

# Graduate Student Employees or Employee Graduate Students? The National Labor Relations Board and the Unionization of Graduate Student Workers in Postsecondary Education

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GRADUATE STUDENT EMPLOYEES OR  
EMPLOYEE GRADUATE STUDENTS? THE  
NATIONAL LABOR RELATIONS BOARD AND THE  
UNIONIZATION OF GRADUATE STUDENT  
WORKERS IN POSTSECONDARY EDUCATION

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ABSTRACT

*This Note concerns the ongoing debate over the unionization of graduate student employees at private universities. An issue that the National Labor Relations Board (the Board) has historically been inconsistent on, graduate student unionization remains a contentious topic as university administrators continue to try to oppose student unionization efforts while graduate student employees seek to assert their collective bargaining rights under the National Labor Relations Act (the NLRA or the Act).*

*This Note will propose two considerations that the Board should take into account concerning issues of graduate student employee unionization: the appropriate bargaining unit and bargainable issues in academia. By considering these two facets of the collective bargaining process and setting out guidelines, this Note argues, the Board can uphold the right of graduate student employees to unionize while also balancing the interests of university administrators.*

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## INTRODUCTION

For many Americans today, going to university is a foregone conclusion—a 2016 report by the United States Census Bureau (Census Bureau) estimates that approximately nineteen million students in the United States are currently enrolled in an undergraduate university program.<sup>1</sup> This number is a marked increase from the approximately two million students enrolled in undergraduate programs in 1955.<sup>2</sup> While part of that difference can certainly be attributed to an overall increase in the American population, it is apparent that more American students are pursuing an undergraduate university education than ever before.<sup>3</sup>

Along with an increase in undergraduate student enrollment numbers, there has been a corresponding increase in the number of teaching staff at universities around the country.<sup>4</sup> The United States Bureau of Labor Statistics (“BLS”) defines postsecondary teachers as those “instruct[ing] students in a wide variety of academic and technical subjects beyond the high school level.”<sup>5</sup> These instructing duties may include teaching courses in their area of expertise, planning lessons and assignments for their classes, grading student work (e.g., examinations, assignments, papers, etc.), and working directly with students to further their understanding of the material taught.<sup>6</sup> BLS estimates that there will be a

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<sup>1</sup> *CPS Historical Time Series Tables on School Enrollment: Table A-1. School Enrollment of the Population 3 Years Old and Over, by Level and Control of School, Race, and Hispanic Origin: Oct. 1955 to 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/school-enrollment/cps-historical-time-series.html> [https://perma.cc/QQM7-3B3Q].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Bureau of Labor Statistics, *Occupational Outlook Handbook: Postsecondary Teachers: Summary*, U.S. DEP’T OF LABOR, <https://www.bls.gov/ooh/education-training-and-library/postsecondary-teachers.htm> [https://perma.cc/V66T-HUAR].

<sup>5</sup> *Id.*

<sup>6</sup> Bureau of Labor Statistics, *Occupational Outlook Handbook: Postsecondary Teachers: What They Do*, U.S. DEP’T OF LABOR, <https://www.bls.gov/ooh/education-training-and-library/postsecondary-teachers.htm#tab-2> [https://perma.cc/ESZA-FEFQ]. Other duties may include “work[ing] with colleagues to develop or modify the curriculum for a degree or certificate program involving a series of courses,” “stay[ing] informed about changes and innovations in their field,” and “develop[ing] an instructional plan ... for the course(s) they teach and ensure that it meets college and department standards.” *Id.*

15 percent growth rate in the number of postsecondary teachers in the period from 2016 to 2026—an increase of almost 200,000 postsecondary teachers.<sup>7</sup> This increased rate is considered by BLS to be “much faster than average.”<sup>8</sup> Notably, many of these anticipated new positions are expected to be part-time, rather than full-time, positions.<sup>9</sup> Scholars note that there is a “trend ... away from tenure track positions. In 1970, approximately 22 percent of faculty appointments were part-time or adjunct. Both the National Education Association and American Association of University Professors now estimate that part-time faculty represent just over 50 percent of positions.”<sup>10</sup>

Though BLS’s records on graduate teaching assistants are not as comprehensive as they are for postsecondary teachers, a 2013 report conducted by BLS found that there were approximately 1.18 million graduate teaching assistants currently employed in postsecondary institutions around the United States.<sup>11</sup> BLS defines the role of graduate teaching assistants as “[a]ssist[ing] faculty and other instructional staff in postsecondary institutions by performing teaching or teaching-related duties.”<sup>12</sup> These duties may include “teaching lower level courses, developing teaching materials, preparing and giving examinations, and grading examinations or papers.”<sup>13</sup> The majority of these graduate teaching assistants are employed at colleges, universities, and professional schools, with a small group employed by junior colleges and technical schools.<sup>14</sup> BLS reports that the mean annual salary for a

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<sup>7</sup> See Bureau of Labor Statistics, *Occupational Outlook Handbook: Postsecondary Teachers: Summary*, supra note 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Matthew A. Bodah, *Significant Labor and Employment Law Issues in Higher Education During the Past Decade and What to Look for Now: The Perspective of an Academician*, 29 J.L. & EDUC. 317, 327 (2000).

<sup>11</sup> Bureau of Labor Statistics, *Occupational Employment Statistics: 25-1191 Graduate Teaching Assistants*, U.S. DEP’T OF LABOR, <https://www.bls.gov/Oes/current/oes251191.htm> [<https://perma.cc/U4CT-UGMB>].

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (finding that there were approximately 1.15 million graduate student teaching assistants employed by colleges, universities, and professional schools; there were approximately 3 million graduate teaching assistants employed by junior colleges; and there were approximately 0.9 million graduate teaching assistants employed by technical and trade schools).

graduate student teaching assistant is approximately \$35,000, with the lowest 10 percent making an annual salary of approximately \$18,000 and the top 10 percent earning an annual salary of approximately \$55,000.<sup>15</sup> This stands in stark contrast to the median annual salary of the average postsecondary teacher, which hovers around \$75,000.<sup>16</sup> The lowest 10 percent of postsecondary teacher earners average around \$38,000 per year, while the highest 10 percent group earns around \$168,000 per year.<sup>17</sup>

As BLS's data so clearly illustrates, the increasing demand for a university education led to a corresponding increase in the number of teachers that universities and other postsecondary educational institutions must employ in order to meet the demand.<sup>18</sup> BLS's data also shows the wide pay gap between postsecondary teachers and graduate student teaching assistants, with the bottom 10 percent of postsecondary teachers earning about the same annual salary as the median graduate student teaching assistant.<sup>19</sup> This pay gap exists in spite of the similarities between the job duties of the two different positions.<sup>20</sup> In its decision in *New York University*, the Board noted that "in some respects the graduate assistants' working conditions are no different from those of [New York University's] regular faculty."<sup>21</sup> Given the similarities in their job duties coupled with the significantly cheaper cost of graduate student teaching assistants, it is not surprising that "graduate students have become a huge pool of cheap labor for university employers."<sup>22</sup>

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<sup>15</sup> *Id.*

<sup>16</sup> Bureau of Labor Statistics, *Occupational Outlook Handbook: Postsecondary Teachers: Pay*, U.S. DEP'T OF LABOR, <https://www.bls.gov/ooh/education-training-and-library/postsecondary-teachers.htm#tab-5> [<https://perma.cc/C6NG-TXNG>].

<sup>17</sup> *Id.*

<sup>18</sup> Bureau of Labor Statistics, *Occupational Outlook Handbook: Postsecondary Teachers: Job Outlook*, U.S. DEP'T OF LABOR, <https://www.bls.gov/ooh/education-training-and-library/postsecondary-teachers.htm#tab-6> [<https://perma.cc/QR92-KCX2>].

<sup>19</sup> Bureau of Labor Statistics, *Occupational Outlook Handbook: Postsecondary Teachers: Pay*, *supra* note 16.

<sup>20</sup> N.Y. Univ., 332 N.L.R.B. 1205, 1208 (2000).

<sup>21</sup> *Id.*

<sup>22</sup> David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 245 (1998).

As the number of graduate student teaching assistants employed by universities has increased during a time when there is a corresponding decrease in the number of full-time faculty teaching at those same universities, questions about the status of student employees have, predictably, arisen.<sup>23</sup> Is the graduate student teaching assistant more of a student? Or are they more of an employee? Are they a mix of the two, in some “sort of a netherworld, something less than pure students but not yet admitted into the ranks of the faculty”?<sup>24</sup> What rights do they have under either category? These questions have stymied the Board for over fifty years, culminating in a jumbled and, at times, contradictory doctrinal approach to the issue.<sup>25</sup>

This Note will start by examining the historical foundations of the Board’s most recent decision on the unionization of graduate student employees in the *Columbia University* case, examining the language of the National Labor Relations Act (NLRA or the Act) itself, then going into the most prominent decisions the Board has made on the issue of student employees. After examining the history behind the decision in *Columbia University*, this Note will then discuss how the *Columbia University* decision has been received by both universities and student employees, as well as some of the practical impacts of the decision. This Note will propose some limits and standards that the Board should establish in light of the broad holding of *Columbia University*, focusing on the importance of defining the scope of the appropriate collective bargaining unit as well as preserving the unique sphere of academia by defining parameters for bargainable issues. This Note will show not just how the Board came to its most recent decision, but also how graduate student unions and school administrators can exist harmoniously in the realm of universities and other postsecondary institutions.

<sup>23</sup> Colleen Flaherty, “Running Out the Clock” on Grad Unions?, INSIDE HIGHER ED. (May 4, 2017), <https://www.insidehighered.com/news/2017/05/04/graduate-student-union-bids-private-institutions-have-succeeded-flopped-and-been> [<https://perma.cc/7D3K-DBSD>].

<sup>24</sup> Sheldon D. Pollack & Daniel V. Johns, *Graduate Students, Unions and Brown University*, 20 LAB. LAW 243, 246 (2004).

<sup>25</sup> See generally Gerilynn Falasco & William J. Jackson, Note, *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) (giving a broad overview of the Board’s changing positions on graduate student employee unionization efforts over the years).

I. HISTORICAL FOUNDATIONS OF THE BOARD'S DECISION IN THE  
*COLUMBIA UNIVERSITY CASE*

*A. Interpreting the NLRA Itself—a History of the Act and a Look  
at Certain Provisions*

The NLRA was enacted in 1935, with the goal to “protect the rights of employees and employers, to encourage collective bargaining, and ... curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses, and the U.S. economy.”<sup>26</sup> The NLRA was considered necessary because employee-employer conflicts had reached a peak and were impacting the flow of commerce.<sup>27</sup> In 1936, the Second Circuit Court of Appeals reaffirmed this interpretation of the NLRA, stating that the “method devised by the [NLRA] to prevent the interruption of the flow of interstate commerce by labor disputes is to ensure collective bargaining through untrammelled representation of employees through representatives of their own choice.”<sup>28</sup> At the time of its passage, the NLRA—also known as the “Wagner Act,” named after the Senator who championed the bill<sup>29</sup>—was one of the most revolutionary pieces of legislation to come out of the New Deal.<sup>30</sup> Among the many worker protections established under the NLRA was the right to collectively bargain.<sup>31</sup> Section 157 of the NLRA holds that “employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representation of their own choosing, and to engage in other concerted activities for the purpose of collective

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<sup>26</sup> National Labor Relations Act of 1935, 29 U.S.C. §§ 151–69 (2012), <https://www.nlrb.gov/resources/national-labor-relations-act> [<https://perma.cc/PTY8-F3U5>].

<sup>27</sup> Stanley Aronowitz et al., *Work, Work, and More Work: Whose Economic Rights? A Conversation Between Professors Stanley Aronowitz, Shirley Lung, Moderated by Professor Ruthann Robson*, 16 CUNY L. REV. 391, 393 (2013) (noting that the NLRA “was established ... in order to control what in 1933 and ‘34 had become the strike wave. The control of the strike wave was in the form of a law that provided a series of procedures as well as the rights to organize unions; workers could organize unions of their own choosing.”).

<sup>28</sup> *Black Diamond S. S. Corp. v. NLRB*, 94 F.2d 875, 879 (1938).

<sup>29</sup> *Who We Are: Our History: The 1935 Passage of the Wagner Act*, NLRB, <https://www.nlrb.gov/who-we-are/our-history/1935-passage-wagner-act> [<https://perma.cc/7RE6-BY8R>].

<sup>30</sup> Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1778 (1983).

<sup>31</sup> 29 U.S.C. § 157 (2012).



bargaining.”<sup>32</sup> Given the revolutionary nature of the NLRA, many employers were reluctant to comply with it, as they had enjoyed nearly *carte blanche* to fight against the formation of unions before the NLRA’s passage.<sup>33</sup> Indeed, prior to the NLRA some companies created so-called “company unions” which were not actually unions but, instead, were “very loose grievance mills” and the only way workers could gain rights was to strike, thereby seriously impacting business operations.<sup>34</sup>

In the first few years after the NLRA’s enactment, over one million voters participated in union elections and unions won about 80 percent of the elections.<sup>35</sup> In the years following World War II, during which there was a slight dip in numbers, union membership reached roughly 35 percent of non-agricultural workers, an almost threefold increase from the pre-NLRA numbers.<sup>36</sup> Since then, union participation has been on a steady decline<sup>37</sup>: by 1980, union membership was just over 20 percent,<sup>38</sup> and as of January 2017, BLS reported that union membership was down to about 11 percent.<sup>39</sup> Among union members today, workers in education, training, and library occupations have the highest unionization rates at about 35 percent in 2016.<sup>40</sup>

Under the NLRA, the term “employee” is given quite a broad definition:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home,

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<sup>32</sup> *Id.*

<sup>33</sup> Weiler, *supra* note 30, at 1778.

<sup>34</sup> Aronowitz et al., *supra* note 27, at 393–94.

<sup>35</sup> Weiler, *supra* note 30, at 1775.

<sup>36</sup> *Id.* at 1771.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Bureau of Labor Statistics, *Economic News Release—Union Members Summary*, U.S. DEPT OF LABOR (Jan. 26, 2017), <https://www.bls.gov/news.release/union2.nr0.htm> [<https://perma.cc/XD6H-Y554>].

<sup>40</sup> *Id.*

or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.<sup>41</sup>

This broad language leaves open uncertainties about who is covered under the NLRA.<sup>42</sup> Early cases on this issue before the Supreme Court supported giving the NLRB deference in its interpretation of the term “employee” as written in the NLRA.<sup>43</sup> The Court held that agencies are to be given “appropriate weight” where it is the agency’s duty to administer the statute in question and that “the Board’s determination that specified persons are ‘employees’ under [the NLRA] is to be accepted if it has ‘warrant in the record’ and a reasonable basis in law.”<sup>44</sup> Practically speaking, this means that the final outcome of a court’s determination on whether to uphold or overrule an NLRB decision will depend on how the court “regards the Board’s expertise, how convincing the Board’s rationale for a given decision is, and, importantly, upon whether that court thinks the Board made a given decision in an unbiased manner.”<sup>45</sup>

Unlike the word “employee,” the NLRA’s definition of the word “employer” is simpler and reads, in major part, that “[t]he term ‘employer’ includes any person acting as an agent of an employer, directly or indirectly.”<sup>46</sup> The NLRA then goes on to narrow this category in noting that the term “employer” does not include the United States, corporations owned by the United States, “or any State or political subdivision thereof.”<sup>47</sup> This is a shorter version of the statute as originally enacted as the statute was amended in 1974 to remove the phrase “or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit

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<sup>41</sup> 29 U.S.C. § 152(3) (2012).

<sup>42</sup> Gregory C. Kloeppel, *Salt Anyone? The United States Supreme Court Holds that Paid Union Organizers Qualify as Employees*, 42 ST. LOUIS UNIV. L.J. 243, 250 (1998).

<sup>43</sup> NLRB v. Hearst Publ’ns, 322 U.S. 111, 130 (1944).

<sup>44</sup> *Id.* at 131.

<sup>45</sup> 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, 860 (2006).

<sup>46</sup> 29 U.S.C. § 152(2) (2012).

<sup>47</sup> *Id.*

of any private shareholder or individual”—a narrow exception to an otherwise expansive definition.<sup>48</sup> Aside from that phrase, which essentially provided that non-profit hospitals would not be subject to the Board’s jurisdiction, strikingly absent from the definition is a non-profit/for-profit organization distinction.<sup>49</sup> In other words, though the Board historically chose to limit the exercise of its jurisdiction under the NLRA to for-profit entities, there really was not any statutory reason to do so.<sup>50</sup> In fact, the Board later refined its position in saying that while the Board traditionally *chose* not to exercise jurisdiction over non-profit entities, that did not mean that it did not *actually have* jurisdiction over them.<sup>51</sup>

Initially, the Board declined to extend its jurisdiction over all private employers which may have been covered under the NLRA, choosing instead to hold in the first *Columbia University* Board decision in 1951 that it would not “effectuate the policies of the Act for the Board to assert its jurisdiction over a non-profit educational institution where the activities involved are non-commercial in nature and intimately connected with the charitable purposes and educational activities of the institution.”<sup>52</sup> The NLRB changed its stance in 1970 when it ruled that it possesses “statutory jurisdiction over non-profit educational institutions whose operations affect commerce.”<sup>53</sup> The NLRB justified the change by arguing that “to carry out its educative functions, the university

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<sup>48</sup> *Id.* The 1974 amendments to the Act deleted the phrase “or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual” from the definition of “employer.” Pub. L. No. 93-360, § 1(a), 88 Stat. 395, 395 (July 26, 1974).

<sup>49</sup> 29 U.S.C. § 152(2).

<sup>50</sup> The Editorial Board, Opinion, *Unions in the Ivory Tower*, N.Y. TIMES (Aug. 24, 2016), [https://www.nytimes.com/2016/08/25/opinion/unions-in-the-ivory-tower.html?\\_r=1](https://www.nytimes.com/2016/08/25/opinion/unions-in-the-ivory-tower.html?_r=1) [<https://perma.cc/TS3A-L6WU>] [hereinafter *Unions in the Ivory Tower*] (opining that “[i]n recent decades, as tenure-track positions at universities have declined precipitously, teaching and research—the mainstay of universities—have increasingly been taken up by adjunct faculty members and graduate assistants, without commensurate increase in pay, status or career opportunities. On many campuses, teaching and research assistants are essentially low-paid, white-collar workers, typically earning around \$30,000 a year, most of whom will never get tenure-track positions.”).

<sup>51</sup> Trs. of Columbia Univ., 02-RC-143012, 2016 N.L.R.B. LEXIS 619, at \*1 (N.L.R.B. Aug. 23, 2016).

<sup>52</sup> Trs. of Columbia Univ., 97 N.L.R.B. 424, 427 (1951).

<sup>53</sup> Cornell Univ., 183 N.L.R.B. 329, 331 (1970).

has become involved in a host of activities which are commercial in character.”<sup>54</sup>

The NLRA’s definition of the term “affecting commerce” (“in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce”<sup>55</sup>) is, like its definition of the word “employee,” quite broad.<sup>56</sup> The NLRB further justified its new exercise of jurisdiction over these institutions by claiming that though the language of the NLRA “does not compel the Board to assert jurisdiction, it does manifest a congressional policy favoring such assertion where the Board finds that the operations of a class of employers exercise a substantial effect on commerce.”<sup>57</sup>

This type of agency mind changing occurs often within the NLRB as the Board’s makeup and policy decisions shift in accordance with changes in the executive branch.<sup>58</sup> This position-shifting was pointedly condoned in the Supreme Court’s 1984 decision in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, when the Court held that agencies are to be accorded a certain amount of deference in their decision making.<sup>59</sup> That deference, the Court concluded, may extend to agency decisions made in reliance on the “incumbent administration’s views of wise policy to inform its judgments.”<sup>60</sup> Given

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<sup>54</sup> *Id.* at 332.

<sup>55</sup> 29 U.S.C. § 152(7) (2012).

<sup>56</sup> *Id.*

<sup>57</sup> *Cornell Univ.*, 183 N.L.R.B. at 332; *see also* 29 U.S.C. § 164(c) (discussing the NLRB’s power to assert or decline jurisdiction over labor disputes and noting that “[t]he Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to [the Administrative Procedure Act] decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.”).

<sup>58</sup> Dunn, *supra* note 45, at 858.

<sup>59</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984).

<sup>60</sup> *Id.* While *Chevron* deference typically means that the Court will defer to agency discretion, some critics contend that, in practice, the Court will exercise more discretion in statutory interpretation and may choose to decline to extend *Chevron* deference to Board decisions, substituting judicial statutory interpretation instead. *See* Catherine L. Fisk & Deborah C. Malamud, *Thirty-Ninth Annual Administrative Law Issue: Administrative Law Under the George W. Bush Administration: Looking Back and Looking Forward: Article: The NLRB in Administrative Law Exile: Problems With Its Structure and Function and Suggestions for*

the deference accorded to agency decisions, even those made pursuant to the agenda of an overall administration, it becomes increasingly difficult for the Board to maintain consistency over the years as administration changes can sway the Board away from its own recent decisions.<sup>61</sup> This vacillation can be seen in the following brief history of the NLRB's treatment of the collective bargaining status of graduate student teaching assistants.<sup>62</sup>

### *B. Early Cases: A Hardline Approach*

The first major case regarding the question of unionization in universities that came before the NLRB was *Columbia University* (1951).<sup>63</sup> In *Columbia University* (1951), the employees in question were clerical graduate employees working in the university library.<sup>64</sup> The employees wanted to unionize under the Community and Social Agency Employees Union, Local 1707 and, in support of their right to unionize, argued that they were entitled to the protections of the NLRA because Columbia University, a non-profit institution, was "engaged in commerce."<sup>65</sup> Columbia University, on the other hand, argued that it was not engaged in commerce,

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*Reform*, 58 DUKE L.J. 2013, 2015–16 (2009) (stating that "[u]nfortunately, the NLRB is not well suited to the regulatory task of bringing public-minded rationality to the processes of labor organizing and collective bargaining. From the agency's beginning, the Supreme Court has sharply limited the Board's range of policy discretion in the name of judicial supremacy in the interpretation of statutes. Within its range of discretionary policymaking, the Board has oscillated between extremes with every change of controlling political party, bringing its legitimacy as expert policymaker sharply into question. Part of the reason for the essentially political nature of Board decision making is that the agency lacks the kind of non-legal expertise that the administrative state was supposed to bring to the table. Although the Board has disappointed people across the political spectrum who believed in the promise of an administrative state, the failures of the NLRB have been a particularly bitter disappointment to those on the left because they had the highest hopes for administrative regulation.").

<sup>61</sup> Dunn, *supra* note 45, at 858; see Stephen L. Ukeiley, *Commentary: Graduate Assistants at the Bargaining Table, But for How Long?*, 21 HOFSTRA LAB. & EMP. L.J. 643, 644, 646–48 (2009) (discussing how changes in administrations have led to shifts in the Board's membership and, as a result, shifts in policy positions over the years).

<sup>62</sup> See *infra* Sections II.B–II.D.

<sup>63</sup> Trs. of Columbia Univ., 97 N.L.R.B. 424, 424–25 (1951).

<sup>64</sup> *Id.* at 424.

<sup>65</sup> *Id.*

the NLRA did not apply to university employees, and the NLRB could not exercise jurisdiction over the university.<sup>66</sup>

In declining to exert jurisdiction over the university, the NLRB noted that: “Although the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the [NLRA] 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 [NLRA] ... to assert jurisdiction here.”<sup>67</sup>

In justifying its decision, the NLRB maintained that it would be contrary to the aims of the NLRA to assert jurisdiction over a non-profit university unless there were exceptional circumstances and the jurisdiction was over the “purely commercial” activities of the university.<sup>68</sup> What constituted “purely commercial” activity was left to the discretion of the Board.<sup>69</sup> The Board particularly emphasized not wanting to assert jurisdiction over activities which are “intimately connected with the [charitable purposes and] educational activities of the institution ....”<sup>70</sup>

With this decision, the Board was adopting a rudimentary version of what would come to be known as the “primary purpose test” for determining when a graduate student employee was an “employee” under the NLRA.<sup>71</sup> The test is a simple one in theory: when determining the employee’s relationship to the employer, the Board would look to the “primary purpose” of the employment.<sup>72</sup> If the employment concerned educational matters, rather than economic, then the Board would find that the student worker was not an “employee” under the Act.<sup>73</sup>

The next major case to touch the issue of graduate student assistant employee status was *Adelphi University*.<sup>74</sup> In *Adelphi University*, university administrators wanted to include student teaching assistants in the formation of a new bargaining unit consisting of both full-time and part-time faculty.<sup>75</sup> In spite

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<sup>66</sup> *Id.* at 424–25.

<sup>67</sup> *Id.* at 425.

<sup>68</sup> *Id.* at 427.

<sup>69</sup> *Id.* at 426.

<sup>70</sup> *Id.*

<sup>71</sup> Falasco & Jackson, *supra* note 25, at 759.

<sup>72</sup> *Trs. of Columbia Univ.*, 97 N.L.R.B. at 762.

<sup>73</sup> *Id.*

<sup>74</sup> *Adelphi Univ.*, 195 N.L.R.B. 639, 639 (1972).

<sup>75</sup> *Id.*

of the Board noting that two-thirds of the students in question taught classes, graded papers, prepared exams, and occasionally substituted for absent faculty members, it held that the students should not be included in that bargaining unit.<sup>76</sup> In coming to this decision, the Board once again relied on the primary purpose test, noting that the “graduate teaching and research assistants here involved, [although] performing some faculty-related functions, are primarily students.”<sup>77</sup> The Board then slightly expanded the test to include a “community of interest” component which, the Board held, precluded the students from being included in a faculty bargaining unit because the two groups did not have a sufficient “community of interest.”<sup>78</sup>

The Board then found further ways to differentiate students from faculty in the *Leland Stanford Junior University (Leland Stanford)* case in 1974.<sup>79</sup> Here, the student petitioners argued that they should be considered employees under the NLRA because they were paid for their work through the university’s regular, faculty payroll system.<sup>80</sup> The Board once again found that the petitioners’ primary purpose was that of student, rather than employee.<sup>81</sup> In coming to this conclusion, the Board noted further factors for consideration in distinguishing between student and employee, including whether payment was through grants (i.e., student) or wages (i.e., employee); whether the student had already completed their PhD program (i.e., employee) or was working in pursuit of their degree (i.e., student); and whether the student had the power to initiate research projects (i.e., employee) or the work is “designated and controlled” by the university (i.e., student).<sup>82</sup> While the *Leland Stanford* opinion seemed like a perfunctory treatment of the student employee question, the Board would dive deeper into a similar issue in the so-called “housestaff cases” just a few years later.<sup>83</sup>

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<sup>76</sup> *Id.* at 639–40.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (noting that the students “do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit. Accordingly, we shall exclude them.”).

<sup>79</sup> *Leland Stanford Univ.*, 214 N.L.R.B. 621, 623 (1974).

<sup>80</sup> *Id.* at 621.

<sup>81</sup> *Id.* at 623.

<sup>82</sup> *Id.*

<sup>83</sup> Falasco & Jackson, *supra* note 25, at 762.

*C. The Housestaff Cases: A Softening Stance?*

Beginning in the mid-1970s, the Board heard a succession of cases involving housestaff at hospitals.<sup>84</sup> These cases were important because they set the stage for further Board consideration of the issue of student employees (in this case, medical housestaff) seeking union representation while employed by their university employer.<sup>85</sup>

The first notable case, *Cedars-Sinai Medical Center (Cedars-Sinai)*, was decided in 1976.<sup>86</sup> In *Cedars-Sinai*, the Board was tasked with determining whether housestaff at a non-profit medical center qualified as employees under the NLRA.<sup>87</sup> The Board defined “housestaff” as a word “commonly used by medical and hospital personnel ... when referring ... to interns, residents, and clinical fellows.”<sup>88</sup> The Board noted several criteria distinguishing the housestaff employees from the rest of the Cedars-Sinai staff, with most of the analysis hinging on an application of the Board’s primary purpose test.<sup>89</sup> The Board held that the purpose of the housestaff’s employment was to pursue their graduate education, rather than to make “a living.”<sup>90</sup> In making this determination, the Board relied heavily on two documents prepared by the Council on Medical Education, titled “Essentials of an Approved Internship and Essentials of Approved Residencies” (collectively, “The Essentials”) which served as guides for the accreditation of medical education programs.<sup>91</sup> The Board noted that The Essentials “indicate[d] that the primary function [of the housestaff’s work] is educational[,]”<sup>92</sup> and spent several paragraphs of its decision pointing out the differences between the housestaff and statutory employees.<sup>93</sup>

While the Board’s holding was hardly shocking given its past stance on the issue,<sup>94</sup> what marked *Cedars-Sinai* as the beginning

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<sup>84</sup> *Id.*

<sup>85</sup> Trs. of Columbia Univ., 02-RC-143012, 2016 N.L.R.B. LEXIS 619, at \*8 (Aug. 23, 2016).

<sup>86</sup> *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 251 (1976).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 253, 256.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 252.

<sup>92</sup> *Id.* at 253.

<sup>93</sup> *Id.* at 252–54.

<sup>94</sup> *See id.* at 251; *see also* *Leland Stanford Univ.*, 214 N.L.R.B. 621, 623 (1974).



of a change in the Board's opinion was that it was the beginning of an attack on the primary purpose test from within the Board itself.<sup>95</sup> The Board's Chairman, John H. Fanning, wrote a fiery dissent to the Board's majority opinion, decrying the Board's "exploit[ation of] semantic distinctions" between the terms "students" and "employees."<sup>96</sup> Fanning went on to note that the words "student" and "employee" were not mutually exclusive and that the focus should be on whether the people in question were *both* students and employees.<sup>97</sup> If so, according to Fanning, the primary question surrounding student employee unions was not whether the students were employees (which they already are by virtue of working for the university employer), but whether they shared a community of interest with the other employees or possessed a "sufficiently distinct community of interests enabling them to constitute an appropriate unit unto themselves ...."<sup>98</sup>

Fanning attacked the Board's primary purpose test because he felt the primary purpose of the program has nothing to do with the fact that, ultimately, the student is performing a service for compensation and instead indicates a desire for further training in their chosen profession which has nothing to do with whether they are "employees" under the NLRA.<sup>99</sup> Fanning argued that the primary purpose test could even be read to find a result that the primary purpose of the housestaff was the "improvement of patient care," or even "exposure to a wide range of medical experience."<sup>100</sup>

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<sup>95</sup> Falasco & Jackson, *supra* note 25, at 756, 762.

<sup>96</sup> *Cedars-Sinai*, 223 N.L.R.B. at 253.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 254.

<sup>99</sup> *Id.* at 256-57.

<sup>100</sup> *Id.* at 257. Bolstering this argument, Fanning noted:

For [their] services the housestaff receives, absent unusual circumstances not before us, *no* degree, *no* grades, *no* examinations. Housestaff officers perform those services on (and *in*) individuals who would hardly take comfort in the notion that the individual in whose hands their life itself may repose is not primarily interested in *performing* that service *for* the hospital and patient but, rather, is primarily a student of the matter .... Certainly, there is a didactic component to the work of *any* initiate, but simply because an individual is 'learning' while performing this service cannot possibly be said to mark that individual as 'primarily a student and, therefore, not an employee' for the purposes of our statute.

Underpinning Fanning's argument was his interpretation of the word "employee" as "the outgrowth of the common law concept of the 'servant'" and the master-servant relationship.<sup>101</sup> Fanning went on to define servant as 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 to control[.]" establishing the master-servant relationship, which is the common law predecessor to the current employer-employee relationship.<sup>102</sup> Fanning pointed to numerous indicia of the employee-employer relationship, including the fact that liability could be imposed on the hospital for the actions of its housestaff,<sup>103</sup> the housestaff's method of wage payment through taxable stipends (resembling wages),<sup>104</sup> the housestaff's receipt of benefits,<sup>105</sup> and the housestaff's mandatory professional

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*Id.*

<sup>101</sup> *Id.* at 254.

<sup>102</sup> *Id.* at 254–55 (quoting RESTATEMENT (SECOND) OF AGENCY § 200 (AM. LAW INST. 1957)).

Although, under common law, consideration for the services performed does not appear to have been a *sine qua non* of establishing the master-servant relationship, it is generally conceded, today, that such consideration is necessary for classification as an 'employee.' So that the conventional meaning of the word implies someone who works or performs a service for another form whom he or she receives compensation.

*Id.*

<sup>103</sup> *Id.* at 255.

It is significant to note that the common law's development of the master-servant doctrine was principally concerned with establishing a tortious liability in the master for the acts of the servant and, indeed, the principle of *respondeat superior* plays more than a small part in the current malpractice crisis of which we are all aware. That my colleagues have ignored a significant component of the hospital-housestaff relationship namely the former's vicarious liability for the actions of the latter, is a convenient introduction to another aspect of these cases which requires greater discussion—the facts.

*Id.*

<sup>104</sup> *Id.* at 255–56 (stating that "[f]rom that 'stipend,' the hospital withholds Federal and state taxes, contributes to social security, and provides for health insurance.").

<sup>105</sup> *Id.* at 252, 256–57 (noting "the hospital grants vacations and sick leave, laundry allowances, etc.").

qualification requirements.<sup>106</sup> Capping off his passionate argument, Fanning lamented that his colleagues on the Board made “substantial errors in judgment,” and asserted that it was Congress’s intention to confer onto the Board, through its statutory mandate, the authority to regulate labor relations in the health care industry and, namely, to govern recognitional strikes which may impact medical care.<sup>107</sup>

The next major case to address the issue of graduate student employees came just a few years later, in 1977, in *St. Clare’s Hospital and Health Center (St. Clare’s)*.<sup>108</sup> In *St. Clare’s*, the Board was “attempt[ing] to clarify [its] view of the relevant legal principles” established by previous housestaff cases, notably *Cedars-Sinai*.<sup>109</sup> Defending its *Cedars-Sinai* decision from critics, the Board reiterated that the primary issue was over the issue of *students*, not the health care industry in general and that the decision was not, as critics claimed, an “initial step in a new direction.”<sup>110</sup> In making this point, the Board reiterated its adherence

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<sup>106</sup> *Id.* at 255.

All housestaff officers are M.D.’s. All fellows and residents are licensed physicians in every State of the Union .... [H]ousestaff officers, *without immediate supervision of any kind*, continually deal in matters literally of the ultimate significance .... They singly staff emergency rooms, frequently at times when their supposed ‘teachers’ are not even in the facility. That accounts for the record facts which demonstrate that, without supervision, a housestaff officer can be called upon and, in fact, has been called upon, to open the chest wall of a 3-year-old child; hold the heart of a patient in his hands; remove breast tissues, kidneys, veins; deliver babies; insert tubes in the trachea of newborns and catheters into abdominal cavities; administer closely controlled and potentially lethal medications; and perform a host of similar procedures.

*Id.*

<sup>107</sup> *Id.* at 259. Congress was, understandably, concerned with the interruption to medical care services when recognitional strikes were occurring. Senator Williams introduced a Senate bill in 1974, which extended NLRA coverage to non-profit hospitals and provided that if there was a threat of a substantial interruption to healthcare, the Director of the Federal Mediation and Conciliation Service shall have the power to resolve the dispute. Pub. L. No. 93-360, § 213(a), 88 Stat. 395, 396 (1974).

<sup>108</sup> *St. Clare’s Hosp.*, 229 N.L.R.B. 1000, 1000 (1977).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

to the primary purpose test in analyzing whether students employed by postsecondary institutions qualified as employees, holding that the Board will primarily find that students will not be considered employees in most cases.<sup>111</sup> As in *Cedars-Sinai*, the Board relied heavily on its idea that students are serving primarily as students and not employees and that the mutual interest between the student employee and their employer is predominantly academic, not economic, in nature.<sup>112</sup> Digging its feet in even further, the Board stated that academic decision making and collective bargaining were largely unrelated to each other and the benefits of the latter to the former would be minimal.<sup>113</sup> The Board went on to elucidate a list of the consequences it believed imparting collective bargaining power onto graduate student employees would bring, including a “grave danger” of infringing upon traditional academic freedoms,<sup>114</sup> the use of grades, examinations, and degree

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One common misconception surrounding *Cedars-Sinai* is that it is primarily a decision about the health care industry. This is just not the case—it is primarily a decision about *students*, albeit students planning to enter the health care industry. When viewed in terms of the other Board decisions involving students, it becomes evident that *Cedars-Sinai* is neither an aberration in national labor policy nor a precursor of things yet to come.

*Id.*

<sup>111</sup> *Id.* at 1001.

<sup>112</sup> *Id.* at 1002.

<sup>113</sup> *Id.*

From the standpoint of national labor policy, subjecting academic decision making to collective bargaining is at best of dubious value because academic concerns are largely irrelevant to wages, hours, and terms and conditions of employment. From the standpoint of educational policy, the nature of collective bargaining is such that it is not particularly well suited to academic decision making. The inevitable change in emphasis from quality education to economic concerns which would accompany injection of collective bargaining into the student-teacher relationship would, in our judgment, prove detrimental to both labor and educational policies.

*Id.*

<sup>114</sup> *Id.* at 1003.

In addition to believing that collective bargaining is not adaptable to the structure of higher education, we also believe that there exists a grave danger that it may unduly infringe upon traditional academic freedoms including the right to speak freely in classrooms ... the right to determine course length and content; to establish standards for advancement and graduation; to

advancement as bargaining chips in collective bargaining negotiations,<sup>115</sup> and the inability of arbitrators to understand issues in the academic sphere.<sup>116</sup> In spite of its fear of what conferring collective bargaining power might entail if given to students, the Board did note that by taking this stance it was not completely foregoing jurisdiction in the issue but, rather, that conferring collective bargaining rights would “not be in the best interest of national labor policy.”<sup>117</sup>

As in *Cedars-Sinai*, however, there was some dissension in the Board’s ranks as to whether the majority came to the correct conclusion in this case.<sup>118</sup> Member Howard Jenkins, Jr. wrote a short concurrence in which he concurred in the result reached by the majority, but very little else.<sup>119</sup> Jenkins argued that the majority’s disposition on the issue was “a seeming willingness to regard any employees who also engage in structured studies as *per se* being somehow ... disqualified from union representation.”<sup>120</sup> Now-Member Fanning once again wrote a forceful dissent in which he argued that the Board’s determination that “longstanding ... policy” considerations formed the basis for denying students collective bargaining rights was incorrect and not supported by the record.<sup>121</sup> Fanning also questioned the Board’s conflation of housestaff and university student employees as a single “student employee”

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administer examinations; and to resolve a multitude of other administrative and educational concerns. If one were to conclude that the student-teacher and employee-employer relationships were in fact analogous, then it would follow that many academic freedoms would become bargainable as wages, hours, or terms and conditions of employment. Once this occurs, Board involvement in matters of strictly academic concern is only a petition or unfair labor practice charge away.

*Id.*

<sup>115</sup> *Id.* (noting “other academic prerogatives such as examinations, grading, course content and materials, program duration, and teaching methods are likely to find their way eventually to the bargaining table.”).

<sup>116</sup> *Id.* (stating that “[i]n all likelihood, a student protest over an unfavorable recommendation would end up before an arbitrator, with the arbitrator being asked to decide whether the subjective recommendation was academically justified—an issue not generally within the scope of most arbitrators’ expertise.”).

<sup>117</sup> *Id.*

<sup>118</sup> See *infra* notes 119–24 and accompanying text.

<sup>119</sup> *St. Clare’s*, 229 N.L.R.B. at 1004–05.

<sup>120</sup> *Id.* at 1005.

<sup>121</sup> *Id.*

category which did not deserve collective bargaining rights, particularly given the highly specialized and critical work that the housestaff did.<sup>122</sup> To Fanning, the Board's lack of clarity on the issue and its dubious rationale for coming to its decision reflected the "majority's tortuous efforts" of defining the scope of *Cedars-Sinai* and the role of the student employee.<sup>123</sup>

*D. Ever-Changing Tides: Granting—and Removing—Student Employees' Collective Bargaining Rights*

The first crack in the majority Board's determination that student employees were not "employees" under the terms of the NLRA occurred in its decision in 1999 in *Boston Medical Center Corporation (Boston Medical)*.<sup>124</sup> Like *Cedars-Sinai* and *St. Clare's* before it, *Boston Medical* once again concerned the status of housestaff working in hospitals.<sup>125</sup> An interesting twist to the *Boston Medical* case is that, prior to a merger between Boston City Hospital and Boston University Medical Center Hospital, housestaff *had* been represented by the petitioner in this case and had, in fact, been a part of the negotiation of roughly ten collective bargaining agreements over the twenty years prior to the merger.<sup>126</sup> Following the merger, the Regional Director under the Board, based on the *Cedars-Sinai* and *St. Clare's* decisions, dismissed the petitioners' requested certification of interns, residents, and house officers and housestaff as a unit.<sup>127</sup> In response, the petitioner in *Boston Medical* asked the Board to overrule both *Cedars-Sinai* and *St. Clare's*.<sup>128</sup> In a sharp reversal from its previous devotion to the *Cedars-Sinai* and *St. Clare's* decisions, the Board issued an opinion finding that housestaff were, in fact, employees under the NLRA

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<sup>122</sup> *Id.* at 1006 (stating "[i]t is easy, then, to become confused, even mystified, by what my colleagues have thus far wrought in the saga of *Cedars-Sinai*. I still do not, for example, understand exactly what my colleagues mean when they state that *Cedars* was, for them, just a case 'about students at academic institutions' and not a 'decision about health care institutions' .... The particular role of housestaff in our health care delivery system is certainly worthy of greater attention .... A strike by research assistants at a university does not, in all candor, rise to the level of significance the health care amendments attribute to a strike by doctors.").

<sup>123</sup> *Id.* at 1009.

<sup>124</sup> See generally *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 152–54.

<sup>127</sup> *Id.* at 152.

<sup>128</sup> *Id.*

and that the Board's holdings in both *Cedars-Sinai* and *St. Clare's* were "flawed in many respects."<sup>129</sup> In coming to its decision, the Board once again looked to the various facets supporting a determination that housestaff were employees under the Act, focusing most on the traditional tenets of the employee-employer relationship and applying those to the relationship between the housestaff and the medical center.<sup>130</sup> The Board took notice of the facts that the housestaff worked for an "employer" under the meaning in the NLRA, received "fringe benefits and other emoluments reflective of employee status,"<sup>131</sup> along with pay which was subject to taxation for the services they rendered for the employer.<sup>132</sup> The Board explicitly adopted Board Member Fanning's definition of "employee" in his dissent from *Cedars-Sinai*, noting that this definition could apply to housestaff.<sup>133</sup> Though the Board noted that housestaff may possess "certain attributes of student status," those attributes did not preclude a finding that housestaff could share a community of interest with statutory employees and could, therefore, be considered "employees" under the NLRA.<sup>134</sup> Looking to the 1974 Congressional codification of the Board's jurisdiction over non-profit healthcare facilities, the Board noted that Congress had referenced "interns, residents, [and] fellows" as nonsupervisory staff which could be read as an implication that housestaff, while not supervisors under the Act (which would render them exempt from the provisions of the Act), were, in fact, employees.<sup>135</sup>

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<sup>129</sup> *Id.* at 159 (stating that "[w]e are convinced by normal statutory and legal analysis, including resort to legislative history, experience, and the overwhelming weight of judicial and scholarly opinion, that the Board reached an erroneous result in *Cedars-Sinai*. Accordingly, we overrule that decision and its offspring, conclude that house staff [sic] are employees as defined by the Act, and find that such individuals are therefore entitled to all the statutory rights and obligations that flow from our conclusion.").

<sup>130</sup> *Id.* at 160 (noting "nothing in the [NLRA] suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act. The essential elements of the house staff's [sic] relationship with the Hospital obviously define an employer-employee relationship.").

<sup>131</sup> *Id.* (pointing to the housestaff receiving workers' compensation, paid vacations, sick leave, parental leave, bereavement leave, along with health, dental, and life insurance and malpractice insurance—benefits which other hospital employees also received).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 161.

<sup>135</sup> *Id.* at 162. *See generally* *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).

Shortly thereafter, the Board extended the *Boston Medical* decision by holding in *New York University* that “graduate assistants are statutory employees, notwithstanding that they simultaneously are enrolled as students.”<sup>136</sup> By extending statutory protections to student workers, the Board once again referenced the master-servant relationship when determining the appropriate statutory definition of “employee,” following Member Fanning’s dissent in *Cedars-Sinai* and the majority in *Boston Medical Center*.<sup>137</sup> As would be expected, the Board recognizing that student employees were to be considered employees eligible for collective bargaining power spurred student employees to file petitions for union representation elections.<sup>138</sup> While not all of these petitions resulted in union representation for student employees, the *New York University* decision was a notable step forward in gaining collective bargaining rights for student employees.<sup>139</sup>

The student employee victory would be short-lived, however, as the Board once again reversed itself with its decision in *Brown University and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL-CIO (Brown University)*.<sup>140</sup> The Board returned to the primary purpose test and noted that “[i]t is clear to us that graduate student assistants ... are primarily students and have a primarily educational,

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<sup>136</sup> N.Y. Univ., 332 N.L.R.B. 1205, 1209 (2000).

<sup>137</sup> *Id.* at 1206.

This definition of the term “employee” reflects the common law agency doctrine of the conventional master-servant relationship. This relationship exists when a servant performs services for another, under the other’s control or right of control in return for payment. These principles were recently applied in [*Boston Medical Center*]. In that case, the Board overruled [*Cedars-Sinai*] ... which held that interns, residents and fellows (house staff) [sic] were not entitled to collective-bargaining rights as a matter of statutory policy.

*Id.* (citations omitted).

<sup>138</sup> Falasco & Jackson, *supra* note 25, at 773. As can be anticipated, this spate of union representation election petitions caused an inverse reaction from private university administrators who disagreed with the Board’s decision and wanted New York University administrators to appeal it. *Id.*

<sup>139</sup> *Id.* at 775 (noting that after “the NYU decision, graduate assistants at a number of universities organized and demanded union recognition. A number of these organizing drives were successfully culminated with an NLRB supervised election. At other universities, organizing efforts ended at the election box or never reached the election stage.”).

<sup>140</sup> See generally *Brown Univ.*, 342 N.L.R.B. 483 (2004).



not economic, relationship with their university.”<sup>141</sup> The Board looked to the various factors it considered in past cases to be indicative of student, rather than employee, status in determining collective bargaining rights were inapplicable to student employees.<sup>142</sup> The Board couched its rejection of *New York University* as a response to concerns about the effect of collective bargaining on the student-educator relationship, noting that “[i]mposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration.”<sup>143</sup> The Board also brushed off any concerns that the very factors it considered as hallmarks of studentdom were also markers of an employee by including a note that “[a]lthough these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.”<sup>144</sup>

Members Wilma B. Liebman and Dennis P. Walsh dissented from the majority’s decision, saying that the Board’s decision “is woefully out of touch with contemporary academic reality.”<sup>145</sup> The dissent argued that the majority’s decision was flawed in two major

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<sup>141</sup> *Id.* at 487. The Board leaned heavily on the justification that, “the Board’s 25-year pre-*NYU* principle of regarding graduate students as nonemployees was sound and well reasoned.” *Id.*

<sup>142</sup> *Id.* at 488. The Board remarked: “[w]e emphasize the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship,” and that these student employees “spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student.” *Id.* The Board goes on to note the prerequisite of student employment is being a student and that because “their status as a graduate student assistant is contingent on their continued enrollment as students, we find that that they are primarily students.” *Id.* The Board also looked to the financial relationship between the student and the university employer and held that “the money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not ‘consideration for work.’ It is financial aid to a student.” *Id.*

<sup>143</sup> *Id.* at 490. The Board also noted that the impacted decisions included “broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants’ duties, hours and stipends.” *Id.* The Board continued its dire predictions of the negative impact of student employee collective bargaining and stated “collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown.” *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 493 (Liebman, Walsh, Members, dissenting).

respects: it did not adequately address the statutory principles at play in the case, and it erred in “seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there was no room in the ivory tower for a sweatshop.”<sup>146</sup> The dissenting Members admonished the Board for “overlook[ing] the realities of the academic world,” and warned that the issues which compelled the student employees to petition for union representation would not go away so easily.<sup>147</sup>

*E. The Doctrine Today: The Columbia University Case*

Following the *Brown University* ruling, the Board faced criticism for lacking empirical support for its decision, as well as its circular rationale.<sup>148</sup> In spite of this, the decision continued to stand until 2016 when, in *Trustees of Columbia University in the City of New York and Graduate Workers of Columbia—GWC, UAW (Columbia University)*, the Board, once again, overruled itself.<sup>149</sup> Turning a skeptical eye to its decision in *Brown University*, the Board noted the purpose of the NLRA to encourage collective bargaining and protect employees’ rights was undermined by not extending these rights to student employees.<sup>150</sup> The Board continued its repudiation of the *Brown University* decision by once again noting that student employees fit the definition of “employee” under the NLRA and were therefore entitled to the Act’s rights and protections.<sup>151</sup> The Board held that though the NLRA itself does not provide a single definition of the word “employee,” context, common law tradition, and judicial precedent could provide an adequate definition.<sup>152</sup> The Board noted that determining the definition of the term “employee” under the Act was the responsibility of the

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<sup>146</sup> *Id.* at 494.

<sup>147</sup> *Id.* at 500.

<sup>148</sup> Fisk & Malamud, *supra* note 60, at 2076–77.

<sup>149</sup> Trs. Colum. Univ., 364 N.L.R.B. No. 90, at 1 (Aug. 23, 2016).

<sup>150</sup> *Id.* at 2 (noting that “[w]e are not persuaded by the *Brown University* Board’s self-described ‘fundamental belief that the imposition of collective bargaining on graduate students would ... be inconsistent with the purposes and policies of the Act.’”). The Board went on to claim that the professed “fundamental belief” is “unsupported by legal authority, by empirical evidence, or by the Board’s actual experience.” *Id.*

<sup>151</sup> *Id.* at 20–22.

<sup>152</sup> *Id.*

agency itself and that none of the exceptions within the NLRA addressed student employees, either generally or specifically.<sup>153</sup> Further, the Board found that in the absence of specific Congressional intent to the contrary, there was nothing within the Act or legislative history that would require that student employees be excluded from the term “employee.”<sup>154</sup> Abandoning the primary purpose test upon which the *Brown University* Board had relied, the majority argued the test should be whether the Act has specifically excluded a group from coverage or if there are “compelling statutory and policy considerations [which] require an exception.”<sup>155</sup> In its opinion, the Board thoroughly addresses concerns about any negative impact of collective bargaining on the student-university relationship and noted the lack of empirical evidence showing that collective bargaining would be deleterious to academic freedom.<sup>156</sup>

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<sup>153</sup> *Id.* at 4 (noting that “[t]he Court has made clear, in turn, that the ‘task of defining the term “employee” is one that “has been assigned primarily to the agency created by Congress to administer the Act,” the Board.”). Further, the Board notes that the exceptions to coverage under the Act listed in Section 2(3) do not include student employees and that the omission “is itself strong evidence of statutory coverage.” *Id.* at 4. The Board goes on to note that the Court has affirmed this approach by generally endorsing the Board finding employee status for certain types of workers so long as that determination was in line with the common law of the agency. *Id.* at 5. Indeed, the Board goes on to mention the “most notable instance” in which the agency’s common law employee definition was found *not* to apply to a certain set of workers regardless of the lack of those employees being specifically excluded under the Act was in the *Bell Aerospace* case. *Id.* at 5. In *Bell Aerospace*, the Court found that managerial employees were exempted from coverage under the Act because “Congress had clearly implied their exclusion by the Act’s design and purpose to facilitate fairness in collective bargaining,” since the purpose of the Act was to facilitate the relationship between rank and file workers and managerial employees; it would “eviscerate the traditional distinction between labor and management.” *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 284 n.13 (1974).

<sup>154</sup> *Colum. Univ.*, 364 N.L.R.B. at 5.

<sup>155</sup> *Id.* at 6.

<sup>156</sup> *Id.* at 7 (noting that “[i]t is no answer to suggest, as the *Brown University* Board did, that permitting student assistants to bargain over their terms and conditions of employment (no more and no less) somehow poses a greater threat to academic freedom than permitting collective bargaining by non-managerial faculty members, “[b]ecause graduate student assistants are students.”). The Board also addresses concerns about collective bargaining impinging First Amendment rights to “speak freely in the classroom” by noting that “there is little, if any, basis here to conclude that treating employed graduate students as employees under the Act would raise serious constitutional

In his dissent, Member Miscimarra noted several concerns about the majority's holding, including his primary worry: that collective bargaining is not appropriate in the academic sphere, given that the "risks and uncertainties associated with collective bargaining ... governing the single most important financial decision that students and their families will ever make," may lead to uncertainty and complexity.<sup>157</sup> Miscimarra focused heavily on his concern that the majority's decision painted with too broad strokes and that the Board "resembles the foolish repairman with one tool—a hammer—to whom every problem looks like a nail; [the Board has] one tool—collective bargaining—and thus every petitioning individual looks like someone's employee."<sup>158</sup> Arguing that the "industrial model cannot be imposed blindly on the academic world," Miscimarra argued the NLRA was enacted by Congress to govern "conventional workplaces" rather than universities.<sup>159</sup> Miscimarra's argument centered around a central premise: that academia is a unique field which requires particular considerations that the Board majority failed to consider, namely that the goal of a student is not financial gain, but the fulfillment of degree requirements.<sup>160</sup>

In spite of Miscimarra's dire warnings about the inapplicability of collective bargaining to the academic sphere and the

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questions, much less violate the First Amendment." *Id.* The Board then notes that there is a dearth of empirical evidence showing that collective bargaining had negative impacts on academic freedoms in schools which had already instituted collective bargaining rights for graduate student employees. *Id.* at 4. The Board pointed to the adaptability of the collective bargaining process and the success of collective bargaining agreements between student employees and university employers as further evidence that collective bargaining power was appropriate in this instance. *Id.* at 10, 12. The Board noted that the dissent's concern about the temporary nature of graduate student employee status negating finding a common bargaining unit was not sufficient to justify continuing to deny graduate student employees the right to collectively bargain, stating, "we find that Master's and undergraduate student assistants' relatively short tenure, within the context of this unit, does not suggest a divergence of interests that would frustrate collective bargaining." *Id.* at 20. Further, the Board noted, "even the Master's and undergraduate student assistants typically serve more than one semester—and thus their tenure is not so ephemeral as to vitiate their interest in bargaining over terms and conditions of employment." *Id.* at 21.

<sup>157</sup> *Id.* at 24 (Miscimarra, Member, dissenting).

<sup>158</sup> *Id.* (quotations omitted).

<sup>159</sup> *Id.* at 24–25.

<sup>160</sup> *Id.* at 22–23, 25.

various amicus briefs from university administrators forewarning the dangers of collective bargaining on campus, *Columbia University* stands today as another swing in the Board's opinion on just who constitutes an "employee" under the NLRA, continuing to broaden an already broad term.<sup>161</sup> Only a few months after the decision, Columbia graduate student employees voted 1,602 to 623 to formally unionize.<sup>162</sup> The fight is not yet over, however—Columbia University administrators have already filed an objection to the ruling, beginning what could turn out to be a protracted legal battle.<sup>163</sup>

## II. THE AFTERMATH OF THE *COLUMBIA UNIVERSITY* CASE: A NEW ERA FOR GRADUATE STUDENT EMPLOYEES

Regardless of the current uncertainty surrounding the staying power of the Board's holding in *Columbia University*, the ruling has many implications for graduate student employees wishing to unionize. The second half of this Note will discuss those implications and propose parameters that the Board should set, either actively or through future decisions on the issue. The main focus of this Part is on collective bargaining units and the scope of bargainable issues in light of the goal of preserving the unique

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<sup>161</sup> See Lucas Novaes, *It's Time to Stop Punting on College Athletes' Rights: Implications of Columbia University on the Collective Bargaining Rights of College Athletes*, 66 AM. U. L. REV. 1533, 1545–46 (2017) (discussing how the Brown University Board's "narrow reading" of the statutory language of the NLRA would be rejected by the Columbia University Board which established a broader common law test for employee status).

<sup>162</sup> Tyler Larkworthy, *Columbia University Begins Legal Battle to Prevent Graduate Student Union*, DAILY PENNSYLVANIAN (May 31, 2017, 8:20 PM), <http://www.thedp.com/article/2017/03/columbia-graduate-students-unionize-administration-opposes> [<https://perma.cc/3VWU-T4WR>].

<sup>163</sup> *Id.* One additional aspect of uncertainty in this case is that dissenting Member (and interim Chairman) Miscimarra, who has been referred to as "the Antonin Scalia of workplace law," has stepped down after the December 2017 expiration of his term, citing personal reasons for choosing not to pursue a second term. See Sean Higgins, *New NLRB Chairman Philip Miscimarra Expected to Undo Recent Pro-Union Changes*, WASH. EXAM'R (May 1, 2017, 12:01 AM), <http://www.washingtonexaminer.com/new-nlr-chairman-philip-miscimarra-expected-to-undo-recent-pro-union-changes/article/2621357> [<https://perma.cc/AW79-CTZS>]; see also Daniel Wiessner, *NLRB Chair Miscimarra to Step Down in December*, REUTERS LEGAL (Aug. 9, 2017, 4:42 PM), <https://www.reuters.com/article/labor-miscimarra/nlr-chair-miscimarra-to-step-down-in-december-idUSL1N1KV20B> [<https://perma.cc/5LDN-4T25>].

atmosphere of academia. The concerns of those who disagree with the *Columbia University* decision will be addressed by proposed solutions to those concerns, showing how the Board's decision can be understood as setting boundaries for both sides of the bargaining table. Namely, by looking to past successful collective bargaining of graduate students, the Board can define the appropriate collective bargaining units for student employees as well as address concerns regarding the scope of bargainable issues.<sup>164</sup> By looking to past experience of public institutions, the Board can have an objective guidepost dictating how best to approach the inevitable conflicts which will arise between student-employee and university-employer following its *Columbia University* decision.<sup>165</sup>

#### A. Defining the Collective Bargaining Unit

One of the more prominent concerns advanced by university administrators and Member Miscimarra is of the appropriateness of a graduate student assistant bargaining unit.<sup>166</sup> It is important to note that union organization of faculty, let alone student employees, on university campuses is still a fairly new phenomenon.<sup>167</sup> The state of union representation in the academic sphere has been difficult to assess because of the uniqueness of the academic environment and the particularities of the faculty-university employer relationship and pre-existing governance structures.<sup>168</sup> However,

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<sup>164</sup> *Recent Adjudication: Labor and Employment Law—National Labor Relations Act—NLRB Holds that Student Assistants at Private Colleges and Universities Are Statutory Employees Covered by the NLRA*, The Trustees of Colum. Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016), 130 HARV. L. REV. 1281, 1287–88 (2017) (noting how the Board referenced the successful execution of collective bargaining agreements at public universities).

<sup>165</sup> *Id.*

<sup>166</sup> Trus. Colum. Univ., 02-RC-143012, 2016 N.L.R.B. LEXIS 6129, at \*104, \*147, \*149 (N.L.R.B. Aug. 23, 2016); see also Brief for Brown Univ. et al. as Amici Curiae Supp. Respondents, Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (2016) (No. 02-RC-143012) at 24 [hereinafter Colum. Amicus Brief].

<sup>167</sup> See generally Daniel J. Julius & Nicholas DiGiovanni Jr., “Academic Collective Bargaining: On Campus Fifty Years” *Research and Occasional Paper Series: CSHE.4.13* (Apr. 2013), [https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe\\_4.13.julius\\_and\\_digiovanni.collectivebargaining.4.19.2013.pdf](https://cshe.berkeley.edu/sites/default/files/publications/rops.cshe_4.13.julius_and_digiovanni.collectivebargaining.4.19.2013.pdf) [<https://perma.cc/5DMN-7QC8>].

<sup>168</sup> *Id.* (noting that “those who have studied collective bargaining in higher education have had difficulty untangling a myriad of internal and external variables from those associated with labor management relations.”). The governance

approximately 35,000 teaching and research assistants across the country are currently in unions.<sup>169</sup> Further, the NLRB has been handling academic collective bargaining issues for over thirty years with the unionization of university faculty members.<sup>170</sup> As such, the definition of an appropriate bargaining unit can be guided both by past unionization of faculty members along with pre-existing graduate student union collective bargaining groups. In determining whether a bargaining unit is appropriate or not the Board has looked at many differing factors over the years,<sup>171</sup> but the primary analytical approach is the community of interest test.<sup>172</sup> In its analysis, the Board looks at various factors including:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.<sup>173</sup>

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structures already in place at universities form an additional complicating factor because "experience indicates [shared governance] not only survives unionization, but in some cases collective bargaining has resulted in the establishment of additional joint decision-making bodies on campus." *Id.*

<sup>169</sup> *Unions in the Ivory Tower*, *supra* note 50.

<sup>170</sup> N.Y. Univ., 332 N.L.R.B. 1205, 1208 (2000) (noting that "[a]fter nearly 30 years of experience with bargaining units of faculty members, we are confident that in bargaining concerning units of graduate assistants, the parties can 'confront any issues of academic freedom as they would any other issue in collective bargaining.'").

<sup>171</sup> See Walter L. Daykin, *Determination of Appropriate Bargaining Unit by the NLRB: Principles, Rules, and Policies*, 27 *FORDHAM L. REV.*, 220, 222 (1958).

In dealing with the problem of the appropriate bargaining units a great deal of emphasis has been placed upon such factors as the history of bargaining, group homogeneity, community of interest or like mindedness existing among the employees, the integration of operations, the centralization of the control of labor relations, the interchange of employees, the distinct functions performed by the employees involved and their identity as a distinct subdivision of the plant, the similarity of the skills, wages, and working conditions of employees, the eligibility of the union involved to represent the workers, and the desires of the employees.

*Id.*

<sup>172</sup> *Trs. Colum. Univ.*, 364 N.L.R.B. No. 90, at 18 (Aug. 23, 2016).

<sup>173</sup> *Id.* at 18–19.

Regarding concern about the appropriateness of graduate student bargaining units, the Board has already made it clear that students employed by their university in a capacity unrelated to their educational studies do not share a sufficient community of interest with graduate student assistants so as to merit their inclusion in the same bargaining unit.<sup>174</sup> Because students employed in a non-academic capacity by the university will not be included in the same bargaining unit as graduate student assistants, this should help allay at least some fears concerning over-inclusivity.<sup>175</sup>

Others, still, express fears of a “heterogenous bargaining unit from all academic disciplines” which “lumps together research assistants, teaching assistants, and undergraduate and master’s students who serve as course assistants and graders.”<sup>176</sup> This concern of groups being “lump[ed] together” in an incongruous mishmash of competing interests can be addressed by looking to the Board’s decision in *Specialty Healthcare & Rehabilitation Center of Mobile (Specialty Healthcare)*.<sup>177</sup> In *Specialty Healthcare*, the Board determined that small groups of employees sharing a community of interest could constitute a single bargaining unit, regardless of whether a larger unit encompassing more interest factors could be made.<sup>178</sup> Though the Board, helmed by now-Chairman Miscimarra, recently overruled that decision and returned to the “overwhelming” community of interest standard it had previously utilized,<sup>179</sup> the *Specialty Healthcare* model can still

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<sup>174</sup> St. Clare’s Hosp., 229 N.L.R.B. 1000, 1001 (1977).

<sup>175</sup> Colleen Flaherty, *Yale Grad Students Unionize*, INSIDE HIGHER ED (Feb. 24, 2017), <https://www.insidehighered.com/quicktakes/2017/02/24/yale-grad-students-unionize> [<https://perma.cc/2MEF-7HG2>] (noting administrators’ concerns about inclusivity of bargaining units).

<sup>176</sup> Members of the Engineering and Applied Science Faculty of Columbia, Opinion, *Engineering and Applied Science Faculty are Deeply Concerned About Student Unionization*, COLUM. DAILY SPECTATOR (Dec. 2, 2016, 6:30 PM), <http://www.columbiaspectator.com/opinion/2016/12/02/engineering-and-applied-science-faculty-are-deeply-concerned-about-student/> [<https://perma.cc/YS5M-FX4U>] (stating that “[w]e believe that such a bargaining unit would be detrimental to the interests of our students and of the University, and to the quality of teaching and research.”).

<sup>177</sup> Julius & DiGiovanni Jr., *supra* note 167.

<sup>178</sup> *Id.*

<sup>179</sup> Office of Public Affairs, *Board Overrules Specialty Healthcare, Eliminates ‘Overwhelming Community of Interest’ Standard*, NLRB (Dec. 15, 2017), <https://www.nlr.gov/news-outreach/news-story/board-overrules-specialty-health>



be viable. There are currently more than thirty collective bargaining units representing graduate student workers across the United States;<sup>180</sup> these units are primarily at public universities in sixteen states<sup>181</sup> and are therefore subject to state laws, rather than the Board's control, but they can be illustrative of how collective bargaining units could be defined at private universities under the Board utilizing a *Specialty Healthcare* approach of putting the onus on the university to prove that a petitioned-for unit is under- or over-inclusive.<sup>182</sup> For instance, 2,500 student employees, including teaching, research and project assistants, and residence directors at the University of Massachusetts, Amherst, successfully won union status under the United Autoworkers Union ("UAW") in 1990.<sup>183</sup> The bargaining unit extends not just to graduate student research assistants, but also to research assistants, teaching assistants, and others.<sup>184</sup> These groups ostensibly share a sufficient community of interest to successfully have been a part of the same union for over twenty years; the endurance of this union should point towards the feasibility of a graduate student bargaining unit being defined by smaller communities of interest *à la Specialty Healthcare* rather than the "overwhelming" community of interest standard.<sup>185</sup>

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care-eliminates-%E2%80%9Coverwhelming-community [https://perma.cc/WE S8-FX6F].

<sup>180</sup> Danielle Douglas-Gabriel, *Are They Students? Or Are They Employees? NLRB Rules That Graduate Students Are Employees*, WASH. POST (Aug. 23, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/08/23/are-they-students-or-are-they-employees-nlr-rules-that-graduate-students-are-employees/?utm\\_term=.fc8594672192](https://www.washingtonpost.com/news/grade-point/wp/2016/08/23/are-they-students-or-are-they-employees-nlr-rules-that-graduate-students-are-employees/?utm_term=.fc8594672192) [https://perma.cc/2Z9J-V26Y].

<sup>181</sup> Graduate School of Arts and Sciences, *Overview of Graduate Student Education at Yale University*, YALE, <https://gsas.yale.edu/about-gsas/overview-graduate-student-education-yale-university#SectionB> [https://perma.cc/LW P8-GGNU].

<sup>182</sup> Douglas-Gabriel, *supra* note 180.

<sup>183</sup> *GEO Turns 20 Years Old This Month!*, GRADUATE EMP. ORG. UAW 2322 (Nov. 10, 2010), <https://www.geouaw.org/?p=cenoshksiocelh&paged=71> [https://perma.cc/GVY9-WFEY].

<sup>184</sup> COLLECTIVE BARGAINING AGREEMENT BETWEEN GRADUATE EMP. ORG. LOC. 2322/UAW & THE UNIV. OF MASS., AMHERST, at 4 (Sept. 1, 2014–Aug. 31, 2017), available at <http://www.umass.edu/gradschool/sites/default/files/GEO%20contract%2014-17%20vfsigned.pdf> [https://perma.cc/N3RF-33NT] [hereinafter UNIV. OF MASS. COLLECTIVE BARGAINING AGREEMENT].

<sup>185</sup> *Id.*

Indeed, those concerned about over-inclusivity in a bargaining unit appear to forget that by forming bargaining units that share a smaller community of interest the parties can be in a better position to bargain about the appropriateness of including or excluding a certain group of workers, as was the case with the UAW and the University of Massachusetts, Amherst.<sup>186</sup> There, the Collective Bargaining Agreement specifically notes several exclusions from the bargaining unit, including graduate student employees working in the Chancellor's Office, graduate student tutors, and other graduate student hourly employees.<sup>187</sup> Similarly, the New York University graduate assistant student union—which was voluntarily recognized by the administration prior to the *Columbia University* decision<sup>188</sup>—is comprised of all graduate students who teach classes (in both PhD and Master's degree programs), graduate assistants, and research assistants, but explicitly excludes graduate assistants in the School of Medicine, research assistants at the Polytechnic Institute, and research assistants in the Biology, Chemistry, Neural Science, Physics, Mathematics, Computer Science, and Psychology departments.<sup>189</sup> This incremental method may be concerning to opponents of unionization, but just because unionizing employees would be able to gain smaller unit recognition does not mean that would lead to many small groups agitating for unionization; there are many “practical and strategic considerations” which would prevent a unionization drive from pursuing that method.<sup>190</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Peter Schmidt, *Graduate-Student Union Organizers Hail NYU Deal as a Breakthrough*, CHRON. OF HIGHER EDUC. (Mar. 11, 2015), <https://www.chronicle.com/article/Graduate-Student-Union/228393?cid=cp53> [<https://perma.cc/58JW-W7LY>].

<sup>189</sup> *Parameters of Recent Graduate Student Bargaining Units*, UNIV. OF CHI. OFF. OF THE PROVOST, <https://provost.uchicago.edu/initiatives/parameters-recent-graduate-student-bargaining-units> [<https://perma.cc/9RGD-5P3A>].

<sup>190</sup> *Hot Topic Labor and Employment Law News*, 2011 A.B.A. SEC. OF LAB. & EMP. L. COMM. ON THE DEV. OF THE L. UNDER THE NLRA, [https://www.americanbar.org/content/newsletter/groups/labor\\_law/ll\\_hottopics/2011\\_aball\\_hottopics/11\\_aball\\_ht\\_specialty\\_healthcare.html](https://www.americanbar.org/content/newsletter/groups/labor_law/ll_hottopics/2011_aball_hottopics/11_aball_ht_specialty_healthcare.html). It should be noted, however, that Yale students seeking unionization attempted to mobilize with a department-by-department approach, which was faced with vehement opposition by the Yale administration which called the tactic “undemocratic.” Flaherty, *supra* note 23. That being said, the students utilized this approach along with hunger strikes

In addition, even if the *Specialty Healthcare* smaller bargaining unit structure method is not utilized, university employers' concerns regarding overly broad bargaining units have already been addressed by the Board in its *Columbia University* decision, in which it held that "similarly situated employees can form an appropriate employer-wide unit."<sup>191</sup> In response to Columbia's concerns regarding a disparity in the types of priorities pursued by Master's, PhD, and undergraduate students, the Board correctly noted that there are "overarching common interests," including balance of coursework, pay, health insurance coverage, and developing discipline and grievance procedures.<sup>192</sup> Indeed, a survey of graduate student employees across a wide variety of institutions of higher education found that almost 81 percent of the responses indicated that health insurance was a major concern and almost 79 percent of those surveyed felt that wages and salary were a major concern.<sup>193</sup> Even without these common interests, the Board noted, "the unit's overarching interest in addressing issues pertaining to one's simultaneous employment and enrollment as a student provides ample basis on which to pursue a common bargaining agenda."<sup>194</sup> In addition, the Board has stated that the choices employees make concerning defining the appropriate bargaining unit for themselves are always relevant when analyzing the appropriateness of the bargaining unit.<sup>195</sup>

Regardless of whichever approach is taken—several smaller bargaining units or a more overarching, larger bargaining unit—it is apparent that having more than one type of student within a single bargaining unit does not defeat the purpose of the bargaining unit to present a united front of representation on common issues.<sup>196</sup> As such, by continuing to define the appropriate

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as a last-ditch effort to gain representation after the administration fought against unionization. *Id.* The administration's opposition continues to frustrate student organizers, one of whom noted "[the administrators] pretend they can't hear me or that I'm not there, and it's quite clear to me that I'm invisible. The only way to make sure they hear me is through formal negotiations and actually getting a seat at the table." *Id.*

<sup>191</sup> Trs. Columbia Univ., 364 N.L.R.B. No. 90, at 19 (Aug. 23, 2016).

<sup>192</sup> *Id.* at 20.

<sup>193</sup> Falasco & Jackson, *supra* note 25, at 786.

<sup>194</sup> *Colum. Univ.*, 364 N.L.R.B. at 20.

<sup>195</sup> *Id.* at 19.

<sup>196</sup> *See* Flaherty, *supra* note 175.

collective bargaining units on a case-by-case basis, the Board can—and should—uphold its decision in *Columbia University*; just because there may be several different types of students within one collective bargaining unit does not defeat the unit’s utility as a bargaining tool.<sup>197</sup>

*B. The Scope of Bargainable Issues and Preserving Academia:  
What’s Off the Table?*

Perhaps one of the most hotly contested issues concerning graduate student assistant organizations, and the topic school administrators often focus on in their amicus briefs to the Board, is the scope of bargainable issues.<sup>198</sup> In the *Columbia University* case, Deans from Brown, Cornell, Dartmouth, Harvard, Massachusetts Institute of Technology, University of Pennsylvania, Princeton, Stanford, and Yale submitted an amicus brief listing a parade of terribles about the scope of bargainable issues and how academic freedom will be curtailed by unions which have “exhibited little sensitivity to academic values and traditions.”<sup>199</sup> The brief argues that, among other things, any potential changes in the student-faculty relationship “could be enormous and psychologically destructive to both teaching assistants and faculty”;<sup>200</sup> students receiving stipends could bargain over the stipend amount and, thus, tuition costs;<sup>201</sup> and students could bargain over multiple choice versus essay question exams,<sup>202</sup> course content,<sup>203</sup> and even teaching qualifications.<sup>204</sup>

The solution to these concerns, as evidenced by the myriad successful unions on college campuses today, is to strictly delimit

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<sup>197</sup> See *id.* (noting how teaching assistants in East Asian languages and literatures, English, geology and geophysics, history, art history, math, physics, political science and sociology each successfully held separate union elections).

<sup>198</sup> See *Yale, Other Universities Submit Amicus Brief to National Labor Relations Board*, YALE (Feb. 29, 2016), <https://news.yale.edu/2016/02/29/yale-other-universities-submit-amicus-brief-national-labor-relations-board> [<https://perma.cc/2BMM-2P6Q>].

<sup>199</sup> Colum. Amicus Brief, *supra* note 166, at 7.

<sup>200</sup> *Id.* at 14.

<sup>201</sup> *Id.* at 10.

<sup>202</sup> *Id.* at 12.

<sup>203</sup> *Id.* at 13.

<sup>204</sup> *Id.* at 16.

the bounds of bargainable issues.<sup>205</sup> As the Board noted in its *Columbia University* decision, “it is not dispositive that [the] student-teacher relationship involves different interests than the employee-employer relationship ... a graduate student may be both a student *and* an employee; a university may be both the student’s educator *and* employer.”<sup>206</sup> Rather, the Board held, granting collective bargaining rights would “permit ... the Board to define the scope of mandatory bargaining over ‘wages, hours, and other terms and conditions of employment,’” and would “make it entirely possible for these different roles to coexist—and for genuine academic freedom to be preserved.”<sup>207</sup> The Board further noted that concerns about what would be covered under mandatory bargaining “is a task that the Board can and should address case by case,” and that the Court’s holding in *NLRB v. Yeshiva University*—that academic faculty were not excluded from coverage under the NLRA just because they needed to exercise academic freedom in determining course content, student evaluations, and research—further showed that collective bargaining issues could be readily defined in the academic sphere.<sup>208</sup> The Board’s stance demonstrates that simply because the academic environment may provide different issues to discuss than are found in the typical employee-employer relationship, this alone is insufficient to find that collective bargaining is incompatible with academia.<sup>209</sup>

Other dire predictions advanced by Member Miscimarra in his dissent include nonconfidential sexual harassment investigations, invalidation of rules promoting civility and barring profanity and abuse, “outrageous conduct by student assistants,” “outrageous social media postings by student assistants,” and “disrespect and profanity directed to faculty supervisors.”<sup>210</sup> While

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<sup>205</sup> See *infra* notes 222–24 and accompanying text.

<sup>206</sup> Trs. Columbia Univ., 364 N.L.R.B. No. 90, at 7 (Aug. 23, 2016).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* at 8.

<sup>209</sup> *Id.* at 3–4.

<sup>210</sup> *Id.* at 29–30 (Miscimarra, dissenting). To illustrate his point, Member Miscimarra noted:

[t]he university must permit student assistants to have angry confrontations with university officials in grievance discussions, and the student assistant cannot be lawfully disciplined or

Member Miscimarra may predict these “unfortunate consequences,”<sup>211</sup> the Board’s majority decision noted that “[t]he Act’s provisions pertaining to document production and the boundaries of protected conduct are, and always have been, contextual.”<sup>212</sup> It is clear that the Board’s decision is acknowledging that while collective bargaining in the academic sphere may present some new issues, the Board will continue to evaluate issues appropriately and in line with typical workplace standards and codes of conduct.<sup>213</sup> Further, as the Board notes, the students’ eagerness to gain union rights suggests an amenability of the students to participate in the traditional collective bargaining process.<sup>214</sup> After all, what is the point in agitating for collective bargaining rights if such rights go unutilized?

Concern over the scope of bargainable issues can be addressed on a case-by-case basis and the parties should be able to use the collective bargaining agreement to do so.<sup>215</sup> Once again, looking to successful collective bargaining pushes at public universities and private universities which voluntarily recognized

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removed from his or her position even if he or she repeatedly screams, ‘I can say anything I want,’ ‘I can swear if I want,’ and ‘I can do anything I want, and you can’t stop me.’

*Id.* at 30. He also goes on to claim that “[i]f a student assistant objects to actions by a professor-supervisor named ‘Bob,’ the university must permit the student to post a message on Facebook stating: ‘Bob is such a nasty mother fucker, don’t know how to talk to people. Fuck his mother and his entire fucking family.’” *Id.* And, as a final illustration, Miscimarra claims that the Columbia University decision will mean that the university can’t discipline a student who “screams at a professor-supervisor and calls him a ‘fucking crook,’ a ‘fucking mother fucking’ [sic] and an ‘asshole’ when the student assistant is complaining about the treatment of student assistants.” *Id.*

<sup>211</sup> *Id.* at 31.

<sup>212</sup> *Id.* at 11. The Board went on to note:

while focusing on a few discrete problems that may arise in bargaining—without considering the likelihood that they would both actually occur and not be amenable to resolution by bargaining partners acting in good faith—Columbia and amici neglect to weigh the possibility of any *benefits* that flow from collective bargaining.

*Id.* at 11–12.

<sup>213</sup> *See id.* at 11.

<sup>214</sup> *Id.* at 12.

<sup>215</sup> *See infra* notes 222–24 and accompanying text.

graduate student unions is illustrative.<sup>216</sup> For instance, at the University of Massachusetts, Amherst, the collective bargaining agreement governing the graduate student union notes that the university retains the right “to operate, manage, control, organize, and maintain the University and in all respects carry out the ordinary and customary functions of management and to adopt policies, rules, regulations, and practices in furtherance thereof.”<sup>217</sup> In addition, the agreement contains an explicit provision noting that students may not participate in strikes and the University may not conduct lockouts.<sup>218</sup> The agreement further sets out bargainable issues including job requirements of graduate student positions, professional development, hiring procedures, and disciplinary processes; fairly standard fare.<sup>219</sup> While the agreement also covers some graduate-student specific issues such as stipends, tuition, and curriculum fee scholarship waivers,<sup>220</sup> the bulk of the agreement is comprised of traditional bargaining issues such as layoff provisions, time off, health benefits, payroll deductions, and grievance procedures.<sup>221</sup> The collective bargaining unit between the graduate student union and University of Oregon is similarly written, but includes an even more extensive list of the University’s rights.<sup>222</sup> The University of Montana’s graduate student union collective

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<sup>216</sup> See *Colum. Univ.*, 364 N.L.R.B. at 8 (noting that “[t]he experience of student assistant collective bargaining at public universities provides no support for the fearful predictions of the Brown University Board. In the words of one scholar, ‘[t]here appear to be no major disasters that have arisen because of [graduate-student] unions,’ and examples of collective bargaining in practice ‘appear to demonstrate that economic and academic issues on campus can indeed be separated.’”).

<sup>217</sup> UNIV. OF MASS. COLLECTIVE BARGAINING AGREEMENT, *supra* note 184, at 12.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 17–28.

<sup>220</sup> *Id.* at 35–38.

<sup>221</sup> See generally *id.*

<sup>222</sup> COLLECTIVE BARGAINING AGREEMENT BETWEEN THE COALITION OF GRADUATE EMP. AFT LOC. 6069, AFL-CIO & OR. ST. UNIV. (Oct. 21, 2016–June 30, 2020), available at [http://cge6069.org/wp-content/uploads/2011/04/CBA-2016-2020\\_Complete.pdf](http://cge6069.org/wp-content/uploads/2011/04/CBA-2016-2020_Complete.pdf) [<https://perma.cc/4J4F-PZUR>]. These rights include determining the “methods, means, resources, and personnel by which operations and academic programs are to be conducted,” administrative organization, allocation of work, procedures surrounding financial aid and scholarships, academic standards, degree standards, and degree requirements. *Id.* at 4.

bargaining agreement contains similar provisions as well as a specific section regarding the University's right of control over academic decisions.<sup>223</sup> Indeed, these provisions are consistent across other graduate student assistant union collective bargaining agreements at other universities.<sup>224</sup>

The strictly defined limits of these agreements ensure that bargainable issues can be brought forth while also preserving the traditional academic relationship by ensuring that some issues stay off of the bargaining table.<sup>225</sup> The agreements countervail the fears of the university administrators in the Columbia University Amicus Brief by demonstrating that academic freedoms and employment rights can stand side-by-side with minimal negative effects.<sup>226</sup>

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<sup>223</sup> COLLECTIVE BARGAINING AGREEMENT BETWEEN THE GRADUATE EMP. ORG. OF MONT. ST. UNIV. & THE MONT. UNIV. SYS. (July 1, 2015–June 30, 2019), available at <https://mus.edu/hr/cba/024-CBA.pdf> [<https://perma.cc/63NR-S73Z>].

<sup>224</sup> See COLLECTIVE BARGAINING AGREEMENT BETWEEN FLA. ST. UNIV. & THE UNITED FAC. OF FLA. ST. UNIV. GRADUATE ASSISTANTS UNITED (2015–2018), available at <http://gradschool.fsu.edu/sites/g/files/imported/storage/original/application/7a0566ebcd9b5f4c0e056d4443193516.pdf> [<https://perma.cc/2R34-7QDA>] (preserving the right of Florida State University to “plan, manage, and control the University”); see also COLLECTIVE BARGAINING AGREEMENT BETWEEN THE BD. OF TR. OF THE CAL. ST. UNIV. & THE UNITED AUTO WORKERS (Nov. 16, 2016–Sept. 30, 2018), available at <https://www2.calstate.edu/csu-system/faculty-staff/labor-and-employee-relations/Documents/unit11-uaw/uaw-contract-2016-2018.pdf> [<https://perma.cc/39DD-8NQB>] (noting that under the collective bargaining agreement at California State University “[b]oth parties had the opportunity during negotiations to make proposals with respect to any subject matter not prohibited by law from bargaining. To that end the parties’ [sic] agree that this Agreement only covers matters that relate to the employment status of bargaining unit members and does not abridge, modify, or alter any terms or conditions related to bargaining unit members’ status as a student.”). The Board notes further in its decision that “the University of Illinois, Michigan State University, and Wayne State University include language in their graduate-assistant collective-bargaining agreements giving management defined rights concerning courses, course content, course assignments, exams, class size, grading policies and methods of instruction, as well as graduate students’ progress on their own degrees.” Trs. Columbia Univ., 364 N.L.R.B. No. 90, at 9 (Aug. 23, 2016).

<sup>225</sup> See *supra* notes 222–24 and accompanying text.

<sup>226</sup> *Colum. Univ.*, 364 N.L.R.B. at 9 (noting that “these agreements show that parties can and successfully have navigated delicate topics near the intersection of the university’s dual role as educator and employer.”).



Indeed, it could be reasonably argued that incidents like the Yale hunger strike for union representation are far more disruptive to an academic institution than the collective bargaining process.<sup>227</sup> While, yes, some students may try to expand their bargaining power past the limits of traditional employer-employee bargaining issues—for instance, some graduate student assistants at Columbia University want Columbia to be “contractually declared a sanctuary campus” for international students<sup>228</sup>—the collective bargaining process, by its very nature, brings both parties to the table for bargaining and the students and the university can bring forth evidence as to why some proposals may or may not be feasible within the scope of the agreement; collective bargaining’s flexibility should be seen as an advantage.<sup>229</sup> Even agreements that include arguably ethical—rather than economic—considerations, such as students at Yale who are seeking greater access to mental health services and guarantees of racial equality on campus,<sup>230</sup> can arguably fit into the traditional collective bargaining system.

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<sup>227</sup> See Jennifer Klein, Opinion, *Why Yale Graduate Students Are on a Hunger Strike*, N.Y. TIMES (May 9, 2017), <https://www.nytimes.com/2017/05/09/opinion/why-yale-graduate-students-are-on-a-hunger-strike.html> [https://perma.cc/3NEJ-TDSK] (discussing how Yale, in response to a hunger strike seeking to bring attention to graduate student unionization efforts, “hired Proskauer Rose, a high-powered law firm that specializes in union-busting, to harass and intimidate the students”). Klein also notes that:

[a]t Yale, graduate student teachers tried sending letters, gathering signatures for community petitions and holding rallies to bring the school to the bargaining table, without result. So ... union members erected a lofty shelter ... facing the offices of Yale’s president, Peter Salovey. They furnished the area with sofas, chairs, tables, lamps, a bookcase, turf and picnic tables. The graduate students who are fasting take posts there each day, wrapped in blankets. Some use wheelchairs as they have become too weak to walk.

*Id.*; see also Raymond Hogler, *Yale Grad Students’ Hunger Strike Can’t Turn the Tide for Labor*, CONVERSATION.COM (May 19, 2017, 10:03 PM), <http://theconversation.com/yale-grad-students-hunger-strike-cant-turn-the-tide-for-labor-77900> [https://perma.cc/4HUE-PRJS] (noting that more than 1,000 protestors for union organization showed up at Yale’s commencement).

<sup>228</sup> Flaherty, *supra* note 23.

<sup>229</sup> See *Colum. Univ.*, 364 N.L.R.B. at 9.

<sup>230</sup> Flaherty, *supra* note 23.

Mental health services, for instance, can be a part of the negotiation surrounding healthcare benefits.<sup>231</sup>

Where disputes arise the solution will be, as the Board noted in its *Columbia University* decision, “[d]efining the precise contours of what is a mandatory subject of bargaining for student assistants is a task that the Board can and should address case by case.”<sup>232</sup>

Those opposing collective bargaining also express fears of the disruptive effect of organizing activities, including strikes and grievances.<sup>233</sup> Opponents claim that “union organizers’ intrusive organizing activities at your offices, classrooms, dining halls, dorm rooms, libraries, apartments, and labs will continue. They will come back again and again whenever there is an election, a vote, a survey, a contract renewal, a protest, a strike, and so on.”<sup>234</sup> In his dissent in the *Columbia University* case, Member Miscimarra lists the various “economic weapons” that both sides could use in a dispute which would “almost certainly” include strikes, lockouts, loss, suspension or delay of academic credit, suspension of tuition waivers, potential replacement, loss of tuition previously paid, and misconduct, potential discharge, academic suspension/expulsion disputes.<sup>235</sup> As previously noted, however, these “economic weapons” could be—and have been in several agreements—explicitly contracted out of in the final collective bargaining agreement.<sup>236</sup> In short, by using the Board’s case-by-case method, looking to successful collective bargaining relationships, and specifically contracting into and out of certain bargainable issues, graduate

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<sup>231</sup> See Kristin Hugo, *Graduate Students Are Underpaid and Overstressed. Can Academic Unions Change That?*, PBS NEWS HOUR (Apr. 19, 2017, 1:32 PM), <https://www.pbs.org/newshour/science/ph-d-students-underpaid-overstressed-can-academic-unions-change> [<https://perma.cc/TJ4K-V8RU>] (noting that postdoctoral student union UAW Local 5810 at the University of California Davis was able to negotiate for mental health packages for union members).

<sup>232</sup> *Colum. Univ.*, 364 N.L.R.B. at 8.

<sup>233</sup> *Id.* at 11.

<sup>234</sup> *Six Arguments*, GRADUATE STUDENT UNIONIZATION: A CRITICAL APPROACH, <https://criticalgsu.wordpress.com/six-arguments> [<https://perma.cc/L7EF-A5KV>] (arguing that “[i]f the union goes on strike you will be encouraged to participate (to maximize damage against the University). If you do, you will not be allowed to make progress on your research or do work for classes you teach. You may not be paid and could lose your benefits while the union is on strike.”).

<sup>235</sup> *Colum. Univ.*, 364 N.L.R.B. at 29.

<sup>236</sup> See *supra* notes 207–19 and accompanying text.

student unionization and the unique sphere of academia may coexist peacefully.

### CONCLUSION

While the future of graduate student unionization remains uncertain under the new administration, the fight is far from over for either side.<sup>237</sup> In spite of this, the Board's decision in *Columbia University* was correct, though future rulings will need to take into account some of the more unique aspects of the student employee-university employer relationship.<sup>238</sup> By defining collective bargaining units and looking to successful collective bargaining agreements already in place to determine the scope of bargainable issues, all parties can ensure that their voices are heard and concerns are addressed.<sup>239</sup> While the Board has had a long (and winding) road on the path to fully recognizing graduate students' right to collectively bargain, the success of collective bargaining in public universities should provide a workable model for determining how the Board should move forward.<sup>240</sup> As tenure-track faculty numbers continue to fall and graduate student employee numbers continue to rise, the Board's *Columbia University* decision will continue to be relevant to students and universities alike.<sup>241</sup>

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<sup>237</sup> See generally Klein, *supra* note 227.

<sup>238</sup> See *Colum. Univ.*, 364 N.L.R.B. at 22.

<sup>239</sup> *Id.* at 7.

<sup>240</sup> See Teresa Kroeger et al., *The State of Graduate Student Employee Unions*, ECON. POL'Y INST. (Jan. 11, 2018), <https://www.epi.org/publication/graduate-student-employee-unions> [<https://perma.cc/B256-LBAJ>] (noting how graduate student worker unions have existed for almost fifty years, comprising more than sixty-four thousand graduate student employees at twenty-eight institutions around the country).

<sup>241</sup> *Id.* (noting that graduate student employee numbers increased approximately 17 percent over the 2005–2015 period while tenure-track faculty numbers decreased approximately one percent over the same period).