

# Undergraduate Unionization: A New Frontier of Student Organizing in a Post-Columbia World

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*ABSTRACT: While much ink has been spilled about graduate students' status as statutory employees in the wake of the NLRB's decision in Columbia University, little attention has been paid to another group of students who gained the right to unionize because of that decision: undergraduate students. This Note examines how that ruling has impacted undergraduate efforts to unionize at three separate institutions. It argues that any new rule the Board devises related to student unionization should not exclude undergraduate students from the NLRB's jurisdiction. Because on-campus undergraduate student workers do not perform work that is required for their studies and participate in a substantial economic relationship with their university, they are sufficiently distinguishable from graduate students such that any of the policy-based reasons for excluding graduate students lose much of their force when applied to this context. Any further policy-based reasons for excluding certain categories of workers from NLRB jurisdiction should be empirically based rather than derived solely from definition or from an employee's secondary purposes, motivations, or statuses. Instead, the Board should observe the undeniable fact that undergraduate students are workers too.*

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## I. INTRODUCTION

In *Columbia University*, the National Labor Relations Board (“NLRB” or “the Board”) returned a momentous ruling in favor of graduate and undergraduate students at America’s private colleges and universities.<sup>1</sup> For the first time since its decision in *New York University* in 2000, the Board recognized that students engaged in work connected to their academic studies are “employees” within the meaning of section 2(3) of the National Labor Relations Act (“NLRA” or “the Act”).<sup>2</sup> Over the university administrators’ objections that tolerating unionization irreconcilably clashed with the educational mission of their institutions, graduate student unions

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1. Trs. of Columbia Univ., 364 N.L.R.B. No. 90, slip op. at 1 (Aug. 23, 2016).

2. *Id.*

gained recognition before the NLRB and the ensuing rights that flow from that recognition.<sup>3</sup>

Graduate students, however, were not the only constituency in postsecondary education affected by the decision. Notably, unlike previous student unionization cases that had come before the Board, the petitioned-for unit in *Columbia University* consisted of both graduate and undergraduate students.<sup>4</sup> Undergraduate students now enjoyed, for the first time, the status of statutory employees.<sup>5</sup> This unprecedented extension of the Board's definition of "employee" created new possibilities for undergraduate students who work on campus for a private college or university. They could now unionize as student workers' exclusive representative, with the aim of securing the Act's section 7 rights to collectively bargain over wages, hours, conditions of employment, and engage in strikes and "other concerted activities,"<sup>6</sup> as well as its section 8 protections against unfair labor practices by their employer.<sup>7</sup>

A few undergraduate students sought to take advantage of their newly won rights, forming some of the first and only unions comprised solely of undergraduate students. At Grinnell College in Grinnell, Iowa, dining hall workers formed the first and only independent union of undergraduate students, and attempted to make their college "the most unionized campus in the country" by expanding union protection to all student workers.<sup>8</sup> At George Washington University in Washington, D.C., resident advisers working in the university's dormitories banded together to better their wages and working conditions.<sup>9</sup> And at Reed College in Portland, Oregon, housing advisers sought to unionize to maximize their voice in administrative decision-making, which they alleged did not adequately take their concerns into account.<sup>10</sup> In each of these cases, the college or university challenged the students' petitions.<sup>11</sup> In each case, after briefing and a fact-finding hearing, a Regional Director nonetheless applied *Columbia University* to find the students in the petitioned-for bargaining unit were statutory employees.<sup>12</sup> In each case, their college or university ultimately requested review of the Regional

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3. *Id.* at 2.

4. *Id.* (noting that the unit included both graduate and undergraduate teaching assistants).

5. This Note primarily focuses on non-academic undergraduate student workers rather than undergraduate student athletes. The latter have not yet expressly been recognized as statutory employees under the NLRA. *See* *Nw. Univ.*, 362 N.L.R.B. 1350, 1354 (2015). Their struggles to unionize have also been covered by other authors. *See generally* Marc Edelman, *The Future of College Athlete Players Unions: Lessons Learned from Northwestern University and Potential Next Steps in the College Athletes' Rights Movement*, 38 *CARDOZO L. REV.* 1627 (2017) (exploring future possibilities for student-athlete unionization in the wake of *Northwestern University*).

6. *See* 29 U.S.C. § 157 (2018).

7. *See id.* § 158.

8. *See infra* Section III.B.1.

9. *See infra* Section III.B.2.

10. *See infra* Section III.B.3.

11. *See infra* Section III.B.

12. *See infra* Section III.B.

Director's decision, and the unions withdrew the petition before it could be decided by the national Board.<sup>13</sup> Meanwhile, the Board, in exercise of its rulemaking power, proposed a rule in 2019 that would expressly exclude both graduate and undergraduate students from the section 2(3) definition of employee, overruling *Columbia University*.<sup>14</sup>

This Note argues that insofar as the work of undergraduate students is distinguishable from that of graduate students, they should not be excluded in any rule from the statutory definition of "employee." Undergraduate work typically does not raise the sort of educational interference or academic freedom issues that graduate work may—generally being entirely non-academic in nature—and undergraduate workers possess a very real economic relationship with their university. The mere fact that they are students should not be enough to justify denying them recognition. Especially in light of the broad statutory definition and purposes of the Act, such a definition should be construed broadly and extended to more workers. In addition, given the dearth of empirical evidence on the subject, the Board should engage in more rigorous inquiry into the actual effects unionization will have on the educational environment before promulgating a rule. Rather than serve as a complete bar to recognition, any concerns universities do have about unionization should be addressed on a case-by-case basis in the collective bargaining process, in which students are more concerned about compensation and working conditions than disrupting their education. As the current weight of empirical evidence suggests that unionization does not result in the parade of horrors predicted by university administrators, more substantive evidence should guide the Board on this subject before denying students the opportunity to decide for themselves whether they want a union to represent them or not. A rule devised by the Board expressly including undergraduate students—so long as they pass the common-law agency test—would provide the best way of ensuring that undergraduate student workers receive statutory coverage.

Part II of this Note delves into the NLRA's statutory definition of "employee," as well as its subsequent interpretation by the Board and by the Supreme Court. Part II explores Board precedent concerning whether students are section 2(3) employees, culminating in the Board's decision in *Columbia University*. Finally, Part II traces the contours of the Board's proposed rule excluding graduate and undergraduate students from that statutory definition. In Part III, this Note looks at the economic conditions which establish undergraduates' status as workers and their potential motivations for forming a union. Part III also examines in depth three of the most prominent examples of undergraduate unionization efforts at Grinnell College, George Washington University, and Reed College. It demonstrates how *Columbia University* and prior Board precedent both empower and constrain undergraduates' attempts at recognition. Part IV proposes a solution for

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13. See *infra* Section III.B.

14. See *infra* Section II.B.5.

securing undergraduate unions greater legal footing. It does so by recommending the Board adopt a rule concerning student employees that does not exclude undergraduate students, as well as suggesting procedural reforms to enable higher-quality decision-making by the Board. Part V concludes this Note.

## II. THE NLRA'S DEFINITION OF "EMPLOYEE"

To understand why undergraduate students should be considered statutory employees, it is important to first look at how this statutory term has been interpreted—both as understood generally by the Board and the courts, and as previously applied to graduate students. Section II.A.1 looks at the text, purposes, and history of the NLRA for the definition of “employee.” Section II.A.2 observes the ways in which the Supreme Court and the Board have determined employee status over time. Finally, Section II.B examines Board precedent and rulemaking on graduate students’ status as employees under the Act.

### A. STATUTORY DEFINITION AND INTERPRETATION OF “EMPLOYEE” GENERALLY

#### 1. Language, Policy, and Purposes of the Act

Whether students are “employees” within the meaning of the NLRA is vitally important for the possibility of student unionization because the Act’s definitions of terms are operative in giving meaning to each of their subsequent uses in the entire Act.<sup>15</sup> Only employees as the NLRA defines them are entitled to its section 7 protections for the right to self-organization, bargain collectively, form or join a union, and engage in concerted activities for the purposes of bettering their wages and working conditions.<sup>16</sup> Essentially, “employees” can organize themselves into unions capable of recognition from the NLRB and receive the requisite rights that follow from that recognition, but non-employees are not afforded the same range of protections.<sup>17</sup> Legal and common definitions provide a baseline understanding of what is meant by this term of art. *Black’s Law Dictionary* defines “employee” as “[s]omeone who works in the service of another person (the employer) under an express or implied contract of hire, under which the employer has the right to control the details of work performance.”<sup>18</sup> Non-legal dictionaries have similar definitions, which basically boil down to any non-executive individual who performs services for another and is compensated for his

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15. See 29 U.S.C. § 152 (2018) (specifying the definitions of terms as used within the Act).

16. See *id.* § 157 (specifying that “[e]mployees shall have the right[s]” enumerated within that section (emphasis added)).

17. See WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW 57 (6th ed. 2019) (noting that it is not illegal for employees not covered by the NLRA to engage in union-related activity, merely that the NLRA does not protect them from the consequences).

18. *Employee*, BLACK’S LAW DICTIONARY (11th ed. 2019).

or her work.<sup>19</sup> Although these dictionary definitions shed some light on the actual statutory definition of the word, the NLRA provides its own terminology and definitions for terms as used within the Act.<sup>20</sup>

It is natural, then, to turn to the Act itself for guidance as to whether student workers can be classified as employees under the NLRA. Unfortunately, the definitions for key terms provided in section 2 do not shed much light on whether students are employees. The Act simply states that “[t]he term ‘employee’ shall include any employee.”<sup>21</sup> The definition does clarify that the term is not limited to employees of a particular employer and includes individuals who have ceased work or have lost their job due to a labor dispute or an unfair labor practice concerning their employer.<sup>22</sup> Importantly, the “employee” clause also expressly excepts certain categories of workers who are *not* “employees” within the meaning of the Act.<sup>23</sup> Students, however, are not among any of those enumerated categories and hence are neither unambiguously included nor excluded within the text of the Act.

The policy goals stated in section 1 of the Act are broad and do not contain much limiting language, but they similarly offer only limited help in determining whether students are employees.<sup>24</sup> Those declarations of policy state that the NLRA is meant to encourage, protect, and expand unionization in order to minimize “industrial strife and unrest,” “encourag[e] practices fundamental to the friendly adjustment of industrial disputes,” and “restor[e] equality of bargaining power between employers and employees.”<sup>25</sup> The statute is also designed to “encourag[e] the practice and procedure of collective bargaining” and to “protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.”<sup>26</sup> Although these broad policy goals suggest an expansive definition of “employee,” the Act does empower the Board to

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19. See, e.g., *Employee*, OXFORD ENGLISH DICTIONARY (3d ed. 2014) (“A person who works for an employer; *spec.* a person employed for wages or a salary under an employment contract, esp. at non-executive level.”); *Employee*, MERRIAM-WEBSTER (Oct. 24, 2020), <https://www.merriam-webster.com/dictionary/employee> [<https://perma.cc/MVG9-9W79>] (“[O]ne employed by another usually for wages or salary and in a position below the executive level.”).

20. See 29 U.S.C. § 152.

21. *Id.* § 152(3).

22. *Id.*

23. Specifically, the clause excludes

any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, 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, as amended from time to time, or by any other person who is not an employer as herein defined.

*Id.* (citation omitted).

24. *Id.* § 151.

25. *Id.*

26. *Id.*

decline to exercise its jurisdiction in particular cases where it deems the employer's impact on interstate commerce to be minimal.<sup>27</sup>

In looking at the legislative history of the Act, there is scant evidence that the drafters of the NLRA specifically considered student workers when defining the term "employee" or when articulating the Act's policy rationales. It is also unlikely that students' concerns—if even articulated or existent at that time—were a top priority for lawmakers.<sup>28</sup> Legislative history of the Act, however, does suggest a broad conception of what Congress meant by "employee" in the NLRA. Generally, Congress considered the meaning of the word in its most natural, ordinary sense, rather than relying on more technical distinctions or definitions.<sup>29</sup>

## 2. Judicial and Board Interpretation of "Employee"—The Common Law Agency Test

In interpreting the meaning of "employee" as used within the NLRA, the Supreme Court and the Board have occasionally declined to exercise their jurisdiction over certain categories of workers not specifically excluded from section 2(3) on policy grounds, even if the activities of those employees impacted interstate commerce enough to justify jurisdiction.<sup>30</sup> They justify this exclusion on the grounds that the excepted categories in this section are not designed to be exhaustive. This part of the Act instead reflects an intent by the legislature not to encompass all categories of workers everywhere, such as situations where labor unions may be inappropriate or where unionization

27. See *id.* § 164(c)(1).

28. See Parbudyal Singh, Deborah M. Zinni & Anne F. MacLennan, *Graduate Student Unions in the United States*, 27 J. LAB. RSCH. 55, 60–61 (2006) (finding the origin of graduate student unions in the student protest movements of the 1960s); see also GOULD, *supra* note 17, at 1–28 (discussing the historical background to the NLRA, including its roots in the labor movements of the Industrial Revolution as well as the composition of major unions at the time, which were primarily focused on and comprised of industrial workers).

29. See H.R. REP. NO. 80-245, at 18 (1947) ("An 'employee,' according to all standard dictionaries, . . . means someone who works for another for hire."); 79 CONG. REC. 9686 (1935) (colloquy between Reps. Taylor and Connery) (noting that "employee" includes "every man on a pay roll"); see also S. REP. NO. 74-573, at 6 (1935) (referring to an employee as a "worker"); H.R. REP. NO. 74-969, at 8 (1935) (same); H.R. REP. NO. 74-972, at 8 (1935) (same); H.R. REP. NO. 74-1147, at 10 (1935) (same).

30. See, e.g., NLRB v. Bell Aerospace Co., 416 U.S. 267, 289 (1974) (holding that "managerial employees" are not covered by the [NLRA], even though they meet the common-law employee definition and are not expressly excluded by section 2(3)); NLRB v. Cath. Bishop of Chi., 440 U.S. 490, 496–99 (1979) (holding the Board could decline to exercise its jurisdiction over teachers at church-operated schools in order to avoid entangling the Board in issues of church-state separation); Evans & Kunz, Ltd., 194 N.L.R.B. 1216, 1218 (1972) (holding that "it would not effectuate the policies of the Act to assert jurisdiction over lawyers and law firms"); Brevard Achievement Ctr., Inc., 342 N.L.R.B. 982, 989 (2004) (holding that workers with disabilities at a rehabilitative facility were not "employees" because their purpose for being there was "primarily rehabilitative"); Nw. Univ., 362 N.L.R.B. 1350, 1354 (2015) (holding, without disturbing the Regional Director's ruling that college football players were employees, that it would not "promote uniformity and stability" to let student players at a private university unionize when the Board could not assert jurisdiction over public schools in the players' football conference).

of certain workers may go against the general structure of labor relations set up by the Act.<sup>31</sup>

Early interpretations by both the Board and the Court of section 2(3), however, in keeping with the wide-ranging section 1 policy goals, gave a broad rather than a narrow meaning to the word “employee.” In *NLRB v. Hearst Publications, Inc.*, a landmark interpretation of the section 2(3) definition of employee, the Supreme Court first faced the issue of whether newsboys hired by a third party to deliver papers were “employees” of the newspaper within the meaning of the Act.<sup>32</sup> The employer argued that in the absence of a clear statutory definition for the term, the Court must use the common law agency test. Under the facts of the case, this test would result in classifying the newsboys as “independent contractors,” making them ineligible for coverage under the NLRA.<sup>33</sup> The Court disagreed with the employer and concluded that nothing in the Act bound it to such a restrictive test nor mandated that such a test must control.<sup>34</sup> Here, where the legislature, in promulgating the NLRA, adopted national standards for labor rights and broadly defined the applicable scope of those rights, the Court said it should defer to that policy judgment in the Act.<sup>35</sup>

Rather than mechanically applying the common law agency test to exclude some workers, the Court decided instead that the question “[w]hether, given the intended national uniformity, the term ‘employee’ includes such workers . . . must be answered primarily from the history, terms and purposes of the legislation.”<sup>36</sup> Looking to legislative purposes, the Court found “that the . . . workers [here] [were] subject . . . to the evils the statute was designed to eradicate” so “the remedies it affords [were] appropriate for preventing them or curing their harmful effects in the special situation.”<sup>37</sup> Therefore, the Court, deferring to the judgment of the Board, introduced a new test for what constitutes an “employee” under the Act:

In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute’s objectives and bring the relation within its protections.<sup>38</sup>

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31. See, e.g., *Nw. Univ.*, 362 N.L.R.B. at 1354; *Bell Aerospace*, 416 U.S. at 284 n.13.

32. *NLRB v. Hearst Publ’ns, Inc.*, 322 U.S. 111, 117 (1944), *overruled in part* by *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992).

33. *Id.* at 120.

34. *Id.* at 120–21.

35. *Id.* at 123.

36. *Id.* at 124.

37. *Id.* at 127.

38. *Id.* at 127–28.



For a brief time, the Board and the Supreme Court applied this “economic facts” or “statutory purpose” test to determine whether workers were employees. In a later ruling decided the same year as *Hearst*, the Supreme Court reaffirmed that “the terms ‘employee’ and ‘employer’ in [the NLRA] carry with them more than the technical and traditional common law definitions.”<sup>39</sup> It emphasized that these terms “also draw substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all the hard facts of industrial life.”<sup>40</sup>

However, a newly elected Republican Congress rebuked the Supreme Court shortly after its decision in *Hearst*. In passing the Taft–Hartley Act of 1947, which made substantial changes to the NLRA, Congress made direct reference to the *Hearst* case and amended section 2(3) to expressly “exclude[] independent contractors,” adding it to the other categories of workers who were not “employees” within the meaning of the Act.<sup>41</sup> With this amendment, and by utilizing the term “independent contractor,” Congress clearly intended to restrict the Board’s jurisdiction to certain categories of workers and for it to adopt the common law agency test instead of the test propagated by the Board and deferred to by the Supreme Court in *Hearst*.<sup>42</sup> When confronted with the issue again, the Supreme Court recognized that Congress intended for the common law agency test to control in employee versus independent contractor determinations, and has subsequently applied it to these situations.<sup>43</sup>

The Board has tinkered with the application of this test to the determination of employee status, but it too has not strayed substantially from Congress’s analytical framework.<sup>44</sup> The Board’s agency test is essentially the same as exists at common law and as codified in the *Restatement (Third) of*

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39. *NLRB v. E.C. Atkins & Co.*, 331 U.S. 398, 403 (1947).

40. *Id.*

41. H.R. REP. NO. 80-245, at 309 (1947) (“To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board’s expertness, has approved [in *Hearst*], the bill excludes ‘independent contractors’ from the definition of ‘employee.’”); *see also* 29 U.S.C. § 152(3) (2018) (in which the phrase “independent contractor” now appears).

42. *See* *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322–25 (1992) (noting that elsewhere, as in *Hearst*, where the Supreme Court adopts a more expansive construction of “employee” in federal statutes in line with its own interpretation of the statute, and Congress subsequently amends that act to reject the Court’s interpretation—especially where Congress utilizes words with established common law meanings—the Court should defer to Congress’s adoption of the common law agency test for “employee” status).

43. *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 256 (1968).

44. *Compare* *FedEx Home Delivery*, 361 N.L.R.B. 610, 610 (2014), *vacated*, 849 F.3d 1123 (D.C. Cir. 2017) (requiring “actual, . . . not merely theoretical, entrepreneurial opportunity” to sustain a finding that a worker is an independent contractor rather than a statutory employee), *with* *SuperShuttle DFW, Inc.*, 367 N.L.R.B. No. 75, slip op. at 1 (Jan. 25, 2019) (overruling the *FedEx* NLRB decision and restoring “the traditional common-law test” without alteration).

*Agency*.<sup>45</sup> According to the Board's formulation, workers pass the common law agency test if they perform services under the direction and control of an employer for compensation.<sup>46</sup> The Supreme Court has also adopted the common law agency test when assessing employee status.<sup>47</sup> But it still interprets section 2(3) broadly and recognizes the policy reasons inherent in section 1 of the NLRA should encourage an expansive rather than a narrow meaning of the word.<sup>48</sup> The old "economic facts" or "statutory purpose" test previously used by the Court, however, is dead.<sup>49</sup> In addition, the Supreme Court now generally defers to the Board's construction of the term "employee" as used within the Act as a matter of agency expertise.<sup>50</sup>

B. GRADUATE STUDENT, FACULTY, AND MEDICAL RESIDENT CASES ON  
STUDENT UNIONIZATION

1. *Columbia University and Cornell University: Asserting Jurisdiction Over Non-Profit Educational Institutions in the First Place, 1950s–1970s*

Applying this definition of "employee" to graduate students has been less than straightforward, however. The Board has frequently gone back and forth on whether students are employees within the meaning of the NLRA. This fluctuation in precedent is inextricably tied to the change in the political composition of the Board with each passing presidential administration.<sup>51</sup> Democratic appointees tend to render decisions favorable to labor, resulting in the expansion of rights for student workers, while Republican appointees

45. See RESTATEMENT (THIRD) OF AGENCY § 7.07(3)(a) (AM. L. INST. 2006) ("[A]n employee is an agent whose principal controls or has the right to control the manner and means of the agent's performance of work . . .").

46. Trs. of Columbia Univ., 364 N.L.R.B. No. 90, slip op. at 1–2 (Aug. 23, 2016).

47. NLRB v. Town & Country Elec., Inc., 516 U.S. 85, 92–95 (1995).

48. See, e.g., *id.* at 90–91 (noting that the Board's interpretation of "employee" was consistent with the broad language and purpose of the NLRA, the broad commonly understood definition of the word as embodied in the dictionary, and Supreme Court precedent in holding that workers paid by a union to help organize the company were statutory employees); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) (noting that "[t]he breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee' and that "[t]he only limitations are specific exemptions" in holding undocumented immigrants to be statutory employees); *NLRB v. Hendricks Cnty. Rural Elec. Membership Corp.*, 454 U.S. 170, 189–90 (1981) (noting the broad definition of employee as articulated in the NLRA and applied by the NLRB).

49. See generally Richard R. Carlson, *Why the Law Still Can't Tell an Employee When It Sees One and How It Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295 (2001) (arguing that statutory application depend on the character of the transactions between the parties rather than the common law agency test or a judicially determined statutory purpose test).

50. *Town & Country*, 516 U.S. at 94; see also *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) ("[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.").

51. See generally Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223 (2016) (observing the impact of partisanship on NLRB decision-making).

tend to render decisions favorable to management, constraining student workers' rights.<sup>52</sup>

As a preliminary matter, the Board in the 1950s initially declined to assert its jurisdiction over non-profit educational institutions at all in cases dealing with non-students working at those institutions. The Board first addressed unionization in the academic setting in *Columbia University*, where it declined for jurisdictional reasons to recognize a unit consisting of clerical employees in the libraries of the university.<sup>53</sup> The Board found that nonprofit universities impacted interstate commerce sufficiently to fall within the boundaries of the Act.<sup>54</sup> Nevertheless, it held "that it would [not] effectuate the policies of the Act for the Board to assert its jurisdiction over a nonprofit, educational institution where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."<sup>55</sup>

In 1970, the Board reversed course in *Cornell University*, where it held that an organization's nonprofit status should not automatically determine its exclusion from the Board's jurisdiction, particularly since the section 2(2) definition of "employer" does not specifically exclude private nonprofit educational institutions and congressional intent to do so was ambivalent.<sup>56</sup> Moreover, the Board noted "that the dividing line separating purely commercial from noncommercial activity ha[d] not been easily defined" and that private colleges and universities, despite their size, "ha[d] not only a substantial, but massive, impact on interstate commerce."<sup>57</sup> The Board subsequently decided that it "[could] best effectuate the policies of the Act by asserting jurisdiction over nonprofit, private educational institutions where [it found] it to be appropriate," leaving itself the option to declare certain categories of workers non-employees for policy reasons if not found to be "appropriate."<sup>58</sup>

## 2. Early Graduate Student and Faculty Unionization Cases, 1970s–1980s

Although the latter decision opened the door for employees at nonprofit educational institutions to unionize, the Board did not initially embrace student assistants within the boundaries of the Act. During the Nixon and Ford Administrations, the Board became increasingly politicized with the

52. *Id.* at 226–27.

53. Trs. of Columbia Univ., 97 N.L.R.B. 424, 424 (1951), *overruled by* Cornell Univ., 183 N.L.R.B. 329 (1970).

54. *Id.* at 427.

55. *Id.* A fact that weighed heavily on the Board's determination that policy reasons dictated its abstention from recognizing unions at nonprofits generally was the NLRA's express exclusion of nonprofit hospitals as "employers" under the Act at the time. *See id.* Congress amended this provision of the NLRA in 1974, striking out the exclusion of nonprofit hospitals from covered employers. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

56. *Cornell Univ.*, 183 N.L.R.B. at 330–31, 333.

57. *Id.* at 331, 332.

58. *Id.* at 334.

appointment of management lawyers as members, resulting in decisions unfavorable to labor interests.<sup>59</sup> In the following cases, the Board thus held that the work functions of graduate students who tried to unionize were primarily educational in nature and hence the students could not be classified as “employees.” *Adelphi University*, for instance, involved one of the earliest attempts by graduate students to unionize.<sup>60</sup> There, the Board held that the graduate teaching and research assistants could not join the faculty union.<sup>61</sup> While it recognized that the students “perform[ed] some faculty-related functions” that were similar to the union-eligible faculty members, they were held to be “primarily students and [did] not share a sufficient community of interest with the regular faculty.”<sup>62</sup>

Similarly, in *Leland Stanford Junior University*, the Board held graduate students working as physics department research assistants could not unionize and echoed *Adelphi*’s language concerning their role as “primarily students.”<sup>63</sup> It observed the school’s requirement of student research on thesis projects to obtain a degree, and that compensation, in the form of financial aid stipends, did not causally connect to the type, amount, or quality of the services rendered.<sup>64</sup> The Board found that, unlike employees who did as instructed by their employer, graduate students set their own hours and tasks in pursuit of finishing the project on which their degree completion depended.<sup>65</sup> Finding the case analogous to the research assistants in *Adelphi University*, the Board ruled these research assistants were primarily students and not employees within the meaning of the NLRA.<sup>66</sup>

The Board also seemed to assert during this period that the mere fact of student status excluded workers from recognition as statutory employees. In *San Francisco Art Institute*, it excluded undergraduate students working for their school as part-time janitors from a unit of non-student full-time janitors.<sup>67</sup> The Board decided “that it [would] not effectuate the policies of the Act to” permit a unit comprised of these students to unionize when they were only temporarily employed by the school and when their main focus was on their studies, rather than their employment as janitors.<sup>68</sup> In so finding, the Board found critical the fact that the students worked for the institution

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59. William B. Gould IV, *Politics and the Effect on the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1512–13 (2015) (observing a more drastic shift away from relatively neutral member selection during this time period).

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

61. *Id.* at 640.

62. *Id.*

63. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974), *overruled by* Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016).

64. *Id.* at 621–22.

65. *Id.* at 623.

66. *Id.*

67. *S.F. Art Inst.*, 226 N.L.R.B. 1251, 1251 (1976), *overruled by* Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016).

68. *Id.* at 1252.

they attended, and concluded students had only a “very tenuous secondary interest” in that adjacent economic relationship.<sup>69</sup> Dissenting, Members Fanning and Jenkins disagreed with what they saw as the majority’s per se rule that merely attending an educational institution for a limited period of time excluded one from the statutory definition of “employee.”<sup>70</sup> Instead, they would have looked to “whether the nature of their employment [gave] [students] a sufficient interest in wages, hours, and other working conditions to” determine the appropriateness of representation.<sup>71</sup>

The Supreme Court during this time period echoed many of the concerns articulated by the NLRB about the suitability of labor law to the educational environment. In *NLRB v. Yeshiva University*, the Court held faculty members at private colleges and universities could not unionize.<sup>72</sup> Although the rationale for that decision rested on the Court’s finding that faculty members were managerial rather than professional employees, it also expressed some reservations as to whether the organizational model of labor unions was appropriate for the model of shared governance that structured academic institutions.<sup>73</sup> The Court warned that standards developed in an industrial setting “intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry”<sup>74</sup> “[should not] be ‘imposed blindly on the academic world.’”<sup>75</sup> In these types of cases, both the Court and the Board distinguished between primarily educational and primarily economic positions. Workers in the latter group were classified as “employees” while those in the former were left out from NLRA protections.

### 3. Medical Resident and Intern Cases, 1970s–1990s

Throughout the rest of the 1970s and into the 1980s, the Board continued to apply the “primary purpose” test for deciding whether students could unionize. In a pair of teaching hospital cases—*Cedars-Sinai* and *St. Clare’s Hospital and Health Center*—the Board ruled that medical residents, although performers of compensated services for their supervisors, were not

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69. *Id.*

70. *Id.* at 1253 (Members Fanning & Jenkins, dissenting).

71. *Id.*

72. *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 679 (1980).

73. *Id.* at 680; *see also* *Adelphi Univ.*, 195 N.L.R.B. 639, 648 (1972) (“[T]he concept of collegiality, wherein power and authority is vested in a body composed of all of one’s peers or colleagues, does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world.”).

74. *Yeshiva Univ.*, 444 U.S. at 680.

75. *Id.* at 681 (quoting *Syracuse Univ.*, 204 N.L.R.B. 641, 643 (1973)). The Board in *Syracuse University* similarly expressed reservations about bringing collective bargaining and labor unions into the academic sphere. It recognized that its precedent could sustain such a conclusion but nonetheless declined to for policy reasons, noting that the university “does not squarely fit the industrial model” for which the NLRA was designed. *Syracuse Univ.*, 204 N.L.R.B. at 643.

employees because their work was primarily educational in purpose.<sup>76</sup> The Board noted the primarily educational nature of the work of medical residents, directed towards fulfilling licensing requirements, even though, unlike graduate students, hospital workers had already earned their degree.<sup>77</sup> Distinct from its previously more common-law-centric agency analysis, it also raised policy concerns that bargaining by students over wages and hours could disrupt the educational mission of the organization, lead to students attempting to bargain with professors about the nature of the curriculum and methods of instruction, and possibly infringe on academic freedom.<sup>78</sup> These decisions were made over vigorous dissents, which argued that these court-made policy distinctions were artificial, misapprehended the policy-based exclusions of some workers in the NLRA, and ignored the fact that nothing in the Act prevented the NLRB from recognizing students simultaneously as students and employees, regardless of which role they primarily inhabited.<sup>79</sup>

Approximately 20 years later and before majority Democratic-appointed members during the Clinton Administration, the Board in 1999 reversed itself on the issue of medical residents. It held in *Boston Medical Center* that interns, residents, and fellows employed by the hospital were statutory employees, thereby overruling *Cedars-Sinai* and *St. Clare's*.<sup>80</sup> Its decision was guided by recent Supreme Court cases, Member Fanning's dissent in *Cedars-Sinai*, and the NLRA's policy purposes.<sup>81</sup> The Board found that nothing in the statute disqualified students from statutory employee status merely because they also happened to be students at the same time.<sup>82</sup> It also dismissed the argument that bargaining could infringe on academic freedoms, finding instead that any potential concerns about academic freedom should be

76. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 254 (1976), *overruled by* *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999); *St. Clare's Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1004 (1977), *overruled by* *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152 (1999).

77. *St. Clare's*, 229 N.L.R.B. at 1002; *Cedars-Sinai*, 223 N.L.R.B. at 253.

78. *St. Clare's*, 229 N.L.R.B. at 1002-03; *see also* *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (noting academic freedom to be "a special concern of the First Amendment" (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967))).

79. *Cedars-Sinai*, 223 N.L.R.B. at 254 (Member Fanning, dissenting) ("Since the statutory exclusions do not mention and the policy underlying the nonstatutory exclusions does not reach 'students,' the relationship between 'student' and 'employee' cannot be said to be mutually exclusive. The fundamental question then is *always* whether the individual before us, be that individual 'primarily a carpenter' or 'primarily a student,' is, *nevertheless*, an 'employee' under the Act."); *St. Clare's*, 229 N.L.R.B. at 1005 (Chairman Fanning, dissenting) (arguing that the majority had not clearly articulated the merits of its policy stance denying recognition to hospital student workers).

80. Gould, *supra* note 59, at 1515-18; *Bos. Med. Ctr.*, 330 N.L.R.B. at 152.

81. *Bos. Med. Ctr.*, 330 N.L.R.B. at 159-60.

82. *Id.* at 160 ("That house staff may also be students does not thereby change the evidence of their 'employee' status. As stressed above, nothing in the statute suggests that persons who are students but also employees should be exempted from the coverage and protection of the Act."); *id.* at 164 ("As a policy matter, we do not believe that the fact that house staff are also students warrants depriving them of collective-bargaining rights, or withholding the statutory obligations attendant to those rights.").

addressed through the collective bargaining process.<sup>83</sup> The Board therefore rejected the “primary purpose” test, holding that whether an individual is an employee should be determined by applying the common law agency test.<sup>84</sup> Such an agency test would consider an employee’s actual job functions and activities in relation to their employer, rather than attempting to divine employees’ “true” motivations or purposes for a particular job.<sup>85</sup>

#### 4. Recent Board Decisions on Student Unionization, 2000–2016

In a recent string of cases, the Board subsequently held graduate students to be employees, reversed course and restored the “primary purpose test,” and then reverted to its prior decision that graduate students are in fact employees.

In *New York University*, the Board reasoned the case was analogous to its decision a year earlier in *Boston Medical Center*, and held for the first time that graduate student teaching and research assistants were employees.<sup>86</sup> In making its decision, it noted the broad, expansive definition of “employee” in section 2(3) of the NLRA, under which graduate students were not expressly excluded and the “ample evidence” that they “plainly and literally f[e]ll within the meaning of ‘employee’ as defined in Section 2(3).”<sup>87</sup> The Board observed the undeniable fact that graduate assistants were compensated for their services under the direction and control of their employer, thereby satisfying the common law agency test.<sup>88</sup> Even though compensation was not causally related to the amount or type of work in which students engaged, the Board noted their work as assistants was not solely or primarily in pursuit of education, as it occurred mostly after the completion of their coursework and separate from their dissertation work.<sup>89</sup>

The Board was also unconvinced by the employer’s arguments that letting graduate students unionize would impinge on academic freedom by allowing students to bargain on all conditions of their graduate schooling, including grades, classes, and professors.<sup>90</sup> Prior experience with unionization in the academic context had not persuaded the Board that such a concern would prove an insurmountable obstacle.<sup>91</sup> The Board also observed that allowing a union to form did not require the employer to agree with the employee on any particular issue.<sup>92</sup> Indeed, in this case it found no evidence

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83. *Id.* at 164.

84. *Id.* at 152.

85. *Id.*

86. *N.Y. Univ.*, 332 N.L.R.B. 1205, 1209 (2000), *overruled by* *Brown Univ.*, 342 N.L.R.B. 483 (2004), *overruled by* *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016).

87. *Id.* at 1205–06.

88. *Id.* at 1206–07.

89. *Id.* at 1207.

90. *See id.* at 1208.

91. *Id.* (first citing *Cornell Univ.*, 183 N.L.R.B. 329 (1971); and then citing *Bos. Med. Ctr. Corp.*, 330 N.L.R.B. 152, 164 (1999)).

92. *Id.* at 1208–09.

that the graduate students wanted to change their academic program of study or significantly alter their relationships with professors; rather their primary concerns focused on the adjustment of wages, hours, and benefits within that educational framework.<sup>93</sup> Here again, the Board continued to reject the “primary purpose” test and declined to apply it to graduate assistants.

After members appointed by President George W. Bush took over a majority of the Board, the Board reversed itself again a few years later, holding that graduate students were not statutory employees per the NLRA.<sup>94</sup> In *Brown University*, the now-Republican-controlled Board overruled *New York University*.<sup>95</sup> It held graduate students’ roles were primarily educational and that their work was tied to their status as students, since students must have been enrolled at Brown to receive a teaching assistant position.<sup>96</sup> In support of that position, it noted the school fixed the amount of financial aid rather than providing it as “consideration for work,” and required working as a teaching assistant as a prerequisite for completion of the doctorate program, unlike in *New York University*.<sup>97</sup> The Board also held that, for policy reasons, the NLRB would be wise to decline to exercise jurisdiction over graduate students or consider them employees within the meaning of the NLRA.<sup>98</sup> It cited the possible negative effects on universities’ collegial atmospheres, interference with administrative or professorial decision-making on students’ program of study, and the unsuitability of collective bargaining to higher education as evidence for this conclusion.<sup>99</sup> The majority specifically rejected two counterarguments: that financial changes in higher education have increasingly led to an economic relationship between universities and students, and that successful bargaining agreements at other institutions had already proved the viability of student unionization.<sup>100</sup> It merely noted that those developments did not change the fact that graduate students were primarily students.<sup>101</sup> This decision represented the Board’s “fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act.”<sup>102</sup>

In *Brown University*’s dissent, several Board members criticized what they saw as a false distinction made by the majority. They accused the majority of “seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there were no room in the ivory tower for a

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93. *Id.*

94. Gould, *supra* note 59, at 1519.

95. *Brown Univ.*, 342 N.L.R.B. 483, 483 (2004), *overruled by* Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016).

96. *Id.* at 488.

97. *Id.*

98. *Id.* at 490.

99. *Id.*

100. *Id.* at 492.

101. *Id.*

102. *Id.* at 493.



sweatshop,” as well as ignoring “the plain language of the statute.”<sup>103</sup> The dissent also criticized the majority members’ dismissal of empirical evidence and reliance on the alleged disconnect between student and employee status, pointing to a wealth of evidence that suggested that none of the alleged harms of unionization would likely materialize.<sup>104</sup> The Board nevertheless reinstated the primary purpose test and marked a return to discretionary decisions not to extend the scope of the NLRA.

The Board eventually overruled itself yet again after Democratic members appointed by President Obama assumed control, deciding that graduate students could in fact unionize.<sup>105</sup> In *Columbia University*, the revamped Board rejected the primary purpose test and sharply criticized the previous Board’s decision in *Brown University*:

The fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one—a standard neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act.<sup>106</sup>

The Board elaborated that concerns about disruption to the educational environment were empirically unsupported and speculative; that past cases had been applying abstract, formalistic policy distinctions far removed from the economic realities of these positions; and that, given the broad statutory language of section 2(3), “it is appropriate to extend statutory coverage to students working for universities covered by the Act unless there are strong reasons *not* to do so.”<sup>107</sup> The Board decided that the unionization of students should not hinge on whether their roles were “primarily educational” or “primarily economic,” noting that “a graduate student may be both a student *and* an employee; a university may be both the student’s educator *and* employer.”<sup>108</sup>

While acknowledging the seriousness of academic freedom concerns, the Board stated that merely alleging a generalized threat unionization may pose to those freedoms should not bar a representation election without a specific case before it. It also noted that the NLRA only required employers “to bargain [over] . . . ‘wages, hours, and other terms and conditions of employment.’”<sup>109</sup> Other claims as to the alleged harms purportedly caused by collective bargaining were rejected as speculative and lacking in empirical

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103. *Id.* at 493–94 (Members Liebman & Walsh, dissenting).

104. *Id.* at 499–500.

105. GOULD, *supra* note 17, at 61 (citation omitted).

106. Trs. of Columbia Univ., 364 N.L.R.B. No. 90, slip op. at 5 (Aug. 23, 2016).

107. *Id.* at 2.

108. *Id.* at 1–4, 7. By so ruling, the Board acknowledged that it was overruling its prior contrary determination in *San Francisco Art Institute* that students in short-term employment relationships with the institution they attended did not adequately possess an economic interest worthy of Board recognition. *See id.* at 20 n.130.

109. *Id.* at 8 (quoting *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674–75 (1981)).

foundation.<sup>110</sup> The Board hence restored “employee” status to graduate students, overruled *Brown University*, and concluded that as long as student employees “have a common-law employment relationship with their university” they were statutory employees within the meaning of the NLRA, “unless compelling statutory and policy considerations require an exception.”<sup>111</sup> The Board concluded that the petitioned-for unit passed the common law agency test and hence were statutory employees.<sup>112</sup> Notably, the unit at issue here, unlike in either *New York University* or *Brown University*, contained both graduate and undergraduate students.<sup>113</sup>

In dissent, Member Miscimarra argued the Board should have adhered to its prior decision in *Brown University*. In particular, he based his response on concerns that labor law was inherently unsuited to academia and that students attend university primarily for the purpose of completing their studies on time and making good on their financial investment.<sup>114</sup> He highlighted several concerns about the decision to allow graduate and undergraduate students to unionize, illustrating several examples of union behavior that universities would now have to tolerate, and which he believed would likely degrade relationships and intensify conflict among university constituencies.<sup>115</sup> Suggested consequences included the use of economic weapons such as strikes and lockout, which could lead to the loss or delay of academic credit.<sup>116</sup> Unionization could also require disclosure of confidential information protected under federal education laws, which might negatively impact sexual harassment investigations.<sup>117</sup> Finally, he predicted universities would be forced to tolerate students’ crude, disrespectful, or profane expressions related to workplace concerns during the collective bargaining process—justified under union speech rights—which would inevitably undermine collegiality and civil discourse in higher education.<sup>118</sup>

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110. See *id.* at 9 (“Our skepticism is based on the historic flexibility of collective bargaining as a practice and its viability at public universities where graduate student assistants are represented by labor unions and among faculty members at private universities.”).

111. *Id.* at 1–2, 6. The Board elaborated: “We 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.

112. *Id.* at 14–15.

113. *Id.* at 15–16.

114. *Id.* at 22–24 (Member Miscimarra, dissenting).

115. *Id.* at 29–31.

116. *Id.* at 29.

117. *Id.* at 30.

118. *Id.* at 30–31. Referencing several examples from other NLRB cases, Member Miscimarra asserted that the majority’s decision would lead to the following scenarios: “[t]he university must permit student assistants to have angry confrontations with university officials in grievance discussions . . . even if he or she repeatedly screams . . . ‘I can do anything I want, and you can’t stop me’” (citing U.S. Postal Serv., 364 N.L.R.B. No. 62 (July 29, 2016)); “the university must permit the student to post a message on Facebook stating: ‘[professor-supervisor] is such a nasty mother fucker, don’t know how to talk to people. Fuck his mother and his entire fucking family’” (citing Pier Sixty, LLC, 362 N.L.R.B. No. 59 (Mar. 31, 2015)); and “[t]he university may not take action against a student assistant who screams at a professor-supervisor and calls him a ‘fucking

### 5. The Future of Student Unionization: NLRB Rulemaking in 2019

The holding in *Columbia University*, however, may not last. After the Board again switched partisan hands under President Trump, it expressed interest in revisiting its prior holding on the subject.<sup>119</sup> The Board, in a change from its previous ways of operating, decided to exercise some of its rulemaking powers under the NLRA, rather than deciding questions of labor law through the adjudicative process.<sup>120</sup> In September 2019, the Board announced its intention to publish a new proposed rule regarding the definition of “employee” under the NLRA, which “would exempt from the NLRB’s jurisdiction undergraduate and graduate students who perform services for financial compensation in connection with their studies.”<sup>121</sup> This proposed rule is one of five rules recently proposed by the Board on a variety of subjects.<sup>122</sup> Several unions, labor rights groups, and graduate student associations have promised to challenge the final version of this rule.<sup>123</sup>

The new proposed rule states that “[s]tudents who perform any services, including, but not limited to, teaching or research assistance, at a private college or university in connection with their undergraduate or graduate studies are not employees within the meaning of Section 2(3) of the Act.”<sup>124</sup> The Board’s position (subject to revision after a public notice-and-comment period) on the issue is that students’ roles in private colleges and universities are “primarily educational, not economic,” and individuals without an economic relationship with their employer have never been held to be statutory employees.<sup>125</sup> It takes the view that the work is required to obtain a

crook,’ a ‘fucking mother fucking’ and an ‘asshole’ when the student assistant is complaining about the treatment of student assistants” (citing Plaza Auto Ctr., Inc., 360 N.L.R.B. No. 117 (May 28, 2014)). *Id.*

119. See generally CELINE MCNICHOLAS, MARGARET POYDOCK & LYNN RHINEHART, ECON. POL’Y INST., UNPRECEDENTED: THE TRUMP NLRB’S ATTACK ON WORKERS’ RIGHTS (2019), <https://www.epi.org/files/pdf/177387.pdf> [<https://perma.cc/XQ58-EDW3>] (noting a substantial change in direction under a Trump-controlled NLRB, resulting in a variety of decisions hostile to labor interests).

120. *National Labor Relations Board Rulemaking*, NAT’L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/national-labor-relations-board-rulemaking> [<https://perma.cc/7KTF-KHP7>]. The Board derives its authority to make rules and regulations from the NLRA. See 29 U.S.C. § 156 (2018). With the exception of two substantive rules proposed by the Obama Board, the Board has rarely utilized this power at all, or particularly successfully. See Charlotte Garden, *Toward Politically Stable NLRB Lawmaking: Rulemaking vs. Adjudication*, 64 EMORY L.J. 1469, 1471 (2015).

121. Press Release, Nat’l Lab. Rel. Bd., NLRB Proposes Rulemaking Concerning Students (Sept. 20, 2019), <https://www.nlr.gov/news-outreach/news-story/nlr-proposes-rulemaking-concerning-students> [<https://perma.cc/H86B-RSYW>].

122. MCNICHOLAS ET AL., *supra* note 119, at 15–20.

123. Hassan A. Kanu, *NLRB Proposes to Make Student Workers Ineligible to Unionize* (1), BLOOMBERG L. (Sept. 20, 2019, 2:11 PM), <https://news.bloomberglaw.com/daily-labor-report/nlr-proposal-would-make-student-workers-ineligible-to-unionize> [<https://perma.cc/LPM2-3K3G>].

124. Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49,691, 49,699 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103).

125. *Id.* at 49,693–94.

degree, the compensation is tied to financial aid for studies rather than serving as consideration for the work rendered, and that policy reasons tied to the purposes of the Act justify the exception.<sup>126</sup> By engaging in rulemaking, the Board asserted that it aims to bring some stability on a matter where the Board has reversed itself several times, provide for broader public input on the decision, and enable the Board to address an issue that had been mooted by the strategic withdrawal of petitions denying the Board the opportunity hear it.<sup>127</sup> Dissenting, Member McFerran, who comprised part of the majority in *Columbia University*, decried the new rule, asserting that it would strip many student-employees and student unions of their legal rights and would likely lead to further campus unrest.<sup>128</sup>

Notably, the rule as written would primarily address work that is performed in connection with students' studies, such as teaching or research assistance.<sup>129</sup> The Board invited additional comment on whether the rule should also exclude "students employed by their own educational institution in a capacity unrelated to their course of study due to the 'very tenuous secondary interest that these students have in their part-time employment.'"<sup>130</sup> It is possible, then, that this rule may end coverage for all student employees, regardless of the academic character of their work.

### III. UNDERGRADUATE STUDENT UNIONIZATION: ISSUES AND IMPLICATIONS

While the 2019 rule may exclude all students from the Act's definition of "employee," many undergraduate student unionization efforts have already relied on the Board's most recent precedent in *Columbia University*. In Section III.A, this Note will cover the economic situation facing those undergraduate students and its consequences for their motivations to unionize. Section III.B will then narrate how *Columbia* has empowered students to organize at three colleges and universities—Grinnell College, George Washington University, and Reed College. It will demonstrate how despite *Columbia's* extension of statutory coverage to undergraduate students, the adjudication process and its corresponding political dynamics have ultimately constrained their ability to successfully unionize.

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126. *Id.* at 49,694.

127. *Id.*; see Colleen Flaherty, *Realities of Trump-Era NLRB*, INSIDE HIGHER ED (Feb. 15, 2018), <https://www.insidehighered.com/news/2018/02/15/blow-graduate-student-union-movement-private-campuses-three-would-be-unions-withdraw> [<https://perma.cc/ZSD5-3GHY>] (noting the withdrawal by three major graduate student unions at private universities so as to avoid unfavorable adjudication by a Trump-controlled Board); see also *infra* Section III.B (describing undergraduate student unions engaging in similar tactics).

128. Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. at 49,698. The majority resisted this characterization, finding it "offensive," and countering that the notice and comment period would enable them to hear from those students affected. *Id.* at 49,695.

129. See *id.* at 49,699.

130. *Id.* at 49,694 (quoting S.F. Art Inst., 226 N.L.R.B. 1251, 1252 (1976)).

## A. ECONOMIC BACKGROUND ON STUDENT WORKERS

Graduate student research and teaching workers—notwithstanding where their status as “employees” under the NLRA currently falls after decades of shifting precedent—certainly do much work in academia essential to its functioning. Indeed, they are often a source of cheap labor for colleges and universities.<sup>131</sup> As tenured and tenure-track faculty positions decrease, graduate students have increasingly taken on greater teaching and research responsibilities that otherwise would fall to more junior faculty, and for far less pay.<sup>132</sup> Currently, six private institutions have signed collective bargaining agreements with their respective graduate student unions—New York University, American University, Brandeis University, Georgetown University, Tufts University, and the New School—while negotiations continue at Brown University, Columbia University, and Harvard University.<sup>133</sup>

Undergraduate students undoubtedly work too. In total, between 70 and 80 percent of all undergraduate students at colleges and universities in the United States have been employed either on or off campus since the late 1980s.<sup>134</sup> Forty-three percent of undergraduates attending college or university full-time and 81 percent attending part-time worked in 2017.<sup>135</sup> Among full-time students in 2018, about 43 percent were employed ten or more hours a week,<sup>136</sup> while among part-time students, that figure is 81 percent.<sup>137</sup> Since the 1990s, students have consistently worked an average of 30 hours a week, and about “a quarter of all students . . . are also employed

131. See David Ludwig, *Why Graduate Students of America Are Uniting*, ATLANTIC (Apr. 15, 2015), <https://www.theatlantic.com/education/archive/2015/04/graduate-students-of-the-world-unite/390261> [<https://perma.cc/2QYM-MUSS>].

132. TERESA KROEGER, CELINE MCNICHOLAS, MARNI VON WILPERT & JULIA WOLFE, ECON. POL’Y INST., *THE STATE OF GRADUATE STUDENT EMPLOYEE UNIONS* 3–5 (2018); see also Grant M. Hayden, “*The University Works Because We Do*”: *Collective Bargaining Rights for Graduate Assistants*, 69 *FORDHAM L. REV.* 1233, 1237, 1241 (2001) (noting that graduate students’ inadequate compensation, minimal or nonexistent benefits, and lack of voice in universities’ administration often motivates efforts to organize).

133. Hassan A. Kanu, *Georgetown Graduate Students Secure First Union Contract*, BLOOMBERG L. (May 1, 2020, 1:47 PM), <https://www.bloomberglaw.com/document/X2UVBQTG000000>; Paul Salvatore & Steven J. Porzio, PowerPoint Presentation at Higher Education Webinar, Current Developments in University Student Assistant Organizing, at slide 15 (Mar. 5, 2020), <https://s3.amazonaws.com/assets.production.proskauer/uploads/5fedc35aef41b2be94ec1e234a710611.pdf> [<https://perma.cc/M62G-3AF6>]. New York University’s graduate student contract predates the Board’s decision in *Columbia University*. Salvatore & Porzio, *supra*, at slide 15.

134. ANTHONY P. CARNEVALE, NICOLE SMITH, MICHELLE MELTON & ERIC W. PRICE, GEORGETOWN UNIV., CTR. ON EDUC. & THE WORKFORCE, *LEARNING WHILE EARNING: THE NEW NORMAL* 11, 22 (2015), <https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Working-Learners-Report.pdf> [<https://perma.cc/FX8T-EXX3>] (noting a significant decline only in 2011–2012 due to job losses during the Great Recession).

135. *The Condition of Education: College Student Employment*, NAT’L CTR. FOR EDUC. STAT., [https://nces.ed.gov/programs/coe/indicator\\_ssa.asp](https://nces.ed.gov/programs/coe/indicator_ssa.asp) [<https://perma.cc/N64V-8LLV>] (last updated May 2020).

136. *Id.*

137. *Id.*

full-time while enrolled.”<sup>138</sup> Students from low-income backgrounds tend to work longer hours than their wealthier peers and face greater precarity in securing food and housing.<sup>139</sup> The need to work longer hours often adversely affects these students’ academic performance.<sup>140</sup> Lower income students also tend to work in jobs with lower earning potential and less clear future career implications—such as food service, sales, and secretarial roles—while higher income students are more likely to work in fields with higher earning potential and better career outlooks—such as in STEM fields, business, and healthcare.<sup>141</sup> A substantial number of undergraduate students also participate in and receive subsidies from the federal work-study program, including approximately 700,000 students, who work on average ten to 15 hours per week.<sup>142</sup> More than 80 percent of those students work on-campus rather than off-campus jobs.<sup>143</sup> In total, students enrolled in post-secondary education make up about “[eight] percent of the total American labor force.”<sup>144</sup>

Students work for a variety of reasons and motivations, many of which are economic. Most work because they must, mainly so they can afford to eat, pay rent, and deal with miscellaneous educational and living expenses.<sup>145</sup> As has been mentioned, it also may be necessary to fulfill the requirements of their financial aid package.<sup>146</sup> Some may work to enhance their resumes and to build skills that will be useful in future careers.<sup>147</sup> Working is also essential to help pay back student loans, particularly as the cost of college skyrockets.<sup>148</sup> Approximately two in three students graduating from both public and private non-profit colleges or universities in 2018 had student loan debt, owing an

138. CARNEVALE ET. AL, *supra* note 134, at 21.

139. See XIANGLEI CHEN & ANNALIZA NUNNERY, RTI INT’L, PROFILE OF VERY LOW- AND LOW-INCOME UNDERGRADUATES IN 2015–16, at 2 (2019), <https://nces.ed.gov/pubs2020/2020460.pdf> [<https://perma.cc/5PDL-LCQ4>] (referencing studies describing the challenges low-income students face in finding adequate food, working to make ends meet, and trying to succeed academically at the same time); see also *id.* at 9 (“Twenty-one percent of very low-income dependent students work 21–35 hours a week while enrolled, compared with 18 percent of their above-poverty-level peers . . .”).

140. ANTHONY P. CARNEVALE & NICOLE SMITH, GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, BALANCING WORK AND LEARNING: IMPLICATIONS FOR LOW-INCOME STUDENTS 11 (2018), <https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Low-Income-Working-Learners-FR.pdf> [<https://perma.cc/8HHX-MVCK>].

141. *Id.* at 3.

142. Judith Scott-Clayton & Veronica Minaya, *Should Student Employment Be Subsidized? Conditional Counterfactuals and the Outcomes of Work-Study Participation*, 52 ECON. EDUC. REV. 1, 1 (2016).

143. *Id.* at 7.

144. CARNEVALE ET AL., *supra* note 134, at 1, 10.

145. See *id.* at 23.

146. *Id.*

147. *Id.*

148. *Tuition Costs of Colleges and Universities*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=76> [<https://perma.cc/U4MY-7RBV>] (reporting a 31 percent increase in costs to attend public non-profit institutions and a 23 percent increase for private colleges and universities between 2007 and 2018).

average of \$29,200 each.<sup>149</sup> It is no longer possible, however, to completely work one's way through college.<sup>150</sup> This new reality stems from accelerating costs of attendance, stagnation in real wages over the last few decades, and the decline of the youth labor market.<sup>151</sup> Nonetheless, higher education remains an increasingly important and often necessary prerequisite for securing employment in the twenty-first century.<sup>152</sup>

In light of the often dire-looking economic conditions that face students during and upon leaving college,<sup>153</sup> it is no surprise undergraduate students may have strong incentives to unionize.<sup>154</sup> Unionized workers across the board tend to have higher wages, better working conditions, better benefits, and a greater voice in their workplace than non-unionized workers.<sup>155</sup> In an era of immense income inequality, unions also help to shore up class differences, as well as reduce wealth disparities among workers and between workers and management.<sup>156</sup> Indeed, the entire legal structure of the NLRA is designed to entitle workers to legally exercise the rights that are essential to negotiating

149. VERONICA GONZALEZ, LINDSAY AHLMAN & ANA FUNG, INST. FOR COLL. ACCESS & SUCCESS, *STUDENT DEBT AND THE CLASS OF 2018*, at 4 (2019), <https://ticas.org/wp-content/uploads/2019/09/classof2018.pdf> [<https://perma.cc/L78F-gZA6>].

150. CARNEVALE & SMITH, *supra* note 140, at 6–7.

151. *Id.* at 2, 6; *see also* CHEN & NUNNERY, *supra* note 139, at 11 (noting the impossibility of paying for college through summer or part-time work before or during postsecondary education).

152. *See* CARNEVALE & SMITH, *supra* note 140, at 2 (noting that postsecondary education is often required and merely a high school diploma is insufficient for employment in a postindustrial economy).

153. ELISE GOULD, ZANE MOKHIBER & JULIA WOLFE, ECON. POL'Y INST., *CLASS OF 2019: COLLEGE EDITION 21–22* (2019), <https://files.epi.org/pdf/167037.pdf> [<https://perma.cc/W9MT-6M5V>] (finding that the lingering effects of the Great Recession continue to leave college graduates underemployed and economically disadvantaged compared to previous generations). Worsening economic fallout from the COVID-19 pandemic, though its full effects remain far from clear as of this writing, paints an even bleaker picture for the job prospects of the Class of 2020 and beyond. *See* Joe Pinsker, *The Misfortune of Graduating in 2020*, ATLANTIC (May 22, 2020), <https://www.theatlantic.com/family/archive/2020/05/class-of-2020-graduate-jobs/611917> [<https://perma.cc/VG4G-NKAK>].

154. Paige Smith & Andrew Wallender, *Student Organizers Ride Roller Coaster of Scores, Setbacks*, BLOOMBERG L. (Dec. 12, 2018, 7:04 AM), <https://news.bloomberglaw.com/daily-labor-report/student-organizers-ride-roller-coaster-of-scores-setbacks> [<https://perma.cc/G8ZH-AARA>] (describing student incentives to organize in turbulent economic times as a way to improve their working and learning conditions).

155. JOSH BIVENS ET AL., ECON. POL'Y INST., *HOW TODAY'S UNIONS HELP WORKING PEOPLE 8–11* (2017), <https://files.epi.org/pdf/133275.pdf> [<https://perma.cc/ZZ8L-33WS>] (higher wages); *id.* at 12–14 (better working conditions); *id.* at 14–16 (better benefits); *id.* at 6 (greater political participation in policy discussions related to their economic interests).

156. *Id.* at 7–8; *see also* Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* 3–7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), <http://www.nber.org/papers/w27193> [<https://perma.cc/G8RY-DGB7>] (finding that a substantial decline in worker power is due in part to decreased unionization, decline in real wage values, and the promulgation of policy hostile to labor, resulting in increased income inequality).

with their employers for better wages and working conditions.<sup>157</sup> Notably, declining real wages and increased economic inequality are concomitant with a corresponding decline in the share of unionized workers in the private sector, as well as the evisceration of many labor rights by the Trump Board.<sup>158</sup> As students enrolled in undergraduate education increasingly must work more to make ends meet—particularly if they do not come from privileged backgrounds—unions may offer an avenue through which these individuals can better their economic position and bargaining power within the university.

### B. CASE STUDIES IN UNDERGRADUATE UNIONIZATION

Yet undergraduate attempts to unionize have been relatively few and far between.<sup>159</sup> Only recently, in the wake of the Board's *Columbia University* decision in 2016, did undergraduate students at private colleges and universities clearly enjoy the right to organize unions.<sup>160</sup> That said, a few solely undergraduate unions have formed at some private colleges and universities, pursuing their organizing goals to various degrees of success and facing various levels of pushback from their respective administrations.

#### 1. Union of Grinnell Student Dining Workers and Grinnell College

In the spring of 2016, the Union of Grinnell Student Dining Workers (“UGSDW”) successfully organized the first and so far only independent

157. See *supra* Section II.A (noting the legal protections that the NLRA affords workers for concerted activity, including collective bargaining, strikes, and other forms of worker advocacy).

158. See generally MCNICHOLAS ET AL., *supra* note 119 (noting the relationship between increased economic inequality and the declining unionization rates, as well as increased attacks on labor rights by the Trump NLRB). See also Press Release, U.S. Dep’t of Lab., Union Membership (Annual) News Release (Jan. 22, 2020), <https://www.bls.gov/news.release/union2.htm> [<https://perma.cc/gDXT-Q6NT>] (noting that private sector unions only cover 6.2 percent of workers); Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 5–6 (2016) (noting the declining influence of workers and participation in unions as well as the weaknesses of current labor law in reversing these trends).

159. The three case studies discussed in this Section constitute the most prominent examples that I could find of unionization efforts undertaken solely by undergraduate students at private colleges and universities. Although I have done due diligence in finding these cases, less prominent or newsworthy cases may have escaped my notice. Student athletes are excluded. See *supra* note 5 and accompanying text. Public universities, which are beyond the jurisdiction of the NLRA, are also excluded, though one such union of undergraduate students exists at the University of Massachusetts-Amherst. See *infra* notes 232, 242 and accompanying text. In addition, this Note excludes unions consisting of a mix of both graduate and undergraduate students. One prominent example which falls into this category is the Student Library Employee Union at the University of Chicago, which recently won a certification election affirmed by the Board and the Seventh Circuit, despite opposition from their university. See Emma Dyer, *University Loses Appeal in Library Union Case*, CHI. MAROON (Dec. 28, 2019), <https://www.chicagomaroon.com/article/2019/12/28/university-loses-library-union-case-nlr-affirms-c> [<https://perma.cc/gFHC-XAWE>]. See Meghan Brophy, *Undergraduates Are Workers, Too*, JACOBIN (Aug. 2, 2017), <https://jacobinmag.com/2017/08/unions-campus-higher-education-organizing-college-students> [<https://perma.cc/S5XM-7NFY>], for other examples of undergraduate labor activism.

160. See *supra* Section II.B.4 (discussing the *Columbia University* decision and the cases preceding it).



union of undergraduate students at a private college or university.<sup>161</sup> After voluntary recognition by their employer, Grinnell College, the students held a certification election—in which dining hall student employees voted to unionize by a 91 percent margin—and signed their first contract with the college.<sup>162</sup> UGSDW subsequently successfully negotiated with the college for wage increases, experience bonuses, grievance procedures, and paid rest breaks.<sup>163</sup>

The union, however, had more ambitious plans to form “the most unionized campus in the country.”<sup>164</sup> At first only representative of the dining hall workers, UGSDW began card-signing efforts in fall 2017 to expand the union to all student workers.<sup>165</sup> It requested that the college stay neutral on the issue and recognize its representation of all student workers if it were to secure a majority of signed union cards.<sup>166</sup> It pushed ahead despite indications from the college that it would oppose an expansion election.<sup>167</sup> The college argued that—while it was supportive of UGSDW specifically and of unions in general—it would not tolerate the sort of wall-to-wall umbrella student union that UGSDW sought to establish.<sup>168</sup> It claimed that on campus workers were primarily students, not employees within the meaning of the NLRA; that collective bargaining would improperly interfere with the educational atmosphere; and that there did not exist a sufficient community of interest among student workers working in a variety of different functions and departments on campus.<sup>169</sup> UGSDW, meanwhile, denied the college’s claims that unionization would have an adverse effect at Grinnell.<sup>170</sup> It asserted that the college had the financial capacity to afford a union, that empirical evidence did not support any of the purported threats to academics that

161. *About*, UGSDW, <https://www.ugsdw.org/about> [<https://perma.cc/4NHS-LU9U>].

162. *Id.*

163. *Id.*

164. Kevin Hardy, *These Iowa Students Want Their College to Be the ‘Most Unionized Campus in the Country,’* DES MOINES REG. (Sept. 25, 2017, 1:35 PM), <https://www.desmoinesregister.com/story/news/education/2017/09/25/these-iowa-students-want-their-college-most-unionized-campus-country/692777001> [<https://perma.cc/Z7QP-8UJB>].

165. *Id.*

166. Kate Irwin, *Union Plans to Represent All Student Workers*, SCARLET & BLACK (Sept. 22, 2017), <http://www.thesandb.com/news/union-plans-to-represent-all-student-workers.html> [<https://perma.cc/HM9Q-8C74>].

167. Julia Anderson, *UGSDW Aims to Expand*, SCARLET & BLACK (Oct. 12, 2018), <http://www.thesandb.com/article/ugsdw-aims-to-expand.html> [<https://perma.cc/9AKB-RCQ3>].

168. *Statements and Positions Archive: College Explains its Position on Student Union Expansion*, GRINNELL COLL. (Nov. 12, 2018) [hereinafter *College Explains*], <https://www.grinnell.edu/campus-life/conversations/student-union-expansion/statements> [<https://perma.cc/4EFW-QV55>].

169. *Student Workers Demand Union, College Responds ‘No,’* SCARLET & BLACK (Apr. 20, 2018), <http://www.thesandb.com/news/student-workers-demand-union-college-responds-no.html> [<https://perma.cc/3M6Z-YESB>].

170. Vera Kahn, *College Community Debates Expanding Union*, SCARLET & BLACK (Apr. 27, 2018), <http://www.thesandb.com/article/college-community-debates-expanding-union.html> [<https://perma.cc/3K89-XY28>].

unionization would pose, and that student workers shared many common employment concerns, which established a community of interest among them.<sup>171</sup>

On October 8, 2018, UGSDW received enough signed union cards to file a petition with the NLRB for a representation election to represent all student workers.<sup>172</sup> The college stridently opposed the petition as part of UGSDW's efforts on the legal ground that the individuals comprising the union were primarily students rather than statutory employees.<sup>173</sup> The NLRB therefore held a hearing on campus on October 17 and 18, 2018, presided over by an NLRB administrative law judge to decide whether the election should go forward.<sup>174</sup>

At the hearing, in its statement of position, and in material published on a unionization information page on the college's website, Grinnell College strenuously argued that allowing the expansion of student unionization to go forward would have adverse effects on the workplace and the educational environment of the college. It called for a return to *Brown University* and a reversal of *Columbia University*, which it contested as wrongly decided.<sup>175</sup> Even if *Columbia University* were to apply, the college argued that the undergraduate students at issue in this case—whose work they noted to be “an integral part of the student experience”—were distinguishable from the graduate assistants in *Columbia University*—whom they seemed to be arguing may have had greater indicia of faculty rather than student status.<sup>176</sup>

Pointing to the background policies and principles of the Act as condoning the Board's discretionary power to refrain from recognizing certain categories of workers as employees, the college also argued that the Board could choose to decline considering students “employees” for policy reasons.<sup>177</sup> The overriding policy reason to prevent recognition here was that students' roles in the institution were primarily educational, not economic.<sup>178</sup> The college asserted that “expanding the union would fundamentally change the educational relationship between the College, faculty and students by

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171. *Id.*; see also *A Case for UGSDW for All*, UGSDW, <https://www.ugsdw.org/together/why> [<https://perma.cc/5G92-BMTX>] (outlining the positive case for expanding UGSDW).

172. Press Release, UGSDW, UGSDW Files for an Election, Paving the Way for Campus-Wide Union (Oct. 8, 2018), <https://www.ugsdw.org/2018/10/08/ugsdw-files-for-election-paving-the-way-for-campus-wide-union> [<https://perma.cc/BQF9-6ZCV>].

173. Zoe Fruchter & Chloe Wray, *College and Union Convene Historic Hearing on Expanded Unionization Efforts*, SCARLET & BLACK (Oct. 18, 2018), <http://www.thesandb.com/article/college-and-union-convene-historic-hearing-on-expanded-unionization-efforts.html> [<https://perma.cc/43F4-XHRA>].

174. Zoe Fruchter & Chloe Wray, *Members of UGSDW Defend Themselves at Hearing*, SCARLET & BLACK (Oct. 18, 2018), <http://www.thesandb.com/article/historic-unionization-hearing-concludes-with-nlr-ruling-pending.html> [<https://perma.cc/9XED-XW24>]. Notably, UGSDW members represented themselves at the hearing against the college's lawyers. *Id.*

175. Statement of Position for Emp. at 11, Trs. of Grinnell Coll., No. 18-RC-228797 (N.L.R.B. 2018), <https://www.ugsdw.org/assets/news/SoP.pdf> [<https://perma.cc/6R2G-UH9Y>].

176. *Id.* at 18–19.

177. *Id.* at 8–9.

178. *Id.*

effectively inserting a third party whose priorities are economic, not educational, into the classroom and alter the relationship between students and faculty.<sup>179</sup> The collective bargaining process, it contended, given its adversarial nature and the transiency of student employees (who were guaranteed to turnover at least every four years), was inherently unsuited to relationships among constituents of the college.<sup>180</sup>

The college also pointed to a host of other potential problems. It noted that the variety of positions at issue here—including not just dining hall workers but also mentors, research assistants, and other campus employees—were too distinct to be lumped together into one unit.<sup>181</sup> It also claimed the costs of recognizing the union would lead to a decrease in financial aid to students, limit the number of jobs available to students, undermine the college's freedom to hire and schedule students, and disrupt the supposed egalitarian nature of the college by limiting jobs to poor students.<sup>182</sup> The college feared that the last concern, in particular, would create a caste structure of “an underclass of serfs” supporting richer students who consequently would not have to work.<sup>183</sup> Finally, the college urged that labor law—which mandates disclosure of information by the employer concerning bargaining subjects—could conflict with educational laws such as the Higher Education Act the Free Application for Federal Student Aid (“FAFSA”), or the Family Education Rights Privacy Act (“FERPA”)—which mandate confidentiality of certain information—thereby placing the college in an impossible position.<sup>184</sup>

UGSDW, however, argued that *Columbia University* remained good law and was controlling in the instant case, and that the policy considerations behind the Act pointed towards expanding the definition of “employee,” not restricting it.<sup>185</sup> It criticized both the policy-based and legal arguments put forward by the college, arguing that there was nothing inherently inconsistent with the educational nature of the college and the existence of the union, and that no empirical evidence supported the college's conclusory assertions that

179. *Frequently Asked Questions About Union Expansion: General Questions*, GRINNELL COLL. (Dec. 5, 2018), <https://www.grinnell.edu/campus-life/conversations/unionization/faq> [<https://perma.cc/4AM6-HDYA>] (answering the question “[w]hy doesn't the College see student unionization as a social justice issue?”).

180. Statement of Position for Emp., Trs. of Grinnell Coll., *supra* note 175, at 8–9.

181. *Id.* at 23–24.

182. *Statements and Positions Archive*, GRINNELL COLL., <https://www.grinnell.edu/campus-life/conversations/student-union-expansion/statements> [<https://perma.cc/3XN4-X9Eg>].

183. Statement of Position for Emp., Trs. of Grinnell Coll., *supra* note 175, at 25 (“Imposing the collective bargaining construct . . . would . . . have the unavoidable result of dictating that campus employment opportunities be given to needy students. This would result in a ‘caste’ system or the creation of an *underclass of serfs* performing campus employment opportunities while their wealthy classmates simply concentrated on their studies.” (emphasis added)).

184. *Id.* at 28–30.

185. Transcript of Hearing at 447–48, Trs. of Grinnell Coll., No. 18-RC-228797 (N.L.R.B. 2018), <https://www.ugsdw.org/assets/news/full-transcript.pdf> [<https://perma.cc/SD6Q-7H6Y>].

unions are inapposite to the educational environment.<sup>186</sup> In fact, a union could further academic learning, bettering working conditions and wages so that students could spend less time laboring to support themselves and more time on their studies.<sup>187</sup> The union also pointed to the very real necessity of the union, noting that real wages at the college, adjusted for inflation and tuition increases, had fallen considerably over the past 15 years, even as the financial capacity and endowment of the college to pay increased wages had grown over that same timeframe.<sup>188</sup> Additionally, the union decried the “underclass of serfs” comment in the college’s statement of position—a statement later removed from the amended brief and disavowed by the college—noting that students of lesser means were already compelled to work more than their wealthier peers: The point of the union was to allow those students to better be able to support themselves.<sup>189</sup>

The Regional Director ruled in favor of UGSDW, allowing the election to go forward.<sup>190</sup> Dismissing most of the employer’s arguments as relying on *Brown University*, rather than *Columbia University* (which she recognized she had no authority to overrule), the Regional Director found the instant case indistinguishable from *Columbia University*.<sup>191</sup> She agreed with the union that the employer’s policy arguments about the supposed negative educational impact a union would have “[were] speculative and not based on any concrete evidence,” particularly since the college’s experience with the existing unit demonstrated a union could operate in harmony with the college’s educational and social mission.<sup>192</sup> As the Regional Director noted, no one at the hearing was able to identify any situation in which unionization “had undermined the college.”<sup>193</sup> Similarly, she viewed the college’s concerns about possible violations of FERPA or FAFSA for other student positions on campus as speculative, hypothetical harms that could be addressed in the collective bargaining process.<sup>194</sup> Nor were these allegations supported by any concrete instances in which a union member violated or caused to be violated any educational law or policy.<sup>195</sup> Since students working in on-campus employment positions passed the common law agency test, the Regional

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186. *A Case for UGSDW for All*, *supra* note 171.

187. *Id.*

188. *Id.*

189. Transcript of Hearing, Trs. of Grinnell Coll., *supra* note 185, at 445; *Update on Student Unionization Issues at Grinnell College*, GRINNELL COLL., <https://www.grinnell.edu/10-17-2018> [<https://perma.cc/MF8U-Z8KD>].

190. Decision and Direction of Election at 6, Trs. of Grinnell Coll., No. 18-RC-228797 (N.L.R.B. 2018); Docket Activity, Trs. of Grinnell Coll., No. 18-RC-228797, <https://www.nlrb.gov/case/18-RC-228797> [<https://perma.cc/6GLM-ARLB>].

191. *Id.*

192. *Id.* at 7.

193. *Id.*

194. *See id.*

195. *Id.*

Director held that they were statutory employees within the meaning of the NLRA.<sup>196</sup>

The Regional Director also found no issue with the wall-to-wall unit requested by the union, in which she held there to be a presumption of appropriateness that was not adequately rebutted by the employer.<sup>197</sup> Of the proposed categories of workers the union sought to include, only two of the challenged groups were found to be properly excluded from the unit.<sup>198</sup> One was service work learning positions, in which students were only technically employed by the college and in fact were not functionally integrated into the college's operations nor physically present on campus.<sup>199</sup> Students who received stipends to conduct academic research were likewise properly excluded from the unit, as they received stipends, rather than the hourly wages that other workers were paid, and received academic credit for what was most clearly academic work.<sup>200</sup>

Accordingly, the NLRB held an election for UGSDW on November 27, 2018, where non-dining hall student workers voted overwhelmingly in favor of the new unit.<sup>201</sup> However, the college appealed for Board review of the decision and continued to oppose the expansion campaign.<sup>202</sup> The threat that a Republican Board composed of Trump nominees would use this case as a vehicle to overturn the *Columbia University* decision establishing that student workers were employees cast a shadow over the union's future chances of success.<sup>203</sup> Before the election, UGSDW had offered to make several concessions to the college in exchange for the college promising not to request a review of the election. In particular, UGSDW provided that it would not strike over the first contract, cap the minimum wage amount in its first contract at nine dollars an hour, accept any contractual language necessary to preserve the college's obligation to students under federal education law, not interfere with the faculty freedom and discretion in choosing research assistants, and not affiliate with a national union for three years.<sup>204</sup> Otherwise,

196. *Id.* at 7–8.

197. *Id.* at 8–10.

198. *Id.* at 12.

199. *Id.*

200. *Id.*

201. Zoe Fruchter & Chloe Wray, *UGSDW Wins Election to Expand Union*, SCARLET & BLACK (Nov. 30, 2018), <http://www.thesandb.com/news/ugsdw-wins-election-to-expand-union.html> [<https://perma.cc/CUK9-S5LU>]. “[O]f the 796 students eligible to vote” in the election, 366, or 46 percent, participated. *Id.* Of those 366 workers, 274, or 84 percent, voted for the new expanded unit, while 54 workers voted against. *Id.*

202. Kate Payne, *Grinnell Files Federal Appeal over Vote to Expand Students' Union*, IOWA PUB. RADIO (Dec. 10, 2018, 6:15 PM), <https://www.iowapublicradio.org/post/grinnell-files-federal-appeal-over-vote-expand-students-union> [<https://perma.cc/5472-GJEX>].

203. Andrew Wallender & Robert Iafolla, *Liberal Arts Students' Union Bid Threatens Obama-Era Policy*, BLOOMBERG L. (Nov. 21, 2018, 10:22 AM), <https://news.bloomberglaw.com/daily-labor-report/liberal-arts-students-union-bid-threatens-obama-era-policy> [<https://perma.cc/SQL9-WCZS>].

204. Jacob Schneyer, *UGSDW Response to College Counsel*, GRINNELL COLL. (Nov. 7, 2018, 11:09 PM), <https://www.grinnell.edu/campus-life/conversations/student-union-expansion/response-counsel> [<https://perma.cc/2YC2-ZBEA>].

if the college continued to refuse to bargain, UGSDW promised the college that it would employ several strike methods, encourage alumni and current students not to donate to the college, and affiliate with a national union.<sup>205</sup>

The college refused to take UGSDW up on its offer, contending that it would be unable to bargain with the union while its appeal was pending before the NLRB.<sup>206</sup> It declined all attempts to negotiate with the union, even before the college had actually filed its appeal and before the election had taken place.<sup>207</sup> Organizers decried what they viewed as the college's aggressive tactics and sought to sway it away from its hard line.<sup>208</sup> UGSDW attempted to use protests, demonstrations, and public persuasion to make its voice heard with the administration.<sup>209</sup> It debated a strike as a means to put pressure on the college to halt its opposition, but fell short of the members' votes necessary to authorize one.<sup>210</sup> Meanwhile, alumni and current students criticized the college's anti-union stance as not in keeping with its stated progressive ideals.<sup>211</sup> However, the college refused to end its appeal or bargain with UGSDW in the interim.<sup>212</sup> The union, fearful of the possible national adverse repercussions to student unions everywhere if their case went to the Board, ultimately withdrew its petition in December 2018 without the college's objection.<sup>213</sup>

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205. *Id.*

206. *College Explains*, *supra* note 168.

207. *Id.*

208. Lauren Aratani, 'Blatant Scare Tactics': Iowa College Leads Crackdown on Student Unions, *GUARDIAN* (Dec. 12, 2018, 4:07 PM), <https://www.theguardian.com/us-news/2018/dec/11/grinnell-college-student-union-appeal-national-labor-relations-board> [<https://perma.cc/Rf7X-VL67>].

209. Zoe Fruchter, *UGSDW Leads Protest to Nollen House in Response to Administration's Looming NLRB Appeal*, *SCARLET & BLACK* (Nov. 30, 2018), <http://www.thesandb.com/article/ugsdw-leads-protest-to-nollen-house-in-response-to-administrations-nlr-appeal.html> [<https://perma.cc/RG6C-5QK9>].

210. Kate Payne, *Grinnell Union Workers Vote Not to Authorize Strike*, *IOWA PUB. RADIO* (Dec. 7, 2018, 7:00 PM), <https://www.iowapublicradio.org/post/grinnell-union-workers-vote-not-authorize-strike> [<https://perma.cc/JC9A-NG8R>] (noting that 64 percent of the present members at the strike authorization meeting voted in favor of a strike, a few votes shy of the two-thirds threshold required by union rules).

211. *See, e.g.*, Jackson Schulte, *Alumni Speak Out on College's Decision to Appeal UGSDW*, *SCARLET & BLACK* (Dec. 7, 2018), <http://www.thesandb.com/news/alumni-speak-out-on-colleges-decision-to-appeal-ugsdw.html> [<https://perma.cc/7CDW-KHEU>]; Kate Payne, *Grinnell Union Workers Hope to Negotiate, Halt Appeal*, *IOWA PUB. RADIO* (Dec. 6, 2018, 6:40 PM), <https://www.iowapublicradio.org/post/grinnell-union-workers-hope-negotiate-halt-appeal#stream/o> [<https://perma.cc/97S2-QK5F>].

212. Kathy A. Bolten, *Grinnell College President: We Won't Bargain with Student Workers Union While Our Appeal is Pending*, *DES MOINES REG.* (Dec. 5, 2018, 5:16 PM), <https://www.desmoinesregister.com/story/news/education/2018/12/05/union-grinnell-college-student-workers-unionize-iowa-nlr-labor-relations-board-university-school/2218061002> [<https://perma.cc/FK99-98NM>].

213. *Board Approves Request by Grinnell Students to Drop Union Effort*, *DES MOINES REG.* (Dec. 24, 2018, 3:18 PM), <https://www.desmoinesregister.com/story/news/education/2018/12/24/union-grinnell-college-student-workers-unionize-iowa-nlr-federal-labor-relations-board/2409846002> [<https://perma.cc/G3N8-36MR>].

After its failure to have its petition validated on appeal, UGSDW's expansion campaign was effectively over. However, UGSDW did not cease its efforts for an expanded union, offering another concession to restrict expansion to only certain categories of student workers.<sup>214</sup> UGSDW also disrupted a meeting of the college's trustees on campus, protesting the college's unwillingness to meet with the union to discuss expansion, leading the trustees to walk out of their meeting.<sup>215</sup> In response, the college announced that it would now be willing to enter into talks with the union about the possibility of voluntarily recognizing selective expansion to categories of student workers, the unionization of whom the college did not believe would adversely affect the educational mission of the college.<sup>216</sup> It also raised the possibility of increasing financial support for students and improving the academic component of student experiential learning.<sup>217</sup>

Subsequently, UGSDW and the college entered into discussions concerning a limited expansion of 14 positions in addition to the student dining workers already part of the union.<sup>218</sup> In early May, the trustees were presented by the administration with a summary of their discussion with UGSDW and a preliminary list of additional student positions.<sup>219</sup> The trustees decided they would need more time to deliberate about the implications of expansion given the complexity of issues at play, and voted to suspend talks with UGSDW and delay a decision on the issue until their October 2019 meeting.<sup>220</sup> Before the October board meeting, however, the trustees announced that they would again delay the decision until they had gathered more information and feedback from the student body, declining to establish a specific date by which they would make their decision.<sup>221</sup> Ultimately, in February 2020 the trustees declined to allow partial expansion of the union to certain categories of workers, citing alternative channels for student-worker voices to be heard and promising reforms to address student issues even in

214. Julia Anderson, *Updates on UGSDW Post-Concessions*, SCARLET & BLACK (Jan. 31, 2019), <http://www.thesandb.com/article/update-on-ugsdw-post-concessions.html> [https://perma.cc/K6JL-5S8B].

215. Zoe Fruchter, "Moving Ahead:" *Kington Outlines Next Steps for College and UGSDW*, SCARLET & BLACK (Feb. 22, 2019), <http://www.thesandb.com/news/moving-on-kington-outlines-next-steps-for-college-and-ugsdw.html> [https://perma.cc/NJ3R-HPWF].

216. *Id.*

217. *Id.*; see Raynard S. Kington, *Special Campus Memo: Moving Ahead*, GRINNELL COLL. (Feb. 21, 2019), <https://www.grinnell.edu/news/special-campus-memo-moving-ahead> [https://perma.cc/6WUN-SJJ4].

218. *Statements and Positions Archive: Information Summary*, GRINNELL COLL. (Sept. 2019), <https://www.grinnell.edu/campus-life/conversations/student-union-expansion/statements> [https://perma.cc/gRDM-gUUW].

219. David Maxwell, *Trustees Vote Regarding Union Expansion*, GRINNELL COLL., <https://www.grinnell.edu/campus-life/conversations/student-union-expansion/communication/trustees-vote> [https://perma.cc/7NLX-gCR8].

220. *Id.*

221. Eva Hill, *Trustees Will Not Yet Vote on Union Expansion*, SCARLET & BLACK (Oct. 3, 2019), <http://www.thesandb.com/article/trustees-will-not-yet-vote-on-union-expansion.html> [https://perma.cc/2gVX-DRDT].

the absence of an expanded union.<sup>222</sup> UGSDW, accepting the decision of the trustees, nevertheless vowed to continue its advocacy for student workers.<sup>223</sup>

## 2. Service Employees International Union, Local 500, and George Washington University

While the unionization effort at Grinnell College is unprecedented, and its union's status unique, it was not undergraduate students' first attempt to unionize. Before UGSDW's expansion election, 110 resident advisors ("RAs") working in 26 residential facilities at the George Washington University in Washington, D.C., petitioned the NLRB for a representation election on November 29, 2016.<sup>224</sup> Unlike UGSDW, those students did not organize themselves independently but instead associated with the Service Employees International Union ("SEIU"), a large national union comprised of two million members working in a variety of different service industries.<sup>225</sup>

The university opposed the petition based on the short temporal period in which students would work as RAs (capped at the length of their studies), as well as the educational purposes of on-campus residency in which RAs furthered and participated.<sup>226</sup> It argued "that it would [not] make sense to apply a federally regulated system of collective bargaining to students who are participating for a period of time in a program as part of their educational experience."<sup>227</sup> The university also raised concerns that unionization would impose restrictions on the flexibility of RAs to work odd hours, that the collective bargaining structure might damage relationships between RAs and their residents, and that unions would prevent RAs from directly discussing problems with their supervisor, leaving them instead to go through union channels.<sup>228</sup> Additionally, the university noted that RAs occupy a confidential position in relation to their residents and that some information they possess is protected by federal education laws like FERPA, threatening the secrecy of such information if the union requested its disclosure pursuant to collective bargaining subjects.<sup>229</sup>

222. Jon Gomez, *A Final Word on USGDW Expansion: No*, SCARLET & BLACK (Feb. 14, 2020), <http://www.thesandb.com/article/a-final-word-on-usgdw-expansion-no.html> [<https://perma.cc/Q27B-E79L>].

223. *See id.*

224. Decision and Direction of Election at 1, George Washington Univ., No. 05-RC-188871 (N.L.R.B. 2016); Docket Activity, George Washington Univ., No. 05-RC-188871, <https://www.nlr.gov/case/05-RC-188871> [<https://perma.cc/SX22-5LEL>].

225. Cayla Harris & Elise Zaidi, *RAs Push to Be First Union at Private University*, GW HATCHET (Dec. 5, 2016, 9:23 AM), <https://www.gwhatchet.com/2016/12/05/ras-file-petition-to-be-first-union-at-private-university> [<https://perma.cc/5REA-VJ8Y>]; *About*, SEIU, <https://www.seiu.org/about> [<https://perma.cc/7A5D-MELJ>].

226. Harris & Zaidi, *supra* note 225.

227. *Id.*

228. *Id.*; *University to Participate in National Labor Relations Board Hearing*, GW TODAY (Dec. 5, 2016) [hereinafter *University to Participate*], <https://gwtoday.gwu.edu/university-participate-national-labor-relations-board-hearing> [<https://perma.cc/Q353-ZEQA>].

229. *University to Participate*, *supra* note 228.



The RAs, meanwhile, argued that unionization was necessary to collectively address employment concerns they had with the university and ensure its support of RAs.<sup>230</sup> They complained about relatively meager pay, rehiring processes based on subjective and discrepant criteria, and employment contracts that did not clearly state how disciplinary procedures for RAs worked, resulting in variable responses to infractions.<sup>231</sup> The RAs noted that RAs at the University of Massachusetts-Amherst—a public university beyond the reach of the NLRA—have been unionized since 2002 and that they “[sought] to emulate” their model.<sup>232</sup>

The NLRB held a hearing to determine whether the representation election should go ahead, considering whether students were statutory employees under the Act and whether any policy reasons would justify a decision to refrain from asserting NLRB jurisdiction anyway.<sup>233</sup>

The Regional Director ruled that the RAs were statutory employees and that no policy justifications should prevent the direction of a representation election.<sup>234</sup> First, he noted that *Columbia University’s* standard was controlling and that it fell to the employer to prove that RAs should be excluded.<sup>235</sup> Applying *Columbia University’s* common law employment test, the Regional Director found that the RAs clearly received compensation under the command and control of their employer, the university, which gave the university a significant degree of control over the activities of its RAs notwithstanding the modicum of discretion they may have in deciding how to complete their tasks.<sup>236</sup> He rejected the university’s claim that these services were primarily educational or social in nature, observing that the university’s claimed primary purpose for these positions totally elided the reasons why individual students generally decide to work as a RA: namely, to get paid.<sup>237</sup> As he wrote:

Plainly, the RAs are not providing these services voluntarily—the RAs unquestionably receive something of value in exchange for their services. Further, since there is no suggestion that RAs receive academic credit in exchange for serving as RAs, I find no basis to conclude they provide these services as part of their educational

230. Harris & Zaidi, *supra* note 225.

231. *Id.* Pay for RAs included a fixed stipend of \$2,500 per year paid biweekly (amounting “to about \$3.12 an hour,” according to the union) and free housing, valued between \$10,530–\$15,200. *Id.*

232. *Op-Ed: RA Statement on Organizing Movement*, GW HATCHET (Dec. 5, 2016, 12:07 AM), <https://www.gwhatchet.com/2016/12/05/op-ed-ra-statement-on-organizing-movement> [<https://perma.cc/Q2B9-W66A>]. See PATRICK P. MCHUGH, *SOC’Y FOR HUM. RES. MGMT., COLLECTIVE BARGAINING IN COLLEGE DORMS* 1–26 (2011) for an account of the University of Massachusetts-Amherst RAs’ successful efforts to unionize, collectively bargain, and sign a contract with their university.

233. Decision and Direction of Election, George Washington Univ., *supra* note 224, at 1–2.

234. *Id.* at 2.

235. *Id.* at 7–8.

236. *Id.* at 10–11.

237. *Id.* at 10.

relationship with the Employer. Rather, I find that the RAs provide these services based on an economic relationship with the Employer—the RAs exchange services desired by the Employer in return for compensation from the Employer and desired by the RAs.<sup>238</sup>

Although the Regional Director acknowledged students might find considerable professional, social, and educational value in the course of their employment, such is true of many other employment opportunities and life experiences, and does not erase the fact that an economic relationship exists at the heart of their relationship.<sup>239</sup> For similar reasons, he did not find NLRA policy rationales excluded RAs because of the supposed dangers to the educational environment.<sup>240</sup> These concerns about hypothetical conflicts with FERPA, he concluded, were best suited to the collective bargaining process and future adjudications before the NLRB.<sup>241</sup>

The NLRB's ruling represented the first time that RAs at a private university had gained recognition of their right to unionize.<sup>242</sup> Although the unionizing RAs had clearly succeeded in securing an election, it was far from clear whether they had enough support among the student body and (more importantly) the eligible employees in order to win it. Several RAs spoke out vocally against unionization, forming a group in opposition.<sup>243</sup> They claimed unionization would lead to a diminishment in the quality of services to their residents as RAs sought to restrict work hours.<sup>244</sup> Some opined further that a union would introduce unneeded bureaucracy to their employment situation, reducing individual autonomy to address grievances.<sup>245</sup> Others added that it might strain relationships between RAs, supervisors, and residents given the confrontational nature of collective bargaining.<sup>246</sup> In the end, however, students did not have the chance to vote on the matter: The SEIU local chapter with which the RAs were affiliated decided to cancel the election on

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238. *Id.*

239. *Id.*

240. *Id.* at 12–13.

241. *Id.*

242. Peter Schmidt, *Resident Advisers Gain the Right to Unionize*, CHRON. HIGHER EDUC. (Apr. 21, 2017), <https://www.chronicle.com/article/resident-advisers-gain-the-right-to-unionize> [<https://perma.cc/4QXZ-F4MK>]. Notably, however, RAs at the University of Massachusetts-Amherst, a public university and hence beyond the reach of the NLRB's jurisdiction, have been unionized since 2002. *Id.*

243. Cayla Harris, *Resident Adviser Forms Group to Oppose Unionization*, GW HATCHET (Apr. 27, 2017, 1:46 AM), <https://www.gwhatchet.com/2017/04/27/resident-adviser-forms-group-to-oppose-unionization> [<https://perma.cc/W4DT-DT33>].

244. *Id.*

245. *Id.*

246. Elise Zaidi, *Some RAs Raise Concerns About Unionization Process, Outcomes*, GW HATCHET (Jan. 23, 2017, 12:08 AM), <https://www.gwhatchet.com/2017/01/23/some-ras-raise-concerns-about-unionization-process-outcomes> [<https://perma.cc/LMQ4-Z3AN>].

May 2, 2019, a day before the scheduled vote.<sup>247</sup> RA organizers expressed disappointment as to the decision, with which they did not agree and on which they alleged they were not consulted.<sup>248</sup> SEIU stated that it did not have time to mobilize enough RAs to vote in time for the election and noted that the timing of the election around exams would likely lead to lower turnout.<sup>249</sup> The decision also likely resulted from SEIU's strategic calculation that the union might lose the election, given the opposition it had faced so far. Even if it had won, it would still have had to face a further appeal by the university that would have likely reached a Board—comprised primarily of members nominated by President Trump—who would almost certainly use the opportunity to overrule *Columbia University*.<sup>250</sup>

So far, there have been no further attempts to unionize RAs at the George Washington University. The university did draft a new RA agreement the next academic year, though it disavowed any causal link between the agreement and the attempted unionization.<sup>251</sup> Notably, the new agreement did not use the word “employee” in reference to the RAs.<sup>252</sup> The university subsequently adopted more sweeping changes to the RA program in the spring of 2019, to some student and RA criticism.<sup>253</sup> Whether new unionization efforts will mobilize to address changes in the RA agreement and increase student involvement in the decision-making process remains to be seen.

### 3. Student Workers Coalition—Local 1 Housing Advisers and Reed College

Undergraduate RAs also attempted to unionize at Reed College, a small private liberal arts college in Portland, Oregon.<sup>254</sup> There, on January 17, 2018, organizers of the college's Housing Advisers (known as “HAs”) filed a petition with the NLRB for an election to form a unit consisting of

247. Cayla Harris, *Local Labor Group Cancels RA Unionization Vote*, GW HATCHET (May 2, 2017, 10:05 PM), <https://www.gwhatchet.com/2017/05/02/local-labor-group-cancels-ra-unionization-vote> [https://perma.cc/S7AL-TQZB].

248. Cayla Harris, *RAs Left in the Dark About Decision to Cancel Unionization Election*, GW HATCHET (May 4, 2017, 2:44 AM), <https://www.gwhatchet.com/2017/05/04/ras-left-in-the-dark-about-decision-to-cancel-unionization-election> [https://perma.cc/X4JA-3FZJ].

249. *Id.*

250. Scott Jaschik, *NLRB: Resident Advisers May Unionize*, INSIDE HIGHER ED (Apr. 24, 2017), <https://www.insidehighered.com/news/2017/04/24/nlrb-official-rules-resident-advisers-private-colleges-may-unionize> [https://perma.cc/QFT5-DQK5] (noting that although a majority of Board members at the time of the decision in *George Washington University* had pro-labor sympathies, after their terms expired President Trump would have openings that he could fill with Republican appointees).

251. Annie Dobler, *Officials Rework RA Agreement Following Unionization Push*, GW HATCHET (Jan. 16, 2018, 12:33 AM), <https://www.gwhatchet.com/2018/01/16/officials-rework-ra-agreement-following-unionization-push> [https://perma.cc/A2SP-NVQ4].

252. *Id.*

253. Paige Morse & Sarah Roach, *Officials Overhaul Resident Adviser Agreement*, GW HATCHET (Mar. 28, 2019, 6:46 PM), <https://www.gwhatchet.com/2019/03/28/officials-overhaul-resident-adviser-agreement> [https://perma.cc/Z96Z-JZP9].

254. *About Reed*, REED COLL., [https://www.reed.edu/about\\_reed](https://www.reed.edu/about_reed) [https://perma.cc/5E62-F4JH].

approximately 52 HAs working in the college's Residence Life Department.<sup>255</sup> HAs complained that the college's reclassification of their job positions as employees adversely affected their compensation and resulted in increased taxes on what remuneration they did receive.<sup>256</sup> Students also cited tuition increases as indicative of their need for a union to raise compensation for HAs.<sup>257</sup> Supporters of the union believed Reed College had not adequately listened to their concerns or adopted their suggestions in the past; only a union would empower them with the sort of collective bargaining front that could force the college administration to listen.<sup>258</sup> Reed College challenged the petition, contesting *Columbia University* as wrongly decided and disputing the appropriateness of the bargaining unit, which it contended "should include other students serving in peer-support roles."<sup>259</sup> The NLRB subsequently held a hearing in which the unionizing students, unaffiliated with a national union and unassisted by counsel, represented themselves.<sup>260</sup>

The Regional Director, following the precedent in *Columbia University*, found that students were statutory employees under the Act, that the petitioned-for unit was appropriate, and that no policy reasons justified excluding them.<sup>261</sup> He interpreted *Columbia University* to mean that a student, as long as he or she passed the common law employment test, may qualify for statutory recognition "even if the economic component is relatively small in comparison to the other aspects of the relationship," such as the social or educational dimensions of that relationship.<sup>262</sup> Finding that the HAs in the proposed unit otherwise met the common law test of an employee, the Regional Director concluded they were in fact employees within the meaning of the act.<sup>263</sup> In regard to policy considerations that would necessitate excluding HAs, the NLRB here considered, and rejected, the argument that students' transiency meant that the production of a stable bargaining unit would be impossible.<sup>264</sup> The Regional Director, noting the Board's majority response to this issue in *Columbia University*, believed that any such concerns

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255. Decision and Direction of Election at 1, Reed Coll., No. 19-RC-213177 (N.L.R.B. 2018); Docket Activity, Reed Coll., No. 19-RC-213177, <https://www.nlr.gov/case/19-RC-213177> [<https://perma.cc/Z3EY-KPLN>].

256. *At Reed College, Students Are Unionizing*, NWLABORPRESS.ORG (Mar. 23, 2018) [hereinafter *At Reed College*], <https://nwlaborpress.org/2018/03/at-reed-college-students-are-unionizing> [<https://perma.cc/2XTZ-TLSF>].

257. *Id.*

258. Arek Rein-Jungwirth, *Opinion: In the Trump Era, Reed College Attacks Student Labor Rights*, REED COLL. QUEST (Sept. 7, 2018), <https://reedquest.org/articles/reed-labor-rights> [<https://perma.cc/5EYD-D8RT>].

259. Colleen Flaherty, *Reed College Housing Advisers to Hold Union Election*, INSIDE HIGHER ED (Mar. 5, 2018), <https://www.insidehighered.com/quicktakes/2018/03/05/reed-college-housing-advisers-hold-union-election> [<https://perma.cc/9VNN-7TFQ>].

260. *At Reed College*, *supra* note 256.

261. Decision and Direction of Election, Reed Coll., *supra* note 255, at 1, 13.

262. *Id.* at 10.

263. *Id.* at 11–12.

264. *Id.* at 13.

about transiency in union composition should be addressed and resolved through the collective bargaining process, rather than administrative adjudication.<sup>265</sup> Finally, the Regional Director ruled the requested unit to be appropriate, noting significant differences between the unit requested by the HAs and the other peer mentor positions which the employer wanted lumped in with the other students.<sup>266</sup>

In the ensuing election, the Reed College HAs voted overwhelmingly for a union. Of the 52 eligible employees, 48, or about 92 percent, participated in the election. Of those 48, 34 HAs, or 71 percent, voted in favor of the union.<sup>267</sup> Reed College continued to oppose the unionization effort, instead requesting Board review of the decision and direction of an election by the Regional Director.<sup>268</sup> The organizers of the Reed College movement, like those at Grinnell and George Washington before them, recognized that pressing ahead would result in the case coming before the national Board, which could be used as an opportunity to overturn *Columbia University*.<sup>269</sup> Facing pressure from some national labor groups, the organizers of the HA unionization movement thus abandoned their efforts and withdrew their petition on June 27, 2018.<sup>270</sup>

#### IV. RECOMMENDATIONS AND REFLECTIONS ON UNDERGRADUATE STUDENT UNIONIZATION

Undergraduate student unionization represents a new and relatively untested frontier in labor law. However, to whatever extent unionization by graduate students is objectionable to its opponents, undergraduate unions should be comparatively less controversial. The factors weighing in support of graduate student unionization tend to even more strongly support the conclusion that undergraduate students should have the right to unionize as well. Undergraduate work especially is rarely connected to or required for one's studies. This Note recommends that in formulating a rule in this area, the Board should at least recognize—even if it still wishes to overrule *Columbia University*—that the situation of undergraduate students is sufficiently distinguishable from graduate students such that it would not make sense to shut the door on the former for the same reasons as the latter. It should therefore adopt a rule that expressly includes undergraduate students within the statutory definition of employee.

In Section IV.A, this Note argues that most of the work done by undergraduates is not done in connection with their studies but rather forms the basis of an economic relationship between students and their universities.

<sup>265</sup>. *Id.*

<sup>266</sup>. *Id.* at 21.

<sup>267</sup>. Tally of Ballots, Reed Coll., No. 19-RC-213177 (N.L.R.B. 2018) (on file with author).

<sup>268</sup>. Emp.'s Request for Rev. of the Reg'l Dir.'s Decision and Direction of Election to the Nat'l Lab. Rels. Bd. at 1, Reed Coll., No. 19-RC-213177 (N.L.R.B. 2018); Docket Activity, Reed Coll., *supra* note 255.

<sup>269</sup>. Rein-Jungwirth, *supra* note 258.

<sup>270</sup>. Docket Activity, Reed Coll., *supra* note 255.

That relationship is not invalidated by the mere fact that the workers at issue happen to be students. In Section IV.B, this Note shows that the policy considerations do not justify exclusion either. Although the weight of empirical evidence strongly suggests that student unionization of any type does not have the adverse effects university administrators claim it will, it admittedly has its limits and has not been studied in respect to undergraduate students. Hence, this Note recommends that if the Board uses a rulemaking, rather than adjudicative, process, it should rely not just on public input but also develop, in a rigorous and nonpartisan way, the sort of empirical evidence that could justify its decisions. Finally, in Section IV.C this Note observes the limitations of undergraduate unionization, both in terms of its utility and the willingness of students to engage in it. This Note then considers alternative paths not involving the NLRA that unions may pursue instead of certification elections, and the problems that approach may engender.

A. LEGAL ARGUMENTS FOR UNDERGRADUATE UNIONIZATION

The new rule proposed by the NLRB would overrule *Columbia University*, thereby imperiling graduate student unions that have already organized and are in currently in the process of bargaining with their universities.<sup>271</sup> The Board, in expressing its rationale for formulating the rule as written, also left open the door to the possibility that public comment may persuade it to expand the rule beyond the types of situations involved in *Columbia University* and similar cases.<sup>272</sup> Specifically, the Board expressed a willingness to exclude more than just students whose work is closely related to their course of education—and can more readily be seen as primarily educational rather than economic. It also pointed to a revival of the *San Francisco Art Institute* standard overruled by *Columbia University*—indicating that employment unrelated but secondary to a student’s studies should also be excluded.<sup>273</sup> The Board should recognize the key differences between undergraduate and graduate student work and refrain from expanding these exclusionary categories through rulemaking.

Unlike whatever may be said about graduate student work, undergraduate on-campus work is not usually connected to or primarily for educational purposes. Graduate students may be required to serve as teaching or research assistants as part of their program of study, and they likely enroll in their program of choice knowing that part of graduate school involves working in such positions.<sup>274</sup> Undergraduate students, on the other hand, are

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271. See *supra* Section II.B.5.

272. See *id.*

273. Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49,691, 49,694 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103).

274. See KROEGER ET AL., *supra* note 132, at 1.

almost never required to work to attain their degree.<sup>275</sup> While working on campus may be necessary for students as part of their financial aid or to support themselves, it is ultimately optional and entirely ancillary to their program of study, even if it may exist closely alongside of it.<sup>276</sup> Indeed, undergraduate work primarily encompasses even more of an economic relationship than graduate work, since most of their work is nonacademic in nature, regardless of the educational, social, or professional benefits that may also flow from it.<sup>277</sup>

The Board should also recognize that even if it does find that undergraduate work is not connected to their studies, it should still not decline to exercise jurisdiction over students for the reasons listed in *San Francisco Art Institute*, namely, student jobs represent a “very tenuous secondary interest” in relation to their studies. As the constant flip-flopping of cases related to graduate student unions demonstrates,<sup>278</sup> determining whether the “primary purpose” of a worker’s employment must not be educational in nature for the Board to assert jurisdiction is fraught with difficulties and results in an unstable, amorphous definition. Workers have multiple relationships. Attempting to determine that an otherwise valid economic relationship is a “secondary interest” (let alone a “very tenuous” one) in comparison to some other relationship would result in difficult and pointless hairsplitting of a standard found nowhere within the text of the Act itself.

Rather than focus on the purposes or motivations of workers for engaging in any particular work, the Board should look at the substance of the work itself and determine if it creates the sort of economic interest sufficient to merit Board recognition.<sup>279</sup> As the dissent states in *San Francisco Art Institute*, that question “depends upon whether the nature of [the students’] employment gives them a sufficient interest in wages, hours, and other working conditions to justify such representation.”<sup>280</sup> The determination of the weight of that interest would hence depend on examining the substantive factors of any particular student’s employment, looking specifically at “such factors as continuity of employment, regularity of work,

275. *But see What is a Work College?*, WORK COLLS. CONSORTIUM, <https://workcolleges.org/about/what-work-college> [<https://perma.cc/QESH-GKZ2>] (describing an association of colleges which mandate that their students work in order to graduate).

276. *See also* Nicholas Fram & T. Ward Frampton, *A Union of Amateurs: A Legal Blueprint to Reshape Big-Time College Athletics*, 60 BUFF. L. REV. 1003, 1060 (2012) (“Athletic labor of undergraduate college athletes is, of course, no more essential to the completion of an academic degree than the services provided by undergraduate dining hall workers.”).

277. *See supra* notes 237–40 and accompanying text (noting that the RAs at George Washington University had an economic relationship with their employer, and that they did not do any of their work for free).

278. *See supra* Section II.B.

279. *See* Carlson, *supra* note 49, at 301 (arguing “statutory coverage [should be] based on the character of the transactions between the parties instead of the status of the parties”).

280. *S.F. Art Inst.*, 226 N.L.R.B. 1251, 1253 (1976) (Members Fanning & Jenkins, dissenting), *overruled by* Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016).

the relationship of the work performed to the needs of the employer, and the substantiality of their hours of work.”<sup>281</sup> In addition to assessing the economic nature of the relationship, whether students pass the common law agency test should be the other main criteria in assessing whether they are employees under the law.<sup>282</sup>

The decisions and directions of election made by the Regional Directors in the *Grinnell College*, *George Washington University*, and *Reed College* cases recognize the economic realities of student workers and understand that whether students pass the common law agency test should be the main determinant of statutory coverage. In *Grinnell College*, for instance, the Regional Director noted the integrality of the mainly non-academic compensated work done by employees, such as those of dining hall workers and desk attendants, but declined to exercise jurisdiction over students who received a fixed stipend to conduct academic research, the substance of which was plainly academic and not economic.<sup>283</sup> The Regional Directors in the other two cases also noted a primarily economic relationship between students and the employer in particular positions, regardless of whatever ancillary benefits may have also existed.<sup>284</sup> All decisions correctly determined employee status under the common law agency test, without regard to whether students’ roles were “primarily educational.”<sup>285</sup>

The Board has also noted previously that undergraduate students working in non-academic positions who pass the common law agency test should be considered statutory employees. In *Northwestern University*, for instance, the Board denied statutory coverage to undergraduate football scholarship players for fear of causing instability within their league of competition.<sup>286</sup> It did not, however, completely rule out the possibility that it could assert jurisdiction over the proper unit of players, nor did it disturb the Regional Director’s findings that the players passed the common law agency test.<sup>287</sup> Similarly, in a memorandum in 2017, the NLRB’s general counsel once adopted the approach that non-academic undergraduate student workers would surely be covered under the NLRA.<sup>288</sup>

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281. *Id.*

282. *See supra* Section II.A.2 (noting the primacy of the common law test in ascertaining statutory employee status); *see supra* notes 106–113 (noting that the Board utilized the common law test to ascertain statutory employee status in *Columbia University*).

283. *See supra* notes 198–200 and accompanying text.

284. *See supra* Sections III.B.2–3.

285. *See supra* Sections III.B.1–3.

286. *Nw. Univ.*, 362 N.L.R.B. 1350, 1354 (2015).

287. *Id.* at 1355.

288. RICHARD F. GRIFFIN, JR., NAT’L LAB. RELS. BD., OFFICE OF THE GEN. COUNSEL, MEMORANDUM GC 17-01, GENERAL COUNSEL’S REPORT ON THE STATUTORY RIGHTS OF UNIVERSITY FACULTY AND STUDENTS IN THE UNFAIR LABOR PRACTICE CONTEXT 14 (2017), [https://splc.org/wp-content/uploads/2018/08/1426\\_gc\\_17\\_01\\_report\\_on\\_the\\_statutory\\_rights\\_of\\_universitydocxo.pdf](https://splc.org/wp-content/uploads/2018/08/1426_gc_17_01_report_on_the_statutory_rights_of_universitydocxo.pdf) [<https://perma.cc/54YU-Y3DY>]. The NLRB rescinded the memo shortly after Griffin left the position. Robert A. Fisher, Jeffrey A. Berman & Mary Kay Klimesh, *NLRB General Counsel Rescinds Controversial Memo Regarding Section 7 Rights of University Faculty, Student*



Such an approach would also be consistent with interpretations of the purposes and policy of the Act, which, although rejecting a “statutory purposes” or “economic realities” test, have adopted a very broad definition of employee limited to few exceptions and focused on making available the rights of collective bargaining and representation to as many as possible.<sup>289</sup> In cases where the Board and the Court have declined to exercise jurisdiction over certain categories of workers, they have done so mostly because recognizing those policies would contradict the inherent logic of the Act.<sup>290</sup> For instance, in *NLRB v. Bell Aerospace*, the Supreme Court declined to allow the Board to recognize managerial employees as statutory employees, even though they were not expressly excluded in section 2(3).<sup>291</sup> Since the purpose of the Act was to manage the conflict between the rank and file and executive members of corporation, the Court reasoned that including managers within the bargaining unit of regular employees “would eviscerate the traditional distinction between labor and management.”<sup>292</sup> Here, where the power dynamic is so clearly lopsided between students and the university administrators, such considerations are absent and unlikely to materialize. The express exclusions listed in section 2(3) of the statute are just as arbitrary as the exclusion of students in the line of Board cases concerning graduate students, and they are more reflective of the powerlessness of those groups at the time the NLRA became law rather than studied policy judgment.<sup>293</sup> These exclusive categories hence should not require any more expansion from the Board.

Rather than turning to arguments from definition or attempting to find the “true” purpose or motivation for a student’s employment, the Board should look at the substance and character of the economic relationship between the university and student regardless how it ranks in comparison to other purposes or relationships in which a student may be invested.<sup>294</sup> Undergraduates—as long as they pass the common law agency test—clearly have an economic relationship with their institutions of higher education<sup>295</sup> and hence should not be excluded by this rule. The idea of rejecting students

*Assistants, and Student-Athletes*, SEYFARTH SHAW LLP (Dec. 13, 2017), <https://www.employerlaborrelations.com/2017/12/13/nlr-general-counsel-rescinds-controversial-memo-regarding-section-7-rights-of-university-faculty-student-assistants-and-student-athletes> [https://perma.cc/9DBW-MHCB].

289. See *supra* Section II.A.

290. See *supra* note 32 and accompanying text.

291. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 289 (1974).

292. *Id.* at 285 n.13. The Board in *Columbia University* likewise noted that “Congress had clearly implied their exclusion by the Act’s design and purpose to facilitate fairness in collective bargaining.” Trs. of Columbia Univ., 364 N.L.R.B. No. 90, slip op. at 5 (Aug. 23, 2016) (citing *Bell Aerospace*, 416 U.S. at 275).

293. GOULD, *supra* note 17, at 58.

294. 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, 2076–77 (2009) (noting that the majority’s arguments in *Brown University* proceeded from definitions of “student” and “employee,” dismissing empirical evidence on the subject as irrelevant).

295. See *supra* Section III.A.

who are otherwise clearly employees because their role is “primarily educational” is artificial and simply does not accord with how the common law agency test has actually been applied.<sup>296</sup> A rule expressly including undergraduate students would therefore align closely with the language, history, and purposes of the NLRA, as well as the Supreme Court’s and the Board’s application of the common law agency test.

Propagating such a rule on undergraduate students would also be superior to the Board’s past approach of relying almost solely on case-by-case adjudication. Many scholars and commentators, recognizing the advantages of this rarely used but important power, have advocated for increased NLRB rulemaking.<sup>297</sup> Administrative rulemaking presents several advantages: increased flow of information to decisionmakers, greater participation by the public, and a more significant degree of stability than the Board’s decisions.<sup>298</sup> A rule would also prevent constant seesawing in precedent and provide greater consistency across different political administrations, especially in light of the Board’s frequent reversals over the last few decades due to its changing political composition.<sup>299</sup> Although adjudications may be overturned for policy reasons by a subsequent Board, rules formulated by administrative agencies, on the other hand, must be followed by agencies in all subsequent decisions.<sup>300</sup> Rules can then only be overturned by going through the same rulemaking process all over again, including publication in the Federal Register and the notice-and-comment period.<sup>301</sup> Given the unlikelihood of amending the NLRA to include more types of workers,<sup>302</sup> a rule allowing undergraduate students to unionize would thus enable longer-term protections for these employees than adjudication. Additionally, rules help set out clear *ex ante* terms delineating the Board’s policy in an area of law, offer advanced guidance to affected parties, enable greater certainty in

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296. See 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, 215–17 (2009) (noting neither the NLRA nor the common law recognizes the Board-created “primarily educational” exclusion).

297. See, e.g., Cornelius J. Peck, *A Critique of the National Labor Relations Board’s Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254, 260–63 (1968); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163, 170 (1985); Fisk & Malamud, *supra* note 294, at 2079; Andrew F. Boccio, Comment, *Student Assistants and the NLRB: A Call for Notice-and-Comment Rulemaking*, 48 SETON HALL L. REV. 193, 215–16 (2017).

298. Garden, *supra* note 120, at 1474–77 (noting the advantages of agency rulemaking).

299. *Id.* at 1476–77; David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 947–48 (1965) (noting that agencies are not bound to prior adjudications when they have a “reasoned change in policy” but that they are bound by their own regulations).

300. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, *ADMINISTRATIVE LAW* 247–49 (3d ed. 2014).

301. MAEVE P. CAREY, CONG. RSCH. SERV., *THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW* 5–9 (2013) (describing the publication, notice, and comment requirements of the Administrative Procedure Act as applied to administrative agencies like the NLRB).

302. See Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002) (observing that the statutory text of the NLRA has not changed substantially for decades, and that current legislative paralysis blocks any attempts to amend it).

parties' decision-making, and ensure equal treatment for those whose cases have yet to come before the Board.<sup>303</sup>

Rulemaking is of course not without its faults. It may require additional resources, and it limits some of the flexibility that comes with adjudication.<sup>304</sup> It also has a sketchy track record of success in the NLRB and may be challenged aggressively in the courts.<sup>305</sup> As a general matter, however, it should nevertheless squarely be within the NLRB's power to interpret section 2(3) of the NLRA,<sup>306</sup> so long as the Board does not exceed its statutory authority by overly narrowing the scope of this statutory construction.<sup>307</sup> A new rule should seriously consider the expansive breadth of the NLRA's definition of "employee" as well as its purposes and policy of encouraging unionization. The Board should accordingly write an undergraduate-related rule that accurately reflects that reality.

### B. EMPIRICAL AND POLICY JUSTIFICATIONS FOR INCLUSION

The prospect of rulemaking also demonstrates the need for the Board to be more careful about the kinds of policy determinations it makes in deciding to exclude certain categories of employees. Specifically, it should rely on empirical evidence to guide those decisions. Many seemingly policy-based arguments in opposition to student unionization, for instance, simply articulate common employer complaints about the collective bargaining process itself rather than explicating why unions are specifically unsuited to academia.<sup>308</sup> Opposition to undergraduate unions also echoes similar rhetoric directed at graduate student unions, predicting dire consequences in terms of academic freedom, collegiality, and institutional administration for

303. See Shapiro, *supra* note 299, at 932–33; see also Phoebe Taurick, Note, *Untested Assumptions in NLRB Proceedings*, 27 ABA J. LAB. & EMP. L. 307, 321–22 (2012).

304. McNICHOLAS ET AL., *supra* note 119, at 16; Shapiro, *supra* note 299, at 947–48.

305. See Garden, *supra* note 120, at 1477–84 (describing congressional and industry opposition to two Obama Board proposed rules, and the eventual judicial invalidation of one of them).

306. See *supra* note 50 and accompanying text (noting Supreme Court deference to the Board's interpretation of section 2(3) of the NLRA). *But see Roundup: Trump-Era Agency Policy in the Courts*, INST. FOR POL'Y INTEGRITY, <https://policyintegrity.org/trump-court-roundup> [<https://perma.cc/74RF-KZ3M>] (noting that the Trump Administration has lost 127 out of the past 163 legal challenges to its agency actions as of October 2020).

307. Compare 5 U.S.C. § 706(2)(C) (2018) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusion found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . ."), with *supra* Section II.A (observing the expansive purposes of the NLRA and the breadth of section 2(3)'s language).

308. See, e.g., *University to Participate*, *supra* note 228 ("'Entering into a collective bargaining arrangement would insert a third party into your relationships with your residents, the resident directors and other staff within the Division of Student Affairs,' wrote Dr. Konwerski. 'Union representation could fundamentally alter the relationship of resident advisors to their residents. Rules of the road could become governed by collective bargaining rather than individual judgment and could restrict your autonomy and choices about how you interact with your residents.'").

universities if they were to be forced to engage in collective bargaining with student unions.<sup>309</sup>

Much of that rhetoric, however, seems to be engendered by an animus towards unions or, more specifically, an ideological opposition to the presence of unions on college campuses, rather than by studied policy considerations as to what effects unionization will actually have. As one former graduate student has observed, “[i]t’s telling that professional academics, committed to ruthless empiricism and logic, are reduced to mystical, even spiritual platitudes when pressed to explain their opposition to grad-student unionism.”<sup>310</sup> Administrators seem to view their institutions as somehow removed from common workplace concerns, and protest vociferously that unions will upset the delicate balance of academic values and community which they have sought to cultivate.<sup>311</sup> Universities are not alone in pushing back against unions, of course: In general, and across a variety of industries, employers tend to respond aggressively to the prospect of unionization and use every legal (and sometimes illegal) method at their disposal to crush those efforts.<sup>312</sup> But since university administrators in particular perceive unionization as an existential threat to their idealized perception of universities as cloistered places dedicated solely to learning, it is hardly surprising they are so fiercely opposed to its expansion.

These beliefs, however, create a false dichotomy between “economic” and “educational” relationships. Opponents of student unionization fail to see how the economic relationship universities have created with their students in recent decades—in particular the increasing ways in which higher education emulates corporate and consumer-based models in forming relationships with students—vitiate their claims that their institutions are purely educational.<sup>313</sup> Administrators cannot ignore the fact that for many

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309. See Brief of *Amici Curiae* Brown University et al. at 1–3, Trs. of Columbia Univ., 364 N.L.R.B. No. 90 (Aug. 23, 2016) (No. 02-RC-143012). Member Miscimarra’s dissent in *Columbia University* repeats many of the same parade of horrors which administrators say student unionization will engender, warning that unionization will turn universities into uncouth, crude, and contentious places. Trs. of Columbia Univ., 364 N.L.R.B. No. 90, slip op. at 30–31 (Aug. 23, 2016) (Member Miscimarra, dissenting); see *supra* note 118 and accompanying text.

310. Mark Oppenheimer, *Graduate Students, the Laborers of Academia*, NEW YORKER (Aug. 31, 2016), <https://www.newyorker.com/business/currency/graduate-students-the-laborers-of-academia> [<https://perma.cc/Q4TL-GEZQ>].

311. See *supra* Section III.B (noting university administrators making similar arguments).

312. See generally KATE BRONFENBRENNER, *ECON. POL’Y INST., NO HOLDS BARRED: THE INTENSIFICATION OF EMPLOYER OPPOSITION TO ORGANIZING* (2009) (analyzing data related to NLRB certification elections and concluding that employers have increased the use of tactics designed to delay, halt, or frustrate unionization among their employees).

313. See Neal H. Hutchens & Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105, 126 (2003) (noting universities’ application of corporate and business models honed in private industry to higher education administration, increasing tensions with employees as institutions cut costs); Nate Kreuter, *Customer Mentality*, INSIDE HIGHER ED (Feb. 27, 2014), <https://www.insidehighered.com/views/2014/02/27/essay-critiques-how-student-customer-idea-erodes-key-values-higher-education> [<https://perma.cc/Y7SK-MM3W>] (decrying the damage to traditional university values of increasingly popular administrative models that treat education as a product and students as consumers).

students, their place of education is also their place of work. It is therefore hypocritical to decry undergraduate unions as “inserting a third party whose priorities are economic, not educational” into campus life when such an element already exists.<sup>314</sup> As the Board in *Columbia University* correctly recognized, in today’s colleges and universities “a . . . student may be both a student *and* an employee.”<sup>315</sup>

To the extent that universities’ claims regarding the negative effects of student unions are “empirically testable,” they should be put to the test.<sup>316</sup> The majority in *Columbia University* rightfully grounded its decision in part on “empirical evidence” and contrasted its approach from what it saw as misguided, unsupported policy notions undergirding the impulse that unions are unsuited to academia.<sup>317</sup> The empirical evidence that does speak to this issue does not support the sort of ills forewarned by administrators in higher education. One study found that unionization of graduate student workers has no impact or even a positive impact on measures of quality of student-teacher relationships, academic freedom, or economic well-being between unionized and nonunionized graduate student employees at U.S. public and private universities.<sup>318</sup> A survey of liberal arts and science professors at five major universities with graduate collective bargaining agreements found that faculty members did not have a negative attitude toward graduate student unionization and did not find that it negatively affected their mentoring or instructive relationships with students.<sup>319</sup> Another survey demonstrated that by far the most important issues to graduate students were health insurance and compensation, and they did not themselves believe that collective bargaining with their university would have a negative effect on academic freedom.<sup>320</sup> Graduate student unions presently exist at state universities, and the sky has not yet fallen there.<sup>321</sup> Although outside the jurisdiction of the NLRB, the Board in *Columbia University* noted “that more than 64,000 graduate student[s] . . . at 28 . . . [public universities]” formed labor unions

314. *Frequently Asked Questions*, *supra* note 179; *see supra* note 179 and accompanying text.

315. *Trs. of Columbia Univ.*, 364 N.L.R.B. No. 90, slip op. at 7 (Aug. 23, 2016).

316. *Fisk & Malamud*, *supra* note 294, at 2077 (noting that claims that unionization “[will] interfere with graduate education and with academic freedom . . . are empirically testable”).

317. *See Trs. of Columbia Univ.*, slip op. at 8, 10–11; *see also* Hayden, *supra* note 132, at 1260–64 (criticizing the policy justifications for exclusion as unsupported and unsuited to Board determination).

318. Sean E. Rogers, Adrienne E. Eaton & Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay*, 66 *INDUS. & LAB. RELS. REV.* 487, 500 (2013).

319. Christine M. Wickens, *The Organizational Impact of University Labor Unions*, 56 *HIGHER EDUC.* 545, 557–58 (2008).

320. 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, 786, 800 (2004).

321. *Trs. of Columbia Univ.*, slip op. at 9.

during the past 50 years.<sup>322</sup> Indeed, the oldest public school graduate student union—the Teacher Assistants’ Association at the University of Wisconsin-Madison—began organizing in 1966, and signed its first contract with the university in 1970.<sup>323</sup>

To be fair, the studies here are not without their analytical flaws, and none of them address undergraduate students. Particularly at a school like Grinnell College, where UGSDW wanted to unionize all student workers (comprising the majority of the student population), the effects of such an expansion of unionization would be without precedent.<sup>324</sup> However, the lack of high-quality empiricism can be remedied in the future by making greater use of expertise in the fields in which it is making important decisions.<sup>325</sup> Especially if the Board engages in rulemaking with the purposes of creating greater longevity and stability for in the definition of “employee,” that determination of employee status should be based on more solid foundations. Testing the assumptions behind the rationale for statutory exclusion would be particularly useful in cases involving undergraduate unionization, where there are such fierce contradictions by both sides as to the other’s position.<sup>326</sup> Empirical evidence on graduate student unionization would provide a greater basis for parties to agree on conditions through which student unionization and the educational environment could coexist peacefully, as well as improve the quality of Board decision making in general.<sup>327</sup> Rulemaking is especially improved by taking into account empirical evidence, and the rulemaking process would be able to take into account more wide-ranging evidence both for and against each possible position than adjudication.<sup>328</sup> A future rulemaking process on undergraduate unionization should take advantage of actual empirical research on undergraduate unions before promulgating a rule on the subject. Such a process would go a long way towards establishing a solid evidentiary foundation demonstrating that undergraduate students are employees and that fears of unionization’s ill effects in this context are unfounded. The Board’s failure to seriously consider the array of evidence on graduate students as it relates to the changes in the higher education model

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322. *Id.* The Board noted examples of graduate student unionization at public universities in California, Florida, Illinois, Iowa, Massachusetts, Michigan, Oregon, Pennsylvania, and Washington. *Id.*

323. *History*, TEACHING ASSISTANTS’ ASS’N, <http://taa-madison.org/history> [<https://perma.cc/EUA7-9NJG>].

324. *See supra* Section III.B.1.

325. *See* Fisk & Malamud, *supra* note 294, at 2078–79 (recommending the Board “[t]ake a more holistic regulatory approach to problem-solving,” with an emphasis on data-driven policymaking and rulemaking as opposed to adjudication).

326. *See id.* at 2072–77 (discussing the competing views over unionization of graduate students).

327. *See id.* at 2077. The NLRA, however, thanks to a Taft–Hartley amendment, currently prohibits economic research or analysis undertaken directly by the NLRB, as opposed to mere passive receipt of empirical evidence. William A. Herbert & Joseph van der Naald, *A Different Set of Rules? NLRB Proposed Rule Making and Student Worker Unionization Rights*, 11 J. COLLECTIVE BARGAINING ACAD. 1, 5 (2020) (citing 29 U.S.C. § 154(a) (2018)).

328. *See* Taurick, *supra* note 303, at 327–28.

to the present day and the current workability of student unions at many colleges and universities may even doom the 2019 rule to judicial invalidation as “arbitrary and capricious” under the Administrative Procedure Act.<sup>329</sup> If a rule covering undergraduate students is not reasonably formulated nor relies on solid evidence, then it may meet a similar fate.<sup>330</sup>

Some opposition to the role of unions in academia could also be mitigated, as other commentators have noted, by agreeing to limit the scope of bargainable subjects to only certain agreed-upon subjects, excluding discussion of any other subjects like academic freedom, and reserving them to the discretion of administrators.<sup>331</sup> Issues of academic freedom will likely rarely even emerge in undergraduate student union cases—which usually deal with jobs, like working in dining halls, serving as RAs, and the like, that are largely unconnected to teaching or research. Even graduate students concern themselves primarily with “bread and butter” issues related to wages and working conditions rather than rewriting the type of relationship they have with their university.<sup>332</sup>

In addition to conceding academic freedom concerns, students have also shown themselves willing to accept any contract language that will ensure that they will not be in violation with FERPA, FAFSA, or any other federal law pertaining to higher education.<sup>333</sup> While this concern is frequently raised by universities as an argument for the harm unions will pose, and admittedly presents some difficulties to negotiate, it is likely blown out of proportion and does not alone justify exclusion. One study, for instance, found out that universities can comply with both obligations at the same time, and that even in the case of the violations, the only consequences imposed would be in an administrative hearing brought by the Department of Education, which is

329. See 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that a decision is “arbitrary and capricious if” it “runs counter to the evidence before the agency”).

330. See AMAN & MAYTON, *supra* note 300, at 369 (noting that “[t]he arbitrary and capricious standard of review . . . usually applies to the overall reasonableness of [a] policy,” and that the “substantial evidence test” may apply).

331. See Hayden, *supra* note 132, at 1262 (noting that “any adverse impact that collective bargaining may have upon educational policies truly within the university’s exclusive province may be dealt with by limiting the scope of bargaining”); Leslie Crudele, Note, *Graduate Student Employees or Employee Graduate Students? The National Labor Relations Board and the Unionization of Graduate Student Workers in Postsecondary Education*, 10 WM. & MARY BUS. L. REV. 739, 775–77 (2019) (noting how union contracts at public universities in Massachusetts, Montana, and Oregon contain clauses limiting bargaining to certain issues, reserving universities rights related to academic freedoms and other matters of university administration).

332. Rogers et al., *supra* note 318, at 507 (finding that graduate students are primarily “more concerned with the basic terms and conditions of employment” than with academic issues); *Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies*, 84 Fed. Reg. 49,691, 49,697 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103) (Member McFerran, dissenting) (noting that student union bargaining has focused almost exclusively “on bread-and-butter issues” related to wages, hours, and working conditions).

333. See, e.g., *supra* Section III.B.1 (observing UGSDW’s willingness to contract language ensuring that they will not run afoul of any of these statutes).

unlikely to cut federal funds to a college or university attempting to comply with labor law.<sup>334</sup> Regardless, since nothing in the employer's statutory duty to engage in good-faith collective bargaining with a union compels it to reach an agreement with it on any particular issue, universities have no corresponding obligation to cede totally in contract negotiations with student unions on issues of prime importance to them, including concerns rooted in academic freedom or compliance with other statutes.<sup>335</sup>

C. LIMITS ON AND LIKELY NEXT STEPS FOR UNDERGRADUATE UNIONS

Even if nothing does or should prevent undergraduates from unionizing, it is far from clear whether they will use the opportunity to do so. First, the protections of the NLRA would only extend to a limited category of student workers—those working on-campus jobs at private colleges and universities. Students at public universities would be totally beyond the reach of the NLRB's jurisdiction, and hence would have to rely on the protections afforded to them under state law.<sup>336</sup> While some states may provide an avenue for undergraduates to unionize, others do not.<sup>337</sup> Similarly, students who work off-campus jobs would not be able to join a union composed of on-campus student workers, as the college or university they attend would not be their employer. It is also possible, as the RA unionization at George Washington University demonstrated, that students may express skepticism at the idea of having a union.<sup>338</sup> Even if undergraduate unions are allowed to conduct a certification election, nothing would stop colleges and universities from mounting a public relations campaign to persuade its students not to vote in favor of the union.<sup>339</sup>

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334. Hutchens & Hutchens, *supra* note 313, at 128–29.

335. See Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1416 (1958) (“The employer (or union) must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach a common ground, but it need make no concessions and may reject any terms it deems unacceptable.”).

336. See 29 U.S.C. § 152(2) (2018).

337. See Robert Iafolla, *Student Unionizing Past Rebuts NLRB Plan to End It, Groups Say*, BLOOMBERG L. (Feb. 6, 2020, 5:11 AM), <https://news.bloomberglaw.com/daily-labor-report/student-unionizing-past-rebuts-nlr-plan-to-end-it-groups-say> [<https://perma.cc/K63P-Z3HH>] (observing which states provide union rights to on-campus college student workers at state universities); see also Fram & Frampton, *supra* note 276, at 1059–62 (noting that while Oregon and Massachusetts expressly recognize undergraduate students at state universities as employees of the university they attend, undergraduate students likely could not organize in Minnesota or Washington even if their work is unconnected with their studies).

338. See *supra* Section III.B.2; see also Hutchens & Hutchens, *supra* note 313, at 129 (noting that students may choose to vote against a union, which they did at both Cornell and Yale). *But see* Olivia Gieger, *Labor 101 for Undergraduate Workers Seeking to Unionize*, IN THESE TIMES (Jan. 9, 2020), <https://inthesetimes.com/article/22199/undergrad-workers-unions-college-university-resident-advisors-conference> [<https://perma.cc/Q8KW-54JC>] (reporting the inaugural gathering of 40 students from ten institutions at the Northeast Undergraduate Worker Convention for the purposes of training undergraduate student workers in the labor organizing strategies); Brophy, *supra* note 159 (noting various examples of undergraduate student workers labor organizations).

339. See Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1777–78 (1983).



The experiences of many of the previously discussed undergraduate unions—all forced to withdraw their petitions in order to avoid a ruling by the national Board that would end their right to organize—may lead them to consider extra-legal organizing outside of the administrative confines of NLRB adjudication. A lack of stability in precedent and the changing political composition of the Board certainly generate uncertainty as to whether any legal rights actually won by successfully going forward with formal union recognition will be preserved in the long term, likely making unionization more trouble than it is worth.<sup>340</sup> That same uncertainty also makes it less likely that national unions would be willing to bear the costs of representing undergraduate students, who must then organize themselves independently without access to the resources and legal support that national affiliation may provide.<sup>341</sup> At the same time, although the NLRB's rulemaking is motivated in part by a desire to circumvent union organizers' strategic withdrawal of petitions before their cases could be decided by the national Board, it is unclear if this particular rulemaking will bring the kind of stability that the Board's current majority thinks it will.<sup>342</sup> As Member McFerran notes in her dissent to the proposed new rule, "[t]he desire of student employees for union representation and for better working conditions will not go away simply because the Board has closed its doors."<sup>343</sup> Blocking students from using the established NLRB channels of collective bargaining and representation elections may lead to wider campus unrest and movements, this time outside the bounds through which the Board can organize or control it.<sup>344</sup>

These extra-legal means may therefore take precedence over formal Board channels, especially as those channels have proven fruitless to undergraduate student organizers so far. Undergraduate unions may attempt to negotiate with their employers as a collective anyway, in the hopes of gaining concessions or even voluntary recognition through informal collective bargaining.<sup>345</sup> Demonstrations, protests, public pressure, social

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340. Smith & Wallender, *supra* note 154 (discussing the uncertainty faced by student organizers given shifting rules on unionization eligibility).

341. See Emma Borzekowski & Mitchell Manning, *The Student Worker Movement Is Growing*, JACOBIN (Nov. 29, 2019), <https://jacobinmag.com/2019/11/student-workers-organizing-national-labor-relations-board> [<https://perma.cc/57XE-2T6S>] (noting that national unions do not find it worth it to invest resources in undergraduate unions, forcing them to organize themselves independently or in loose coalitions); see also *supra* Section III.B (noting both SEIU's unwillingness to continue working with the RAs at George Washington University as well as the fact that students at Grinnell College and Reed College independently organized and represented themselves at NLRB hearings).

342. See *supra* Section II.B.5.

343. Jurisdiction—Nonemployee Status of University and College Students Working in Connection With Their Studies, 84 Fed. Reg. 49,691, 49,698 (proposed Sept. 23, 2019) (to be codified at 29 C.F.R. pt. 103) (Member McFerran, dissenting).

344. See *id.*; Crudele, *supra* note 331, at 775–77.

345. See Kanu, *supra* note 133 (reporting how a Georgetown University graduate-student union sought and won voluntary recognition from its administration); GOULD, *supra* note 17, at 57–58. *But see* Kanu, *supra* note 123 (observing that even voluntary recognition under a standard

media campaigns, and other forms of persuasion, however, may prove a more fruitful way for undergraduate organizers to secure the type of benefits they seek.<sup>346</sup> This form of “social bargaining” to assert political or public weight on employers, as opposed to relying on the exclusive bargaining agreements sanctioned by the Board, may be the future of undergraduate union organizing.<sup>347</sup>

## V. CONCLUSION

Undergraduate students are workers who clearly have an economic relationship with their school. The statutory definition of “employee,” understood in light of the broad policy purposes of the Act, indicates that most workers in such an economic relationship—including undergraduate students—should not be excluded from unionization unless there are strong policy reasons not to do so, with any exceptions drawn narrowly. Since undergraduate students do not implicate many of the policy conflicts with educational objectives frequently raised as arguments against graduate student unionization, they should be recognized as employees within the meaning of the Act. Simply put, undergraduate student workers are different from graduate student workers. The policy arguments made against the latter lack the same force when redirected against the former. When universities recite these arguments against undergraduate students, they demonstrate the weakness of arguments from definition claiming students and employees are two entirely distinct categories. Rather than adhering to these obscure distinctions, the Board should engage in real policymaking and craft a rule that recognizes that undergraduate workers are statutory employees. And instead of making the same arguments from definition, and risking more seesawing between contrary precedents, it should rely on evidence-based decision-making in promulgating a rule on whether students are employees. Such an approach would do a better job than the Board has currently done at fairly and equitably adjusting the interests of universities and students alike.

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that did not recognize students as employees may leave students unprotected if they seek legal recourse through the NLRB).

346. See *supra* Section III.B.1 (noting UGSDW’s utilization of similar tactics at Grinnell College).

347. See Andrias, *supra* note 158, at 94 (noting the role of this form of bargaining in an emerging form of labor law, where formal adjudication is unreliable and unsuccessful).