progress toward their respective degrees."⁵⁷ It conceded they received a stipend and worked approximately sixteen to twenty hours a week, but made a distinction that the graduate students were "primarily students" and therefore did not "share sufficient community of interest with faculty members to warrant their inclusion in the unit."⁵⁸ In making a determination that the graduate students were primarily students, the Board was not making a ruling on their status as employees under the Act, but rather was making a distinction for purposes of evaluating a community of interests.

The following year the Board found yet another distinction between teaching assistants and a university-wide union which represented part-time employees. Teaching assistants at Georgetown University attempted to join a collective

53 Long Island Univ., C.W. Post Ctr., 189 NLRB 904 (1971).

54 Id. at 908.

55 Id. at 907.

56 Coll. of Pharm. Sci. in the City of New York, 197 NLRB 959 (1972).

57 Id.

58 Id. at 960.

bargaining unit which included clerical, technical, and hospital employees.⁵⁹ The Board noted that student employees were paid differently from regular part-time employees because their pay was diminished by the amount of financial aid each received via academic grants and federal aid.⁶⁰ The Board also noted that student employees typically only worked for nine months out of the year and therefore were unlike traditional part-time employees who worked year-round.⁶¹ Thus, the students had “many facts particular to themselves, and [did] not appear to have a community of interests with other regular part-time employees.”⁶²

Just a year later in Barnard College, the Board held that ten students – eight graduate students and two undergraduate students – who were employed as resident assistants and bowling alley operators could not be included in the collective bargaining unit of office clerical and other nonprofessional administrative staff employees.⁶³ The Board again distinguished between traditional university employees and student employees in determining that there was no community of interest. The Board reasoned that student employees are not permitted to remain permanently in their position of employment. However, the largest factor appeared to be that the students’ employment was “only incidental to their educational objectives.”⁶⁴ Also notable in Barnard College was the Board’s recognition of an emerging question of whether students who worked at the university were employees under Section 2(3) of the NLRA.⁶⁵ The Board did not address the issue of students being both students and employees because the students lacked a sufficient community of interest and therefore the question was moot. However, it was the first time the Board acknowledged the possibility of such an argument and one the Board would repeatedly have to address in the future.

The primary lesson learned from the preceding cases was that graduate students, or even students for that matter, could never share the same community of interests as faculty members or other university employees. Notable differences in their job description, their qualifications, and pay prevented graduate students from sharing a sufficient community of interests with lifelong academics who had obtained terminal degrees and occupied tenured positions at their institutions or with other university employees. If graduate students were going to establish an appropriate collective bargaining unit, with a sufficient community of interest, they would have to stop looking beyond their own ranks. They could avoid problems of community of interest only by forming their own unit.

IV. Graduate Students As Employees under the NLRA

In the mid-1970s, after years of unsuccessfully seeking recognition in units which

59 Georgetown Univ., 200 NLRB 215, 215 (1972).

60 Id. at 216.

61 Id.

62 Id.

63 Barnard Coll., 204 NLRB 1134 (1973).

64 Id. at 1135.

65 Id. at n. 5.

included faculty or other university staff, graduate students sought employee status and recognition exclusively as graduate students. Because graduate students generally encounter similar working conditions within the university, employers were unable to challenge the request for recognition on community of interest grounds. Rather, the Board had to address whether a student could in fact be an employee under the Act.

A. Leland Stanford University

In 1974, eighty-four graduate students in Stanford University's physics department sought recognition as employees and the right to form a union.⁶⁶ They did not seek to join a faculty union, but rather planned to start their own. The community of interest test as applied in the previous cases was not applicable; not only were all of the members within the unit graduate students, but they also were in the same course of study and therefore distinctions based on academic discipline were also out of the question.

The graduate students claimed that they were student-employees. In support of that statement, they noted that they were paid through Stanford's normal payroll machinery for their work and as such were employees under the NLRA.⁶⁷ However, Stanford insisted, and the Board agreed, that the physics graduate students were not employees. There were several notable characteristics of a traditional employer-employee relationship absent in the relationship between the graduate student research assistants and the university.

First, the research that the graduate students were required to engage in was a necessary part of the PhD program because it helped prepare the students to select a topic for their dissertation and they received academic credit for this work which counted towards their degree.⁶⁸ Second, the money received by the students was a stipend which was meant to make the pursuit of an advanced degree possible.⁶⁹ While it is true that the graduate research assistants received their stipend through Stanford's payroll machinery, the actual source of the funding was obtained through contracts or grants by government agencies or third parties. Research assistants did receive some benefits such as health care. They were not, however, extended traditional fringe benefits such as sick leave, vacation, or retirement benefits. Third, because the money received was a stipend, there was no correlation between the type of research done and the amount received by the student, nor was there a correlation between the hours spent conducting research and the amount received.⁷⁰ Finally, because the source of the stipend was from government contracts or grants, it was not taxed as part of the research assistants' income, but rather was tax-exempt.

66 The Leland Stanford Junior Univ., 214 NLRB 621 (1974).

67 Id.

68 Id. at 622.

69 Id. at 621.

70 Id.

Each of the above-described factors lent credence to the Board’s conclusion that the research assistants were “primarily students” and “not employees within the meaning” of the Act.⁷¹ In subsequent cases, these factors would form the basis of the “primary purpose” test. The primary purpose test would be used to determine whether the individual had achieved employee status under the Act or whether they were primarily a student.

B. Cedars-Sinai Medical Center

In 1976, the Board dismissed a petition for an election among interns, residents, and clinical fellows at Cedars-Sinai Medical Center in Los Angeles, California.⁷² While these individuals were not students per se, they were similar to graduate students because they were enrolled in programs which had a practical element which was required to obtain professional status. The interns, residents, and fellows had already completed the classroom portion of their medical degree requirements and were now engaged in the hands-on, or internship, component of their graduate degree. The internships, residencies, and clinical fellowships ranged from one year to five years, with an average length of less than two years. Upon completion of these programs, the majority left the training hospital and entered into practice elsewhere.⁷³

The individuals enrolled in these programs received a stipend of \$20,000. The Board determined that they did not participate in these programs in order to earn a living, but rather for the primary purpose of pursuing a graduate medical education, of which internships, residencies, and fellowships were a requirement.⁷⁴ Similar to graduate students in Stanford University, the number of hours worked or the quality of the work rendered had no bearing on the monetary compensation paid in the form of a stipend.⁷⁵ While the students did receive fringe benefits such as health care and vacation, they were not eligible for the employee retirement plan.⁷⁶ Finally, the Board determined that these programs were not designed for the purpose of meeting the hospital’s staffing needs, but rather to allow the students to develop the skills necessary to practice medicine in the area of the student’s choosing.⁷⁷ These factors, the Board believed, highlighted the “fundamental difference[s] between an educational and employment relationship.”⁷⁸

The stinging dissent written by member Fanning accused the majority of “exploit[ing] semantic distinctions between the terms ‘students’ and ‘employees.’”⁷⁹ Fanning argued that the NLRA did not require the relationship between student

71 Id. at 623.

72 Cedars-Sinai Med. Ctr., 223 NLRB 251 (1976).

73 Id. at 253.

74 Id.

75 Id.

76 Id. at 252.

77 Id. at 253.

78 Id. at 254 (Fanning, dissenting).

79 Id.

and employee to be mutually exclusive. Rather, the NLRA was meant to include any employee, unless explicitly excluded by the statute. Students, moreover, were not meant to be among those groups excluded from the statute. In rejecting the majority's primary purpose test, he noted that an individual could be "'primarily a carpenter' or 'primarily a student', but 'nevertheless, an 'employee' under the Act."⁸⁰

Fanning believed that the students were undoubtedly employees under the Act. He argued that the term "employee" was at least as broad as it was understood under the common law.⁸¹ Moreover, the conventional meaning of the word implied "someone who works or performs a service for another from whom he or she receives compensation."⁸² Fanning also noted that the hospital would be vicariously liable for the conduct of the students. For Fanning, this was indicative of an employee-employer relationship. Fanning also tried to diminish the majority's classification as a student by emphasizing that they spent the majority of their time providing care for the hospital's patients and received no grades. He further argued that the mere fact that an individual is learning while performing a service could not possibly serve as a justification for classifying the individual primarily as a student and not an employee.⁸³

C. St. Clare's Hospital

The following year, the Board addressed the ability of graduate students working in a teaching hospital to organize for the purpose of collective bargaining. Realizing that some considered Cedars-Sinai to be an aberration in national labor policy, the St. Clare's Hospital decision began by reaffirming the holding in Cedars-Sinai as consistent with prior precedent.⁸⁴ The Board sought to clarify that Cedars-Sinai was not primarily a decision about the health care industry and therefore only applicable in that setting, but rather Cedars-Sinai was much broader in its application and was primarily a decision about students.⁸⁵

Summarizing its previous case law, the Board noted that student employment can be classified into four general categories. The first category consists of students employed by a commercial employer in a capacity unrelated to the students' course of study. In this category, the status of individuals as students is sufficiently remote from their employment interests and therefore the distinction between employee and student is inconsequential for purposes of determining the appropriate bargaining unit.⁸⁶ The second category involves students who are employed by their own educational institution in a capacity unrelated to their course of study.

80 (emphasis in original) Id.

81 Id.

82 Id.

83 Id. at 256.

84 St. Clare's Hosp. & Health Ctr., 229 NLRB 1000, 1000 (1977).

85 Id.

86 Id. at 1001.

The Board has excluded students from units which include nonstudent employees and has not afforded them the privilege of being represented separately because in these situations employment is incidental to the student's primary interest of acquiring an education. In this category, the student's employment is directly related to their continued enrollment at the educational institution and their transitory status excludes them from being included in bargaining units with full-time employees.⁸⁷ The third category consists of students employed by a commercial employer in a capacity related to the student's course of study. The Board has concluded that the student shall be excluded from a bargaining unit of full-time nonstudent employees because in this instance, the commercial employer is acting as a surrogate for the educational institution, and thus, the student's interests in their employment is primarily educational in nature.⁸⁸ The final category consisted of students performing services at their educational institutions which are directly related to their educational program. In such instances, the Board has excluded students from units which include nonstudent employees and has denied their right to be represented separately.⁸⁹

The majority concluded that the situation at St. Clare's Hospital was directly analogous to the fourth category. There, graduate students were rendering services which were directly related to and constituted an integral part of their educational program. The services performed by the graduate students were therefore predominantly academic in nature and unsuitable for the collective bargaining process which is fundamentally economic.⁹⁰

The Board was particularly concerned that academic matters, such as curriculum and teaching methods, would become the subject of collective bargaining. The Board feared that there would be a change in emphasis from the quality of education to economic concerns and that this shift would ultimately have a detrimental effect on both labor and education. The detrimental effects were particularly relevant in the educational setting because graduate education consists of largely personal relationships between the student and instructor.⁹¹ Collective bargaining does not result in personalized treatment, but rather implies collective treatment for all those represented, and therefore permitting collective bargaining at the graduate level would be "the very antithesis of personal individualized education."⁹² Furthermore, the superior knowledge and experience possessed by the instructors places them in the best position to determine the most appropriate course of instruction. Thus, the Board reasoned that the instructional methods

87 Id. See, e.g., the discussion of Georgetown Univ., *supra*.

88 St. Clare's Hosp., 229 NLRB at 1001. This would likely to arise in an external internship situation.

89 Id. at 1002. See, e.g., the discussion of CW Post and Stanford, *supra*.

90 St. Clare's Hosp., 229 NLRB at 1002.

91 The Board attempted to provide context by noting that the subject of hours is a mandatory bargaining subject under the NLRA. Part of a graduate education in medicine includes working as a resident or intern. These positions are necessary to provide the student with a broad educational experience and such experiences do not necessarily occur during ideal working hours. Permitting students to bargain over these hours could result in decreased educational opportunities. Id.

92 Id.

and, by implication, graduate education in general, should not be the subject of collective bargaining.

D. Boston Medical Center

The precedents established in Cedars-Sinai and St. Clare's Hospital were expressly overruled in Boston Medical Center.⁹³ The facts of Boston Medical Center were nearly identical to Cedars-Sinai and St. Clare's Hospital – a unit of interns and residents in a teaching hospital sought representation. In reaching its conclusion, the Board was persuaded by Member Fanning's definition of employee advocated in Cedars-Sinai and St. Clare's Hospital which was rooted in the common law concept of servant.⁹⁴ The Board, relying on a recent Supreme Court decision, stated that Section 2(3) created a "broad statutory definition of employee."⁹⁵ The fact that the interns may also be students has no bearing on their employee status because "nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act."⁹⁶ All of the essential elements necessary to define an employer-employee relationship were present in the relationship between the housestaff (interns and residents) and the hospital.

In support of the conclusion that the housestaff could simultaneously be students and employees, the majority pointed to the fact that the housestaff worked for a statutorily covered employer and were compensated for their services in the form of the stipend. Additionally, the hospital withheld federal and state taxes on the stipend and provided an array of fringe benefits, including: worker's compensation, paid vacation, sick leave, health, dental, life and malpractice insurance. These were the same benefits that other hospital employees received. Further, the majority observed that housestaff spend nearly eighty percent of their time at the hospital engaged in direct patient care. The fact that housestaff "also obtained educational benefits from their employment does not detract" from their status as employees because their "status as students is not mutually exclusive of a finding that they are employees."⁹⁷ Thus, the Board concluded that the housestaff held positions more closely similar to an apprentice, rather than a student, and fell within the definition of employee under Section 2(3) of the NLRA.

This more expansive reading of the NLRA overturned precedent, at least as it pertained to medical interns and residents. The Boston Medical Center decision

93 Boston Med. Ctr. Corp., 330 NLRB 152 (1999).

94 Id.

95 Id. at 160, quoting *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-892 (U. S. 1984).

96 Boston Med. Ctr., 330 NLRB at 160.

97 Id. at 161.

enabled, at least for the time, these types of students to occupy a position in which they were both a student and employee. The decision, however, was unclear in its application to teaching assistants and research assistants at research universities. Such uncertainty regarding the application of the NLRA set the stage for a further shift in the Board's jurisprudence.

V. New York University

Just months after its decision in Boston Medical Center, the Board sought to clarify whether all students or only medical interns and residents could be employees under the NLRA. New York University involved a subset of graduate students who served as graduate assistants, graders, and tutors.⁹⁸ Within this subset of graduate students, more than a majority sought recognition as employees under the NLRA. As in other cases, the university took the opposite position. The University also argued that there were a number of policy concerns which should prevent the Board from certifying the graduate students as a unit.

Similar to Boston Medical Center, the Board began by applying the common law master-servant test. That doctrine states that the master-servant relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment.⁹⁹ Adopting the same broad interpretation of Section 2(3) of the NLRA as in *Sure-Tan* and *Boston Medical Center*, the Board explained graduate assistants are not in a category of worker who are excluded from the definition provided in that section. Rather, they perform services under the control and direction of the university, for which they are compensated by the university and are carried on the university's payroll.¹⁰⁰ Thus, the graduate assistants' relationship with the university was "indistinguishable from a traditional master-servant relationship."¹⁰¹ The Board rejected NYU's attempt to distinguish this case from *Boston Medical Center* on the basis that the graduate students here only spent approximately fifteen percent of their time performing graduate assistants' duties for the university. The Board also declined to adopt NYU's argument that graduate assistants receive only financial aid and not compensation for their services. NYU also attempted to distinguish *Boston Medical Center* by noting that the housestaff had already obtained their degree which was unlike the graduate students here who performed the work in furtherance of their degree. Rather, the Board concluded that the graduate assistants who spent fifteen percent of their time performing services for the university were no less employees than part-time employees would be under the NLRA. In rejecting the argument that graduate students were not compensated for their work, the Board stated:

It is indisputable, however, that the graduate assistants, unlike the students

98 New York Univ., 332 NLRB 1205 (2000).

99 Id. at 1206 citing *NLRB v. Town & Country*, 516 U.S. 85, 90-91, 93-95 (U. S. 1995).

100 New York Univ., 332 NLRB at 1206.

101 Id.

receiving financial aid, perform work, or provide services, for the Employer under terms and conditions. . . controlled by the Employer. That this is work in exchange for pay, and not solely the pursuit of education, is highlighted by the absence of any academic credit for virtually all graduate assistant work. . . Thus, however the Employer may wish to characterize a graduate assistant position, the fulfillment of the duties of a graduate assistant requires the performance of work, controlled by the Employer, in exchange for consideration. . . .

[W]e disagree with the Employer's argument that graduate assistant work is primarily educational. . . We recognize that working as a graduate assistant may yield an educational benefit, such as learning to teach or research. But . . . [that] is not inconsistent with employee status. . . Therefore, notwithstanding any educational benefit derived from the graduate assistants' employment, we reject the premise of the Employer's argument that graduate assistants should be denied collective bargaining rights because their work is primarily educational.¹⁰²

By applying the common law tests for employee status, the traditional arguments against graduate student unionization would no longer succeed. The Board refused to accept NYU's policy arguments concerning the collective-bargaining process' potential chilling effect on academic freedom. Concerns over the chilling effect that collective bargaining could have on academic freedom were used to bolster many pre-Boston Medical Center cases, particularly St. Clair's Hospital.¹⁰³ The Board classified NYU's fears regarding academic freedom as speculative and noted that faculty members had been permitted to engage in collective bargaining for over thirty years. The parties could "'confront any issues of academic freedom as they would any other issue in collective bargaining.'"¹⁰⁴ The Board concluded by reminding those concerned about any potential infringements upon academic freedom that the NLRA did "not compel agreements between employers and employees," rather it provides a forum to bring about adjustments or agreements concerning issues but the Act did not compel such agreement.¹⁰⁵

VI. Brown University

The NYU decision was seen by many as a victory for graduate students across the country.¹⁰⁶ As graduate students were now employees under Section 2(3) of the NLRA, they could now hold elections and vote to bargain collectively with a particular university. The wages, hours, and terms and conditions of employment which had previously been negotiated on an individual basis, if at all, would now be subjected to collective bargaining. The right to unionize lasted for nearly four

102 Id. at 1207.

103 See supra notes 94-96.

104 New York Univ., 332 NLRB at 1208, quoting Univ. of Pa. v. EEOC, 493 U.S. 182, 195-202 (U. S. 1990).

105 New York Univ., 332 NLRB at 1208.

106 Gerilynn Falasco & William J. Jackson, Note, The Graduate Assistant Labor Movement, NYU and Its Aftermath: a Study of Attitudes of Graduate Teaching and Research Assistants at Seven Universities, 21 Hofstra Lab. & Emp. Law J. 753, 753 (2004).

years until Brown University. The Brown decision was a 3-2 split decision decided along party lines.¹⁰⁷

Graduate students at Brown University sought to exercise their statutory rights extended in NYU. However, the university argued that the current situation was factually distinguishable from NYU because the majority of the university's departments at Brown required a student to serve as a teaching assistant or a research assistant in order to obtain his or her degree.¹⁰⁸ The Board, in rendering its decision, did not stop at merely analyzing the factual distinctions between NYU and Brown, but rather concluded that NYU was wrongly decided and that graduate students were not employees under the NLRA.¹⁰⁹

The Board reverted to its pre-NYU decisions and readopted the primary purpose test articulated in *Adelphi University*.¹¹⁰ To support its conclusion that these individuals were primarily students rather than employees, the Board noted that all of the individuals needed to be enrolled at Brown in order to be awarded a teaching assistant, research assistant, or proctor position. Only those enrolled at Brown could be eligible for the position. Also of significance to the Board was the fact that only a limited number of hours were spent performing these duties; their principal time commitment was the pursuit of their degree.¹¹¹ However, some of the most persuasive evidence indicating that these positions were primarily educational was the fact that completing a teaching assistant or research assistant position was a necessary component in twenty-one of the thirty-two departments which offered PhD degrees. This constituted sixty-nine percent of all graduate students enrolled.¹¹² Therefore, the Board determined that being a graduate student assistant and pursuing a PhD were "inextricably linked, and thus, that relationship. . . clearly educational."¹¹³

The Board also rejected the argument put forth by the graduate students that the financial support they received was a form of compensation for work performed. Rather, the Board rationalized the financial support as a means to help defray the cost of graduate education. The Board noted that nearly eighty-five percent of continuing graduate students received this assistance and that the amount received was comparable to those students who received funds for a fellowship, which did

107 At the time of the Brown decision, President George W Bush had been in office for three years and had appointed three members to the board – the three-member majority. The two members of the minority had been appointed by President Bill Clinton and voted in the majority in the NYU decision.

108 *Brown Univ.*, 342 NLRB 483, 484 (2004).

109 *Id.* at 486.

110 "[The] principles developed for use in the industrial setting cannot be imposed blindly on the academic world. . . It is clear to us that graduate student assistants. . . are clearly students and have a primarily educational, not economic relationship with their university ." *Id.* at 487 (internal quotes omitted).

111 *Id.* at 488.

112 *Id.*

113 *Id.* at 489.

not require any teaching or research.¹¹⁴ Reaffirming the rationale espoused in *St. Clare's Hospital*, the Board explained that collective bargaining rights could not be extended to students who perform services at their educational institutions that are "directly related to their educational program."¹¹⁵

Because the majority viewed the relationship between students and the university as primarily educational rather than economic, the traditional employer-employee framework was inappropriate.¹¹⁶ Following the line of reasoning adopted in *St. Clare's Hospital*, the NLRB concluded that the collective-bargaining process – a fundamentally economic process – would be of "dubious value" because educational concerns were largely irrelevant to the traditional mandatory bargaining subjects of wages, hours, and working conditions.¹¹⁷

The NLRB also addressed the issue of academic freedom in the context of collective bargaining. Permitting graduate students to engage in collective bargaining, the Board thought, would devolve from a discussion of wages, hours, and working conditions into an attempt to bargain over fundamental academic decisions traditionally left to the university and its faculty; these included course length and content, standards for advancement, administration of examinations, and other administrative concerns.¹¹⁸ Allowing such a discussion would "have a deleterious impact on the overall educational decisions by the Brown faculty and administration. . . [because it] would intrude upon decisions over who, what, and where to teach or research – the principal prerogatives of an educational institution like Brown."¹¹⁹

The dissent in *Brown* argued that the Board should continue to follow the precedent established only four years prior in *NYU*. To that end, they believed that graduate assistants in *Brown* were statutorily employees under the NLRA, to whom collective bargaining rights should be extended.¹²⁰ The dissent also argued that the majority had "minimiz[ed] the economic relationship between graduate assistants and their universities. . . [and that their holding] rest[ed] on fundamental

114 Id.

115 Id., citing *St. Clare's Hosp.*, 229 NLRB 1000, 1002 (1977).

116 "[It] 'is important to recognize that the student-teacher relationship is not at all analogous to the employer-employee relationship.'" *Brown Univ.*, 342 NLRB at 489.

117 Id.

118 Id. at 490.

119 Id. In the most recent NLRB decision regarding university students, the NLRB refused to assert jurisdiction over Northwestern University football players who sought collective bargaining rights. The Board did not determine whether the players were statutory employees under the NLRA, but rather held that asserting jurisdiction over a single team would not promote stability in labor relations across the NCAA. The overwhelming majority of college football teams in Division I football (108 of 125 teams) are state-run institutions and therefore collective bargaining rights are determined at the state level. Moreover, Northwestern is the only private institution in its athletic conference, the Big Ten. *Northwestern Univ.*, Case 13-RC-121359 (2015).

120 *Brown Univ.*, 342 NLRB 483, 497 (2004).

misunderstandings of contemporary higher education.”¹²¹ In responding to the minority’s criticism, the majority asserted that “the ‘academic reality’ for graduate student assistants has not changed, in relevant respects, since our decisions over twenty-five years ago.”¹²²

In sum, the Board determined that students could not be both students and employees if their work was related to, or a necessary component to, obtaining their degree. In making this determination, the Board acknowledged a number of policy considerations. Among these considerations was the unsuitability of collective bargaining in the educational setting and the effects that collective bargaining could have on academic freedom.

VII. Reconsidering Brown

More than a decade after Brown was decided, it remains binding precedent and all Regional Offices, when confronted with requests for recognition by graduate students, have acknowledged Brown’s constraint.¹²³ This reliance on precedent is problematic because the Brown decision was premised on the misunderstanding that academic realities for graduate students had remained constant for more than twenty-five years. Further, its holding cannot be reconciled with the language or intent of the statute, and is inconsistent with relevant Board and Court decisions. Given these flaws and shortcomings, Brown needs to be reconsidered.

1. Misunderstanding of Academic Realities

In its departing words, the majority in Brown determined that its analysis should remain faithful to the primary purpose test first articulated in Cedars-Sinai Medical Center because the academic realities for graduate students had not changed since its decision in Cedars-Sinai and therefore there was no justification for upholding NYU.¹²⁴ This conclusion, however, was made on a faulty understanding of the current state of higher education. From the time of the Cedars-Sinai decision in the 1970s, to the Brown decision in 2004, there had been a significant upheaval in the way that colleges and universities were managed, and as a result how graduate students were treated and utilized within the university setting.

In the time spanning the two decisions, tuition costs had risen significantly. The National Center for Education Statistics indicates that during that time there was greater than a fivefold increase in college attendance costs.¹²⁵ Consequently,

121 Id.

122 Id. at 492.

123 See e.g., Columbia Univ., Case 02-RC-14301 (2015), stating “To date, Brown remains controlling on the issue of graduate assistants as employees and I am compelled to follow that precedent.”

124 See Brown Univ., 342 NLRB at 492.

125 The data, adjusted to current dollar amounts shows that the average cost of attending a four year university in 1976-77, the same year as the Cedars-Sinai decision cost roughly \$2577. Conversely, the adjusted average tuition in 2004, the same year as the Brown decision, was \$16,509. National Center for Education Statistics, Average Undergraduate Tuition and Fees and Room and Board Rates Charged for Full-Time Students in Degree Granting Institutions, by Type and Control of

colleges and universities had received increased criticism and resistance on the part of consumers and were forced to find ways to increase efficiency and reduce expenses – to operate like a business.¹²⁶ One of the means used to constrain costs has been the increased reliance by colleges and universities on graduate students and non-tenure-track instructors. By the late 1990s, the presence of graduate students and adjunct professors had grown to comprise more than forty percent of the teaching force in post-secondary education.¹²⁷ This number was significantly higher at some institutions, where graduate assistants and adjuncts can handle over seventy percent of undergraduate classroom hours.¹²⁸ Thus, unlike the situation in Cedars-Sinai where the Board indicated that the hospital’s use of student interns was not designed to meet staffing needs, the modern university is using graduate students to meet the instructional staffing needs.

For universities operating on businesslike models and looking to become increasingly more financially efficient, graduate students and adjunct faculty are an attractive alternative to higher paid faculty members because they generally receive lower pay and sub-par benefits.¹²⁹ For example, part-time faculty receive about a third of what a full-time faculty member earns per course taught. Further, only seventeen percent of part-time faculty received employer subsidized health insurance as compared to ninety-seven percent for full-time faculty.¹³⁰ These figures are likely even lower for graduate students.¹³¹ Thus, for the majority in Brown to argue that there had been no significant changes in the realities of graduate students’ situation since the 1970s was to ignore the modern trends in higher education which had increasingly begun to rely on graduate students and adjunct faculty to meet their employment needs and to reduce their operating costs.

2. Inconsistent With Statutory Definition

The statutory definition of employee provided in Section 2(3) of the National Labor Relations Act is broad in its application. An employee for purposes of the

Institutions: 1964-65 through 2006-07, https://nces.ed.gov/programs/digest/d07/tables/dt07_320.asp (last visited Jan. 15, 2016).

126 Bettinger & Long, Does Cheaper Mean Better? The Impact of Using Adjunct Instructors on Student Outcomes, *The Review of Economics and Statistics*, 598 (2010); Hutchens, *supra* note 25 at 126.

127 Gregory M. Saltzman, Union Organizing and the Law: Part-Time Faculty in Graduate Teaching Assistants, *NEA 2000 Almanac of Higher Education*, 44 (2000).

128 At Yale University, seventy percent of undergraduate courses are taught by non-full-time faculty members, including graduate students and part-time or adjunct faculty. *Id.*

129 *Id.*

130 *Id.*

131 The students in Brown received a \$12,800 stipend per year. Some graduate students were also fortunate enough to have their university health fees for on-campus health services included in the stipend. However, not all graduate students received this benefit and no graduate students received traditional fringe benefits such as sick leave, retirement, vacation, or traditional comprehensive health insurance. *Brown Univ.*, 342 NLRB 483, 486 (2004).

NLRA is defined as “any employee”.¹³² In interpreting the Act, the Supreme Court has repeatedly held that that phrase is to be read broadly. For example, in *Sure-Tan, Inc. v. NLRB*, the Supreme Court wrote that the “breadth of §2(3)’s definition is striking: the Act squarely applies to ‘any employee.’”¹³³ A unanimous Court in *NLRB v. Town & Country* stated “[t]he ordinary dictionary definition of ‘employee’ includes any ‘person who works for another in return for financial or other compensation.’”¹³⁴ In that decision, the Court looked at congressional reports and floor statements in order to determine the purpose of the NLRA. The Court noted that it was “fairly easy to find statements to the effect that an ‘employee’ simply ‘means someone who works for another for hire’¹³⁵ and includes ‘every man on a payroll.’”¹³⁶ Statements to the contrary, or statements suggesting a narrow or qualified view of the word are “scarce or nonexistent—except, of course, those made in respect to the specific exclusions written into the statute.”¹³⁷ These exceptions include: agricultural laborers, domestic workers, individuals supervised by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA.¹³⁸ Notably absent from the exemptions listed are students; there is no exception in the statute for employees who also happen to be students or are primarily students.

Prior Board decisions have been consistent with this broad reading of the definition of an employee authorized by the statute and approved by the Supreme Court. For example, in *Sundlund Construction Co.*, the Board held that paid union organizers were employees when they attempted to obtain jobs to try to organize other employees. In so holding, the Board noted the absence of an express exclusion. “Under the well-settled principle of statutory construction – *expressio unius est exclusio alterius* – only these enumerated classifications are excluded from the definition of employee.”¹³⁹ The Board also gave a broad reading to the statutory definition of employee in *Seattle Opera Association* by permitting auxiliary choristers at a nonprofit opera company to be included in the Act.¹⁴⁰ In adopting the Supreme Court and the Board’s earlier broad reading of the statute and the common law master servant relationship test, the DC Circuit stated:

[I]t is clear that – where he is not specifically excluded from coverage by one of Section 152(3)’s enumerated exemptions – the person asserting statutory employee

132 29 U.S.C. §152 (3) (2015).

133 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (U. S. 1984).

134 *NLRB v. Town & Country*, 516 U.S. 85, 90 (U. S. 1995), quoting *American Heritage Dictionary*, 604 (3d ed. 1992).

135 *NLRB v. Town & Country*, 516 U.S. at 91, quoting H.R.Rep. No. 245, 80th Cong., 1st Sess., 18 (1947).

136 *NLRB v. Town & Country*, 516 U.S. at 91, quoting 79 Cong. Rec. 9686 (1935).

137 *Id.*

138 *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (U. S. 1984).

139 *Sundlund Constr. Co.*, 309 NLRB 1224, 1226 (1992).

140 *Seattle Opera Ass’n*, 33 NLRB 1072 (2000), enforced 292 F.3d 757 (D.C. Cir. 2002).

status does have such a status if (1) he works for a statutory employer in return for financial or other compensation; and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed.¹⁴¹

Thus, *Brown* is inconsistent with Supreme Court and Board precedent that has interpreted the meaning of employee to be broad and all-encompassing. Instead, the Board has crafted an exclusion that does not appear in the statute. This is an aberration from its own precedent and a departure from congressional intent which was meant to exclude from the statute only those who are expressly listed.

3. Inconsistent with Prior Court Cases and Board Decisions

Finally *Brown's* holding, that an individual cannot be both a student and an employee, is irreconcilable with the long history of cases holding to the contrary. An apprentice, by its very definition, is simultaneously a student and employee.¹⁴² As part of their training, apprentices work for an employer while receiving instructions in their craft. This type of on-the-job training is vital to learning the craft and nearly always accompanied by classroom training. The Board has repeatedly treated apprentices as employees, despite the fact that the work is part of their training for a career. As early as 1944, the Board held that apprentices who attended a school as part of the four or five year training program and worked under the supervision of training supervisors for two and a half years while learning shipbuilding skills were employees under the NLRA.¹⁴³ In *General Motors Corp.*, the Board also found apprentices who are required to complete a set number of hours of on-the-job training, combined with the related classroom work necessary to achieve journeyman status, were also employees under the NLRA.¹⁴⁴ Similarly, in *Boston Medical Center*, the Board found that medical interns, residents and fellows were "employees," despite also being students.¹⁴⁵ The Board explained that "their status as students is not mutually exclusive of a finding that they are employees." The fact that students engaged in "long-term programs intended to impart and improve skills and knowledge," did not jeopardize their status as employees.¹⁴⁶

In each of these cases, the apprentices were simultaneously students and employees. They engaged in work that was related to their schooling. The Board has never suggested that the work of an apprentice was "primarily educational" and therefore incapable of achieving employee status. Thus, given the striking

141 *Seattle Opera v. NLRB*, 292 F.3d 757, 763 (D.C. Cir. 2002) (emphasis in original).

142 Black's Law Dictionary defines an apprentice as, "a person, usually a minor, bound in due form of law to a master, to learn from his art, trade, or business, and to serve him during the time of his apprenticeship." That definition highlights that an apprentice is there to learn, indicating student status, but also uses the traditional master servant relationship indicative of an employer-employee relationship. Black's Law Dictionary 80 (7th ed. 1999).

143 *Newport News Shipbuilding and Dry Dock Co.*, 57 N.L.R.B. 1053, 1058-59 (1944).

144 *General Motors Corp.*, 133 NLRB 1063, 1064-65 (1961).

145 *Boston Med. Ctr.*, 330 NLRB 152 (1999).

146 *Id.* at 161.

similarities between apprentices and the work of graduate students, the Board's distinction that the work of the graduate student is "primarily educational" is a departure from its own precedent established for apprentices.¹⁴⁷

The Board in *Brown* purported to substantiate its decision on Adelphi University and Leland Stanford Junior University. However, these cases do not support the proposition that graduate students cannot simultaneously be employees. In Adelphi the Board held that graduate teaching and research assistants were "primarily students."¹⁴⁸ This determination does not indicate that the Board believed that the graduate students could not also be employees under the NLRA. Rather, the Board had distinguished teaching assistants from regular faculty members for purposes of determining a community of interests. Because the graduate students were primarily students, they did not share a sufficient community of interest with full-time faculty to "warrant their inclusion in the unit."¹⁴⁹ The Board in *Brown* did not return to the holding in Adelphi, but instead distorted the holding of that case. At a minimum, Adelphi held that graduate students and faculty have different community of interests, but it does not preclude a finding that graduate students are also employees; it simply was not addressed in the decision.

In the same vein, Leland Stanford did not hold that a graduate student could not be simultaneously a student and an employee. The Board found that the graduate students were not employees based on the particular facts of the case. There, the graduate students received academic credit for their work and such work was needed in order to help the student explore potential thesis options. However, the most significant factor was that the students received the tax-exempt stipends from outside funding agencies, not from the university. The Board concluded on these facts, that "the relationship of RA's and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by the employer."¹⁵⁰ Leland Stanford's holding does not support *Brown's* holding that a graduate student cannot be an employee when he or she performs a task under the direction of, and for the benefit of, the university.

To support its finding that student employees are not covered under the NLRA

147 The Department of Labor would likely reach a similar conclusion regarding the status of graduate students. The DOL has established criteria for when interns must be compensated under the Fair Labor Standards Act. Among the criteria the DOL looks at to determine whether a student intern must be compensated under the FLSA are: whether the internship is similar to training which would be given in an educational environment; whether the internship experience is for the benefit of the intern; whether the intern displaces regular employees and works under the close supervision of existing staff; the employer providing the training derives no immediate advantage from the activities of the intern and on occasion its operation may actually be impeded; whether the intern is entitled to a job at the conclusion of the internship; and whether the employer and intern understand that the intern is not entitled to wages for the time spent in the internship. Graduate students undoubtedly benefit from the teaching experience, but in doing so, displace faculty or other instructors that the university would have to hire to teach those courses. The Department of Labor, Fact Sheet #71: Internship Programs Under the Fair Labor Standards Act, <http://www.dol.gov/whd/regs/compliance/whdfs71.pdf> (last visited Feb., 4, 2016).

148 Adelphi Univ., 195 NLRB 639, 640 (1972).

149 Id.; see also *supra* notes 49-52.

150 The Leland Stanford Junior Univ., 214 NLRB 621, 623 (1974).

because their relationship to the university was “primarily educational,” the Board relied heavily on *St. Clare’s Hospital*. This is because there was nothing in *Adelphi* or *Leland Stanford* to support a conclusion that one cannot be simultaneously a student and an employee. This line of reasoning had been rejected by *Boston Medical Center* and decades of case law finding apprentices to be employees under the Act. Because the Board could not find precedent within its jurisprudence to support its conclusion in *Brown*, it had to rely on *St. Clare’s Hospital*; this decision, however, had been overruled by *Boston Medical Center* and thus the Board in *Brown* relied upon bad case law in order to substantiate its decision.¹⁵¹

VIII. Conclusion

The recent efforts by graduate students at *Brown*, *Cornell*, *The New School*, *Yale*, and *Columbia University* indicate that the desire for graduate students to be represented for purposes of collective bargaining is still present, despite the ruling in *Brown*. As colleges and universities continue to use graduate students as a means to defray ever-increasing costs, it is unlikely that their requests for recognition are going to cease any time soon. Because graduate students’ working conditions are unilaterally dictated to them by their employer, they seek a unified voice in order to engage with the employer concerning a discussion over wages, hours, and other terms and conditions of employment. As the reliance on graduate students increases, it is likely that the number of classes that they are required to teach or the number of exams they are required to grade will increase, while their pay in the form of stipends and other financial aid will remain stagnant.

For those sympathetic to the graduate students’ cause, there is hope. President *Barack Obama*, during his tenure, has had the ability to replace Board members with those more likely to favor a reversal of *Brown*. Consequently, as graduate students at *Columbia*, *The New School*, and other universities appeal their regional office decisions, they are likely to encounter a Board much more favorable to their plight and willing to reconsider *Brown*. Those who favor *Brown’s* holding are likely to argue that constant reversals and overturnings will undermine the Board’s integrity and lead to further unpredictability in the Board’s jurisprudence. However, a Board willing to overturn *Brown* can support its decision on more than partisan politics. The need to reconsider and overturn *Brown* can be substantiated on the basis that the Board failed to follow Congress’s intent by declining to read Section 2(3) broadly. A broad reading of the definition of employee is supported both by Supreme Court decisions and prior Board precedent. Additionally, the cases cited in *Brown* for the proposition that there is some inconsistency between being simultaneously a student and an employee do not support that conclusion. Rather, *Adelphi* and *Leland Stanford* reach their conclusions because the graduate students did not share an appropriate community of interest with other unit members and did not directly receive their compensation from the university. Moreover, the Board’s decision completely ignores its previous history of finding apprentices to be employees under the Act. Finally, the Board relied on a decision which had been expressly overruled just a few years prior. Thus, there are compelling reasons to reconsider *Brown*.

151 *Boston Med. Ctr. Corp.*, 330 NLRB 152, 152 (1999).