

## STUDENT ASSISTANTS AND THE NLRB: A CALL FOR NOTICE-AND-COMMENT RULEMAKING

Andrew F. Boccio \*

### I. INTRODUCTION

On August 23, 2016, student assistants<sup>1</sup> seeking to form unions throughout the country scored a major victory when the National Labor Relations Board (NLRB or Board) issued its decision in *Columbia University*.<sup>2</sup> In a 3–1 decision, the Board reversed a twelve-year-old precedent and held that virtually all graduate and undergraduate students employed by private educational institutions are statutory employees under the National Labor Relations Act<sup>3</sup> (NLRA or Act).<sup>4</sup> *Columbia University* marks the latest development in a decades-long struggle that has included contentious stand-offs between universities and students looking to unionize,<sup>5</sup> a united front of Ivy-League schools against unionization,<sup>6</sup> and numerous policy reversals by the NLRB.<sup>7</sup>

Prior to *Columbia University*, student employees were excluded from the protections of the NLRA under the Board’s 2004 decision in *Brown University*.<sup>8</sup> That ruling held that the Act extended only to employees whose primary relationship with their employer is “fundamentally economic,”<sup>9</sup> and

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\*J.D. Candidate, 2018, Seton Hall University School of Law; B.A., Ramapo College of New Jersey. I would like to thank Professor Timothy P. Glynn for his thoughtful guidance and suggestions, as well as the staff of the *Seton Hall Law Review* for its editing assistance.

<sup>1</sup> Throughout this Comment, the term “student assistants” is used to refer to all graduate and undergraduate students who are employed by the educational institution at which they are enrolled.

<sup>2</sup> Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016).

<sup>3</sup> 29 U.S.C. §§ 151–69 (2012).

<sup>4</sup> *Columbia Univ.*, 364 N.L.R.B. No. 90, at \*2.

<sup>5</sup> See, e.g., Grant M. Hayden, “*The University Works Because We Do*”: *Collective Bargaining Rights for Graduate Assistants*, 69 *FORDHAM L. REV.* 1233, 1238–42 (2001) (discussing student unionization efforts at Yale University and Kansas University).

<sup>6</sup> Brief of Amici Curiae Brown University, Cornell University, Dartmouth College, Harvard University, Massachusetts Institute of Technology, University of Pennsylvania, Princeton University, Stanford University, Yale University at 1–3, *Columbia Univ.*, 362 N.L.R.B. No. 90 (Aug. 23, 2016) (No. 02-RC-143012).

<sup>7</sup> See *infra* Part IV.

<sup>8</sup> *Brown Univ.*, 342 N.L.R.B. 483, 493 (2004).

<sup>9</sup> *Id.* at 488 (citing *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1275 (1999)).

not to workers who are “primarily students.”<sup>10</sup> In *Columbia University*, the Board eliminated this “primary-purpose” test<sup>11</sup> and held that the Act protects any student in a common-law employment relationship with his or her school.<sup>12</sup>

At its most basic level, the debate over the employment status of students under the NLRA reflects a fundamental disagreement about the role of both students and universities. Opponents of student unionization contend that collective bargaining threatens to undermine the primary functions of universities—fostering the free flow of ideas<sup>13</sup> and allowing students to earn degrees as quickly and efficiently as possible.<sup>14</sup> On the other hand, proponents of unionization argue that these concerns are wholly overblown and no compelling reason justifies treating students differently than any other employees.<sup>15</sup> At the center of this disagreement is the NLRB itself. The Board, comprised of five presidential appointees,<sup>16</sup> has gained notoriety for frequently shifting its policies when a new political party takes control of the executive branch.<sup>17</sup> Exacerbating this political reality, the Board develops the vast majority of its policies through case-law and adjudication,<sup>18</sup> which is more susceptible to reversal than the more formal “notice-and-comment” rulemaking favored by most other administrative agencies.<sup>19</sup>

This Comment will discuss student unions, the NLRB, and the interaction between them to provide background and explain why a definitive answer on the employment status of student assistants has been so elusive. It will then attempt to identify a path moving forward to ensure the continued protection of student assistants while making the necessary accommodations to address the unique position of universities in American society. Part II will introduce the role of student assistants and give a brief

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<sup>10</sup> *Id.* at 493.

<sup>11</sup> Trs. of Columbia Univ., 364 N.L.R.B. No. 90, at \*5 (Aug. 23, 2016).

<sup>12</sup> *Id.* at \*2. As articulated by the Board, a common-law employment relationship “exists when a servant performs services for another, under the other’s control or right of control, and in return for payment.” *Id.* at \*3.

<sup>13</sup> *Brown Univ.*, 342 N.L.R.B. at 490.

<sup>14</sup> *Columbia Univ.*, 364 N.L.R.B. No. 90, at \*23 (Member Miscimarra, dissenting) (“If one regards college as a competition, this is one area where ‘winning isn’t everything, it is the only thing,’ and I believe winning in this context means fulfilling degree requirements, hopefully on time.”) (internal citation omitted).

<sup>15</sup> *Id.* at \*8–13 (majority opinion).

<sup>16</sup> 29 U.S.C. § 153(a) (2012).

<sup>17</sup> ROBERT GORMAN, MATTHEW W. FINKIN, & TIMOTHY GLYNN, COX AND BOK’S LABOR LAW: CASES AND MATERIALS 87–88 (16th ed. 2016).

<sup>18</sup> N.L.R.B. v. FedEx Freight, Inc., 832 F.3d 432, 445 n.13 (3d Cir. 2016) (citing *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998)).

<sup>19</sup> Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. REV. 411, 416 (2010).

overview of the history and rationales behind their fight to unionize. Part III will introduce the NLRA and the Board designed to administer it, focusing on the Board's structure, authority, and politically-charged nature. Part IV will discuss the history of NLRB jurisprudence concerning the employment status of student assistants, which culminated in *Columbia University*. Part V will call for the NLRB to exercise its notice-and-comment rulemaking authority to codify *Columbia University* and address some of the concerns unique to the student-employment context.

## II. GRADUATE ASSISTANTS AND THEIR FIGHT FOR UNIONIZATION

After *Columbia University*, both undergraduate and graduate assistants have the right to form unions and collectively bargain with their universities;<sup>20</sup> however, the historical push for student-unionization has been led by, and primarily focused on, graduate students. At educational institutions across the United States, graduate students perform various teaching and research-related services for their universities in exchange for compensation.<sup>21</sup> Increasingly, universities rely on these students to perform critical functions.<sup>22</sup> This Part introduces the role of graduate assistants and provides a brief historical overview of their unionization efforts.

### A. *The Role of Graduate Assistants*

A graduate assistant is any graduate student who works for his or her university while simultaneously juggling the academic workload necessary to pursue an advanced degree.<sup>23</sup> In return for their services, graduate assistants typically receive compensation through a stipend, tuition reimbursement, or other form of payment.<sup>24</sup> These assistants can be classified into three categories: (1) teaching assistants, (2) research assistants,<sup>25</sup> and (3) all other graduate assistants.

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<sup>20</sup> *Columbia Univ.*, 364 N.L.R.B. No. 90, at \*2.

<sup>21</sup> See generally Hayden, *supra* note 5, at 1250–51.

<sup>22</sup> *Brown Univ.*, 342 N.L.R.B. 483, 498 (2004) (Members Liebman and Walsh, dissenting).

<sup>23</sup> See Neal H. Hutchens & Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105, 106 (2004); Hayden, *supra* note 5, at 1236.

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

<sup>25</sup> Research assistants are distinct from research *associates*. Research associates perform work for a university *after* receiving their doctorates, and they are considered statutory employees with the right to unionize. *C.W. Post Ctr.*, 189 N.L.R.B. 904, 906–07 (1971); see *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974).

The typical responsibilities of a teaching assistant include teaching certain undergraduate classes and helping professors handle larger lecture classes.<sup>26</sup> Teaching assistants may also be asked to “select textbooks, plan syllabi, design tests, plan lectures, plan laboratory setup, compose final exams, and grade all tests and projects.”<sup>27</sup> Research assistants perform field and laboratory research,<sup>28</sup> either to assist a professor or independently.<sup>29</sup> Funding for this research may come either from the school or from outside sources in the form of grants.<sup>30</sup> The final category of graduate assistants is comprised of any student-employee who does not fall neatly into either of the above two categories, such as office assistants in administrative departments, and curatorial assistants in university museums.<sup>31</sup> Depending on the university and the nature of the tasks performed, the work of these graduate assistants may or may not be a required component of earning an advanced degree.<sup>32</sup>

From a university’s perspective, graduate students earn significantly less than full-time faculty, and schools have increasingly turned to them as “an attractive cost-saving measure.”<sup>33</sup> This dependence on graduate assistants has “created a group of workers who demand more economic benefits and workplace rights.”<sup>34</sup> The time to complete a degree has increased, and some students “perceive the faculty with whom they work with to be living in comparative luxury.”<sup>35</sup> For nearly fifty years, graduate students have sought to address some of these concerns through the mechanisms of unionization and collective bargaining.

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<sup>26</sup> Hayden, *supra* note 5, at 1236.

<sup>27</sup> *Id.* at 1236 n.12.

<sup>28</sup> *Id.* at 1236.

<sup>29</sup> See *Leland Stanford*, 214 N.L.R.B. at 622 (discussing how Ph.D. candidates must complete research projects assigned by the University before performing the independent research required for a doctorate).

<sup>30</sup> N.Y. Univ., 332 N.L.R.B. 1205, 1215 (2000). Before *Columbia University*, this distinction was a relevant factor in determining whether certain assistants were statutory employees. *Id.*

<sup>31</sup> Hayden, *supra* note 5, at 1236 n.11.

<sup>32</sup> Compare *N.Y. Univ.*, 332 N.L.R.B. at 1207 (“[I]t is undisputed that working as a graduate assistant is not a requirement for obtaining a graduate degree in most departments.”) with *Brown Univ.*, 342 N.L.R.B. 483, 484 (2004) (“[M]ost university departments at Brown require a student to serve as a TA or RA to obtain a degree.”). Opponents of student unions argue that a student who performs work that would have to be completed anyway to obtain a degree cannot simultaneously be considered an employee for that same work. See *Leland Stanford*, 214 N.L.R.B. at 622–23.

<sup>33</sup> *Brown Univ.*, 342 N.L.R.B. at 498 (Members Liebman and Walsh, dissenting).

<sup>34</sup> *Id.* (citing Gordon J. Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students*, 29 J. COLLECTIVE NEGOT. PUB. SECTOR 153, 154 (2000)).

<sup>35</sup> *Id.* (quoting Daniel J. Julius & Patricia J. Gumpport, *Graduate Student Unionization: Catalysts and Consequences*, 26 REV. HIGHER EDUC. 187, 191, 196 (2002)).

B. *A Brief History of Graduate-Student Unions*

The history of graduate-student unions dates back to the late 1960s, when the University of Wisconsin-Madison voluntarily recognized a union of teaching assistants and entered into a collectively-bargained employment contract.<sup>36</sup> Since then, graduate students at numerous public universities have followed suit and established unions of their own. At the time of the *Columbia University* decision, more than 64,000 students in at least twenty-eight colleges had organized.<sup>37</sup>

In sharp contrast to the relative success achieved by unions at these public universities, students at private universities, until very recently, have almost universally been excluded from collective bargaining.<sup>38</sup> This dichotomy can be blamed on the disparate legal standards governing each group of students. At public universities, the labor laws of a particular state govern the right to organize.<sup>39</sup> State legislatures may freely grant students at public universities the right to unionize, and many have so chosen.<sup>40</sup> On the other hand, the uniform standard of the NLRA governs essentially all private universities in the United States.<sup>41</sup> As set forth in detail below, the NLRB has historically refused to grant graduate assistants the right to unionize,<sup>42</sup> which meant that a proposed student union at a private university could gain recognition only in the unlikely event that a university voluntarily chose to accept it.<sup>43</sup> Given the vigor with which these schools have opposed student

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<sup>36</sup> EDMUND DAVID CRONON & JOHN W. JENKINS, 4 *THE UNIVERSITY OF WISCONSIN: A HISTORY* 495–96 (1999), <http://digicoll.library.wisc.edu/cgi-bin/UW/UW-idx?type=article&did=UW.UWHist19451971v4.i0019&id=UW.UWHist19451971v4&>. In addition to its desire to improve pay and working conditions, the Wisconsin teaching assistants' union originated out of a wish for educational reform and anti-war activism. *Id.* at 494. For a detailed look at the early days of the Wisconsin union, see *id.* at 494–506.

<sup>37</sup> Trs. of Columbia Univ., 364 N.L.R.B. No. 90, at \*9 (Aug. 23, 2016) (citing J. Berry & M. Savarese, *Directory of U.S. Faculty Contracts and Bargaining Agents in Institutions of Higher Education* (2012)).

<sup>38</sup> See Robert A. Epstein, Note, *Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus*, 20 J. C.R. & ECON. DEV. 157, 163 (2006).

<sup>39</sup> See 29 U.S.C. § 152(2) (2012) (“The term ‘employer’ . . . shall not include the United States or any wholly owned Government corporation, or . . . any State or political subdivision thereof.”). See generally Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361–88 (1982) (discussing various doctrinal distinctions between public and private labor law).

<sup>40</sup> As of 2010, fourteen states had conferred this right. Josh Rinschler, Note, *Students or Employees? The Struggle over Graduate Student Unions in America's Private Colleges and Universities*, 36 J. COLL. & UNIV. L. 615, 619 n.25 (2010); see, e.g., CAL. GOV'T CODE § 3562(e) (West 2016).

<sup>41</sup> Cornell Univ., 183 N.L.R.B. 329, 334 (1970) (asserting jurisdiction over private universities that have a substantial impact on interstate commerce).

<sup>42</sup> See *infra* Part IV.

<sup>43</sup> Only one university—New York University—has ever voluntarily recognized such a

unionization, it should come as no surprise that not a single private university voluntarily recognized a student union until 2013.<sup>44</sup>

### III. THE NLRA

In the midst of the Great Depression in 1935, President Franklin D. Roosevelt signed the NLRA into law.<sup>45</sup> As amended by the 1947 Taft-Hartley Act,<sup>46</sup> the NLRA provides important protections to employees throughout the country.<sup>47</sup> Congress specified the NLRA's purpose within the first section of the Act:

It is hereby declared to be the policy of the United States to eliminate . . . certain substantial obstructions to the free flow of commerce . . . by encouraging . . . collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.<sup>48</sup>

The focus on the protection of commerce was crucial to the Act's survival during early challenges under the Commerce Clause,<sup>49</sup> and it remains an important factor today in determining who receives the Act's protections.<sup>50</sup>

In furtherance of the above policy, the NLRA confers upon employees "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 bargaining."<sup>51</sup> The Act also prohibits employers and labor organizations from engaging in certain "unfair labor practices" that would interfere with

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union. Press Release, New York University, Joint Statement of NYU and GSOC and SET, UAW (Nov. 26, 2013), <http://www.nyu.edu/about/news-publications/news/2013/november/joint-statement-of-nyu-and-gsoc-and-set-uaw.html>. As part of its agreement with NYU, the union agreed to withdraw a pending petition before the NLRB. *Id.*

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

<sup>45</sup> Ronald Turner, *Ideological Voting on the National Labor Relations Board Revisited*, 14 HOUS. BUS. & TAX L. J. 24, 27 (2014) (footnotes omitted).

<sup>46</sup> 29 U.S.C. §§ 151–69 (2012).

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

<sup>48</sup> *Id.* § 151.

<sup>49</sup> See *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937).

<sup>50</sup> See § 160(a) ("The Board is empowered . . . to prevent any person from engaging in any unfair labor practice . . . affecting commerce.") (emphasis added). As discussed in greater detail below, opponents of student unionization cite the NLRA's principal objective of facilitating the free flow of commerce to justify excluding students from coverage under the Act. See *Brown Univ.*, 342 N.L.R.B. 483, 496 (2004) (citing *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1275 (1999)) ("The vision of a fundamentally economic relationship between employers and employees is inescapable.").

<sup>51</sup> § 157.

these rights.<sup>52</sup>

A. *The Structure and Function of the NLRB*

Rather than leaving the administration of the NLRA to the courts, Congress created an administrative agency—the NLRB.<sup>53</sup> The Board is headed by a five-member panel appointed by the President with the advice and consent of the Senate.<sup>54</sup> The five members each serve staggered five-year terms,<sup>55</sup> with the term of one member expiring each year.<sup>56</sup> Once appointed and confirmed, Board members may only be removed by the President after a hearing “for neglect of duty or malfeasance in office.”<sup>57</sup> Although the Act does not mandate bi-partisanship, tradition dating back to the Eisenhower administration dictates that the Board be comprised of three members from the President’s party and two from the opposing party.<sup>58</sup> In addition to the five-member panel, the Board maintains Regional Offices throughout the country, each of which falls under the supervision of a Regional Director.<sup>59</sup>

The NLRB has two primary functions: to prevent unfair labor practices<sup>60</sup> and to hold and regulate representation elections.<sup>61</sup> Under the Administrative Procedures Act,<sup>62</sup> the Board has two rulemaking tools it can employ to accomplish these goals:<sup>63</sup> the promulgation of administrative regulations in the Code of Federal Regulations (“notice-and-comment rulemaking”)<sup>64</sup> and adjudication through quasi-judicial proceedings.<sup>65</sup>

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<sup>52</sup> See generally Gerilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities*, 21 HOFSTRA LAB. & EMP. L.J. 753, 756–57 (2004).

<sup>53</sup> § 153(a). For an overview of the rationale behind the decision to create the Board, see Daniel P. O’Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 TEMP. L. REV. 177, 182–83 (2008).

<sup>54</sup> § 153(a).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* (“[A]ny individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed.”); O’Gorman, *supra* note 53, at 187.

<sup>57</sup> § 153(a).

<sup>58</sup> William B. Gould IV, *Politics and the Effect on the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1507–08 (2015); see *Members of the NLRB since 1935*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Sept. 8, 2017).

<sup>59</sup> GORMAN, *supra* note 17, at 74.

<sup>60</sup> 29 U.S.C. § 160(a) (2012).

<sup>61</sup> § 159(c); see O’Gorman, *supra* note 53, at 181.

<sup>62</sup> 5 U.S.C. §§ 551–59 (2012).

<sup>63</sup> 29 U.S.C. § 156 (2012) (“The Board shall have authority . . . to make, amend, and rescind, in the manner prescribed by [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this subchapter.”).

<sup>64</sup> 5 U.S.C. § 553.

<sup>65</sup> *Id.* § 554.

Creating an administrative regulation through notice-and-comment rulemaking entails a three-step process. First, an agency must publish notice of the proposed rule in the Federal Register.<sup>66</sup> Second, interested persons must have the opportunity to make comments and argue for or against the proposed rule.<sup>67</sup> Finally, the agency must provide a “concise general statement” of the basis and purpose behind the rule.<sup>68</sup>

Despite its administrative rulemaking powers, the Board has almost exclusively chosen to resolve disputes and develop precedent through adjudication.<sup>69</sup> The major cases discussed in this Comment came before the Board via a specific type of proceeding that falls under the Board’s authority to regulate elections. First, a group of workers who desire representation (in this case students) petition the Regional Office to request a representation election.<sup>70</sup> The Regional Office will then determine: (1) whether the petitioners fall within the scope of the NLRA;<sup>71</sup> and (2) if so, whether the petitioners constitute “an appropriate unit for collective bargaining.”<sup>72</sup> A determination by a Regional Director may be appealed to the five-member Board for review on specified grounds.<sup>73</sup> Through this mechanism, the Board has repeatedly found itself questioning the employment status of student-employees.<sup>74</sup>

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<sup>66</sup> *Id.* § 553(b). The notice must include “(1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.*

<sup>67</sup> § 553(c).

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

<sup>69</sup> *N.L.R.B. v. FedEx Freight, Inc.*, 832 F.3d 432, 445 n.13 (3d Cir. 2016) (citing *Allentown Mack Sales & Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998)). *See generally* Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015). *See infra* Part V.A. for a discussion of the pros and cons of this approach by the Board. Part V will argue that the Board should exercise its rulemaking authority to define and protect the rights of student-employees.

<sup>70</sup> O’Gorman, *supra* note 53, at 81.

<sup>71</sup> *See, e.g.*, *N.Y. Univ.*, 332 N.L.R.B. 1205, 1220 (2000).

<sup>72</sup> *Id.* at 1221.

<sup>73</sup> 29 C.F.R. § 102.67(c). The Board will only grant review where (1) “A substantial question of law or policy is raised;” (2) “the regional director’s decision on a substantial factual issue is clearly [and prejudicially] erroneous;” (3) “the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error” or (4) “there are compelling reasons for reconsideration of an important Board rule or policy.” 29 C.F.R. § 102.67(d).

<sup>74</sup> *See infra* Part IV.



### B. *Jurisdictional Limits of the NLRB*

Before the NLRB may hear a case, it must grapple with constitutional and self-imposed limits on its jurisdiction. Congress vested the NLRB with “the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause.”<sup>75</sup> Therefore, the Board has authority over any business that engages in or substantially affects interstate commerce.<sup>76</sup>

Even if this constitutional test is satisfied, the NLRB has the discretion to decline jurisdiction when hearing a case would not effectuate the policies of the Act, or would not be an appropriate use of the Board’s limited resources.<sup>77</sup> An excellent example occurred recently in the university context. In *Northwestern University*, the Board declined to assert jurisdiction over scholarship football players seeking to unionize, reasoning that a ruling that addressed only the employment status of athletes at *private* institutions would not promote the stability of labor relations in an “industry” dominated by public universities.<sup>78</sup>

### C. *The Shifting Ideologies of the NLRB*

Throughout its history, and particularly during the last few decades, the NLRB has garnered a somewhat infamous reputation for being highly politicized.<sup>79</sup> Frequent turnover in the Board’s composition through the appointment procedure discussed above<sup>80</sup> leads to frequent reversals in decisions regarding controversial topics.<sup>81</sup> This is because the Board is not

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<sup>75</sup> N.L.R.B. v. Le Fort Enters., Inc., 791 F.3d 207, 209 (1st Cir. 2015) (citing N.L.R.B. v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963)).

<sup>76</sup> R.W. Harmon & Sons, Inc. v. N.L.R.B., 664 F.2d 248, 250 (10th Cir. 1981), *overruled on other grounds by* Aramark Corp. v. N.L.R.B., 179 F.3d 872 (10th Cir. 1999).

<sup>77</sup> 29 U.S.C. § 164(c)(1) (2012) (“The Board, in its discretion, may . . . decline to assert jurisdiction over any labor dispute involving any class or category of employers, where . . . the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.”); *see, e.g.*, N.L.R.B. v. Somerville Const. Co., 206 F.3d 752, 755 n.3 (7th Cir. 2000) (noting the Board asserts jurisdiction over a non-retail business only if its gross outflow or inflow across state lines exceeds \$50,000); N.L.R.B. v. Dredge Operators, Inc., 19 F.3d 206, 212 n.7 (5th Cir. 1994) (citing *Offshore Express Inc.*, 265 N.L.R.B. 378 (1983)) (discussing the Board’s refusal of jurisdiction over a United States Navy vessel operating on a remote island in the Indian Ocean). In addition to these standards developed through adjudication, the Board has occasionally exercised its notice-and-comment rulemaking authority to codify jurisdictional standards for specific industries. *See* 29 C.F.R. § 103.1 (colleges); 29 C.F.R. § 103.2 (symphony orchestras); 29 C.F.R. § 103.3 (“horseracing and dogracing”).

<sup>78</sup> Nw. Univ., 362 N.L.R.B. No. 167, at \*3 (Aug. 17, 2015).

<sup>79</sup> GORMAN, *supra* note 17, at 87–88. For a detailed analysis on the wisdom of the Board’s structure and operating procedure, *see* Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2077–84 (2009).

<sup>80</sup> *See* discussion *supra* p. 200.

<sup>81</sup> Rinschler, *supra* note 40, at 618–19. For a continuously updated list of Board

bound by the doctrine of stare decisis and can disregard its precedents whenever it has “adequately explicated the basis of its [new] interpretation.”<sup>82</sup> As a Canadian commentator astutely noted: “In the United States where, because of legislative paralysis, there has been no major labour law reform for 50 years, the government in power influences the direction of labour relations policy through its appointments.”<sup>83</sup>

While this trend has prevailed for decades, it does not date back to the Act’s inception. Congress initially envisioned the Board as a nonpartisan body.<sup>84</sup> In the early years of the Board, Democratic Presidents Roosevelt and Truman appointed Board members almost exclusively from government service or academia.<sup>85</sup> This policy changed when President Eisenhower, the first Republican president since the New Deal, appointed management-friendly members to the Board.<sup>86</sup> After the Board completed its transformation following Eisenhower’s third appointment, it reversed several prevailing Board precedents.<sup>87</sup> Since Eisenhower, the Board has frequently overruled decisions put into place by the prior administration.<sup>88</sup>

The effects of the Board’s politicization are exacerbated by the deferential standard federal courts accord to the Board’s interpretation of the NLRA.<sup>89</sup> With specific regard to the Act’s statutory definition of “employee,” the Supreme Court has indicated that it will uphold any interpretation that is “reasonably defensible.”<sup>90</sup> Although the Supreme Court has not yet had the occasion to address the employment status of student-

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compositions dating back to the NLRA’s inception, see *Members of the NLRB since 1935*, N.L.R.B., <https://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited Sept. 8, 2017).

<sup>82</sup> *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. N.L.R.B.*, 802 F.2d 969, 974 (7th Cir. 1986) (citing *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251, 267 (1975)).

<sup>83</sup> Kevin Burkett, *The Politicization of Ontario Labour Relations*, 6 CANADIAN LAB. & EMP. L.J. 161, 173 (1998). Burkett’s observation rings particularly true in the university context, where the NLRB has repeatedly shifted its policy. See *infra* Part IV.

<sup>84</sup> Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 OHIO ST. L.J. 1361, 1363 (2000) (internal citation omitted).

<sup>85</sup> *Id.* at 1365–66.

<sup>86</sup> *Id.* at 1368–69.

<sup>87</sup> B. Glenn George, *To Bargain or Not to Bargain: A New Chapter in Work Relocation Decisions*, 69 MINN. L. REV. 667, 668 n.14 (1985). For a contemporary view on the policy-shift by the Eisenhower Board, see Directors of the Columbia Law Review Association, Inc., *The NLRB Under Republican Administration: Recent Trends and Their Political Implications*, 55 COLUM. L. REV. 852 (1955).

<sup>88</sup> See, e.g., Harold J. Datz, *When One Board Reverses Another: A Chief Counsel’s Perspective*, 1 AM. U. LAB. & EMP. L.F. 71–80 (2011).

<sup>89</sup> See generally Michael C. Harper, *Judicial Control of the National Labor Relations Board’s Lawmaking in the Age of Chevron and Brand X*, 89 B.U. L. REV. 189, 191–94 (2009).

<sup>90</sup> *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 409 (1996) (citing *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 891 (1984)).

employees, based on the controversial nature of the topic, it likely would uphold the decision of the Board.

#### IV. THE NLRB'S EVER-CHANGING STANCE TOWARDS STUDENT-EMPLOYEES

The NLRB's journey to *Columbia University* has been far from smooth. Since the early 1950s, the Board has struggled with questions of whether to extend the protections of the NLRA to educational institutions and, if so, whether those protections apply to students in addition to faculty.<sup>91</sup> The Board's jurisprudence in this area has been riddled with decisions that reverse some precedents, narrow others into near-oblivion, and generally leave both students and universities wondering what will happen when a new president takes office. This Part begins with an overview of the general analytical framework used by the Board in making its employee-classification decisions, followed by the history and development of NLRB employment classification in the academic context through a case-by-case analysis.

##### A. Analytical Framework

Though the precise framework utilized in each decision has varied, the cases discussed below have more or less employed a two-prong test to determine whether to classify students as employees under the NLRA. First, the Board has looked to the plain meaning of the words "employee" and "employer," as defined by section 2 of the Act, to determine whether students and the universities they work for satisfy those definitions.<sup>92</sup> Second, even if it determined that the petitioning students fell within the literal meaning of the statute, the Board has looked to the policies underlying the Act to determine whether the students should nonetheless be excluded.<sup>93</sup>

##### 1. Statutory Definitions

Section 2 of the NLRA defines both "employee" and "employer," but does not affirmatively describe either term.<sup>94</sup> Instead, each definition

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<sup>91</sup> See *infra* pp. 207-18.

<sup>92</sup> Trs. of Columbia Univ., 364 N.L.R.B. No. 90, at \*4-6 (Aug. 23, 2016).

<sup>93</sup> *Id.* at \*6-13.

<sup>94</sup> 29 U.S.C. § 152 (2012). Section 2(3) unhelpfully defines "employee" as "any employee." § 152(3).

contains a list of persons *who are not* employers<sup>95</sup> or employees.<sup>96</sup> The Supreme Court has recognized that when Congress uses the term “employee” without defining it, it reflects the common law agency doctrine of the conventional master-servant relationship.<sup>97</sup> Therefore, since section 2 excludes neither students nor universities, the debate over this prong turns on whether students and universities have a common-law employment relationship under the law of agency.<sup>98</sup>

As typically defined in the labor-law context, a common-law employment relationship exists when a servant performs services (1) for the benefit of another, (2) under the other’s control or right of control, and (3) in return for payment.<sup>99</sup> Two specific issues typically arise in the university context: whether a student performs work for the benefit of the university, or for his own benefit;<sup>100</sup> and whether a student who performs services does so *in return* for compensation, or merely receives compensation *independently* of any work actually performed.<sup>101</sup>

## 2. Policy Considerations

Even if the employee and employer fall under the literal meaning of the statute, the Board may nonetheless exclude certain parties from the NLRA if it would not further the Act’s policies to extend them coverage.<sup>102</sup> For

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<sup>95</sup> As noted above, the NLRA extends coverage only to employees of private employers. *See* § 152(2). The section 2(2) definition of “employer” further excludes “[1] any person subject to the Railway Labor Act, . . . [2] any labor organization (other than when acting as an employer), [and 3] anyone acting in the capacity of officer or agent of such labor organization.” *Id.*

<sup>96</sup> The section 2(3) definition of “employee” excludes (1) agricultural laborers, (2) workers “in the domestic service of any family or person at his home,” (3) persons employed by a parent or spouse, (4) independent contractors, (5) supervisors, (6) “any individual employed by an employer subject to the Railway Labor Act,” and (7) anyone employed by a person who is not an “employer” under section 152(2). § 152(3).

<sup>97</sup> *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 320 (1992) (ERISA); *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740 (1989) (Copyright Act of 1976).

<sup>98</sup> *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, at \*15–18 (Aug. 23, 2016).

<sup>99</sup> *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 90–91, 93–95 (1995).

<sup>100</sup> *See* *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974) (finding research assistants perform work “to advance their own academic standing”).

<sup>101</sup> *See id.* at 621 (“[P]ayments to the R[esearch] A[ssistants] are in the nature of stipends or grants to permit them to pursue their advanced degrees and are not based on the skill or function of the particular individual or the nature of the research performed.”).

<sup>102</sup> *See* *Brown Univ.*, 342 N.L.R.B. 483, 488, 491 (2004) (“[A]ssuming arguendo that [graduate-assistants are common-law employees], it does not follow that they are employees within the meaning of the Act. The issue of employee status under the Act turns on whether Congress intended to cover the individual in question.”). The need for this second piece of the analysis stems from the canon of statutory construction stating that a regulatory statute should not be read in isolation, but as part of the entire regulatory scheme. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000). This second prong can also be justified based on the Board’s express authority to decline jurisdiction when a particular labor

instance, in *NLRB v. Bell Aerospace Co.*, the Supreme Court held that “managerial employees” fall outside the Act’s protection because they are “so clearly outside the [NLRA] that no specific exclusionary provision was thought necessary.”<sup>103</sup> The Court reasoned that holding otherwise would “eviscerate the traditional distinction between labor and management.”<sup>104</sup> For a less extreme example, the Board in *Goodwill Industries of Tidewater* excluded clients of a non-profit organization that provided training to handicapped individuals in order to help them enter the workforce.<sup>105</sup> The non-profit entered into a contract with a local naval base whereby its handicapped clients provided janitorial services for the base.<sup>106</sup> Although the local naval base paid the clients wages and the clients worked alongside non-handicapped employees of the non-profit, the Board nonetheless excluded them from the Act because they had a “primarily rehabilitative” relationship with their employer and worked under conditions not typical of the private sector.<sup>107</sup>

B. *1951-1970: The Board Asserts Jurisdiction over Private Universities*

Throughout the first few decades after the enactment of the NLRA, it was unclear whether the Act’s protections would extend to academic institutions at all, much less to students. Congress had originally exempted non-profit *hospitals* from the Act,<sup>108</sup> but made no such exclusion for universities, leaving the issue open. In the two cases that follow, the Board juggled the threshold questions of whether universities fell within its jurisdiction under the Commerce Clause and, if so, whether the Act’s policies justified classifying universities as statutory employers.

1. *Columbia University* (1951)

The Board first addressed the application of the NLRA to the academic setting in *Columbia University* (1951),<sup>109</sup> when it heard a petition filed on

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dispute does not affect commerce sufficiently to justify the use of the Board’s resources. 29 U.S.C. § 164(c)(1) (2012); *see supra* pp. 10–11.

<sup>103</sup> *N.L.R.B. v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974).

<sup>104</sup> *Id.*; *see also* *N.L.R.B. v. Hendricks Cty. Rural Elec. Membership Corp.*, 454 U.S. 170, 179 (1981) (quoting *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946)) (upholding exclusion of “employees who assist and act in a confidential capacity to persons who exercise ‘managerial’ functions in the field of labor relations.”).

<sup>105</sup> *Goodwill Indus. of Tidewater, Inc.*, 304 N.L.R.B. 767, 767 (1991).

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

<sup>107</sup> *Id.* at 767–78.

<sup>108</sup> *Trs. of Columbia Univ.*, 97 N.L.R.B. 424, 424 (1951). Congress subsequently amended section 2(2) to eliminate this exclusion. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

<sup>109</sup> This designation distinguishes the 1951 case from the 2016 *Columbia University*

behalf of clerical employees working in the libraries of Columbia University.<sup>110</sup> The Board first found that the University “affect[ed] commerce sufficiently” to fall within its Commerce Clause jurisdiction.<sup>111</sup> However, the Board held that it would not further the policies of the Act to assert jurisdiction over a “nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected the charitable purposes and educational activities of the institution.”<sup>112</sup> A key component of the Board’s reasoning was that since Congress had expressly excluded non-profit hospitals from the NLRA, it therefore likely would not have wanted to extend coverage to non-profit colleges.<sup>113</sup>

## 2. *Cornell University* (1970)

Nearly twenty years after *Columbia University* (1951), the Board reversed course in *Cornell University*, which involved faculty at Cornell and Syracuse Universities.<sup>114</sup> The Board began by noting that since the section 2(2) definition of “employer” does not specifically exclude them, non-profit colleges clearly fall within the plain meaning of the statute.<sup>115</sup> Moving to policy concerns, the Board rejected the notion that the congressional exclusion of non-profit hospitals somehow inferred an intent to deny coverage to university employees.<sup>116</sup> Next, after reviewing evidence showing that universities “have not only a substantial, but massive, impact on interstate commerce,” the Board overturned *Columbia University* (1951) and asserted jurisdiction over “nonprofit, private educational institutions whose operations have a substantial effect on [interstate] commerce.”<sup>117</sup>

## C. 1972-1999: *The Board Kicks Graduate Assistants to the Curb*

Since *Cornell University*, the Board has continuously exercised jurisdiction over faculty at private colleges. With that issue firmly decided, the Board’s attention turned to whether students should be extended the Act’s protections as well. Two years after *Cornell University*, the Board decided *Adelphi University*, which concerned a petition by a bargaining unit

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decision that granted students the ability to unionize. *See infra* pp. 212–14.

<sup>110</sup> *Columbia Univ.*, 97 N.L.R.B. 424.

<sup>111</sup> *Id.* at 425.

<sup>112</sup> *Id.* at 427.

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

<sup>114</sup> *Cornell Univ.*, 183 N.L.R.B. 329 (1970).

<sup>115</sup> *Id.* at 329.

<sup>116</sup> *Id.* at 331–32.

<sup>117</sup> *Id.* at 332, 334. The Board subsequently refined this test and, in a rare exercise of its notice-and-comment rulemaking authority, determined that it would assert jurisdiction only over colleges or universities that generated at least \$1 million in gross annual profits. 29 C.F.R. § 103.1 (2016).

consisting of both a university's regular faculty and graduate assistants.<sup>118</sup> The *Adelphi University* Board excluded the graduate assistants from the unit, reasoning that the students did not "share a sufficient community of interest" with the faculty because they were "primarily students."<sup>119</sup> Although *Adelphi University* did not address the assistants' statutory employment status, subsequent Board decisions would latch onto this "primary students" language as a rationale for denying coverage to student assistants altogether.<sup>120</sup>

1. *Leland Stanford Junior University* (1974)

The Board finally directly addressed the employment status of certain graduate assistants in *Leland Stanford Junior University*.<sup>121</sup> *Leland Stanford* addressed a group of research assistants in Stanford's physics department who received compensation from the university in the form of stipends or grants.<sup>122</sup> The students in question were all Ph.D. candidates who were obligated to perform independent research as part of their doctoral programs.<sup>123</sup> However, before allowing independent research, Stanford required the candidates to perform specified research under supervision to "prepare the student for selection of a topic for a dissertation" and "to determine the student's interest and ability."<sup>124</sup>

Based on the above facts, the Board dismissed an election petition filed on behalf the students because it did not consider the research assistants to be "employees" within the meaning of section 2(3) of the NLRA.<sup>125</sup> This conclusion, however, came as somewhat of an afterthought towards the end of the Board's opinion.<sup>126</sup> The crux of the Board's reasoning can be properly thought of in terms of the two-pronged common-law/policy framework outlined above.<sup>127</sup> Regarding the common-law definition of employee,<sup>128</sup> the Board reasoned that (1) the assistants performed research "to advance their own academic standing," and thus not for the benefit of the employer;<sup>129</sup> and

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<sup>118</sup> *Adelphi Univ.*, 195 N.L.R.B. 639 (1972).

<sup>119</sup> *Id.* at 640.

<sup>120</sup> *See Brown Univ.*, 342 N.L.R.B. 483, 487 (2004); *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1001 (1977).

<sup>121</sup> *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

<sup>122</sup> *Id.* at 621.

<sup>123</sup> *Id.* at 621–22.

<sup>124</sup> *Id.* at 622.

<sup>125</sup> *Id.* at 623.

<sup>126</sup> *Id.*

<sup>127</sup> *See discussion supra*, pp. 205–07.

<sup>128</sup> A common-law employment relationship exists when a servant performs services (1) for the benefit of another, (2) under the other's control or right of control, and (3) in return for payment. *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 90–91, 93–95 (1995).

<sup>129</sup> *Leland Stanford*, 214 N.L.R.B. at 623.

(2) the University dispersed stipends to help the students pursue a degree, and thus, not in return for services.<sup>130</sup> As for policy concerns, the Board noted that the assistants and Stanford did not have a traditional employment relationship because, while an employee may be fired for unsatisfactory performance, a research assistant would merely receive a failing grade.<sup>131</sup> Based on these findings, and building off *Adelphi University*, the Board held the assistants to be “primarily students” and thus, not employees.<sup>132</sup>

## 2. The Teaching Hospital Cases (1976-1999)

In the years that followed *Leland Stanford*, the Board refined what became known as the “primary-purpose” test in a different, but related, setting—teaching hospitals. In two similar decisions in the late 1970s, the Board dismissed petitions seeking representation elections for bargaining units consisting of interns and residents who worked at certain hospitals.<sup>133</sup> Like graduate assistants, these hospital workers performed services and received compensation, but unlike graduate assistants, they already had their degrees and were working to fulfill licensing requirements to practice medicine.<sup>134</sup> Nevertheless, the Board held that since the primary purpose of the residents’ work was educational, the residents should be excluded from the Act.<sup>135</sup> Unlike the common-law-centric approach taken in *Leland Stanford*, the Board relied almost exclusively on policy considerations to make its determinations. In particular, the Board in *St. Clare’s Hospital* expressed concerns that collective bargaining would infringe on academic freedom and hinder the interns’ ability to receive an effective education.<sup>136</sup>

This status quo persisted until 1999, when a Board composed of President Clinton’s appointees<sup>137</sup> decided *Boston Medical Center* and reassessed the employment status of medical residents and interns.<sup>138</sup> In a 3–2 decision, the Board reversed both *St. Clare’s Hospital* and *Cedars-Sinai Medical Center* and held that interns, residents, and fellows employed by a

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<sup>130</sup> *Id.* at 622.

<sup>131</sup> *Id.* at 623.

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

<sup>133</sup> *St. Clare’s Hosp. & Health Ctr.*, 229 N.L.R.B. 1000 (1977); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976).

<sup>134</sup> *Cedars-Sinai*, 223 N.L.R.B. at 253.

<sup>135</sup> *St. Clare’s*, 229 N.L.R.B. at 1002; *Cedars-Sinai*, 223 N.L.R.B. at 253.

<sup>136</sup> *St. Clare’s*, 229 N.L.R.B. at 1003.

<sup>137</sup> Like previous Boards, the Clinton NLRB had no issue overturning precedents put into place by previous administrations. *See, e.g., Springs Indus., Inc.*, 332 N.L.R.B. 40 (2000) (overturning *Kokomo Tube Co.*, 280 N.L.R.B. 357 (1986) and finding that the Board should presume that an unlawful threat of plant closing disseminated to one worker was also disseminated to additional workers). Perhaps unsurprisingly, *Springs Industries* was itself overruled by the Bush Board in *Crown Bolt, Inc.*, 343 N.L.R.B. 776 (2004).

<sup>138</sup> *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999).



teaching hospital are statutory employees under the Act.<sup>139</sup> The majority reasoned that the educational benefits received by the hospital workers did not have any bearing on employment status.<sup>140</sup> This rationale became crucial in the student-assistant cases that followed.

#### D. 2000-Present: NLRB Indecisiveness

With the Board's decision in *Boston Medical Center*, commentators began to speculate whether the Clinton Board would reverse course from *Leland Stanford* and extend the Act's protections to graduate assistants as well.<sup>141</sup> Shortly thereafter, the Clinton Board answered when it granted statutory employment status to certain graduate assistants for the first time.

##### 1. *New York University* (2000)

In *New York University*, the NLRB heard a petition by a union seeking to represent teaching and research assistants at New York University (NYU).<sup>142</sup> Turning first to the statutory definition of employee, the Board found that graduate assistants fall within the plain meaning of "any employee" under section 2(3) of the NLRA and the common law.<sup>143</sup> In doing so, the Board explicitly rejected several arguments, including some that the *Leland Stanford* Board had found persuasive.<sup>144</sup> First, the University argued that graduate assistants spent only about fifteen percent of their time performing duties for the University.<sup>145</sup> The Board rejected this argument and analogized the graduate assistants to part-time employees, who had been previously adjudicated to be statutory employees.<sup>146</sup> Next, NYU claimed that graduate assistants receive "financial aid" and not "compensation," and may receive the same funding even if they perform no work.<sup>147</sup> To this, the Board responded:

[T]he graduate assistants, unlike the students receiving financial aid, perform work . . . for the Employer under terms and conditions controlled by the Employer. That this is work in

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<sup>139</sup> *Id.* at 152. Unlike the graduate-assistant cases, *Boston Medical Center* has never been overturned. Trs. of Columbia Univ., 364 N.L.R.B. No. 90, at \*3 (Aug. 23, 2016).

<sup>140</sup> *See Boston Med.*, 330 N.L.R.B. at 160 ("[W]hatever other description may be fairly applied to house staff, it does not preclude a finding that individuals in such positions are, among other things, employees as defined by the Act.").

<sup>141</sup> *See, e.g.,* Bernhard Wolfgang Rohrbacher, Comment, *After Boston Medical Center: Why Teaching Assistants Should Have the Right to Bargain Collectively*, 33 LOY. L.A. L. REV. 1849 (2000).

<sup>142</sup> N.Y. Univ., 332 N.L.R.B. 1205, 1205 (2000).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1205–07.

<sup>145</sup> *Id.* at 1206.

<sup>146</sup> *Id.* (citing Univ. of S.F., 265 N.L.R.B. 1221 (1982)).

<sup>147</sup> *Id.* at 1206–07.

exchange for pay, and not solely the pursuit of education, is highlighted by the absence of any academic credit for virtually all graduate assistant work. Indeed, in most cases graduate assistants have completed their coursework and are working on their dissertation while performing this work.<sup>148</sup>

Finally, the Board rejected the notion that the students performed their work primarily in furtherance of a degree, noting that most degrees did not even require working as a graduate assistant.<sup>149</sup>

Having found the petitioning students to be common-law employees, the Board then rejected the University's policy arguments for excluding the graduate assistants. First, it found that the students had a "traditional economic relationship" with the University because the assistants' relationship with the University mirrored that of the faculty.<sup>150</sup> Next, the Board briefly addressed concerns that "extending collective-bargaining rights to graduate assistants would infringe on the [University's] academic freedom."<sup>151</sup> The Board summarily dismissed this argument, reasoning that (1) any issue of academic freedom can be resolved through collective bargaining, and (2) the NLRA does not require employers to agree to anything.<sup>152</sup>

Essentially, *New York University* was a sound rejection of the "primary-purpose test," with the Board explicitly holding that an educational benefit does not preclude statutory employment status.<sup>153</sup> Based on this holding and the reasoning above, the Board concluded that most of NYU's teaching assistants and research assistants were statutory employees entitled to a representation election.<sup>154</sup> The decision, however, excluded a class of research assistants funded by external grants who performed no research outside that needed to obtain a degree.<sup>155</sup> The decision of the Regional Director adopted by the Board reasoned that these assistants do not actually perform a service for another in exchange for compensation, and thus cannot be considered "employees" under the Act.<sup>156</sup> The exclusion of research assistants thus left *Leland Stanford* intact, albeit with a very narrow scope.

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<sup>148</sup> *N.Y. Univ.*, 332 N.L.R.B. at 1207.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1207–08. As noted above, university faculty indisputably fall within the NLRA. *Cornell Univ.*, 183 N.L.R.B. 329, 332 (1970).

<sup>151</sup> *N.Y. Univ.*, 332 N.L.R.B. at 1208.

<sup>152</sup> *Id.* (citing *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 45 (1937)).

<sup>153</sup> *Id.* at 1207.

<sup>154</sup> *Id.* at 1205, 1221.

<sup>155</sup> *Id.* at 1221.

<sup>156</sup> *Id.* This issue was not appealed to the Board. *See id.* at 1205 n.5.

## 2. *Brown University* (2004)

In the wake of *New York University*, unionization efforts began almost immediately at several private universities with varying degrees of success.<sup>157</sup> At NYU, students successfully negotiated the first collectively-bargained contract between graduate assistants and a private university in the nation's history.<sup>158</sup> This victory for student employees proved to be short-lived. Only four years later, but well into the George W. Bush administration, the Board overruled *New York University*. This determination came in an appeal from a Regional Director's decision to grant an election to teaching assistants, research assistants, and proctors at Brown University.<sup>159</sup> The *Brown University* Board reversed the Regional Director and held that even if assistants are employees at common law (an issue which it did not decide), "it does not follow that they are employees within the meaning of the Act."<sup>160</sup> Instead, the Board excluded graduate assistants from the Act based on two policy concerns unique to the university context: (1) the "primarily educational" relationship between students and universities, and (2) the ever-lurking threat to academic freedom.<sup>161</sup>

The Board stressed that the policies behind the Act only justified extending protection to employees who have a "fundamentally economic" relationship with their employer.<sup>162</sup> Accordingly, it revived the briefly-deceased "primary-purpose" test and held that individuals who are primarily students cannot be statutory employees under the NLRA.<sup>163</sup> Employing this test, the Board found that the assistants had a primarily educational relationship with Brown, and emphasized that: students must be enrolled at Brown to receive a teaching assistant position, research assistant position, or proctorship;<sup>164</sup> the money received by the teaching assistants, research assistants, and proctors was the same received by fellows (who perform no services), making it financial aid and not "consideration for work;"<sup>165</sup> and most graduate students were pursuing a Ph.D., and unlike the assistants at

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<sup>157</sup> See, e.g., Steven Greenhouse, *Grad Students Reject Union in Yale Vote*, N.Y. TIMES (May 2, 2003), <http://www.nytimes.com/2003/05/02/nyregion/grad-students-reject-union-in-yale-vote.html>.

<sup>158</sup> Karen W. Arenson & Steven Greenhouse, *N.Y.U. and Union Agree on Graduate-Student Pay*, N.Y. TIMES (Jan. 30, 2002), <http://www.nytimes.com/2002/01/30/nyregion/nyu-and-union-agree-on-graduate-student-pay.html>. As noted above, such contracts had been negotiated at many public universities. See *supra* p. 197.

<sup>159</sup> *Brown Univ.*, 342 N.L.R.B. 483 (2004).

<sup>160</sup> *Id.* at 491.

<sup>161</sup> *Id.* at 492–93.

<sup>162</sup> *Id.* at 488 (citing *WBAI Pacifica Found.*, 328 N.L.R.B. 1273, 1275 (1999)).

<sup>163</sup> *Id.* at 493.

<sup>164</sup> *Id.* at 488.

<sup>165</sup> *Brown Univ.*, 332 N.L.R.B. at 485, 488.

NYU,<sup>166</sup> most departments at Brown required teaching as a condition of receiving a doctorate.<sup>167</sup> The Board expressly declined to give any weight to empirical evidence showing the changing financial and corporate structure of universities, reasoning that this had no bearing on whether graduate assistants are primarily students.<sup>168</sup>

Turning to academic freedom, the Board relied heavily on *St. Clare's Hospital*<sup>169</sup> and found that extending NLRA coverage to graduate students would infringe upon academic freedom.<sup>170</sup> Specifically, the Board feared that purely academic issues would be subject to collective bargaining, including class size, time, length, and location; decisions over who, what, and where to teach or research; standards for advancement and graduation; and the administration of exams.<sup>171</sup> The Board also expressed concerns that collective bargaining would jeopardize the “intensely personal” nature of the student-faculty relationship.<sup>172</sup> Finally, the Board rejected evidence that some collective-bargaining agreements have been entered into at universities with no intrusion into the educational process, essentially reasoning that past performances do not guarantee future outcomes.<sup>173</sup>

### 3. *Columbia University* (2016)

The building unionization movement at private universities came to a screeching halt after the Board's decision in *Brown University*. At NYU, the University refused to negotiate a second contract after the initially bargained agreement expired.<sup>174</sup> This state of affairs prevailed for over a decade, until a Board composed of President Obama's appointees heard a petition from a

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<sup>166</sup> N.Y. Univ., 332 N.L.R.B. 1205, 1207 (2000).

<sup>167</sup> *Brown Univ.*, 342 N.L.R.B. at 488.

<sup>168</sup> *Id.* at 492.

<sup>169</sup> *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000 (1977). As noted above, *St. Clare's Hospital* was overruled by *Boston Medical Center*, 330 N.L.R.B. 152 (1999). The *Brown University* Board distinguished *Boston Medical* because the hospital workers in that case had already earned their degrees, while the graduate assistants here had not. *Brown Univ.*, 342 N.L.R.B. at 487. As for the holding of *Boston Medical* itself, the Board cryptically stated that “[w]e need not decide whether [that case] was correctly decided.” *Id.* The Bush Board never had a chance to reassess the employment status of hospital interns and residents.

<sup>170</sup> *Brown Univ.*, 342 N.L.R.B. at 490.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 489–90 (citing *St. Clare's Hospital*, 229 N.L.R.B. at 1002)).

<sup>173</sup> *Id.* at 492 (“Even if some unions have chosen not to intrude into academic prerogatives, that does not mean that other unions would be similarly abstemious.”).

<sup>174</sup> Karen W. Arenson, *N.Y.U. Moves to Disband Graduate Students Union*, N.Y. TIMES (June 17, 2005), <http://www.nytimes.com/2005/06/17/education/nyu-moves-to-disband-graduate-students-union.html>. Eight years later, NYU voluntarily re-recognized the graduate-assistant union. See Steven Greenhouse, *N.Y.U. Graduate Assistants to Join Auto Workers' Union*, N.Y. TIMES (Dec. 12, 2013), <http://www.nytimes.com/2013/12/13/nyregion/nyu-graduate-assistants-to-join-auto-workers-union.html>.

union seeking to represent teaching and research assistants at Columbia University.<sup>175</sup> Unlike prior student-petitions before the NLRB, the proposed Columbia University bargaining unit contained undergraduates, as well as graduate students.<sup>176</sup> Based on the plain meaning of the NLRA and an analysis of the policies behind it, the Board again changed course by reversing *Brown University* and extending the Act even further than it did in *New York University*.<sup>177</sup>

In a 3-1 decision, *Columbia University* granted employment status to all “student assistants who have a common-law employment relationship with their university.”<sup>178</sup> First, the Board reaffirmed the principle that all common-law employees not specifically excluded by section 2(3) of the NLRA fall within the plain meaning of “employee” under the Act.<sup>179</sup> The Board thus concluded that the Act applied to all student assistants who are common-law employees “unless compelling statutory and policy considerations require an exception.”<sup>180</sup>

The Board went on to find that the “special issues” posed by the academic-employment setting do not justify a blanket exclusion of students from the Act.<sup>181</sup> The majority opinion unequivocally discarded the “primary-purpose test,” finding that it had no basis in either the policies or the text of the NLRA.<sup>182</sup> Specifically, the Board rejected *Brown University*’s requirement of a “fundamentally economic” relationship.<sup>183</sup> Rather, it held that the only economic relationship required by the Act is “the payment of tangible compensation.”<sup>184</sup> Thus, “a graduate student may be both a student *and* an employee; a university may be both the student’s educator *and* employer.”<sup>185</sup>

Rather than completely disregarding threats to academic freedom, as the *New York University* Board did,<sup>186</sup> the Board acknowledged that “[i]nsofar as the concept of academic freedom implicates the First Amendment, the Board certainly must take any such infringement into

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<sup>175</sup> Trs. of Columbia Univ., 364 N.L.R.B. No. 90, at \*1 (Aug. 23, 2016).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at \*2.

<sup>178</sup> *Id.* at \*13.

<sup>179</sup> *Id.* at \*4–6.

<sup>180</sup> *Id.* at \*6. The Board further stated, “[w]e do not hold that the Board is required to find workers to be statutory employees whenever they are common-law employees, but only that the Board may and should find here that student assistants are statutory employees.” *Id.* at \*4.

<sup>181</sup> *Columbia Univ.*, 364 N.L.R.B. No. 90, at \*7.

<sup>182</sup> *Id.* at \*5.

<sup>183</sup> *Id.* at \*6.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at \*7 (emphasis in original).

<sup>186</sup> N.Y. Univ., 332 N.L.R.B., 1205, 1208 (2000); see discussion *supra* Part IV.D.1.

account.”<sup>187</sup> The majority, however, held that a generic threat to academic freedom could not justify a blanket exclusion because: (1) the Act mandates only employers to bargain over “wages, hours, and other terms and conditions of employment,”<sup>188</sup> and (2) the Board can address specific First Amendment issues on a case by case basis.<sup>189</sup> Based primarily on these reasons, the Board held that the NLRA extends to all student assistants with a common-law employment relationship with their university.<sup>190</sup>

Lastly, the *Columbia University* Board considered whether the petitioning teaching and research assistants were, in fact, common-law employees.<sup>191</sup> As for the teaching assistants, the Board found that those students provided important instructional work for the university in exchange for compensation.<sup>192</sup> The majority then held that whether or not completion of a degree required teaching had no bearing on the employment-status inquiry.<sup>193</sup> With respect to research assistants, the Board fully overruled *Leland Stanford*, and departed from *New York University* insofar as that decision held that externally funded research assistants were not statutory or common-law employees.<sup>194</sup> The *Columbia University* Board concluded that the student-researchers performed work under the direction of the University in exchange for compensation—even if that compensation came from a source outside of the school.<sup>195</sup> Therefore, the Board deemed all of the petitioning students, including undergraduates, statutory employees under the NLRA.<sup>196</sup>

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<sup>187</sup> *Columbia Univ.*, 364 N.L.R.B. No. 90, at \*7 (citing *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (holding serious First Amendment concerns precluded Board from exercising jurisdiction over certain faculty at church-run schools)).

<sup>188</sup> *Id.* at \*8 (citing *First Nat. Maint. Corp. v. N.L.R.B.*, 452 U.S. 666, 674–75 (1981)).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at \*13.

<sup>191</sup> *Id.* at \*13–18. As noted above, a common-law employment relationship exists when a servant performs services (1) for the benefit of another, (2) under the other’s control or right of control, and (3) in return for payment. *N.L.R.B. v. Town & Country Elec., Inc.*, 516 U.S. 85, 90–91, 93–95 (1995).

<sup>192</sup> *Columbia Univ.*, 364 N.L.R.B. No. 90, at \*15.

<sup>193</sup> *Id.* at \*16 (“[T]he fact that teaching may be a degree requirement in many academic programs does not diminish the importance of having students assist in the business of universities by providing instructional services for which undergraduate students pay tuition.”).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at \*17–18. The opinion did note that “it is theoretically possible that funders may wish to further a student’s education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder’s own particular research goals.” *Id.* at \*17. This presumably would not create a common-law employment relationship with the University and would thus not be covered under the NLRA.

<sup>196</sup> *Id.* at \*16, \*18. The Board additionally found that (1) undergraduate, Master’s degree, and Ph.D. students shared a sufficient community of interest to constitute an appropriate

## V. THE FUTURE OF STUDENT-UNIONIZATION: AN ARGUMENT FOR NOTICE-AND-COMMENT RULEMAKING

In the months since *Columbia University*, students at private universities have once again begun to organize unionization efforts. At Columbia University, graduate students voted overwhelmingly in favor of unionization.<sup>197</sup> At Yale, students in eight departments voted to unionize<sup>198</sup> following an order by the Regional Director permitting unionization on a department-by-department basis.<sup>199</sup> Elections have also been held at Harvard<sup>200</sup> and Cornell.<sup>201</sup>

These developments notwithstanding, students' right to unionize is far from etched in stone. The political instability of the NLRB means that a reconstituted Board could easily reverse course again and return to the *Brown University* "primary-purpose" standard. This uncertainty makes it critical that the employment status of student assistants be decided with some semblance of finality. The Board should act to codify its holding in *Columbia University* and make clear that students in a common-law employment relationship with their schools are statutory employees under

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collective-bargaining unit; and (2) none of the students were "temporary employees" who must be excluded from the unit. *Id.* at \*18–21.

<sup>197</sup> Elizabeth A. Harris, *Columbia Graduate Students Vote Overwhelmingly to Unionize*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/nyregion/columbia-graduate-students-union-vote.html>. Following the election, an NLRB officer dismissed Columbia's objections regarding the validity of the elections. Ginger Adams Otis, *Graduate Workers at Columbia Get OK from National Labor Relations Board to Join Union*, N.Y. DAILY NEWS (Mar. 7, 2017, 1:28 P.M.), <http://www.nydailynews.com/new-york/graduate-workers-columbia-join-union-article-1.2990869>.

<sup>198</sup> Danielle Douglas-Gabriel, *Yale Graduate Students Vote to Form a Union*, WASH. POST (Feb. 24, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/02/24/yale-graduate-students-vote-to-form-a-union>.

<sup>199</sup> Ed Stannard, *Yale University Graduate Students in 9 Departments Given Right to Hold Union Elections*, NEW HAVEN REG. (Jan. 25, 2017, 7:33 P.M.), <http://www.nhregister.com/general-news/20170125/yale-university-graduate-students-in-9-departments-given-right-to-hold-union-elections>.

<sup>200</sup> After the initial election at Harvard resulted in a majority of votes against unionization, the Regional Director ordered a re-vote due to concerns over the adequacy of eligible voter lists circulated prior to the election. Caroline S. Engelmayr, *Harvard Appeals Unionization Vote Ruling to National NLRB*, THE HARVARD CRIMSON (Aug. 15, 2017), <http://www.thecrimson.com/article/2017/8/15/harvard-appeals-decision-nlr/>. Harvard has appealed the decision to the full NLRB. *Id.*

<sup>201</sup> As of this writing, the election at Cornell was too close to call. Meg Gordon, *With New Tactics, Graduate Students Look to Renew Last Year's Union Effort*, THE CORNELL DAILY SUN (Aug. 22, 2017), <http://cornellsun.com/2017/08/22/with-new-tactics-graduate-students-look-to-renew-last-years-union-effort/>. Prior to the vote, the administration actively campaigned against the union. See Statement of Hunter R. Rawlings III, Interim President, Cornell University, Interim President Rawlings Issues Statement on Graduate Assistant Labor Union Representation (Oct. 27, 2016), <http://www.news.cornell.edu/stories/2016/10/statement-graduate-assistant-unionization>.

section 2(3) of the NLRA.

In an ideal world, this job would fall to Congress, which could amend the NLRA to specifically include students in the Act. But, the NLRA has not been amended since 1974,<sup>202</sup> and Congress may be unlikely to break its streak of inaction. Therefore, the responsibility to craft stable labor regulations must fall to the NLRB. As previously noted, the Board has two rulemaking tools—adjudication and notice-and-comment rulemaking.<sup>203</sup> This Part discusses the advantages and disadvantages of both approaches to show why notice-and-comment rulemaking is the only way to eliminate the present uncertainty concerning the employment status of students and provide guidance and stability moving forward.

#### A. *Adjudication vs. Notice-and-Comment Rulemaking*

Both adjudication and notice-and-comment rulemaking have their advantages, but neither is perfectly suited for every situation.<sup>204</sup> Yet, this fundamental fact appears to be lost on the NLRB, which throughout its history has almost exclusively relied on adjudication to set policy and resolve disputes.<sup>205</sup> Even the Supreme Court, while acknowledging the importance of maintaining the flexibility afforded by adjudication in many situations, has opined that the Board should promulgate formal rules where appropriate.<sup>206</sup> Generally speaking, the primary advantages of adjudication are *flexibility* and *specificity*, while the advantages of notice-and-comment rulemaking are *clarity* and *stability*.

##### 1. Advantages of Adjudication

Adjudication by an agency focuses on particular disputes between particular parties and, as such, is “better suited for intensive exploration of factual disputes and . . . resol[ution of] narrow policy issues involving limited numbers of contestants.”<sup>207</sup> Similarly, “the party most immediately affected has substantially greater procedural rights than he would have in

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<sup>202</sup> Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

<sup>203</sup> See discussion *supra* pp. 200-01.

<sup>204</sup> Lubbers, *supra* note 19, at 415 (citing Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149, 162 (1986)).

<sup>205</sup> N.L.R.B. v. FedEx Freight, Inc., 832 F.3d 432, 445 n.13 (3d Cir. 2016) (citing Allentown Mack Sales & Serv., Inc. v. N.L.R.B., 522 U.S. 359, 374 (1998)); see generally Garden, *supra* note 69, at 1471.

<sup>206</sup> See N.L.R.B. v. Bell Aerospace Co., 416 U.S. 267, 294 (1974) (“[T]here may be situations where the Board’s reliance on adjudication would amount to an abuse of discretion or a violation of the Act.”); SEC v. Chenery Corp., 332 U.S. 194, 202 (1947) (“The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.”).

<sup>207</sup> Lubbers, *supra* note 19, at 415 (quoting Berg, *supra* note 204, at 162).



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rulemaking.”<sup>208</sup> Moreover, adjudication allows the “flexibility to adjust standards as novel situations arise or as the agency gains experience.”<sup>209</sup> Adjudication thus forms policy gradually, rather than the all-at-once approach of a formal rule. This gradual rulemaking may be less likely to attract unwanted attention from Congress or the Supreme Court.<sup>210</sup> As one commentator noted, “there is far more at stake when a rule is rejected by a federal court than when an adjudicated decision is reversed.”<sup>211</sup> The Board itself has defended its reliance on adjudication because the “cumbersome process of amending formal rules would impede the law’s ability to respond quickly and accurately to changing industrial practices.”<sup>212</sup>

## 2. Advantages of Notice-and-Comment Rulemaking

While adjudication can be an effective mechanism for addressing many narrow, fact-specific issues, notice-and-comment rulemaking is typically better suited for addressing broader policy concerns. Rather than waiting for aggrieved parties to come before an agency, formal rulemaking allows an agency to decide exactly when and how to address an issue.<sup>213</sup> Once an agency initiates a formal rulemaking proceeding, the comments and empirical evidence submitted by the public create a more thorough record, and may lead to better decision-making by the agency.<sup>214</sup> Additionally, if an agency methodically addresses all concerns raised by opponents of the new rule, courts may be more likely to show deference to the agency’s decision to adopt the rule.<sup>215</sup>

Finally, an administrative regulation is binding on all future agency adjudications, which may make a particular policy significantly more stable.<sup>216</sup> In order for an agency to modify or eliminate a regulation, it would have to institute another formal rulemaking proceeding.<sup>217</sup> As detailed above, this process is much more cumbersome than simply announcing a rule

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<sup>208</sup> *Id.* (quoting Berg, *supra* note 204, at 162).

<sup>209</sup> Garden, *supra* note 69, at 1474.

<sup>210</sup> *See id.*

<sup>211</sup> James J. Brudney, *Isolated and Politicized: The NLRB’s Uncertain Future*, 26 COMP. LAB. L. & POL’Y J. 221, 235 (2005).

<sup>212</sup> Lubbers, *supra* note 19, at 416 (citing Scott A. Zebrak, Comment, *The Future of NLRB Rulemaking: Analyzing the Mixed Signals Sent by the Implementation of the Health Care Bargaining Unit Rule and by the Proposed Beck Union Dues Regulation*, 8 ADMIN. L.J. AM. U. 125, 129 (1994)).

<sup>213</sup> Garden, *supra* note 69, at 1475.

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

<sup>215</sup> *Id.*

<sup>216</sup> Lubbers, *supra* note 19, at 416.

<sup>217</sup> *Am. Fed’n of Gov’t Emps. Local 3090 v. Fed. Labor Relations Auth.*, 777 F.2d 751, 759 (D.C. Cir. 1985).

through adjudication,<sup>218</sup> and policy shifts effected through this formal mechanism may be more likely to be perceived as legitimate.<sup>219</sup>

B. *Application of Notice-and-Comment Rulemaking to Student Assistants*

The advantages and disadvantages outlined above weigh heavily in favor of using notice-and-comment rulemaking to settle the threshold question of whether student assistants are “employees” under the NLRA. This is not a “novel situation” that requires the Board to retain its flexibility. It has been litigated and re-litigated for decades, and although the basic facts surrounding student assistants have remained the same, the determinations made by the Board have not. The stability and clarity of a formal administrative regulation is necessary to provide finality and to allow students and universities to make informed decisions moving forward. Similarly, a rule in this context would in no way impede the Board’s ability to “respond quickly and accurately to changing industrial practices.”<sup>220</sup> Industrial practices have not changed since *New York University*; only the composition of the NLRB has.

Importantly, the comment period in a formal rulemaking proceeding would give affected persons the opportunity to voice their concerns and allow the Board to make an informed decision on whether, or how, it should restrict the collective-bargaining rights of students. Opponents of student-unionization have raised numerous concerns about applying the NLRA to students,<sup>221</sup> most of which would undoubtedly be addressed during the rulemaking proceeding. However, one particular concern—the importance of academic freedom—merits particular consideration.

Although not expressly mentioned in the Constitution, it is well settled that academic freedom in a university is “a special concern of the First Amendment because of the university’s unique role in participating in and fostering a marketplace of ideas.”<sup>222</sup> Chief Justice Warren best described the

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<sup>218</sup> See 5 U.S.C. § 553 (2012); see *supra* pp. 200-01.

<sup>219</sup> Garden, *supra* note 69, at 1476.

<sup>220</sup> Zebrak, *supra* note 212, at 129.

<sup>221</sup> For instance, in his dissent in *Columbia University*, Member Miscimarra enumerated an extensive list of “unfortunate consequences” that could stem from the ruling. Trs. of Columbia Univ., 364 N.L.R.B. No. 90, at \*29–31 (Aug. 23, 2016). These potential issues include: (1) Schools may withhold, suspend, or delay academic credit if a student-assistant is unable to work due to a strike or lockout; (2) Certain disclosures mandated by the NLRA may directly conflict with the Family Educational Rights and Privacy Act (FERPA); (3) Schools may not be able to conduct confidential investigations into allegations of sexual harassment; and (4) Schools may be restricted from promulgating general rules promoting civility or rules barring profanity. *Id.* The merit of these concerns, and of other issues contemplated by the *Columbia University* dissent, falls outside the scope of this Comment.

<sup>222</sup> *Brown v. Chi. Bd. of Educ.*, 824 F.3d 713, 716 (7th Cir. 2016) (citing *Keyishian v.*

importance of maintaining academic freedom in his poignant (if slightly dramatic) majority opinion in *Sweezy v. State of N.H.*:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>223</sup>

Based on these compelling policy rationales, courts have identified “four essential freedoms” afforded to educational institutions: the right to decide “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>224</sup>

Concerns over the effect that collective bargaining may have on academic freedom could have some merit, but as noted by the Board in *Columbia University*, these concerns cannot justify the complete exclusion of students from the NLRA.<sup>225</sup> Instead, the Board should specifically carve-out matters that would infringe on a university’s academic freedom. The statute governing collective bargaining at the University of California provides an excellent model for this:

(q)(1) For purposes of the University of California only . . . [t]he scope of representation shall not include any of the following:

. . . (C) Admission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs.<sup>226</sup>

Other states have imposed similar restrictions (through statute or adjudication) on collective bargaining,<sup>227</sup> but the California statute provides

Bd. of Regents, 385 U.S. 589, 603 (1967)) (internal quotations omitted).

<sup>223</sup> *Sweezy v. State of N.H.*, 354 U.S. 234, 250 (1957).

<sup>224</sup> *Borden v. Sch. Dist. of Twp. of E. Brunswick*, 523 F.3d 153, 172 (3d Cir. 2008) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978)); *see also* *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 n.11 (1985) (quoting *Bd. of Curators v. Horowitz*, 435 U.S. 78, 96, n.6 (1978) (Powell, J., concurring)) (“University faculties must have the widest range of discretion in making judgments as to the academic performance of students and their entitlement to promotion or graduation.”).

<sup>225</sup> *Columbia Univ.*, 364 N.L.R.B No. 90, at \*7.

<sup>226</sup> CAL. GOV’T CODE § 3562(q)(1)(C) (West 2016).

<sup>227</sup> *See, e.g., Federated Publ’ns, Inc. v. Bd. of Trs.*, 594 N.W. 2d 491, 497 (Mich. 1999) (citing *Regents of the Univ. of Mich. v. Mich. Emp’t Relations Comm’n*, 204 N.W. 2d 218

the requisite specificity to protect the “four essential freedoms” of educational institutions, while leaving students ample bargaining room.

Undoubtedly, additional issues stemming from the unique position of colleges and universities will arise with the passage of time. If, during the notice-and-comment period, the NLRB finds that any other issues merit significant consideration, it should adjust its new rule accordingly. Most of these concerns, however, can likely be dealt with on a case-by-case basis and are properly left to Board’s adjudicatory process. The Board should therefore exercise its notice-and-comment rulemaking authority to craft a regulation specifying that student-workers are statutory employees entitled to full collective-bargaining rights, subject to the academic restrictions outlined above.

#### VI. CONCLUSION

The history of NLRB jurisprudence regarding the employment status of student assistants has been muddled and inconsistent. Now, the Board has the opportunity to codify its holding in *Columbia University* and make it significantly more difficult for future administrations to revive the “primary purpose” test. By doing so, the Board can provide much needed guidance and clarity to both students and universities and help alleviate the NLRB’s reputation for inconsistency. Perhaps someday Congress will step in to amend the NLRA to provide permanent clarity on this issue, but until then, the Board should do the next best thing by stepping out of its comfort zone and crafting a formal administrative rule.

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(Mich. 1973)) (“[T]he scope of bargaining . . . may be limited if the subject matter falls clearly within the educational sphere”).