

STUDENTS OR EMPLOYEES?

THE STRUGGLE OVER GRADUATE STUDENT UNIONS IN AMERICA'S PRIVATE COLLEGES AND UNIVERSITIES

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I. INTRODUCTION

Graduate students, especially in doctoral programs, generally receive

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compensation, tuition remission, or both in return for aiding in faculty members' research, grading papers or teaching classes.¹ These students inhabit a grey area in terms of American labor law. They perform work in return for some form of compensation, but unlike most employees, they do not perform this work primarily for wages, but instead apply their work towards a degree.

Historically, graduate students at private universities have not been considered employees for the purposes of unionization. As such, they are unable to organize, like workers in most other industries, in order to collectively bargain for wages, benefits and working conditions. This issue has taken on increasing importance as the higher education system, particularly at larger research oriented universities, has come to rely on the efforts of graduate students to an ever greater degree. Students have, understandably, complained that their efforts are under rewarded. One Brown student complained recently that she has had to teach a class of 102 students for a mere \$12,800 a year.² Such a meager stipend could result in an hourly wage far below the legal minimum.

In 2000, the National Labor Relations Board ("NLRB" or "the Board") overturned three decades of precedent addressing graduate student unionization in a case involving a graduate student union at New York University.³ In deciding that some graduate students were employees under the National Labor Relations Act ("NLRA" or "the Act"), the NLRB appeared to open the floodgates to attempts to organize graduate students at the nation's universities. However, this window of opportunity was shut just four years later by the NLRB decision in *Brown University*.⁴ In that case, the NLRB reverted to its prior doctrine which denied graduate students unionization rights under the theory that they were merely students and not employees as defined by the NLRA.⁵ Since *Brown University*, the NLRB has stuck to this line of jurisprudence when the issue has come before it. However, this controversy seems likely to continue given the higher education system's dependence on graduate student work and the

1. For example, the Graduate School at Brown "grants incoming doctoral students five years of guaranteed support, which includes a stipend, tuition remission, and a health insurance subsidy. All promises of student support are subject to students making satisfactory academic progress as determined by their programs of study." ADMISSIONS AND FINANCIAL AID, HISTORY DEPARTMENT, BROWN UNIVERSITY, available at <http://www.brown.edu/Departments/History/grad/grad-finaid.html> (last visited Jan. 8, 2008).

2. Robert A. Epstein, *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, 186-90 (2005).

3. New York Univ., 332 N.L.R.B. 1205 (2000).

4. Brown Univ., 342 N.L.R.B. 483 (2004).

5. *Id.*

ever changing composition of the NLRB.⁶

While both the *NYU* and *Brown* decisions may have been politically motivated, the NLRB eventually settled on the right course. The *NYU* decision was a complete about-face from the NLRB's previous jurisprudence and was not warranted. In *Brown*, the NLRB returned to its time-tested, correct view that students are primarily students, not employees, and should not be eligible to form unions.⁷ Part II of this note will briefly explain the governing law in the area and then provide an in-depth history of NLRB decisions related to attempts on the part of graduate students to form unions prior to the *NYU* decision. Part III will explore the change of course in *NYU*. Part IV will examine the NLRB's return to form in *Brown*. Part V will discuss the developments in this area since *Brown*. Part VI will consider the future for graduate student unions and argue that Congressional action is the best way to resolve the uncertainty in this area of the law.

II. THE HISTORY OF GRADUATE STUDENT UNIONS BEFORE THE NLRB

A. The NLRB—History and Structure

The NLRB was created in 1935 by the National Labor Relations Act, more commonly called the Wagner Act ("Wagner Act").⁸ The Wagner Act was the second attempt by the Roosevelt Administration to federalize unionization laws and provide a nationwide uniform right to organize.⁹ The Supreme Court struck down a previous attempt, the National Industrial Recovery Act ("NIRA"), earlier that year as exceeding Congress' authority under the Commerce Clause.¹⁰ Slightly less ambitious than the NIRA, the NLRA still had as its goal the standardization of the nation's labor law.¹¹ Prior to this legislation, collective bargaining was regulated by a complex combination of state common law and a patchwork of judicial doctrines.¹² Under the specter of President Roosevelt's threat to increase the number of Supreme Court justices to fifteen, the NLRA was held constitutional in a landmark decision, *N.L.R.B. v. Jones & Laughlin Steel Corp.*¹³

6. See *infra* text accompanying notes 21–22 on the method of selecting members of the NLRB.

7. *Brown Univ.*, 342 N.L.R.B. at 483.

8. Act of July 5, 1935, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (2000)).

9. 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, 103 (2005).

10. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

11. Hogler, *supra* note 9, at 104.

12. *Id.* at 103.

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

The NLRB was created to oversee organization attempts across the nation and to remedy any abuses or other unlawful acts by employers or unions, functions it still performs today.¹⁴ The Board's current structure is a result of the Taft-Hartley Amendments of 1947.¹⁵ The Board is made up of five members who serve five year terms and are appointed by the President with the advice and consent of the Senate.¹⁶ Members' terms are staggered so that a new member is appointed each year.¹⁷ A General Counsel, also appointed by the President, investigates and prosecutes cases of unfair practices.¹⁸ The Board hears appeals from unfair labor practice cases prosecuted by attorneys in field offices around the country in front of an NLRB administrative law judge ("ALJ").¹⁹ In representation cases, when thirty percent of the workers within an appropriate bargaining unit have signed authorization cards demonstrating their interest in having a particular union represent the unit, the appropriate NLRB Regional Director will order an election. If a majority of a unit's members vote in favor of union representation, the Regional Director will certify the union as the unit's representative.²⁰ Both *NYU* and *Brown* came before the NLRB on appeal from a decision ordering an election based on a "showing of interest" by graduate students at these universities.²¹

Because members of the Board are political appointees, Board decisions are often criticized as politically motivated.²² It is possible for each President to remake nearly the entire body within a single term. Like any other political appointment, it is likely that presidents will appoint those

14. FACT SHEET, NATIONAL LABOR RELATIONS BOARD, available at http://www.nlr.gov/about_us/overview/fact_sheet.aspx [hereinafter FACT SHEET]. Unions came under the NLRB's purview in 1947. *Id.*

15. 29 U.S.C. § 141 et seq (2006).

16. 29 U.S.C. § 153 (2006).

17. *Id.* Due to recess appointments and resignations by board members, the Board's membership is even less consistent than the statute would indicate. For a complete history of the Board's membership since its inception, see BOARD MEMBERS SINCE 1935, NATIONAL LABOR RELATIONS BOARD, available at http://www.nlr.gov/about_us/overview/board/board_members_since_1935.aspx [hereinafter BOARD MEMBERS].

18. FACT SHEET, *supra* note 14.

19. *Id.*

20. For a general overview of NLRB procedures governing union certification, see PROCEDURES GUIDE, NATIONAL LABOR RELATIONS BOARD, available at http://www.nlr.gov/publications/Procedures_Guide.htm (last visited October 27, 2008).

21. Ryan Patrick Dunn, *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, 867 (2006). A showing of interest occurs when thirty percent of the members of an appropriate bargaining unit have returned signed cards confirming their desire to have the union represent their collective interests with their employer. *Id.* See also 29 C.F.R. § 102.67 (2004).

22. See Epstein, *supra* note 2.

whom they believe will issue rulings consistent with their political principles and goals. The high rate of turnover makes Board decisions somewhat unpredictable and means a consistent NLRB jurisprudence can be difficult where controversial issues in labor law are implicated.²³

Finally, the NLRB does not have jurisdiction over public sector employees with the exception of U.S. Postal Workers.²⁴ Thus, this note will only discuss cases which involve private colleges and universities, as that is the scope of NLRB decisions. As a result, graduate students at public colleges and universities have no federally guaranteed right to organize, although they may have rights under state law.²⁵

B. Early Cases

1. Cornell University

In its first several decades, the NLRB did not consider graduate students as employees eligible to form unions under the theory that private universities were not engaged in any sort of commercial activity.²⁶ The Board clearly stated this doctrine in a 1951 case involving Columbia University:

Columbia University is a non-profit educational corporation chartered by a special act of the Legislature of the State of New York. . . . Its income is derived almost completely from its endowment, from gifts, and from tuition and other payments made by students. The sole purpose of Columbia University is the promotion of education, and all of its activities are directed toward that end. Although the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute and the standards established by the Board for the normal exercise of its jurisdiction, we do not believe that it would effectuate the policies of the Act for the Board to assert jurisdiction here.²⁷

Although the NLRA only exempted charitable hospitals, the Board

23. See BOARD MEMBERS, *supra* note 17.

24. 29 U.S.C. § 152 (2006). “The term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof . . .” *Id.*

25. Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions, and Brown University*, 20 LAB. LAW 243, 247 (2004). Currently fourteen states provide such a right: California, Florida, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, and Wisconsin. See FREQUENTLY ASKED QUESTIONS, THE COALITION OF GRADUATE EMPLOYEE UNIONS, available at <http://cgeu.org/faq.php> (last visited January 17, 2009).

26. Pollack & Johns, *supra* note 25, at 247

27. Columbia Univ., 97 N.L.R.B. 424 (1951).

asserted that the NLRA's legislative history supported its decision to decline to exercise jurisdiction over non-profit organizations where "the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."²⁸

The Board changed course in the *Cornell* case, a case involving maintenance workers at Cornell and Syracuse Universities. Although this decision did not involve graduate students, the extension of NLRB jurisdiction to private colleges and universities made later cases involving graduate students possible.²⁹ The NLRB held that asserting jurisdiction over private universities was consistent with the NLRA's goal of regulating private commercial activity:

[T]he Board has declined to assert jurisdiction over non-profit universities if the activity involved was noncommercial and intimately connected with the school's educational purpose. However, an analysis of the cases reveals that the dividing line separating purely commercial from noncommercial activity has not been easily defined. . . . [C]harged with providing peaceful and orderly procedures to resolve labor controversy, we conclude that we can best effectuate the policies of the Act by asserting jurisdiction over non-profit, private educational institutions where we find it to be appropriate.³⁰

With their newly asserted jurisdiction, the NLRB was able to rule on cases involving attempts by graduate students to unionize at private institutions of higher education.

2. Adelphi University

The *Adelphi* case, decided in 1972, involved an attempt by graduate students at Adelphi University, a private university in Garden City, New York, to join the faculty union in order to collectively negotiate their working conditions.³¹ These students received free tuition, as well as a stipend ranging from \$1,200 to \$2,900, in exchange for duties, such as grading papers or helping with faculty research, for approximately twenty hours each week.³² Because they sought to join the same bargaining unit as their faculty supervisors, the NLRB applied the "community of interest" test to decide whether the graduate students were eligible to become members of this union.³³ In order to certify an appropriate bargaining unit, the Board must be satisfied that all of the members have sufficiently similar

28. *Id.* at 427.

29. *Cornell Univ.*, 183 N.L.R.B. 329, 334 (1970).

30. *Id.* at 331, 334.

31. *Adelphi Univ.*, 195 N.L.R.B. 639, 639 (1972).

32. *Id.*

33. *Id.* at 640.

interests. If groups within a unit have divergent interests, it will be difficult or impossible for a single labor organization to represent all of them.

The Board held that there was not a sufficient community of interest to merit including the graduate students in the faculty union.³⁴ One reason of particular importance was that the students' continued status as employees had little to do with their work as teaching or research assistants and everything to do with the continued satisfactory progress in their coursework.³⁵ This rationale would remain important in later decisions involving attempts by graduate students to form their own unions.³⁶

Another important factor was the students' lack of any formal role in faculty decision making. The Board found that the graduate students were not faculty members, and as such, should not be included in their bargaining unit:

They do not have faculty rank, are not listed in the University's catalogues 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, and, except for health insurance, do not participate in any of the fringe benefits available to faculty members. Graduate assistants may be elected by the students as their representatives on student faculty committees. 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.

In view of the foregoing, we find that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit. Accordingly, we shall exclude them.³⁷

3. Other Early Cases

A quartet of cases from the early 1970's illustrates the NLRB's position on graduate students during this period—no community of interest, no unionization. As the NLRB began to formulate policy in this area, it needed to define exactly which members performing which job functions within the academic community qualified as workers to join a faculty union. As it did so, it clearly demarcated a line in the sand which excluded

34. *Id.*

35. *Id.*

36. *See infra* Part II.C.3.

37. *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972).

students.

The first of these cases, *C.W. Post*, involved an election for a union which would represent faculty in negotiations with the C.W. Post Center, a college within the Long Island University system.³⁸ In its decision, the Board excluded students from the proposed bargaining unit.³⁹ More instructive was the Board's rationale in allowing a single "research associate" to join the bargaining unit.⁴⁰ This employee did not teach classes, but conducted research supported by a grant given to the University. Unlike the teaching assistants, he had already earned a doctoral degree. The Board found, based on his qualifications and the fact that "research associates" could receive tenure, that he had a sufficient community of interest with other faculty members.⁴¹ This case crystallized the dilemma graduate students faced in trying to join faculty unions: different qualifications and different goals for collective bargaining meant that there was never a sufficient community of interest.

Interestingly, the NLRB never addressed whether teaching assistants qualified as employees under the NLRA. Because students continued to attempt to join faculty unions, the "community of interest" test repeatedly blocked the way. Such was the case just a few years after *Adelphi* when the Board considered another attempt by teaching assistants to join a faculty union at the College of Pharmaceutical Sciences in New York.⁴² The Board rejected the graduate students' request to join the faculty unit, noting in the process that the teaching assistants were primarily students rather than employees.⁴³ This rationale had important consequences for future attempts to unionize graduate students.⁴⁴

The NLRB found an additional rationale to exclude graduate students at Georgetown University the following year.⁴⁵ Teaching assistants there were denied membership in a university wide union which represented part-time employees.⁴⁶ Teaching assistants at Georgetown could have their

38. *C.W. Post Univ.*, 189 N.L.R.B. 904 (1971).

39. *Id.* at 908. "In accordance with the above, we find that the following unit is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act: 'All professional employees employed at the Employer's C. W. Post Center, Brookville, Long Island, New York. . . but excluding. . . student assistants.'" *Id.*

40. *Id.* at 906-07.

41. *Id.*

42. *Coll. of Pharm. Sci. in the City of New York*, 197 N.L.R.B. 959 (1972).

43. *Id.* at 960. "We find that the teaching assistants are primarily students and do not share a sufficient community of interest with faculty members to warrant their inclusion in the unit." *Id.*

44. *See infra* Part II.C.

45. *Georgetown Univ.*, 200 N.L.R.B. 215, 216 (1972).

46. *Id.*

pay decreased based on their financial aid package.⁴⁷ This difference in the form of compensation further reduced the community of interest between teaching assistants and other university employees.⁴⁸ In addition, the Board found that the teaching assistants at Georgetown were only temporary employees since they only worked nine months a year.⁴⁹ This temporary status was another difference destroying any community of interest between the teaching assistants and other university employees.⁵⁰

The following year, the Board denied organizing rights to several graduate students employed as residence assistants and bowling alley operators at Barnard College.⁵¹ This decision is most notable for an amicus brief filed by Wheaton College which argued that graduate students were not “employees” under Section 2(3) of the NLRA.⁵² The Board considered this argument moot since it denied the graduate students the right to join the Barnard College union due to a lack of community of interest.⁵³ However, this brief is the first instance of an argument that graduate students are not employees. It would not be the last.

These cases show the early difficulties graduate students had in gaining collective bargaining rights. In attempting to join faculty unions at their institutions, teaching and research assistants were fighting a battle they could never win. Their job descriptions, qualifications and pay structures were simply too different to allow graduate students to possibly have sufficient community of interests with tenured professors and other lifelong academics. Faculty members typically hold advanced degrees and are evaluated based on their teaching and research while graduate students are generally working towards such qualifications and are evaluated by faculty members based on their performance in coursework.

Importantly, the amicus brief filed in *Barnard* anticipated a new battlefield in the struggle for graduate student unionization: graduate students could avoid the community of interest test by forming their own union. University employers would, logically, counter that teaching and research assistants were students, not employees. The Board addressed such a case just a year later, when a group of physicists at Stanford attempted to form their own union.⁵⁴

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Barnard Coll.*, 204 N.L.R.B. 1134 (1973).

52. *Id.* at 1135.

53. *Id.* at n.5.

54. *The Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

C. The Mid-Seventies Cases

1. Leland Stanford University

In 1974, the NLRB heard a case concerning a union election for a bargaining unit consisting of eighty-three research assistants in the physics department at Stanford University.⁵⁵ Unlike previous cases heard by the Board on the issue of graduate student unionization, the research assistants at Stanford did not seek to join the faculty union, but planned to start their own.⁵⁶ This, of course, meant the community of interest test, applied in previous cases, was not applicable because the research assistants did not seek to earn the right to collectively bargain by riding on the faculty's coattails.

Stanford argued, and the Board agreed, that the students were not employees under Section 2(3) of the Wagner Act.⁵⁷ The Board found the relationship between the research assistants and the University lacked several of the key characteristics inherent in the employer-employee relationship. For one thing, the money provided to the students was part of a package of financial aid meant to make graduate study at the university affordable to students from a wide variety of socioeconomic backgrounds.⁵⁸ The amount of the monies received bore no relation to the value of the student's services or the number of hours worked, another key difference from traditional wages.⁵⁹ Instead, the level of funding was set by the National Science Foundation Fellowship.⁶⁰

Another important factor affecting the NLRB's decision was the fact that the University treated the research assistants like students, rather than employees:

[A]lthough RA's are paid through Stanford's payroll machinery, they do not share the fringe benefits of employees but do have the privileges enjoyed by other students. Thus they have the student health care and insurance, share in various campus activities, and may use student housing; they get no vacation, sick leave, or retirement benefits and have no schooling benefits for their children. Significantly, the payments to the RA's are tax exempt income.⁶¹

Finally, the Board found that all of these students were required to research whether they received financial aid or not, in order to receive

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 622.

59. *Id.*

60. *Id.*

61. *Id.*

required credit towards the completion of their degree.⁶² This lent credence to the fact that the monies received for doing research were financial aid, rather than a wage paid in exchange for work performed, as in the traditional employer-employee relationship. This final part of the Board's analysis would appear again shortly in two cases involving medical interns.⁶³

2. Cedars-Sinai Medical Center

In 1976, the Board dismissed a petition for an election among a unit of interns and residents at Cedar-Sinai Medical Center in Los Angeles.⁶⁴ Although this case did not involve graduate students working as teaching or research assistants, the Board further defined just who was and was not an employee under the Wagner Act.

The interns and residents at the Medical Center were similar to graduate students in that the program in which they were enrolled had both educational and practical elements.⁶⁵ Students, at first, spent most of their time in the classroom but their education became progressively "hands on" as they gained experience.⁶⁶ They were enrolled in programs ranging in length from one to five years (the average length was about two years) after which the majority went into private practice elsewhere.⁶⁷ For this they received a salary of \$20,000 per year.⁶⁸ As in most previous graduate student cases, the amount of this stipend was the same for each of the interns and was not in any way related to their experience or duties.⁶⁹ The Board considered it important that stipends were uniform and that the interns and residents most likely would not remain at the Medical Center after their programs.⁷⁰ The Board ruled that the primary purpose of the interns' and residents' work was educational.⁷¹

As such, the "primary purpose" test became the applicable test for graduate students' attempts at unionization. Here, the Board found that the interns and residents needed to complete their programs at the Medical Center in order to further their medical careers:

They participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine. An

62. *Id.* at 622-23.

63. *See infra* Parts III-IV.

64. Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251 (1976).

65. Pollock & Johns, *supra* note 23, at 250.

66. Cedars-Sinai Med. Ctr., 223 N.L.R.B. at 251.

67. *Id.* at 253.

68. *Id.* at 255.

69. *Id.* at 253.

70. *Id.*

71. *Id.*

internship is a requirement for the examination for licensing. And residency and fellowship programs are necessary to qualify for certification in specialties and subspecialties.⁷²

The students were not primarily motivated by a desire to earn a salary; the stipends enabled them to maintain a minimal standard of living while they completed their education.⁷³

However, while the graduate students at Stanford produced work that only benefited them as they worked towards their degree, the interns and residents at Cedars-Sinai spent considerable amounts of time (sometimes up to 100 hours a week) providing patients with care.⁷⁴ Cedar-Sinai's primary business was providing patients with medical services.⁷⁵ The Board overlooked this distinction, finding that working directly with patients was the only suitable way of providing the students with the necessary education.⁷⁶ The Board also stressed that the students' compensation was not related to their performance or expertise with patients.⁷⁷ These facts marked "the fundamental difference between an educational and an employment relationship."⁷⁸ The Board decided that compensation and motivation were major factors in differentiating between a student and an employee.

The *Cedars-Sinai* decision came with a vigorous dissent, written by Member Fanning, an opinion that was far lengthier than the majority's decision.⁷⁹ The dissent began by accusing the majority of "exploit[ing] semantic distinctions between the terms 'students' and 'employees.'"⁸⁰ The dissent denied any need to differentiate between the interns' roles as students and employees and rejected the majority's "primary purpose" analysis.⁸¹ There was no need to cast students exclusively as students or exclusively as employees. Member Fanning explained that Section 2(3) of the Wagner Act specifically excluded certain groups of workers from its provisions and "students" were not listed among the excepted groups.⁸² The dissent also noted that the Supreme Court added managerial workers to the excluded list for policy reasons although managerial workers were not specifically excluded by the Wagner Act.⁸³

72. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976).

73. *Id.*

74. *Id.* at 255.

75. *Id.* at 251.

76. *Id.* at 253.

77. *Id.*

78. *Id.*

79. *Id.* at 254-59 (Manning, dissenting).

80. *Id.* at 254.

81. *Id.*

82. *Id.* at 254.

83. *Id.*

Member Fanning advocated common law principles for determining whether a particular worker is an employee under the Act.⁸⁴ Using this analysis, the interns and residents at Cedars-Sinai were employees because they performed work in exchange for compensation.⁸⁵ The interns had taxes withheld from their income and had sick leave, and the hospital was liable for any negligence they committed.⁸⁶ In addition, they received no grades and took no exams, instead spending the vast majority of their time at the Center providing patients with care.⁸⁷ Therefore, common law principles required a finding that the students were employees simply because they performed work in exchange for a salary:

The term “employee” is the outgrowth of the common law concept of the “servant.” At common law, a servant was a “person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other’s control or right of control. . . . So that the conventional meaning of the word implies someone who works or performs a service for another from whom he or she receives compensation.”⁸⁸

As Member Fanning acknowledged, the Supreme Court previously added managerial employees to the list of excluded classes of workers purely on policy grounds.⁸⁹ Arguments about policy would play a big role the next time this issue came before the Board.

3. St. Clare’s Hospital

Just a year later, the Board, again over a vigorous dissent from now Chairman Fanning, further explained and expanded its “primary purpose” jurisprudence in *St. Clare’s Hospital*.⁹⁰ This case involved an election for a bargaining unit consisting of interns and residents at a hospital.⁹¹ In dismissing the petition for an election, the Board adhered to the “primary purpose” test:

[I]t is apparent that Cedars-Sinai has been viewed by many as an aberration in national labor policy, or, if not an aberration, at

84. *Id.* at 255.

85. *Id.*

86. *Id.* at 255–56.

87. *Id.* at 256.

88. *Id.* at 254.

89. *Id.* There is long standing precedent for excluding managerial employees based on a perceived conflict of interest. Specifically, managerial employees’ role as “policy makers” for their employers creates a situation in which their interests will differ from those of lower level employees. *See NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 270–90 (1974).

90. *St. Clare’s Hosp. and Health Ctr.*, 229 N.L.R.B. 1000 (1977).

91. *Id.*

least the initial step in a new direction. Nothing could be further from the truth. Cedars-Sinai is consistent with, and reflective of, longstanding national labor policy as developed and articulated by this Board.⁹²

The majority explained that, in situations in which students were employed by their university in a role directly related to their educational program, policy considerations made it inappropriate for these students to be considered employees.⁹³ The Board was especially concerned about academic matters, such as curriculum and teaching methods, becoming the subject of collective bargaining.⁹⁴ In the case of medical interns, the possibility of hours being negotiated was particularly vexing to the majority.⁹⁵ Without a significant number of clinical hours, medical interns would receive an inferior educational experience. Medical interns who become doctors without benefiting from a significant amount of time practicing in clinical settings might not serve the best interests of the public because they would not be fully prepared to address the problems and situations that arise in everyday practice. Such a limitation could result in a vastly inferior educational experience, clearly contrary to the best interests of the public:

The subject of hours, for example, is of particular relevance when speaking of housestaff Unfortunately, medical emergencies do not always conveniently occur between the hours of 9 a.m. and 5 p.m., Monday through Friday. Thus, the flexibility which medical educators need to schedule shifts, assignments, transfers, etc., in an educationally sound fashion could become bargainable should the housestaff be afforded collective-bargaining privileges.⁹⁶

The superior knowledge possessed by instructors meant they were inherently in a position to best determine educational methods. Therefore, these methods should not be the subject of collective bargaining.⁹⁷

Chairman Fanning again weighed in with a dissent which the majority criticized as showing “a fundamental misunderstanding of the policy considerations which underlie our conclusion in Cedars-Sinai that

92. *Id.* The Board’s ultimate basis for denying the petition was that organization seeking representative status was not a labor organization within the meaning of the Act because only students, not employees, participated in the Committee, as required by § 2(5) of the Act. *See* St. Clare’s Health and Hospital Ctr., 223 N.L.R.B. at 1002.

93. *Id.* at 1002.

94. *Id.*

95. *Id.* at 1003.

96. *Id.*

97. *Id.* “From the standpoint of educational policy, the nature of collective bargaining is such that it is not particularly well suited to academic decision making.” *Id.*

housestaff are ‘primarily students.’”⁹⁸ The dissent claimed that the majority was caught up in semantics and that it was against legislative intent for the Board to expand the group of excluded employees based on policy concerns.⁹⁹ Surely, Congress did not intend to create a “jurisdictional no-man’s land” into which housestaff would fall.¹⁰⁰ Chairman Fanning’s argument was undercut somewhat by his own admission in *Cedar-Sinai* that it was appropriate for the Supreme Court to add managerial employees to the excluded groups of workers for policy reasons.¹⁰¹

For the next two decades, *St. Clare’s Hospital* and *Cedar-Sinai* remained the landmark decisions in the area of graduate student unionization. However, the views of Chairman Fanning would eventually have their day.

D. The Tide Turns

1. Boston Medical Center

Due to the high rate of turnover, the NLRB is a very fluid body; this is often reflected in its rulings.¹⁰² It is possible to remake nearly the entire membership of the Board within a single presidential term. This is at least a partial explanation for the Board’s decision to reverse *Cedar-Sinai* and *St. Clare’s Hospital* in 1999 in the *Boston Medical Center* case.¹⁰³ By that time, the Board consisted entirely of President Clinton’s appointees.

Boston Medical Center involved very similar facts to its two predecessors. A unit consisting of interns and residents in a hospital sought an election.¹⁰⁴ The Board was persuaded to adopt the common law test enunciated by Member Fanning in his dissents in *Cedar-Sinai* and *St. Clare’s*.¹⁰⁵ Likewise, a recent Supreme Court case, *Sure-Tan, Inc. v. NLRB*,¹⁰⁶ influenced the Board, as the Court interpreted Section 2(3) as creating a “broad statutory definition” of “employee” subject only to narrow statutory exceptions.¹⁰⁷

Applying the common law master-servant test, the Board found that the

98. *Id.* at 1000.

99. *St. Clare’s Hospital and Health Ctr.*, 229 N.L.R.B. 1000, 1005-09 (1977) (Manning, dissenting).

100. *Id.* at 1005.

101. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 254 (1976). *See also supra* note 82 and accompanying text.

102. *See supra* notes 15–20 and accompanying text.

103. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999).

104. *Id.*

105. *See supra* Parts II.C.2-3.

106. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891-92 (1984).

107. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. at 160.

interns and residents were, in fact, employees under the Act.¹⁰⁸ They provided a service in exchange for compensation, a fact strongly indicative of an employer-employee relationship.¹⁰⁹ Since the residents did not receive any grades or take any exams, the Board concluded they were apprentices more than students, or more aptly named by the Board, “junior professional associates.”¹¹⁰ Under the master-servant test, the most important factor was what the prospective employees do rather than their motivation for doing it.

Another important aspect at common law was the agency factor.¹¹¹ The existence of agency, or employer responsibility for acts of the employee, is indicative of a master-servant dynamic.¹¹² The Hospital was liable for acts of negligence committed by the interns and residents. The Board found it telling that the interns and residents spent nearly eighty percent of their time providing patient care.¹¹³ This pointed to an employee-employer relationship under the master-servant test.

The Board, having read the Wagner Act expansively, had turned the previous jurisprudence on its head, at least with respect to medical interns and residents. One could now be a student without necessarily forfeiting one’s status as an employee. How this ruling affected teaching assistants and research assistants at research universities was still unclear. With the NLRB’s graduate student unionization jurisprudence in disarray, the stage was set for a possible sea change the next time the issue came before the Board.

III. NEW YORK UNIVERSITY

New York University involved a union organizing campaign consisting of the majority of NYU’s 1,750 graduate students who worked as either research or teaching assistants.¹¹⁴ The case took on a familiar tone, with the graduate students arguing they were employees under the Act while the University argued they were not.¹¹⁵ Alternatively, the University argued that policy concerns should prevent certification of a graduate student union.¹¹⁶ The Board relied heavily on *Boston Medical Center* in applying the common law master-servant test.¹¹⁷ In applying that test, they reached

108. *Id.* at 160–61. For a discussion of the master-servant test, see *supra* note 88 and accompanying text.

109. *Id.* at 160.

110. *Id.* at 161.

111. *Id.* at 160.

112. *Id.*

113. *Boston Medical Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999).

114. *New York Univ.*, 332 N.L.R.B. 1205, 1205 (2000).

115. *Id.*

116. *Id.*

117. *Id.*

the same conclusions as in *Boston Medical Center*, namely that student status did not require a forfeiture of one's right to organize.¹¹⁸ The Board found that the students' relationship with their employers was typical of employer-employee relationships.¹¹⁹ They provided services for the employer and were paid for it, just like any other employees at the University.¹²⁰

The Board adopted an expansive and inclusive interpretation of the word "employee" in Section 2(3).¹²¹ Using this analysis, there was no justification for excluding students, as students are not a group excluded by the language of the statute.¹²²

The Board completely rejected any attempt to distinguish the working conditions of the graduate students at NYU from the interns and residents at Boston Medical Center.¹²³ While the interns spent nearly eighty percent of their time providing patient care, the graduate students spent a far smaller percentage of time providing services, such as teaching or grading, to the University.¹²⁴ The Board found this to be irrelevant because any time spent providing services to the University still constituted an exchange of services for compensation, the hallmark of an employer-employee relationship.¹²⁵

NYU argued that the stipends provided to graduate assistants were financial aid, rather than wages.¹²⁶ Students who did not do any work as graduate assistants still received identical stipends.¹²⁷ The Board rejected this, noting that for those who did perform work for their stipends, there was still an exchange of work for compensation. The fact that similar stipends were provided to other students without labor was not a relevant consideration.¹²⁸

The Board also rejected NYU's contention that the students received an educational benefit far in excess of the educational benefit received by the interns at Boston Medical Center.¹²⁹ Although the graduate students, unlike the interns, were still working towards a degree and received a large

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1205-06.

122. *Id.* at 1206.

123. *Id.* at 1206-07.

124. *Id.* at 1206.

125. *Id.*

126. *Id.* at 1206-07.

127. *Id.* When the University was particularly anxious to have a prospective student, it would offer stipends to that student without requiring work. Other students, whose undergraduate achievements may have been less stellar, would have been required to perform work for these stipends. *Id.*

128. *Id.* at 1207.

129. *Id.*

educational benefit, this did not change the fact that they provided labor for wages.¹³⁰ According to the Board, educational benefits did not override the students' status as employees.¹³¹

Applying the common law test meant these traditional arguments against graduate student unionization would no longer succeed. The Board also rejected NYU's policy arguments regarding unions' potential chilling effects on academic freedom.¹³² These arguments had been of particular importance in pre-*Boston Medical Center* cases, particularly *St. Clare's Hospital*, as Board members were loathe to make a ruling which would allow students to bargain over subjects such as teaching methods, class hours, and curriculum.¹³³

In virtually all graduate student unionization cases, the employer has issued dire warnings of the effect on education if graduate students were able to negotiate their working conditions. There has been a general fear that students would move beyond negotiating over common issues like hours, wages and benefits, eventually attempting to negotiate other conditions such as their own classes, grades, or professors.¹³⁴ The Board rejected that argument as well, noting that certification of a unit did not require the employer to reach an agreement with the union about any particular issue.¹³⁵ The Board put its faith in the abilities of both parties to confine collective bargaining to those areas where it was appropriate.¹³⁶ There was no reason to believe that graduate students would seek to collectively bargain in areas where they should not. This was a complete about-face from previous decisions, particularly *St. Clare's Hospital*, where the possibility of infringing on academic freedom was reason enough for the board to dismiss the petition.¹³⁷

The Board's position regarding academic freedom was borne out by the eventual contract agreed between the union and NYU, which contained a clause stating that "[d]ecisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University."¹³⁸ However, nothing

130. *Id.*

131. *Id.* "Therefore, notwithstanding any educational benefit derived from 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." *Id.*

132. *Id.* at 1208-09.

133. *See supra* Part II.C.3.

134. New York Univ., 332 N.L.R.B. at 1208-09. *See also* Epstein, *supra* note 2, at 186-90.

135. New York Univ., 332 N.L.R.B. at 1208-09. *See also* NLRB v. Jones & Laughlin Steel Corp., 301 N.L.R.B. 1, 45 (1937).

136. New York Univ., 332 N.L.R.B. at 1208-09.

137. *See supra* Part II.C.3.

138. Epstein, *supra* note 2, at 187.

prevented clauses like this one being negotiated away in future contracts. While nothing compels the university to agree to allow graduate students to influence teaching conditions, universities argue that, with the power of a union, graduate students may make inroads into academic freedom.

New York University and *Boston Medical Center* were a complete change of jurisprudence. The dissents of Member Fanning had finally seen their day, more than two decades later. However, the nature of the NLRB is change, given the constant turnover in its membership. The next change would not be long in coming.

IV. BROWN UNIVERSITY

In the wake of the *NYU* decision, graduate students at private colleges and universities across the country were able to organize and collectively bargain. When graduate students at Brown University attempted to form a union, the University argued that their situation was factually distinguishable from *NYU* because a far greater percentage of Brown's graduate students were research or teaching assistants.¹³⁹ The Board went far beyond that, however, reversing *NYU* and once again holding that graduate students were not employees under Section 2(3) of the Wagner Act.¹⁴⁰

Now consisting of a majority less favorable to union causes, the Board reverted to the "primary purpose" test.¹⁴¹ The Board also found the traditional arguments concerning academic freedom persuasive.¹⁴² The union at Brown proposed to represent 450 teaching and research assistants in social science and humanities departments at the University.¹⁴³ The students received a stipend, the size of which did not vary based on duties or skill.¹⁴⁴ Many students received fellowships and therefore received the stipends despite not performing any duties for the University.¹⁴⁵ The majority cited *Leland Stanford* as the precedent which the Board had dutifully followed for more than a quarter of a century before *NYU*.¹⁴⁶ The lack of flexibility in compensation and the fact that this compensation was given to all students regardless of their work or financial need was telling in the opinion of the majority.¹⁴⁷

The Board cited the fact that the relationship between students and the University was primarily educational rather than economic in concluding

139. *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004).

140. *Id.*

141. Epstein, *supra* note 2, at 176.

142. *Brown Univ.*, 342 N.L.R.B. at 492.

143. *Id.* at 483.

144. *Id.* at 486.

145. *Id.*

146. *Id.* at 486–87. *See supra* Part II.C.1.

147. *Brown Univ.*, 342 N.L.R.B. 483, 487 (2004).

that the traditional employer-employee framework was inappropriate.¹⁴⁸ Indeed, most of the students in the proposed bargaining unit would not have been able to receive their degree without completing a teaching requirement.¹⁴⁹ Thus, the *Brown* decision marked a return to the “primary purpose” test. According to the Board, graduate students attended Brown first and foremost to earn a degree. Because their positions were not available to non-graduate students, and they received income regardless of the work they performed, the Board found that they were primarily students, rather than employees.

The NLRB further noted that it was empowered to make policy determinations in interpreting the statute.¹⁵⁰ Previously, the Supreme Court had excluded managerial employees from protection under the Wagner Act although they are not among the groups specifically excluded in Section 2(3).¹⁵¹ The Supreme Court did this because it was necessary in order to realize the goals of the legislation.¹⁵² Thus, the Board determined it should do the same in interpreting the rights of graduate students to form unions since the Wagner Act was meant to cover economic, rather than educational, relationships.¹⁵³

The Board relied heavily on its decision in *St. Clare’s Hospital*.¹⁵⁴ In particular, the majority’s decision issued dire warnings about the threat graduate student unions posed to academic freedom:

The concerns expressed by the Board in *St. Clare’s Hospital* 25 years ago are just as relevant today at Brown. Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants’ duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown.¹⁵⁵

Finally, the majority criticized both the dissenting members and the *NYU* Board for overturning a quarter-century of precedent by allowing graduate

148. *Id.*

149. *Id.* at 488.

150. *Id.*

151. *Id.* See *supra* note 94.

152. *Brown Univ.*, 342 N.L.R.B. 483, 488 (2004).

153. *Id.* at 488. “We follow that principle here. We look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships. The Board’s longstanding rule that it will not assert jurisdiction over relationships that are ‘primarily educational’ is consistent with these principles.” *Id.*

154. *Id.* at 489–91.

155. *Id.* at 490.

student unionization. “Although the Board may not have been presented the precise facts of *NYU* in earlier cases, the dissent chooses either to ignore or simply to disregard what had been Board law regarding this category of students for over 25 years.”¹⁵⁶ The majority also noted that there had been little disruption caused by its consistent rulings prior to *NYU* denying graduate students collective bargaining rights.¹⁵⁷ Additionally, Congress never voiced any displeasure with the Board’s earlier line of decisions.¹⁵⁸

In summary, the NLRB in *Brown* returned national labor policy in this area to exactly where it was prior to *NYU*. The Board decided that the “primary purpose” test was back. Students could not be both students and employees at the same time if their work was directly related to their educational goals. The Board firmly stated its belief that it had the right to interpret statutes so that legislative intent was realized and it made clear that these policy considerations were best served by denying graduate students organizing rights. Finally, the majority made it clear that it took seriously the potential threats to academic freedom posed by graduate student unions.

The current prospects for graduate student unions project a bleak picture. However, the outlook may change under the direction of the Obama Administration. Currently, the time period from 2000 to 2004 appears to be a brief interlude in an otherwise unbroken period where graduate students were denied union rights. Only time will tell what will happen next.

V. POST-BROWN DEVELOPMENTS

A. The Aftermath at NYU

Following the NLRB’s decision in *NYU*, the University was forced to negotiate with the newly formed graduate student union. The parties agreed to a contract in January 2002 that featured significant stipend increases as well as improved health benefits.¹⁵⁹ The contract did not give the students any say in academic decisions as the NLRB had feared.¹⁶⁰ Students at other universities began to sit up and take notice. A leader in the budding graduate student union movement at Columbia said, “Graduate students who are unsure of the impact a union will have can look at the N.Y.U. contract and see the concrete evidence of the benefits of

156. *Id.* at 491.

157. *Id.* at 493.

158. *Id.*

159. Karen W. Arenson & Steven Greenhouse, *N.Y.U. and Union Agree On Graduate-Student Pay*, N.Y. TIMES, Jan. 30, 2002 at B3.

160. *See supra* note 129 and accompanying text.

unionizing.”¹⁶¹

After the *Brown* decision, NYU refused to continue recognizing the union and did not negotiate a new contract with it.¹⁶² Graduate students went on strike, refusing to submit grades for the Fall 2005 semester.¹⁶³ “This issue is worth fighting for,” said Susan Valentine, a fourth-year graduate student in history at N.Y.U. and graduate student leader. “I really love teaching. I love being in graduate school. And it would not be possible for me without a fair salary and benefits that the union ensures.”¹⁶⁴ For its part, the University continued to insist that student agitation, via the union, infringed on academic freedom.¹⁶⁵

The strike lasted for the remainder of the 2005–2006 school year, causing a great deal of angst on the part of undergraduate students, who were often left with canceled classes and a lack of instruction due to the unavailability of graduate assistants.¹⁶⁶ During the spring semester, many graduate assistants eventually returned to work, although the strike continued.¹⁶⁷ It took the end of the academic year and with it a thirty percent turnover in membership to break the deadlock.¹⁶⁸

When the strike ended, the University still refused to voluntarily recognize the union.¹⁶⁹ NYU continued to insist that academic freedom had been infringed under the terms of the contract.¹⁷⁰ Union leaders and graduate students vowed to keep up the fight for union recognition on their campus.¹⁷¹ Even today, the union’s website continues to insist “we will win.”¹⁷² History shows that a change of outlook by the NLRB may be necessary in order to make that boast a reality.

B. Research Foundation at SUNY

Since the *Brown* decision, only one case of note involving graduate student unions has come before the Board. This case involved graduate students at the State University of New York (“SUNY”) who worked for a

161. Arenson, *supra* note 151, at B3.

162. Karen W. Arenson, *N.Y.U. Graduate Students Say They’ll Strike to Unionize*, N.Y. TIMES, Nov. 1, 2005 at B2.

163. *Id.*

164. *Id.*

165. *Id.*

166. Karen W. Arenson, *Strike by Graduate Students at N.Y.U. Enters Its Second Week*, N.Y. TIMES, Nov. 17, 2005 at B4.

167. Karen W. Arenson, *N.Y.U. Teaching Aides End Strike With Union Unrecognized*, N.Y. TIMES, Sept. 7, 2006 at B2.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. GRADUATE STUDENT ORGANIZING COMMITTEE AND UNITED AUTO WORKERS LOCAL 2110, available at <http://www.2110uaw.org/gsoc/> (last visited Jan. 8, 2008).

Research Foundation (“Foundation”) set up in order to provide additional research opportunities at the University.¹⁷³ The Regional Director applied *Brown* and dismissed the election petition, holding that the students were not employees under Section 2(3). The NLRB distinguished *Brown* and reinstated the petition for the proposed bargaining unit.¹⁷⁴

Although all of the union’s potential members were students and their employment was dependent on their status as students, the Board found other factors distinguished their situation from that of the students in *Brown*.¹⁷⁵ Compensation was set at different levels depending on a student’s skill level and experience, and could be adjusted by the employer based on performance on the job.¹⁷⁶ Most importantly, the Foundation was a separate entity from SUNY. It did not grant degrees or teach students.¹⁷⁷ No credit was received for work performed and working at the Foundation was not a required part of any degree program.¹⁷⁸ It maintained its own payroll and human resources systems, distinct from the University, out of which the students were paid.¹⁷⁹ Accordingly, the students did not have a primarily educational relationship with the Foundation, although they did with the University. Thus, the students were employees under the “primary purpose” test.

Although this case did not deal with the same set of facts as previous cases involving graduate student unions, it still holds a degree of significance. First, despite still being dominated by a conservative majority, the Board declined to extend the “primary purpose” doctrine any further. On the other hand, faced with a possible opportunity to reverse *Brown*, the Board did not do so. This case indicates that the current state of the law in this area will remain in force at least until the composition of the Board is significantly changed.

C. Attitude of Graduate Students

A survey carried out in 2004 by the Hofstra Labor and Employment Law Journal offers some insight into the attitude of graduate students around the country with regard to labor issues.¹⁸⁰ Although the format and method of the survey was less than perfect, it is instructive as to the concerns of

173. Research Found. of the State Univ. of N.Y. Office of Sponsored Programs, 350 N.L.R.B. 197, 197 (2007).

174. *Id.*

175. *Id.* at 198.

176. *Id.*

177. *Id.* at 197.

178. *Id.* at 198-99.

179. *Id.* at 197.

180. Gerilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities* 21 HOFSTRA LAB. & EMP. L.J. 753 (2004).

potential members of graduate student unions.¹⁸¹

The survey showed that health care and wages were the primary issues of concern to graduate students.¹⁸² This pokes some holes in the argument made by colleges and universities that students will seek to bargain over academic matters. For example, only 2.9% of graduate assistants chose “class size” as their most important issue.¹⁸³ Only 5.2% chose classwork, and less than 1% chose “class content.”¹⁸⁴ Again, this indicates that, if graduate student unions became a reality at these colleges and universities, students would look to bargain (at least initially) over issues such as wages and benefits. As one student stated: “[N]egotiating a living wage for graduate student teachers [is] the first step in recognizing the services of grad teachers and allowing graduate education to remain open to those of all income levels without forcing people into unmanageable debt.”¹⁸⁵ The survey also indicated that the vast majority of graduate students did not have any additional employment outside their assistant positions.¹⁸⁶

VI. CONCLUDING THOUGHTS—WHERE TO NOW?

One of the primary lessons from the Board’s double reversal in *NYU* and *Brown* is the difficulty of applying a statute to a situation which was never envisioned by those drafting it. Both the “master-servant” test and the “primary purpose” test represent sincere attempts by Board members to interpret an ambiguous provision of the NLRA. In the absence of clarification from Congress, it remains very possible that the Board could change course again in the coming years.

The issue of graduate student unions looks likely to come up again within the next decade. Having had victory taken away from them in *Brown* just four years after winning the right to organize in *NYU*, advocates of unionization are unlikely to leave the matter where it presently stands. Currently, three of the five seats on the Board are vacant, meaning President Obama will be able to appoint a majority of the Board immediately.¹⁸⁷ Given the important role of organized labor in the Democratic Party, it appears likely that the appointees chosen may be more disposed to union interests.

Nevertheless, the Board has reason to be wary of reversing itself quickly. Constant reversals and re-reversals rob the law of predictability and undermine the Board’s integrity as its decisions look inherently

181. *Id.* at 782-84.

182. *Id.* at 786.

183. *Id.* at 787.

184. *Id.* at 788.

185. *Id.* at 789.

186. *Id.*

187. BOARD, NATIONAL LABOR RELATIONS BOARD, *available at* http://www.nlr.gov/About_Us/Overview/board/ (last visited March 17, 2009).

political. Furthermore, evidence from the handful of public colleges and universities which have graduate student unions suggests they have not been the panacea supporters had hoped for.¹⁸⁸ For example, students at UC-Berkeley worked without a contract for seven years during the late 1980's and early 1990's.¹⁸⁹ Such a lengthy period represents the entire graduate career of most students. Generally, contracts which have been successfully negotiated by graduate student unions have resulted in modest increases in the wages and benefits for its members.¹⁹⁰ Unions may find it difficult to extract even these increases from colleges and universities at a time when endowments have rapidly decreased in value.¹⁹¹

On the other hand, evidence from public institutions as well as from NYU during the period it had a graduate student union, suggests that unionization does not result in the sky falling. It does not appear that public colleges and universities with graduate student unions had to greatly reduce the number of teaching and research assistants in the wake of unionization. The fears of colleges and universities that graduate student unions would attempt to bargain over class sizes and teaching methods have proved largely unfounded as well.¹⁹² While it remains unclear what the effects of wider unionization by graduate students would be, the alarmist scenario predicted by NYU when it came before the Board has not materialized.

The issue of graduate student unionization seems likely to come up again in the near future. Another about-face from the Board, the third in a relatively short period of time, is a possibility. Colleges and universities and organized labor have invested considerable time and effort into this struggle. They should not be at the mercy of the whims of a politically motivated Board. Instead of allowing uncertainty to prevail in this area of the law, Congress should act. Congressional clarification would be the best solution and perhaps the only one likely to resolve the situation once and for all. Today's uncertainty exists because the roles of teaching and research assistants do not fit neatly within the categories created by the NLRA. Positions such as these simply did not exist in 1935. Congress now has it within its power to make its intent clear and clarify whether graduate students are "employees" under the NLRA. It should do so.

188. For an excellent, if slightly outdated, summary of the contracts negotiated by graduate student unions at public universities, see William C. Barba, *The Unionization Movement: An Analysis of Graduate Student Employee Union Contracts*, NACUBO BUSINESS OFFICER, Nov. 1994 at 35-43.

189. *Id.* at 40-41.

190. *Id.* at 37-40.

191. See Geraldine Fabrikant, *Colleges Struggle to Preserve Financial Aid*, N.Y. TIMES, Nov. 10, 2008 at F25.

192. The University of Wisconsin is an exception. State law requires bargaining over class sizes and educational planning. Barba, *supra* note 188, at 40.