The Trustees of Columbia University in the City of New York *and* Graduate Workers of Columbia–GWC, UAW. Case 02–RC–143012

August 23, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

The threshold question before us is whether students who perform services at a university in connection with their studies are statutory employees within the meaning of Section 2(3) of the National Labor Relations Act. Here, after a hearing directed by the Board, the Regional Director applied *Brown University*, 342 NLRB 483 (2004), where the Board found that graduate student assistants were not employees within the meaning of Section 2(3), and dismissed a petition filed by the Graduate Workers of Columbia-GWC, UAW, which seeks to represent both graduate and undergraduate teaching assistants, as well as graduate research assistants.[1] The Board granted review in this case on December 23, 2015, and then issued a notice and invitation to file briefs, identifying the primary issue presented, as well as subsidiary issues that would follow if *Brown University* were overruled.[2] We have carefully considered the record, the positions of the parties and the amici,[3] the reasoning of the *Brown University* Board, and the views of our dissenting colleague, who endorses *Brown University* (as well as advancing arguments of his own).

For the reasons that follow, we have decided to overrule *Brown University*, a sharply-divided decision, which itself overruled an earlier decision, *New York University*, 332 NLRB 1205 (2000) (*NYU*). We revisit the *Brown University* decision not only because, in our view, the Board erred as to a matter of statutory interpretation, but also because of the nature and consequences of that error. The *Brown University* Board failed to acknowledge that the Act does not speak directly to the issue posed here, which calls on the Board to interpret the language of the statute in light of its policies. The *Brown University* Board's decision, in turn, deprived an entire category of workers of the protections of the Act, without a convincing justification in either the statutory language or the policies of the Act.

As we will explain, our starting point in determining whether student assistants are covered by the Act is the broad language of Section 2(3), which provides in relevant part that "[t]he term 'employee' shall include any employee," subject to certain exceptions—none of which address students employed by their universities.[4] The *Brown University* Board held that graduate assistants *cannot* be statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university."[5] We disagree. The Board has the statutory authority to treat student assistants as statutory employees, where they perform work, at the direction of the university, for which they

[1] The petition defined the bargaining unit sought as follows:

> *Included*: All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.
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> *Excluded:* All other employees, guards and supervisors as defined in the Act.

[2] On January 16, 2016, the Board invited the parties and interested amici to file briefs addressing the following four issues:

> 1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act?
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> 2. If the Board modifies or overrules *Brown University*, supra, what should be the standard for determining whether graduate student assistants engaged in research are statutory employees, including graduate student assistants engaged in research funded by external grants? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).
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> 3. If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, would a unit composed of all these classifications be appropriate?
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> 4. If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, what standard should the Board apply to determine whether they constitute temporary employees?

[3] Briefs were filed in support of the Petitioner by: American Association of University Professors (AAUP); American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); American Federation of Teachers (AFT); Ellen Dannin, Attorney; The General Counsel of the NLRB; Individual Academic Professors of Social Science and Labor Studies (IAP); National Association of Graduate-Professional Students (NAGPS); Service Employees International Union and Committee of Interns and Resident, SEIU Healthcare (SEIU-CIR); and United Steelworkers (USW). Filing in support of Columbia were: American Council on Education (ACE), et al.; Brown University et al.; Higher Education Council of the Employment Law Alliance (HEC); and National Right to Work Legal Defense and Education Foundation (NRW).

[4] 29 U.S.C. §152(3).

[5] *Brown University*, 342 NLRB at 487.

are compensated. Statutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach.

The unequivocal policy of the Act, in turn, is 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."[6] Given this policy, coupled with the very broad statutory definitions of both "employee" and "employer," 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.[7] We are not persuaded by the *Brown University* Board's self-described "fundamental belief that the imposition [sic] 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."[8] This "fundamental belief" is unsupported by legal authority, by empirical evidence, or by the Board's actual experience.

Thus, we hold today that student assistants who have a common-law employment relationship with their university are statutory employees under the Act. We will apply that standard to student assistants, including assistants engaged in research funded by external grants. Applying the new standard to the facts here, consistent with the Board's established approach in representation cases, we conclude (1) that all of the petitioned-for student-assistant classifications consist of statutory employees; (2) that the petitioned-for bargaining unit (comprising graduate students, terminal Master's degree students, and undergraduate students) is an appropriate unit; and (3) that none of the petitioned-for classifications consists of temporary employees who may not be included in the unit. Accordingly, we reverse the decision of the Regional Director and remand the proceedings to the Regional Director for further appropriate action.

[6] 29 U.S.C. §151.

[7] Cf. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711–712 (2001) (upholding Board's rule allocating burden of proof to party asserting supervisory exception to Sec. 2(3), citing broad definition of "employee").

[8] 342 NLRB at 493. Under the Act, collective bargaining can never be "imposed" on employees by the Board; rather, the Act guarantees employees full freedom of choice in deciding whether or not to seek union representation, based on majority support. See National Labor Relations Act, §§1, 7, & 9, 29 U.S.C. §§151, 157, 159.

I. OVERVIEW OF PRECEDENT

A. Board precedent prior to Brown University

The Board has exercised jurisdiction over private, nonprofit universities for more than 45 years.[9] During that time, the Board has permitted collective bargaining by faculty members at private universities and has had frequent occasion to apply the Act in the university setting.[10] The Board first considered the status of graduate student assistants in *Adelphi University,* 195 NLRB 639 (1972). There, the Board held that graduate assistants should be excluded from a bargaining unit of university faculty members because they did not share a community of interest with the faculty. However, the *Adelphi* Board did not address whether the student assistants were statutory employees. Two years later, the Board held that certain university research assistants were "primarily students" and thus *not* statutory employees, observing that the relationship between the research assistants and the university was "not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer." *The Leland Stanford Junior University,* 214 NLRB 621, 623 (1974). For similar reasons, the Board dismissed representation petitions for house staff at teaching hospitals in *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976) and *St. Clare's Hospital*, 229 NLRB 1000 (1977).[11]

In *Boston Medical Center*, 330 NLRB 152 (1999), the Board overruled *Cedars-Sinai* and *St. Clare's Hospital* and held that interns, residents, and clinical fellows (house staff) at a teaching hospital were statutory employees entitled to engage in collective bargaining with the hospital over the terms and conditions of their employment. In so holding, the Board emphasized the broad scope of Section 2(3) and noted the absence of any statutory exclusion for students or house staff. And, contrary to *St. Clare's Hospital*, in *Boston Medical Center* the Board found that the policies of the Act would be advanced by extending full statutory protection to house staff.[12]

The Board first held that certain university graduate assistants were statutory employees in its 2000 decision in *NYU*, supra. In *NYU*, the Board examined the statutory language of Section 2(3) and the common law agency

[9] See *Cornell University*, 183 NLRB 329 (1970).

[10] See, e.g., *Bradford College*, 261 NLRB 565 (1982).

[11] In *St. Clare's Hospital*, the Board clarified *Cedars-Sinai*, observing that "national labor policy . . . preclude[d] the extension of collective-bargaining rights and obligations to situations such as the one" presented, which implicated predominantly academic, not economic, interests. 229 NLRB at 1002.

[12] 330 NLRB at 160.

doctrine of the conventional master-servant relationship, which establishes that such a "relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment."[13] In so doing, the Board determined that "ample evidence exists to find that graduate assistants plainly and literally fall within the meaning of 'employee' as defined in Section 2(3)" and by the common law.[14] The Board's interpretation was based on the breadth of the statutory language, the lack of any statutory exclusion for graduate assistants, and the undisputed facts establishing that the assistants in that case performed services under the control and direction of the university for which they were compensated.

The *NYU* Board also relied on *Boston Medical Center* to support its policy determination that collective bargaining was feasible in the university context.[15] In *Boston Medical Center*, the Board held that interns, residents and clinical fellows (collectively, house staff) at a teaching hospital were statutory employees entitled to engage in collective bargaining with the hospital over the terms and conditions of their employment.[16] After 16 years, *Boston Medical Center* remains good law today—with no evidence of the harm to medical education predicted by the dissenters there—but *NYU* was overruled only a few years after it was decided, by a sharply divided Board's 2004 decision in *Brown University*.

B. Brown University

In *Brown University*, the majority described *NYU* as "wrongly decided," and invoked what it called the "underlying fundamental premise of the Act," i.e. that the Act is "designed to cover economic relationships."[17] The Board further relied on its "longstanding rule" that the Board will decline to exercise its jurisdiction "over relationships that are 'primarily educational.'"[18] In so deciding, the *Brown University* majority rejected *NYU*'s reliance on the existence of a common-law employment relationship between the graduate students and the university, stating that "[e]ven assuming arguendo" such a relationship existed, "it does not follow that [the graduate assistants] are employees within the meaning of the Act."[19] That issue was "not to be decided purely on the basis of older common-law concepts," but rather by determining "whether Congress intended to cover the individual in question."[20] Disavowing the need for empirical analysis, the *Brown University* majority instead relied on what it perceived to be a fundamental tenet of the Act and a prerequisite to statutory coverage: a relationship that is *primarily* economic in character, regardless of whether it constitutes common-law employment.

In addition to its declaration that graduate assistants, as primarily students, were necessarily excluded from statutory coverage, the *Brown University* Board also articulated a policy rationale based almost exclusively on the overruled decision in *St. Clare's Hospital*, supra, finding that the *St. Clare's* Board had correctly "determined that collective bargaining is not particularly well suited to educational decisionmaking and that any change in emphasis from quality education to economic concerns will 'prove detrimental to both labor and educational policies.'"[21] That determination ostensibly was supported by several factors: (1) that the student-teacher relationship is based on mutual academic interests, in contrast to the conflicting economic interests that inform the employer-employee relationship; (2) that the educational process is a personal one, in contrast to the group character of collective bargaining; (3) that the goal of collective bargaining, promoting equality of bargaining power, is "largely foreign to higher education"; and (4) that collective bargaining would "unduly infringe upon traditional academic freedoms."[22]

The *Brown University* dissenters, in stark contrast, noted that "[c]ollective bargaining by graduate student employees" was "increasingly a fact of American university life" and described the majority's decision as "woefully out of touch with contemporary academic reality."[23] According to the dissenters, the majority had misapplied the appropriate statutory principles and erred "in seeing the academic world as somehow removed from the economic realm that labor law addresses."[24] The dissenters emphasized that the majority's decision improperly disregarded "the plain language of the statute—which defines 'employees' so broadly that graduate students who perform services for, and under the control of, their universities are easily covered" and instead chose to exclude student assistants.[25] This decision was based on "policy concerns . . . not derived from the Act at all," reflecting "an abstract view of what is best for American higher education—a subject far removed from the

[13] 332 NLRB at 1206.
[14] Id.
[15] Id.
[16] 330 NLRB at 164-65.
[17] 342 NLRB at 483, 488.
[18] Id. at 488.
[19] Id. at 491.
[20] Id., citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).
[21] Id. at 489, citing 229 NLRB at 1002.
[22] Id. at 489–490.
[23] Id. at 493 (dissent of Member Liebman and Member Walsh).
[24] Id. at 494.
[25] Id. at 493.

Board's expertise."[26] Contrary to the majority, the dissenters concluded, in line with the Board's decision in *NYU*, that the terms and conditions of graduate-student employment *were* adaptable to collective bargaining (as illustrated by experience at public-sector universities and at New York University itself) and that empirical evidence contradicted claims that "academic freedom" and educational quality were harmed by permitting collective bargaining.[27]

We believe that the *NYU* Board and the *Brown University* dissenters were correct in concluding that student assistants who perform work at the direction of their university for which they are compensated are statutory employees. That view better comports with the language of Section 2(3) of the Act and common-law agency principles, the clear policy of the Act, and the relevant empirical evidence.[28]

II. DISCUSSION

A. The Brown University *Board Erred by Determining that, as a Matter of Statutory Interpretation, Student Assistants Could Not Be Treated as Statutory Employees*

For reasons already suggested, the *NYU* Board was on very firm legal ground in concluding that student assistants could be employees of the university within the meaning of Section 2(3) of the Act, while also being students—and thus permitting collective bargaining when student assistants freely choose union representation.[29] We now reaffirm that approach. Where student assistants have an employment relationship with their university under the common law test—which they do here—this relationship is sufficient to establish that the student assistant is a Section 2(3) employee for all statutory purposes. 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.[30]

1. Section 2(3)

Section 2(3) of the Act defines "employee" to "include any employee," subject to certain specified exceptions.[31] The Supreme Court has observed that the "breadth of [Section] 2(3)'s definition is striking: the Act squarely applies to 'any employee.'"[32] The "phrasing of the Act," the Court has pointed out, "seems to reiterate the breadth of the ordinary dictionary definition" of the term, a definition that "includes any 'person who works for another in return for financial or other compensation.'"[33]

The Court has made clear, in turn, that the "task of defining the term 'employee' is one that 'has been assigned primarily to the agency created by Congress to administer the Act,'" the Board.[34]

None of the exceptions enumerated in Section 2(3) addresses students generally, student assistants in particular, or private university employees of any sort.[35] The absence of student assistants from the Act's enumeration of categories excluded from the definition of employee is itself strong evidence of statutory coverage.[36] Although Section 2(3) excludes "individuals employed . . . by any . . . person who is not an employer . . . as defined" in Section 2(2) of the Act, private universities do not fall within any of the specified exceptions, and, indeed, as previously noted, the Board has chosen to exercise jurisdiction over private, nonprofit universities for more than 45 years.[37]

The Act does not offer a definition of the term "employee" itself. But it is well established that "when Congress uses the term 'employee' in a statute that does not define the term, courts interpreting the statute 'must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning'" of the

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[26] Id. at 497.

[27] Id. at 499–500.

[28] Leading scholars of labor law have long agreed with this view. See, e.g., 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, 222 (2009) ("In *Brown*, the Board majority departed from the most relevant precedent, effectively refused to engage any available evidence, and disagreed with the dissenters and with the *New York University* decision in a way that vitiated any claim for special deference to its expertise in labor relations."). See also Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Functions and Suggestions for Reform*, 58 Duke L. J. 2013, 2076–2077 (2009).

[29] *New York University*, supra, 332 NLRB at 1206.

[30] Cf. *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995) (observing that "[i]n some cases, there may be a question about whether the Board's departure from the common law of agency with respect to particular questions and in a particular statutory context, renders its interpretation unreasonable," but finding no such issue presented because the "Board's interpretation of the term 'employee' [was] consistent with the common law"). See also *Office Employees Int'l Union, Local No. 11 v. NLRB*, 353 U.S. 313 (1957) (Board lacked discretion to refuse to assert jurisdiction over labor unions as employers, in face of clear Congressional expression in Sec. 2(2) of Act, defining "employer" to exclude "any labor organization (other than when acting as an employer)").

[31] 29 U.S.C. § 152(3).

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

[33] *Town & Country Electric*, supra, 516 U.S. at 90, quoting American Heritage Dictionary 604 (3d ed. 1992).

[34] *Sure-Tan, Inc.*, supra, 467 U.S. at 891, quoting *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130 (1944).

[35] Nor is the employee status of students mentioned anywhere else in the Act. Thus, "Congress has not directly addressed the precise question at issue" in this case. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[36] See *Sure-Tan, Inc.*, supra, at 891–892.

[37] See *Cornell University*, supra, 183 NLRB at 331–333, overruling *Trustees of Columbia University*, 97 NLRB 424 (1951).

term, with reference to "'common-law agency doctrine.'"[38] Not surprisingly, then, the Supreme Court has endorsed the Board's determination that certain workers were statutory employees where that determination aligned with the common law of agency.[39] Other federal courts have done so as well.[40] In accordance with the statute's broad definition and with the Supreme Court's approval, the Board has interpreted the expansive language of Section 2(3) to cover, for example, paid union organizers (salts) employed by a company,[41] undocumented aliens,[42] and "confidential" employees,[43] among other categories of workers.

The most notable instance in which apparent common-law employees were found *not* to be employees under the Act, in spite of the absence of an explicit statutory exclusion, is the exception that proves the rule. In *Bell Aerospace*, cited by the *Brown University* Board, the Supreme Court held that "managerial employees" were not covered by the Act because Congress had clearly implied their exclusion by the Act's design and purpose to facilitate fairness in collective bargaining.[44] As the Court concluded, giving employee status to *managers* would be contrary to this purpose: it would place managers, who would be expected to be on the side of the employer in bargaining, and non-managerial employees in the same bargaining "camp," "eviscerat[ing] the traditional distinction between labor and management."[45] The exclusion of managers rested on legislative history, along with the intrinsic purpose and structure of the Act. No legislative history supports excluding student assistants from statutory coverage, nor does the design of the Act itself.[46]

2. The *Brown* Board Did Not Adequately Consider the Text of Section 2(3)

The *Brown University* Board insisted that Section 2(3) of the Act must not be examined in isolation; rather, the Board must "look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships."[47] Certainly, the Supreme Court has suggested that, despite the centrality of common-law agency principles to employee status under the Act, "[i]n doubtful cases resort must still be had to economic and policy considerations to infuse [Section] 2(3) with meaning."[48] But we reject the *Brown University* Board's claim that finding student assistants to be statutory employees, where they have a common-law employment relationship with their university, is somehow incompatible with the "underlying fundamental premise of the Act." The Act *is* designed to cover a particular type of "economic relationship" (in the *Brown University* Board's phrase)—an employment relationship—and where that relationship exists, there should be compelling reasons before the Board excludes a category of workers from the Act's coverage.

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.[49] Indeed, in

[38] *Town & Country Electric*, supra, 516 U.S. at 94, quoting *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322–323 (1992).

[39] Id. at 94–95 (rejecting employer's argument that common law principles precluded Board's determination that paid union organizers, salts, were statutory employees, and holding that salts fell within reasonable construction of common law definition).

[40] See, e.g., *Lancaster Symphony Orchestra v. NLRB*, 822 F.3d 563 (D.C. Cir. 2016), enfg. 357 NLRB 1761 (2011) (musicians in a regional orchestra are statutory employees); *Seattle Opera v. NLRB*, 292 F.3d 757, 761–762 (D.C. Cir. 2002), enfg. 331 NLRB 1072 (2000) (opera company's auxiliary choristers are statutory employees). The Board has consistently applied common-law principles in its application of other concepts under the Act, including the Act's broad definition of an employer. See, e.g., *Browning-Ferris Industries*, 362 NLRB No. 186 (2016) (test for joint-employer status).

[41] *Town & Country Electric*, supra, 516 U.S. at 94 & 97–98 (common-law principles supported Board's construction of the term "employee" to include salts).

[42] *Sure-Tan*, supra, 467 U.S. at 892 (observing that undocumented aliens are "not among the few groups of workers expressly exempted by Congress" from the definition of "employee" and that "extending the coverage of the Act to [them] is consistent with the Act's avowed purpose of encouraging and protecting the collective-bargaining process").

[43] *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189–190 (1981).

[44] *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

[45] Id. at 284 fn. 13.

[46] Contrary to Columbia's assertion, the fact that Congress has not enacted legislation to countermand the Board's *Brown* decision carries little weight. One is not to infer legislative intent based on Congress's seeming acquiescence to an agency decision unless there is evidence that Congress actually considered the precise agency action at issue. *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 169–170, fn. 5 (2001). For this reason, we do not rely today on the fact that Congress took no action to overrule the Board's earlier decision in *NYU*.

[47] 342 NLRB at 488.

[48] *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass*, 404 U.S. 157, 168 (1971).

[49] Columbia also argues for our adoption of another, similar non-common-law standard: the "primary beneficiary" analysis used by the courts in some Fair Labor Standards Act (FLSA) cases, including cases involving the employee status of student interns. Because the FLSA definition of a statutory employee is not tethered to the common law (as the Act's definition is), and because the FLSA reflects policy goals distinct from those of the Act, we are not persuaded that the "primary beneficiary" analysis should govern this case. For the same reason, we are not persuaded by Columbia's contention that the Department of Labor's recent guidance regarding whether graduate research assistants are employees within the meaning of the FLSA bears on the separate

spite of the *Brown University* Board's professed adherence to "Congressional policies," we can discern no such policies that speak to whether a common-law employee should be excluded from the Act because his or her employment relationship co-exists with an educational or other non-economic relationship.[50] The Board and the courts have repeatedly made clear that the extent of any required "economic" dimension to an employment relationship is the payment of tangible compensation. Even when such an economic component may seem comparatively slight, relative to other aspects of the relationship between worker and employer, the payment of compensation, in conjunction with the employer's control, suffices to establish an employment relationship for purposes of the Act.[51] Indeed, the principle that student assistants may have a common-law employment relationship with their universities—and should be treated accordingly—is recognized in other areas of employment law as well.[52]

In sum, we reject the *Brown* Board's focus on whether student assistants have a "primarily educational" employment relationship with their universities.[53] The Supreme Court has cautioned that "vague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the *specific* issue under consideration."[54] The crucial statutory text here, of course, is the broad language of Section 2(3) defining "employee" and the language of Section 8(d) defining the duty to bargain collectively. It seems clear to us, then, that the Act's text supports the conclusion that student assistants who are common-law employees are covered by the Act, unless compelling statutory and policy considerations require an exception. As we explain next, the relevant considerations strongly favor statutory coverage.

B. Asserting Jurisdiction over Student Assistants Promotes the Goals of Federal Labor Policy

1. Overview of Federal Labor Policy

Federal labor policy, in the words of Section 1 of the Act, is to "encourag[e] the practice and procedure of collective bargaining," and to protect workers' "full freedom" to express a choice for or against collective-

question of whether student assistants who have a common-law employment relationship with their universities should be regarded as employees under the NLRA.

[50] Our dissenting colleague observes that an "array of federal statutes and regulations apply to colleges and universities," but he does not identify any statute or regulation that speaks directly (or even indirectly) to the key question here. That Congress is interested in supporting and regulating postsecondary education, as it surely is, does not demonstrate a Congressional view on whether or how the NLRA should be applied to student assistants.

Nor does our colleague identify any potential for conflict between the Act's specific requirements and those of federal education law—with one possible exception, related to educational records, which we address below. See fn. 93, infra. That application of the Act in some specific respect might require accommodation to another federal law cannot mean that the Board must refrain from applying the Act, at all, to an entire class of statutory employers or statutory employees. Cf. *Sure-Tan, Inc.*, supra, 467 U.S. at 89–893, 903–904 (affirming Board's holding that undocumented workers were statutory employees under NLRA, but concluding that federal immigration law precluded awarding certain remedies for periods when workers were not legally entitled to be present and employed in United States). See generally *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995) ("[W]hen two statutes are capable of co-existence … it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.") (quotations omitted).

[51] See *Town & Country Electric*, supra, 516 U.S. at 88, 95 (although chief purpose of union salts seeking employment was to organize and form a union, not to benefit economically, they were nonetheless employees as they were both paid and controlled by the company with respect to ordinary workplace duties); *Seattle Opera Assn.*, 331 NLRB 1072, 1073 (2000) (observing that while auxiliary choristers received some nonmonetary benefit in the form of personal satisfaction at their involvement in the opera, which is characteristic of a volunteer relationship, they also received monetary compensation for their effort, and this fact, along with employer control, made them employees under the Act), enfd. 292 F.3d 757 (D.C. Cir. 2002).

[52] For purposes of employment law, student assistants cannot be fairly categorized as "volunteers," rather than employees. See *Restatement of Employment Law* §1.02 ("An individual is a volunteer and not an employee if the individual renders uncoerced services to a principal without being offered a material inducement"). As the *Restatement* explains, "[w]here an educational institution compensates student assistants for performing services that benefit the institution, . . . such compensation encourages the students to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship." Id., comment g. The *Restatement* illustrates this principle with the following example:

> A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P's auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. *A is an employee of P. P is providing A with significant benefits both in order to further A's education and also to obtain A's services on P's funded research.*

Id., illustration 10 (emphasis added).

[53] The *Brown University* Board insisted that "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process" and announced that the Board would "decline to take these risks with our nation's excellent private educational system." 342 NLRB at 493. The Board's statement—coupled not only with the absence of any experiential or empirical basis for it, but also with the remarkable assertion that no such basis was required—strongly suggests that the Board acted based on little more than its own view of what was best for private universities. "No one in Congress," an academic critic of *Brown University* has written, "would have wanted the Board to determine which workers may be protected by the Act on the basis of mere suppositions without consideration of how statutory or other goals would be served in practice by exclusion or coverage." 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, 220 (2009).

[54] *Mertens v. Hewitt Associates*, 508 U.S. 248, 261 (1993) (emphasis in original).

bargaining representation. *Permitting* student assistants to choose whether they wish to engage in collective bargaining—not prohibiting it—would further the Act's policies.

Although the *Brown University* Board held that student assistants were *not* statutory employees, it also observed that, even assuming they were, the Board would have "discretion to determine whether it would effectuate national labor policy to extend collective bargaining rights" to student assistants and that, in fact, it would "*not* effectuate the purposes and policies of the Act to do so."[55] We disagree not with the claim that the Board has some discretion in this area,[56] but with the conclusion reached by the *Brown University* Board, including its view that "empirical evidence" is irrelevant to the inquiry.[57] We have carefully considered the arguments marshaled by the Board majority in *Brown University* (as well as the arguments advanced here by Columbia and supporting amici, as well as our dissenting colleague), but find that they do not outweigh the considerations that favor extending statutory coverage to student assistants.

The claims of the *Brown* majority are almost entirely theoretical. The *Brown University* Board failed to demonstrate that collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education. Labor law scholars have aptly criticized the *Brown University* decision as offering "no empirical support" for its claims, even though "those assertions are empirically testable."[58]

The National Labor Relations Act, as we have repeatedly emphasized, governs only the employee-employer relationship. For deciding the legal and policy issues in this case, then, it is not dispositive that student-teacher relationship involves different interests than the employee-employer relationship; that the educational process is individual, while collective bargaining is focused on the group; and that promoting equality of bargaining power is not an aim of higher education. Even conceded, all these points simply confirm that collective bargaining and education occupy different institutional spheres. In other words, a graduate student may be both a student *and* an employee; a university may be both the student's educator *and* employer. By permitting the Board to define the scope of mandatory bargaining over "wages, hours, and other terms and conditions of employment," the Act makes it entirely possible for these different roles to coexist—and for genuine academic freedom to be preserved. It is no answer to suggest, as the *Brown University* Board did, that permitting student assistants to bargain over their terms and conditions of employment (no more and no less) somehow poses a greater threat to academic freedom than permitting collective bargaining by non-managerial faculty members, "[b]ecause graduate student assistants are students."[59] That the academic-employment setting poses special issues of its own—as the Board and the Supreme Court have both recognized[60]—does not somehow mean that the Act cannot properly be applied there at all.

2. Applying the Act to Student Assistants Would Not Infringe upon First Amendment Academic Freedom

The *Brown University* Board endorsed the view that "collective bargaining would unduly infringe upon traditional academic freedoms," citing the "right to speak freely in the classroom" and a list of "traditional academic decisions" including "course length and content, standards for advancement and graduation, [and] administration of exams."[61] Insofar as the concept of academic freedom implicates the First Amendment, the Board certainly must take any such infringement into account.[62] But there is little, if any, basis here to conclude that treating employed graduate students as employees under the Act would raise serious constitutional questions, much less violate the First Amendment.

The Supreme Court has made clear that academic freedom, in the constitutional sense, involves freedom from government efforts "to control or direct the *content*

[55] 342 NLRB at 492 (emphasis added).

[56] However, in exercising this discretion, we tread carefully and with an eye toward the Act's purposes. In *Northwestern University*, 362 NLRB No. 167 (2015), we denied the protections of the Act to certain college athletes—without ruling on their employee status—because, due to their situation within and governance by an athletic consortium dominated by public universities, we found that our extending coverage to them would not advance the purposes of the Act. Here, conversely, we have no reason to believe that extending bargaining rights will not meaningfully advance the goals of the Act.

[57] 342 NLRB at 492–493.

[58] Catherine L. Fisk & Deborah C. Malamud, *The NLRB in Administrative Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 Duke L. J. 2013, 2076–2077 (2009).

[59] 342 NLRB at 490 fn. 26.

[60] See *NLRB v. Yeshiva University*, 444 U.S. 672, 680-681 (1980), citing *Syracuse University*, 204 NLRB 641, 643 (1973) (permitting law school faculty to vote separately from other university faculty members on questions of representation, based on divergent professional interests). In *Syracuse University*, the Board observed that in the "academic world," the "basic interests recognized by the Act remain the same, but their interrelationship, the employer-employee relationship, and even the employee-employee relationship, does not squarely fit the industrial model." 204 NLRB at 643.

[61] 342 NLRB at 490, citing *St. Clare's Hospital*, supra, 229 NLRB at 1003.

[62] Cf. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (declining to construe Act as authorizing Board to exercise jurisdiction over lay faculty members at church-related schools, given serious First Amendment questions potentially raised).

of the speech engaged in by the university or those affiliated with it."[63] No such effort is involved here. Neither the *Brown University* majority, nor the parties or amici in this case, have explained how the "right to speak freely in the classroom" (in the *Brown University* Board's phrase) would be infringed by collective bargaining over "terms and conditions of employment" for employed graduate students, as the Act envisions.[64]

Further, the Supreme Court has explained that "[a]lthough parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of 'wages, hours, and other terms and conditions of employment.'"[65] Defining the precise contours of what is a mandatory subject of bargaining for student assistants is a task that the Board can and should address case by case.[66] That approach will permit the Board to consider any genuine First Amendment issues that might actually arise—in a concrete, not speculative, context.[67]

In upholding that Board's authority to exercise jurisdiction over faculty members at private universities—provided that they are statutory employees—the Supreme Court has implicitly rejected the view that some undefined need to preserve academic freedom overrides that policies of the Act. In *Yeshiva University*, supra, the Court found that the full-time university faculty members there—whose "authority in academic matters [was] absolute"[68]—were excluded from the Act's coverage, as managerial employees, on that basis. But the Court also observed that not all university faculty members will be managerial employees and that "professors may not be excluded [from statutory coverage] merely because they determine the content of their own courses, evaluate their own students, and supervise their own research."[69] If the *Brown University* Board's broad view of academic freedom were correct, then it seems highly unlikely that the *Yeshiva* Court could have contemplated collective bargaining by university professors (as, indeed, the Board has permitted for many years[70]) in the face of such an obvious constitutional obstacle.

3. Empirical Evidence and the Board's Experience Indicate That It Is Appropriate for the Board to Exercise Jurisdiction over Student Assistants

If, historically, the Board had permitted student assistants to engage in collective bargaining, and if actual experience over the years had demonstrated both that collective bargaining rarely proved beneficial to students and that it seriously harmed the ability of private universities to function effectively, *then* perhaps the Board would have had grounds for deciding that the Act cannot productively be applied in the university setting. But that is not the case, because collective bargaining by student assistants at private universities is historically uncommon. Neither administrative experience nor empirical evidence supported the *Brown University* Board's determination that extending statutory protection to student assistants would be detrimental to the educational process.

It is telling, moreover, that the *Brown University* Board gave no weight at all to the analogous experience of public universities with collective bargaining by student assistants or to private universities' experience with faculty bargaining, subjects we turn to below. The experience of student assistant collective bargaining at public universities provides no support for the fearful predictions of the *Brown University* Board. In the words of one scholar, "[t]here appear to be no major disasters that have arisen because of [graduate-student] unions," and examples of collective bargaining in practice "appear to demonstrate that economic and academic issues on campus can indeed be separated."[71]

[63] *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990) (emphasis in original) (rejecting university's First Amendment challenge to EEOC investigative subpoena under Title VII, seeking materials related to faculty-member tenure review process alleged to be discriminatory).

[64] National Labor Relations Act, §8(d), 29 U.S.C. §158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession.").

[65] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674–675 (1981) (footnotes omitted).

[66] In this situation, as with other aspects of labor law, the "'nature of the problem, as revealed by unfolding variant situations,' requires 'an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer.'" *Eastex, Inc. v. NLRB, 437 U.S. 556, 575 (1978),* quoting *Electrical Workers v. NLRB, 366 U.S. 667, 674 (1961)*.

[67] In *Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937), which involved the discriminatory discharge of an editorial employee, the Supreme Court upheld Board jurisdiction over a news-gathering organization, despite arguments that it would violate the First Amendment freedom of the press. The Court found that Board's reinstatement order "in nowise circumscribe[d]" the First Amendment rights of the Associated Press, observed that the "publisher of a newspaper has no special immunity from the application of general laws," and rejected the contention that because "regulation in a situation not presented would be invalid," the Board could not exercise jurisdiction at all.

[68] 444 U.S. at 686.

[69] Id. at 690, fn. 31.

[70] See, e.g., *Bradford College*, 261 NLRB 565 (1982). See also *Pacific Lutheran University*, 361 NLRB No. 157 (2014).

[71] Judith Wagner DeCew, *Unionization in the Academy: Visions and Realities* 98 (2003). See also Josh Rinschler, *Students or Employees? The Struggle over Graduate Student Unions in America's Private Colleges and Universities*, 36 J. College & University L. 615, 639–640

Here, Columbia, its supporting amici, and our dissenting colleague defend the *Brown University* decision, echoing the claim that permitting collective bargaining by student assistants will harm the educational process. These arguments are dubious on their own terms. 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.

As the *Brown University* dissenters observed, "[c]ollective bargaining by graduate student employees is increasingly a fact of American university life."[72] Recent data show that more than 64,000 graduate student employees are organized at 28 institutions of higher education, a development that began at the University of Wisconsin at Madison in 1969 and that now encompasses universities in California, Florida, Illinois, Iowa, Massachusetts, Michigan, Oregon, Pennsylvania, and Washington.[73] At these universities, to be sure, collective bargaining is governed by state law, not by the National Labor Relations Act.[74] Even so, the experience with graduate-student collective bargaining in public universities is of relevance in applying the Act, as the closest proxy for experience under the Act.[75]

By way of example, as AFT notes in its amicus brief, the University of Illinois, Michigan State University, and Wayne State University include language in their graduate-assistant collective-bargaining agreements giving management defined rights concerning courses, course content, course assignments, exams, class size, grading policies and methods of instruction, as well as graduate students' progress on their own degrees.[76] This is not to suggest a prescription for how individual collective-bargaining agreements should resolve matters related to the protection of academic freedom and educational prerogatives. Rather, these agreements show that parties can and successfully have navigated delicate topics near the intersection of the university's dual role as educator and employer.

Other scholars, whose studies were cited in the *Brown University* dissent,[77] confirm that view. Based on their survey-based research of public universities, they reject the claim, for example, that collective bargaining will harm mentoring relationships between faculty members and graduate students.[78] More recent survey-based research found "no support" for the contentions that graduate student unionization "would harm the faculty-student relationship" or "would diminish academic freedom," and observed that "[d]espite the NLRB's focus on the potential negative effects on academic outcomes, graduate students themselves have likely been more concerned with the basic terms and conditions of employment."[79] Although Columbia presented the testimony of an academic economist to address this study, its expert simply maintained that the study could not "rule out harm or benefit" to the faculty-student relationship from collective bargaining. When the best analytical evidence offered by Columbia suggests merely that neither harm nor benefit from collective bargaining can be ruled out, the dire predictions of the *Brown University* Board are undercut.

(2010) ("[E]vidence from public institutions as well as from NYU during the period it had a graduate student union, suggests that unionization does not result in the sky falling.").

[72] 342 NLRB at 493 (dissent of Members Liebman and Walsh). The dissenters cited a body of scholarly literature examining this development. Id. at fn. 1. See Neal H. Hutchens & Melisa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 Gonzaga L. Rev. 105, 106–107 (2004); Daniel J. Julius & Patricia J. Gumport, *Graduate Student Unionization: Catalysts and Consequences*, 26 Review of Higher Education 187, 191–196 (2002); Grant M. Hayden, *"The University Works Because We Do": Collective Bargaining Rights for Graduate Assistants*, 69 Fordham L. Rev. 1233, 1236–1243 (2001). See also DeCew, supra, *Unionization in the Academy* at 89-110.

[73] J. Berry & M. Savarese, *Directory of U.S. Faculty Contracts and Bargaining Agents in Institutions of Higher Education* (2012). See also Daniel J. Julius & Nicholas DiGiovanni, Jr., *Academic Collective Bargaining: On Campus Fifty Years*, Center for Studies in Higher Education, Research & Occasional Paper Series: CSHE 4.13 at 5 (April 2013), available at www.cshe.berkeley.edu/publications.

[74] Sec. 2(2) of the Act excludes "any State or political subdivision thereof" from the definition of "employer." 29 U.S.C. §152(2).

[75] Cf. *Management Training Corp.*, 317 NLRB 1355, 1357 (1995) (holding that Board will exercise jurisdiction over employers without considering extent of their control over purely economic terms and conditions of employment and citing "successful and effective bargaining" in public sector "where economic benefits play a small role").

[76] Agreement by and between the Board of Trustees of the University of Illinois and Graduate Employees' Organization IFT/AFT 6300 (August 16, 2012—August 15, 2017), available at http://www.ahr.illinois.edu/geo.pdf; Collective Bargaining Agreement between Michigan State University and The Graduate Employees Union, Local 6196, AFT-Michigan/AFL–CIO (May 2015—May 2019), available at https://www.hr.msu.edu/documents/contracts/GEU2015-2019.pdf; Collective Bargaining Agreement between Wayne State University and The Graduate Employees Organizing

Committee, AFT (May 2015—February 2018), available at http://provost.wayne.edu/pdf/geoc_contract_2015–2018_w_toc.pdf.

[77] 342 NLRB at 499-500.

[78] Julius & Gumport, supra, *Graduate Student Unionization: Catalysts and Consequences*, 26 Review of Higher Education at 201, 209; Gordon J. Hewitt, *Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students*, 29 J. Collective Negotiations in the Public Sector 153, 159–164 (2000).

[79] Sean E. Rogers, Adrienne E. Eaton, and Paula B. Voos, *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom, and Pay*, 66 Industrial & Labor Relations Rev. 487, 507 (2013).

Columbia and supporting amici point to a few individual examples arising from the 28 public universities and 64,000 represented public university student assistants, along with NYU on the private side, in which, they contend, collective bargaining by student assistants has proven detrimental to the pursuit of the school's educational goals. They note the occurrences of strikes and grievances over teaching workload and tuition waivers. Similarly, they point to grievances over classroom assignments and eligibility criteria for assistantships. But labor disputes are a fact of economic life—and the Act is intended to address them.

Columbia and its supporting amici suggest that collective-bargaining demands would interfere with academic decisions involving class size, time, length, and location, as well as decisions concerning the formatting of exams. They also worry that disputes over whether bargaining is required for such issues may lead to protracted litigation over the parties' rights and obligations as to a given issue, for example, over the propriety of a university's change in class or exam format, thus burdening the time-sensitive educational process. However, to a large extent, the Board's demarcation of what is a mandatory subject of bargaining for student assistants, and what is not, would ultimately resolve these potential problems.[80] Moreover, there is no good reason to doubt that unions and universities will be able to negotiate contract language to delineate mutually satisfactory boundaries of their respective rights and obligations.[81] Indeed, faculty members have successfully negotiated collective-bargaining agreements that address terms and conditions of employment at private universities while contractually ensuring academic freedom for decades.[82]

The notion that the parties themselves can resolve, through the bargaining process, many of the latent conflicts suggested by Columbia and amici (as well as by our dissenting colleague)—and hence forge successful bargaining relationships—is not a theoretical one. The experience at New York University is a case in point. Even after *Brown University* issued, NYU continued—after a brief interruption—to voluntarily recognize its graduate assistants union and successfully negotiated collective-bargaining agreements with that union.

Both the original and successor agreements at NYU addressed such matters as stipends, pay periods, discipline and discharge, job posting, a grievance-and-arbitration procedure, and health insurance—nearly all familiar mandatory subjects of bargaining across the private sector, which appear to have been successfully adapted to a university setting.[83] The agreements also incorporate a "management and academic rights" clause, which would tend to allay fears that collective bargaining will attempt to dictate academic matters.[84] In the most recent agreement, in effect from September 1, 2014, to August 31, 2020, the clause preserved the university's right to "determine . . . qualifications . . . and assignment of graduate employees; to determine the processes and criteria by which graduate employees' performance is evaluated; . . . to schedule hours of work; . . . to determine how and when and by whom instruction is delivered; . . . to introduce new methods of instruction; . . . and to exercise sole authority on all decisions involving

[80] Indeed, decisions concerning management's right to control its fundamental operations and to produce a product of its choosing are issues of concern to manufacturing employers as well. Collective bargaining does not limit such a management right normally, unless the parties consent to it. See *First National Maintenance v. NLRB*, 452 U.S. 666, 677–679 (1981). However, in a common feature of collective bargaining across economic sectors, employers must, and do, routinely address incidental operational impacts based on their agreements with unions. For example, an employer chooses the amount and type of product it produces, but an employer must bargain about employees' hours of work and must operate within whatever work-hours constraint it agrees to.

[81] Notably, the NYU graduate assistants union, voluntarily recognized by that university after the Board overruled its *NYU* decision, has given the university control over academic matters in the parties' collective-bargaining agreement.

[82] As AAUP notes in its amicus brief, many of its unionized faculty chapters' collective-bargaining agreements expressly refer to and quote the AAUP's *1940 Statement of Principles on Academic Freedom and Tenure*, which provides a framework that has proven mutually agreeable to many unions and universities. See *1940 Statement of Principles on Academic Freedom and Tenure*, available at https://www.aaup.org/file/1940%20Statement.pdf.

[83] The evidence all seems to suggest that the bread-and-butter economic concerns reflected in the NYU collective-bargaining agreement are what drive American graduate students to seek union representation. See, e.g., Julius & Gumport, supra, *Graduate Student Unionization: Catalysts and Consequences*, 26 Review of Higher Education at 196 ("[D]ata show that the unionization of these individuals is driven fundamentally by economic realities."); Gerrilynn Falasco & William J. Jackson, *The Graduate Assistant Labor Movement, NYU and Its Aftermath: A Study of the Attitudes of Graduate Teaching and Research Assistants at Seven Universities*, 21 Hofstra Labor & Employment L. J. 753, 800 (2004) ("Overwhelmingly, the respondents from the seven universities surveyed indicated that the most important issues to them were wages and health insurance").

[84] Collective-Bargaining Agreements between NYU and International Union, UAW, AFL-CIO and Local 2110, Technical Office and Professional Workers, UAW, Sept. 1, 2001-Aug. 31, 2005, and Sept. 1, 2014-Aug. 31, 2020, Art. XXII. See *Brown University*, supra, 342 NLRB at 499 (dissent) (discussing agreement). The cited clause would seem to confirm the view of one scholar that the "historical development of professional norms of academic freedom creates a strong potential for faculty and GAs [employed graduate students] to find common interests in carrying out the core functions of the university." Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 Cornell J. L. & Public Policy 263, 326 (2007) (discussing events at Cornell).

academic matters . . . decisions regarding who is taught, what is taught, how it is taught and who does the teaching."[85]

Moreover, to the extent disputes nonetheless do arise, the process of resolving such disputes over the boundaries of parties' rights and obligations is common to nearly all collective-bargaining contexts in which management seeks to act in some way it believes is important to its business, including critical sectors such as national security and national defense. Not long after *Brown University* was decided, for example, the Board observed that "for over 60 years, in times of both war and peace, the Board has asserted jurisdiction over employers and employees that have been involved in national security and defense," and that the Board could "find no case in which our protection of employees' Section 7 rights had an adverse impact on national security or defense."[86] Similarly, in the acute care hospital sector, the *Boston Medical Center* Board, supra, recognized house staff at teaching hospitals as statutory employees, and the Board's experience since that decision has provided no support for one dissenting member's prediction that "American graduate medical education [would] be irreparably harmed"[87] if the Board asserted jurisdiction over house staff.

These critical sectors have proven able to effectively integrate collective bargaining, with its occasional disputes and attendant delays, into their modes of doing business. We have no reason to doubt that the higher-education sector cannot do the same. Indeed, some of the practical concerns raised by Columbia and amici seem to be generic complaints about the statutory requirements inherent in a collective-bargaining relationship, rather than education-specific concerns. For example, it is posed as problematic by amici that a university may have to bargain, at least as to effect, over the elimination of assistantship positions. However, bargaining over staffing levels is a core concern of employees, and standard fare for collective bargaining. Fulfilling one's obligation to bargain about job loss or staffing levels, or the effects thereof, has not proven unduly burdensome to countless other unionized workplaces.[88] Similarly, Columbia and amici, as well as our dissenting colleague, also raise the specter of strikes (and lockouts), and the impact they might have on the educational trajectory of students and on their considerable investment in their education; but the problems raised by strikes are common to nearly all industries in which the Board accords employees bargaining rights.[89]

Moreover, we cannot give credence to the dissent's speculation that, among other things, the provisions of the Act might negatively interfere with university confidentiality practices or standards of decorum, for example by authorizing abusive language by student assistants directed against faculty. The Act's provisions pertaining to document production and the boundaries of protected conduct are, and always have been, contextual. The Board evaluates such claims in light of workplace standards and other relevant rules and practices.

Moreover, while focusing on a few discrete problems that may arise in bargaining—without considering the likelihood that they would both actually occur and not be amenable to resolution by bargaining partners acting in good faith—Columbia and amici neglect to weigh the

[85] We recognize that part of the ostensible reason NYU decided to withdraw recognition from its union of student assistants was the recommendations of two university committees, which cited the union's filing of grievances that were perceived as threatening to undercut NYU's academic decisionmaking. We need not decide whether this perception was accurate or whether it would hold true over time and at other universities where student assistants organized. That employees may invoke their Sec. 7 rights to a greater or lesser degree has no bearing on whether the Act should be interpreted to grant them those rights. We note, in any case, that the NYU collective-bargaining relationship was new, that the collective-bargaining agreement was untested, and that ultimately the university appears to have prevailed in grievance-arbitration proceedings in its assertion of its academic prerogatives.

[86] *Firstline Transportation Security*, 347 NLRB 447, 453 (2006) (rejecting argument that Board should decline to assert jurisdiction over privately-employed airport security screeners, on national-security grounds).

[87] *Boston Medical Center*, supra, 330 NLRB at 182.

[88] See, e.g., *St. Anthony Hospital Systems*, 319 NLRB 46, 47 & 50 (1995) (discussing a hospital's duty to bargain with nurses' union over staffing levels).

[89] Strikes may affect the operations of an employer—especially in industries where the provision of goods and services may be time-sensitive. However, these already include many sectors where collective bargaining has long been a staple of workplace life, such as those involving caring for hospital patients, maintaining critical infrastructure, publishing newspapers, unloading billions of dollars in overseas freight, and teaching students in college or pre-college settings (as in the case of unionized faculty in private schools). In all of these situations, strikes pose the possibility of a disruption with significant costs, given the value and/or time-sensitivity of the goods and services involved. Yet, the Act permits collective bargaining in these sectors; and indeed, employers have incorporated the risks of economic conflict into their negotiation strategies and modes of doing business. The Board's experience demonstrates that parties grasp the seriousness of recourse to economic weapons, and do not do so lightly or without the conviction that their position is worth fighting for. There is no reason to set universities apart, where the Act otherwise points toward coverage.

Our dissenting colleague points to the potential for unique consequences to student assistants in the event of a work stoppage, such as loss of academic credit and tuition waivers. As we have noted, the Act permits collective bargaining—and permits parties to decide for themselves what risks to take—even where there is a potential for economic disruption. However, to the extent a work stoppage cannot be avoided, parties will frequently resolve a strike or lockout on terms that address questions pertaining to vested rights and other such matters that arose because of the work stoppage.

possibility of any *benefits* that flow from collective bargaining, such as those envisioned by Congress when it adopted the Act. In this connection, it is worth noting that student assistants, in the absence of access to the Act's representation procedures and in the face of rising financial pressures, have been said to be "fervently lobbying their respective schools for better benefits and increased representation."[90] The eagerness of at least some student assistants to engage in bargaining suggests that the traditional model of relations between university and student assistants is insufficiently responsive to student assistants' needs. That is not to say collective bargaining will necessarily be a panacea for such discontent, but it further favors coverage by the Act, which was designed to ameliorate labor unrest.[91]

Finally, we disagree with the suggestion of our dissenting colleague that the Act's procedures are ill suited here, because student assistants have finite terms and because the academic world may experience a fast pace of development in fields of study, and thus because, in the time it takes for the Board to resolve a question arising under the Act, there may be significant turnover or other changes involving affected employees. It goes without saying that the resolution of cases under the Act, both representation and unfair labor practice cases, before the Board and the courts can be time-consuming. However, this is simply not a basis on which to deny the Act's protections to student assistants. The alternative—to deny coverage because of the effects of procedural delays—would seem to countenance the denial of the Act's coverage to large groups of employees whose tenures are short or industries where there is a rapid pace of change.[92]

In sum, there is no compelling reason—in theory or in practice—to conclude that collective bargaining by student assistants cannot be viable or that it would seriously interfere with higher education. We have put suppositions aside today and have instead carefully considered the text of the Act as interpreted by the Supreme Court, the Act's clearly stated policies, the experience of the Board, and the relevant empirical evidence drawn from collective bargaining in the university setting. This is not a case, of course, where the Board must accommodate the National Labor Relations Act with some other federal statute related to private universities that might weigh against permitting student assistants to seek union representation and engage in collective bargaining. Finding student assistants to be statutory employees, and permit-

[90] David Ludwig, *Why Graduate Students of America Are Uniting*, The Atlantic, available at http://www.theatlantic.com/education/archive/2015/04/graduate-students-of-the-world-unite/390261/. See also Rachel Bernstein, *Ivy League Graduate Students Push for Unionization*, Science, available at http://www.sciencemag.org/careers/2015/04/ivy-league-graduate-students-push-unionization ("Graduate students' concerns include inadequate health insurance, high prices for dependent coverage on student health insurance policies, and insufficient child care and family leave support."). Indeed, some scholarship suggests that universities are actively seeking to derive greater profit from instructional and research activities, and to lower their teaching costs. Such endeavors—to lower labor costs to increase profit—are hallmarks of the sort of economic dynamic in which, historically, employees' bargaining rights have played an important countervailing role. See generally *The Corporatization of Higher Education*, 39 Monitor on Psychology 50 (2008), available at http://www.apa.org/monitor/2008/12/higher-ed.aspx.

[91] Indeed, it is important to note the policy judgment embodied in the Act: that collective bargaining can help avert workplace unrest that may occur in the absence of a process for employees to choose representation, bargain collectively, and resolve disputes peacefully. See *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 488 (1960) (good-faith bargaining "may narrow the issues, making the real demands of the parties clearer to each other, and perhaps to themselves, and may encourage an attitude of settlement through give and take."). The Act is designed to lessen conflict by channeling disputes into structured negotiations and reflects the judgment of Congress that collective bargaining, with its occasional attendant workplace conflicts such as strikes and lockouts, is a right to be accorded broadly and across many industries.

It is noteworthy that at NYU, graduate assistants struck after the Board reversed its *NYU* decision and the school withdrew recognition from their union. Without the protection of the Act, student assistants lacked recourse to the orderly channels of bargaining and instead chose to resort to more a disruptive means of resolving their dispute with the University.

[92] In cases involving seasonal workplaces or those with significant turnover, the Board has held elections even though, when there have been employer challenges, bargaining may not begin until well after the election. In this connection, the Board generally presumes that new employees support the union in the same proportion as those who voted. See generally *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 779 (1990). Otherwise, it would be difficult for employees in any workplace with high turnover to ever achieve representation, because the nature of administrative adjudication, as well as the provision of due process to an employer's challenges to certification may delay a final ruling on certification. Conversely, when an employer's operation is seasonal in nature or otherwise involves peaks and valleys in employment, the Board retains the discretion to adjust the election date to ensure that a representative group of employees will be able to express their choice concerning representation. See, e.g., *Tusculum College*, 199 NLRB 28, 33 (1972) (adjusting date of election to the beginning of the fall semester to ensure that a representative complement of the petitioned-for faculty would have an opportunity to express their wishes).

In unfair labor practice cases, remedies are commonly applied after affected individuals have ceased working for an employer. But remedies are tailored to address the violation of the Act relative to the context in which they are applied. Backpay or other monetary remedies may still be appropriate even after an individual is no longer in an employment relationship with a respondent. Other remedies, such as in a bad-faith bargaining case, involve the unit as a whole, and thus may be implemented in the future, notwithstanding the turnover of individual employees. Notice-posting requirements ensure that future complements of employees are aware of any violations and provide assurances that the violations will not continue in the future.

ting them to seek union representation, does not conflict with any federal statute related to private universities, as far as we can discern. Certainly the *Brown University* Board cited no statutory conflict, nor have the parties and amici in this case.[93] Our conclusion is that affording student assistants the right to engage in collective bargaining will further the policies of the Act, without engendering any cognizable, countervailing harm to private higher education.

Accordingly, we overrule *Brown University* and hold that student assistants who have a common-law employment relationship with their university are statutory employees entitled to the protections of the Act.

[93] Where a party does not actually raise a supposed conflict between the Act and another federal statute, the Board is not required to consider the issue. *Can-Am Plumbing, Inc.*, 350 NLRB 947, 947–948 (2007). For his part, our dissenting colleague takes us to task for failing to accommodate the Act with the "broad range of federal statutes and regulations [that] apply to colleges and universities," which "govern, among other things, the accreditation of colleges and universities, the enhancement of quality, the treatment of student assistance, graduate/postsecondary improvement programs, and the privacy of student records." But our colleague does not explain how any one of these education statutes and regulations bears on the specific issue posed in this case or how the Board should accommodate the Act to them—short of not applying our statute at all to student assistants. That alternative, of course, is disfavored, unless a conflict between two federal statutes is truly irreconcilable. See *Lewis v. Epic Systems Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016) (rejecting asserted conflict between NLRA and Federal Arbitration Act). There is no such conflict here, as we have already explained. See fn. 50, supra.

That an industry or economic sector is governed in certain respects by other federal laws, in addition to being covered by the NLRA, cannot mean that the Board must determine, in the abstract, whether the general policies of those other laws might be better accomplished if the Act did *not* apply, notwithstanding the absence of any exemption from coverage in the statutory text or the legislative history. It is far too late in the day—45 years after the Board's decision in *Cornell University*, supra—to argue that the Act cannot safely be applied to private universities. The supposed conflicts our colleague conjures would seem to arise, for example, in cases where the Board applies the Act to university faculty members, but there is no suggestion in our case law that an actual conflict has ever arisen (or even been raised by a university employer).

Our colleague identifies *one* specific, potential conflict between the NLRA and federal education law related to the disclosure of educational records, where Sec. 8(a)(5) of the Act, which grants unions the right to information necessary for carrying out their collective-bargaining duties, conceivably could require a disclosure that the Family Educational Rights and Privacy Act (FERPA) might otherwise prohibit. Any such conflict can and should be addressed in the particular factual setting in which it arises. Suffice it to say that the Act recognizes that a union's right to information may, in a particular context, be subordinated to a legitimate confidentiality interest. See, e.g., *Olean General Hospital*, 363 NLRB No. 62, slip op. at 7–8 (2015) (considering state laws protecting patient confidentiality). See generally *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979).

III. APPLICATION TO THIS CASE

We now apply our holding to the facts of this case. For the reasons that follow, we conclude (1) that all of the petitioned-for student-assistant classifications consist of statutory employees; (2) that the petitioned-for bargaining unit (comprising graduate students, terminal Master's degree students, and undergraduate students) is an appropriate unit; and (3) that none of the petitioned-for classifications consists of temporary employees who must be excluded from the unit by virtue of the limited length of their employment.

A. Statement of Facts

Columbia is a nonprofit postsecondary educational institution located in New York City. Columbia's major sources of annual revenue include tuition (net revenue of $940 million in 2015, nearly a quarter of operating revenue) and government contracts and grants ($750 million).[94]

Graduate students at Columbia are selected by the faculty of the academic departments into which they are accepted on the basis of academic performance, as demonstrated by educational background and standardized test scores. In general, Ph.D. candidates spend five to nine years of study within their discipline, during which they take coursework, as well as prepare a doctoral thesis, that the candidates develop with guidance of faculty or in connection with their laboratory work. During their enrollment, candidates are subject to various academic requirements, including timely progress toward a thesis and proficiency in coursework. Most Ph.D. candidates are required to take on teaching duties for at least one semester as part of their academic requirements, although many departments require additional semesters of teaching as a condition for obtaining a degree.[95]

Columbia fully funds most Ph.D. student assistants, typically providing tuition and a stipend, for at least their

[94] See Consolidated Financial Statements, The Trustees of Columbia University in the City of New York, available at http://finance.columbia.edu/files/gateway/content/reports/financials2015.pdf. Tuition and government grants are the second and third largest revenue streams. Columbia, which operates a hospital, earned the most revenue, approximately $1 billion, from patient care.

A substantial portion of the tuition revenue comes from students in graduate and professional programs, including law and business. However, the approximately 8500 undergraduates at Columbia, paying approximately $25,000 in base tuition per semester, generate about $376 million in tuition revenue, of which only $148 million is offset by grant aid from Columbia. See Columbia University, Institutional Grant Aid by School, 2014–2015, available at http://www.columbia.edu/cu/opir/abstract/opir_institutional_grant_aid_1.htm.

[95] There is some variation as to the specifics of degree program requirements and the nature of student assistant duties across schools and programs at Columbia.

first 5 years of study. In most students' second through fourth year, taking on teaching or research duties is a condition for full receipt of such funding. For most Ph.D. candidates, the first and fifth years are funded without a condition of service. In students' sixth year and beyond, teaching-based support may be available. Research-based financial support, unlike teaching support, frequently comes in whole or in part from sources outside the University. Grants from government or other outside entities, generally to support a specified research task, often cover research assistants' financial awards. However, the University will make up any shortfall if outside grants provide a level of funding that falls below the standard graduate funding package.

Terminal Master's degree students (as opposed to those who earn the degree as an intermediate step toward earning a Ph.D.) typically earn their degrees in shorter time periods and do not prepare a thesis. They receive very little financial aid, although some take on teaching duties for which they receive compensation.

The nature of teaching duties for a teaching assistantship varies. Columbia's teaching assistants, known as Instructional Officers, fall into various subsidiary categories, which involve varying levels of discretion and involvement in course design. Undergraduate, Master's degree, and Ph.D. student assistants can all serve in teaching assistant roles, with some similarities in their duties, although Ph.D. teaching assistants may take on the most advanced duties. Notably, some Instructional Officers teach components of the core curriculum, which is Columbia's signature course requirement for all undergraduate students regardless of major. Instructional Officers generally work up to 20 hours per week, and they are typically appointed for one or two semesters at a time.

Instructional Officers include the specific classifications of Teaching Fellows and Teaching Assistants. Teaching Fellows are doctoral students in the Graduate School of Arts and Sciences, while Teaching Assistants may be either doctoral or Master's degree students and perform similar functions outside the Graduate School of Arts and Sciences. Teaching Fellows and Teaching Assistants spend 15–20 hours a week undertaking a wide range of duties with respect to a course. Their duties may include grading papers and holding office hours, leading discussion or laboratory sessions, or assuming most or all the teaching responsibilities for a given course. Columbia maintains other, specialized teaching-assistant funding as well. Instructional officers who participate in the Teaching Scholars Program, a category that includes Ph.D. students who are somewhat advanced in their studies, teach courses that they have designed for undergraduates in their junior or senior years. Undergraduates serve in the Teaching Assistant III classification. They are responsible for grading homework and running laboratory or problem sections that are ancillary to large classes within the School of General Studies and Columbia College.

The category of Instructional Officers also includes classifications of Preceptors and Readers (sometimes referred to as "Graders"). Preceptors are graduate assistants who teach significant undergraduate courses with high levels of independence. These positions are generally available only to graduate students far along in their studies because they require the highest level of teaching ability. Preceptors hold office hours, design and grade all exams and assignments in their courses, and assign final grades to their students. Readers/Graders are Master's degree students who are appointed to grade papers under the direction of a course instructor. Finally, Course Assistants, who are not Instructional Officers and do not receive semester-long appointments, assist faculty with administering classes by performing clerical tasks that may include proctoring exams, printing and collecting homework, answering students' questions, and occasionally grading assignments.

Research Officers generally participate in research funded by outside entities. The research grants specify the nature of the research and the duties of the individuals working on the grant. The revenue from the grant beyond the amounts allotted to research assistantships goes to Columbia's general operating expenses. Graduate Research Assistants in Ph.D. programs must both comply with the duties specified by the grant and simultaneously carry out research that they will ultimately present as part of their thesis.[96] Departmental Research Assistants, by contrast, are Master's degree students and are appointed and funded by the University and provide research assistance to a particular department or school within the University.

Teaching and research occur with the guidance of a faculty member or under the direction of an academic department. In the teaching context, poor performance by an instructional officer is addressed through remedial training, although in one instance poor performance resulted in the University's removal of a student's teaching duties, and the cancellation of his stipend.

B. Application of the Revised Section 2(3) Analysis

For the reasons that follow, we conclude that the petitioned-for student-assistant classifications in this case[97]

[96] Training grant recipients are subject to slightly different conditions, and are discussed below.

[97] As reflected in its petition, the Union here seeks to represent:

comprise statutory employees: individuals with a common-law employment relationship with Columbia University. At the hearing before the Regional Director, Columbia seemingly conceded[98] that, if the Board were to adopt the common-law test, the petitioned-for individuals—with the exception of students operating under training grants—were employees under the Act. In its brief to the Board on review, however, Columbia argues that research assistants are not common-law employees, citing the Board's decision in *Leland Stanford*, supra. With respect to teaching assistants, Columbia confines itself to arguing that the common-law test should not be the standard of statutory employment (a position we have rejected). Below, we begin by examining the common-law employment status of Columbia's student assistants generally. We then address arguments specific to the status of Columbia's research assistants and overrule *Leland Stanford* because its reasoning cannot be reconciled with the general approach we adopt today.

1. Instructional Officers[99]

Common-law employment, as noted above, generally requires that the employer have the right to control the employee's work, and that the work be performed in exchange for compensation.[100] That is the case here.

Here, the University directs and oversees student assistants' teaching activities. Indeed, the University possesses a significant interest in maintaining such control, as the student assistants' work advances a key business operation of the University: the education of undergraduate students. The record shows that teaching assistants who do not adequately perform their duties to the University's satisfaction are subject to corrective counseling or removal.

Instructional officers receive compensation in exchange for providing services to the University. Receipt of a full financial award is conditioned upon their performance of teaching duties. When they do not perform their assigned instructional duties, the record indicates they will not be paid. For instance, after one assistant, Longxi Zhao, was removed from his teaching assistantship, his stipend was cancelled. In his termination letter, the University indicated that, "[T]his termination is effective immediately. As a result, you will no longer receive a salary for this position." This letter, in connection with the explicit conditioning of awards on performance of teaching duties, demonstrates that the University offers student assistants stipends as consideration for fulfilling their duties to perform instructional services on the University's behalf.

Although the payments to Ph.D. student assistants may be standardized to match fellowship or other non-work based aid, these payments are not merely financial aid. Students are required to work as a condition of receiving this tuition assistance during semesters when they take on instructional duties, and such duties confer a financial benefit on Columbia to offset its costs of financial aid, even if it chooses to distribute the benefit in such a way that equalizes financial aid for both assistants and non-assistant students. Indeed, in semesters where a student assistant would normally be required to work as a condition of funding, he or she may opt not to work only if he or she finds a source of outside fellowship aid. Also, the stipend portion of the financial package given to assistants is generally treated as part of university payroll and is subject to W-2 reporting and I-9 employment verification requirements.

Even though it is unnecessary to delve into the question of whether the relationship between student assistants and their universities is primarily economic or educational—we have overruled the *Brown University* standard—the facts in this case do not suggest a primarily educational relationship, but rather, simply point to the

> All student employees who provide instructional services, including graduate and undergraduate Teaching Assistants (Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers and Graders): All Graduate Research Assistants (including those compensated through Training Grants) and All Departmental Research Assistants employed by the Employer at all of its facilities, including Morningside Heights, Health Sciences, Lamont-Doherty and Nevis facilities.

[98] At the hearing, Columbia's counsel stated, "If the Board finds that students who provide services to their institutions are employees based on common law test of employment, if you will, then our position would be that the graduate research assistants and the teaching assistants would be considered employees and part of an appropriate bargaining unit, but that the students on training grants are simply not employees because they're not employed in a University position, that they're simply supported by the Government to be students and they don't provide a service to the University."

[99] This category encompasses the Teaching Assistants, Teaching Fellows, Preceptors, and Readers/Graders named in the petition. Course assistants, a classification named in the petition, do not appear to be Instructional Officers and are not appointed on a semester-long basis. The increments of their employment—they may work in less-than-semester-long intervals—may raise questions about their eligibility. However, we leave such determinations to the Regional Director in determining an eligibility formula (as we discuss, infra) in the first instance.

[100] See, e.g., *Seattle Opera*, supra, 292 F.3d at 762 ("[T]he person asserting statutory employee status [under the Act] *does* have such status if (1) he works for a statutory employer in return for financial or other compensation … and (2) the statutory employer has the power or right to control and direct the person in the material details of how such work is to be performed.") (emphasis in original). Accord *Restatement of Employment Law* §1.02 (2015) ("Where an educational institution compensates student assistants for performing services that benefit the institution . . . such compensation encourages the student to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship").

difficulty of the analytical exercise required by the prior approach.

While overlooked by the *Brown University* Board, there is undoubtedly a significant economic component to the relationship between universities, like Columbia, and their student assistants. On average, private nonprofit colleges and universities generate a third of their revenue from tuition, and 13 percent from government grants, contracts and appropriations.[101] Columbia, for example, generates nearly a billion dollars in annual tuition revenue and over a half-million in government grants and contracts.[102]

Teaching assistants frequently take on a role akin to that of faculty, the traditional purveyors of a university's instructional output. The teaching assistants conduct lectures, grade exams, and lead discussions. Significant portions of the overall teaching duties conducted by universities are conducted by student assistants. The delegation of the task of instructing undergraduates, one of a university's most important revenue-producing activities, certainly suggests that the student assistants' relationship to the University has a salient economic character.

While Columbia's pool of student assistants consists of enrolled students who were selected based on the University's academic admissions process, this fact is not inconsistent with an economic relationship. Students pre-selected for their academic proficiency would naturally tend to constitute a labor pool geared toward the endeavor of teaching or researching in a university setting, and their usage as instructors and researchers achieves the efficiency of avoiding a traditional hiring process for these jobs.[103]

And, the fact that teaching may be a degree requirement in many academic programs does not diminish the importance of having students assist in the business of universities by providing instructional services for which undergraduate students pay tuition.[104] Indeed, the fact that teaching assistants are thrust wholesale into many of the core duties of teaching—planning and giving lectures, writing exams, etc., including for such critical courses as Columbia's Core Curriculum—suggests that the purpose extends beyond the mere desire to help inculcate teaching skills.

We have no difficulty, then, in finding that all of the petitioned-for classifications here comprise statutory employees—with the possible exception of research assistants. That issue, as we explain next, is more complicated in light of Board precedent.

2. Student Research Assistants

As indicated, Columbia argues that student research assistants have no common-law employment relationship with the University. It relies on *Leland Stanford*'s determination that certain externally-funded research assistants were not employees.[105] That holding was later applied by the *NYU* Board in finding that some research assistants in that case were not statutory employees, even as it reversed the overall exclusion of student assistants from the Act's protections.[106] Applying our holding today regarding the employment status of student assistants, we find that core elements of the reasoning in *Leland Stanford* are no longer tenable. We further find that, under the common-law test discussed in our decision today, research assistants at Columbia are employees under the Act.

In *Leland Stanford*, the student research assistants received external funding to cover their tuition while they essentially went about pursuing their own individual ac-

[101] See National Center for Education Statistics, *Postsecondary Revenues by Source*, available at http://nces.ed.gov/programs/coe/pdf/Indicator_CUD/coe_cud_2015_06.pdf.

[102] See Consolidated Financial Statements, The Trustees of Columbia University in the City of New York, available at http://finance.columbia.edu/files/gateway/content/reports/ financials2015.pdf.

[103] The claim that universities could more inexpensively hire adjunct faculty to perform the duties also does not establish that the relationship is primarily educational. Indeed, it is unclear that using students in these roles is more costly to a university. As previously noted, a university that makes use of an existing pool of student labor garners the efficiency benefit of avoiding costly labor searches. Moreover, the financial packages offered to graduate students are dictated in part by the need to be competitive with other schools also seeking to attract top graduate students. Although it may pay student assistants more compensation than it would need to pay to attract an employee hired on the open market, a university also receives the benefit of making itself more attractive in recruiting graduate students. Compensation to a student assistant is offset, then, by the benefits of hiring students. Thus, because it fails to account for all the benefits that accrue to a university by using its graduate students to fill assistantships, the argument that student assistants are more costly to a university than an employee hired in the free market is not self-evidently true.

[104] As the American Association of University Professors, an organization that represents professional faculty—the very careers that many graduate students aspire to—states in its brief, teaching abilities acquired through teaching assistantships are of relatively slight benefit in the attainment of a career in higher education. While the evidence does suggest that graduate research assistantships dovetail more strongly with the career/educational goals of graduate students than teaching assistantships, it is by no means clear that education overshadows economics in the case of research assistants either.

[105] Supra, 214 NLRB at 623.

[106] See *NYU*, supra, 332 NLRB at 1209 fn.10, citing *Leland Stanford*, supra ("[W]e agree that the Sackler graduate assistants and the few science department research assistants funded by external grants are properly excluded from the unit [because] [t]he evidence fails to establish that the research assistants perform a service for the Employer and, therefore, they are not employees as defined in Section 2(3) of the Act.").

ademic goals in a manner of their own choosing. They were not subject to discharge for failure to perform satisfactory work, but would at worst receive a non-passing grade for their coursework. Further, the Board concluded, the award the research assistants received was not correlated to the nature or quantum of services they rendered. The Board also contrasted the student research assistants with non-student research associates who were employees. The student researchers received none of the fringe benefits that these non-student employee research associates received. And these non-student research associates already had their academic degrees, were under the direction of their department, and were subject to discharge.

In view of these facts, the *Stanford* Board found that the externally-funded research assistants were "primarily students," and concluded that their relationship with the university was not one of employment because it was "not grounded on the performance of a specific task where both the task and the time of its performance is designated and controlled by an employer [but] [r]ather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary."[107]

Leland Stanford thus, in many respects, focused upon the absence of the common-law features of employment of the externally-funded research assistants. It contrasted the research assistants with non-student, employee research associates who worked under the direction of their department, and it noted that the work performed by the externally-funded research assistants was largely done at the students' own discretion and for their own benefit. It also observed that these student research assistants could not be disciplined in a traditional sense. Their researcher status, and presumably their aid award, was not terminable based on a failure to meet any obligations of the grant, undermining a claim that the aid was compensation.

However, the *Leland Stanford* decision arguably suggested that the mere fact that the performance of a task that advanced a student's personal educational goals could negate an employment relationship. It described the status of the research assistants as akin to "the situation of all students," who work on academic projects, and suggested the importance of the fact that they were "simultaneously students" as well as researchers.[108] Because *Leland Stanford* thus relied in part on the existence of a student relationship in determining employee status, rather than determining whether a common-law relationship existed, we now overrule it, alongside *Brown University*, as inconsistent with the approach adopted today, which better reflects the language and policies of the Act.[109]

The premise of Columbia's argument concerning the status of its research assistants is that because their work simultaneously serves both their own educational interests along with the interests of the University, they are not employees under *Leland Stanford*. To the extent Columbia's characterization of *Leland Stanford* is correct, we have now overruled that decision. We have rejected an inquiry into whether an employment relationship is secondary to or coextensive with an educational relationship. For this reason, the fact that a research assistant's work might advance his own educational interests as well as the University's interests is not a barrier to finding statutory-employee status.[110]

Nonetheless, it remains the case that if a student research assistant is not an employee under the common-law test, we would not normally find the assistant to be an employee under the Act. But there is nothing about the nature of student-assistant research that would automatically imply an absence of the requisite control under the common-law test. It is theoretically possible that funders may wish to further a student's education by effectively giving the student unconditional scholarship aid, and allowing the student to pursue educational goals without regard to achieving any of the funder's own particular research goals. But where a university exerts the requisite control over the research assistant's work, and specific work is performed as a condition of receiving the financial award, a research assistant is properly treated as an employee under the Act.

The research assistants here clearly fall into this latter category of common-law employees. The research of Columbia's student assistants, while advancing the assistants' doctoral theses, also meets research goals associated with grants from which the University receives substantial income.[111] The research assistants here work under the direction of their departments to ensure that

[107] 214 NLRB at 623.
[108] Id.

[109] Our dissenting colleague contends that the longstanding nature of the Board's *Leland Stanford* precedent favors leaving its holding—that research assistants are not statutory employees—untouched. However, as we have already explained, we believe that the better view is that student assistants, including research assistants, should be regarded as employees under the Act.

[110] In this respect, our decision is entirely consistent with other employee-status decisions under the Act involving individuals who work, at least in part, to advance personal interests. See fn. 39–41, supra.

[111] One can conceive of countless employment situations where the employee gains personally valuable professional experience and skills while simultaneously performing a valuable service for his or her employer.

particular grant specifications are met. Indeed, another feature of such funding is that the University typically receives a benefit from the research assistant's work, as it receives a share of the grant as revenue, and it is relieved of any need to find other sources of funding for graduate students under a research grant; thus it has an incentive to ensure proper completion of the work in accordance with the grant. Further, a research assistant's aid package requires fulfillment of the duties defined in the grant, notwithstanding that the duties may also advance the assistant's thesis, and thus the award is compensation. Students, when working as research assistants, are not permitted to simply pursue their educational goals at their own discretion, subject only to the general requirement that they make academic progress, as they would be in semesters where they were under some form of financial aid other than a research grant.[112]

The funding here is thus not akin to scholarship aid merely passed through the University by a grantor without specific expectations of the recipients. Because Columbia directs the student research assistants' work and the performance of defined tasks is a condition of the grant aid, we conclude that the research assistants in this case are employees under the Act.[113]

Columbia argues that, even if research assistants generally are common-law employees, the research assistants funded by a specific form of grants known as *training grants* present unique circumstances and lack the characteristics of common-law employment. However, the record shows that Columbia, which receives revenue from these training grants, is charged with ensuring that research assistants thereunder receive appropriate training within a formalized program (consistent with the funder's goal of having a well-trained workforce in biomedical and behavioral research), and accordingly it oversees and directs the research assistants who receive the grants. Additionally, research assistants often receive funds from research and training grants simultaneously. Further, participation in specific training activities is a requirement for receipt of training grants; thus, notwithstanding the grantor's statement that the grant aid is not salary, it is a form of compensation.

C. Student Assistants in the Petitioned-for Unit Share a Community of Interest

We now turn to the question of whether the petitioned-for unit is a unit appropriate for collective bargaining. Columbia argues that the petitioned-for unit is inappropriate because it groups undergraduate and Master's degree student assistants together in the same unit with Ph.D. assistants. According to Columbia, differences in pay and benefits, duties, and remunerative interests demonstrate the absence of a community of interest. We disagree.

The first and central right that Section 7 of the Act grants employees is "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing . . . ." Section 9(b) provides that "[t]he Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." As recognized by the Supreme Court, Section 9(a) "suggests that employees may seek to organize 'a unit' that is 'appropriate'—not necessarily *the* single most appropriate unit."[114] In other words, "[m]ore than one appropriate bargaining unit logically can be defined in any particular factual setting."[115]

In making the determination of whether the proposed unit is *an* appropriate unit, the Board's "focus is on whether the employees share a 'community of interest.'"[116] In determining whether employees in a proposed unit share a community of interest, the Board examines:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employ-

[112] *Stanford* found that the fact that the university equalized financial packages for research assistants and other graduate students suggested that funding for research assistants was financial aid and not compensation. 214 NLRB at 622. As previously discussed, we do not believe that Columbia's practice to distribute the benefits it receives from student-assistant labor, in order to equalize aid packages, demonstrates that funding for an assistantship is not compensation, given that the research work assigned in a given semester is a requirement for receipt of aid.

[113] Indeed, in *NYU*, the Board upheld the Regional Director's determination that those research assistants who were "assigned specific tasks and . . . [who] work[ed] under the direction and control of the faculty member," were employees eligible for inclusion in the unit. See *NYU*, supra, 332 NLRB at 1221 fn.51.

[114] *American Hospital Assn.,* 499 U.S. 606, 610 (1991) (emphasis in original). See also *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 942 (2011), enfd. 727 F.3d 552 (6th Cir. 2013).

[115] *Country Ford Trucks, Inc. v. NLRB,* 229 F.3d 1184, 1189 (D.C. Cir. 2000) (quoting *Operating Engineers Local 627 v. NLRB,* 595 F.2d 844, 848 (D.C. Cir. 1979)).

[116] *Specialty Healthcare*, supra, 357 NLRB at 942, quoting *NLRB v. Action Automotive, Inc.,* 469 U.S. 490, 491 (1985).

ees; have distinct terms and conditions of employment; and are separately supervised.[117]

Further, to honor the statutory command to maximize employees' freedom in choosing a representative, the Board has held that a petitioner's desire concerning the unit "is always a relevant consideration."[118] Although Section 9(c)(5) of the Act provides that "the extent to which the employees have organized shall not be controlling," the Supreme Court has made clear that the extent of organization may be "consider[ed] . . . as one factor" in determining if the proposed unit is an appropriate unit.[119] We thus consider the unit expressed in the petition to be a factor, although not a determinative one.

In *Specialty Healthcare and Rehabilitation Center of Mobile*,[120] the Board held that a unit is appropriate if the employees in the proposed unit constitute a readily identifiable grouping and share a community of interest. Here, the proposed unit consists of a readily identifiable grouping of employees: all student employees who provide instructional services and all research assistants at Columbia University's campuses. We further find that the employees in the unit share a community of interest and agree with the Regional Director who, in concluding the unit was appropriate, found substantial similarities among the types of work of all the student assistants in the proposed unit. She noted that they work in similar settings (in labs and classrooms at the same university) and serve similar functions with respect to the University's fulfillment of its teaching and research mission. Thus, the petitioned-for unit of student assistants performing instructional services and research services provide supplemental educational services to the faculty and the University and therefore constitute a readily identifiable grouping of employees within the University's operations that share a community of interest.

While Columbia argues that there are some dissimilarities, such as differences in the difficulty and independence of work assignments, as well as in pay and benefits, among the categories of student assistants, we find that—although there might potentially be other appropriate unit groupings among these student assistants—the petitioned-for classifications share a sufficient community of interest to form *an* appropriate unit. We note that all of the student assistants here are performing a supplemental educational service. That is, their duties are functionally integrated into a system designed to meet the university's teaching and research missions in non-faculty roles. Although some of the assistantships undertaken by Ph.D. students may involve advanced duties, in many cases their roles are similar to those of Master's and undergraduate assistants who fill related positions. And even when the Ph.D. assistants take on more advanced roles, there is often still an overlap of job duties with Master's and undergraduate student assistants.[121]

Further, all student assistants work under the direction of the University. Most are appointed on a semester-long basis and are paid in part through a tuition remission and in part via a bimonthly stipend. Although it is the contention of our dissenting colleague that the "broad array" of employees within the unit militates against its appropriateness, we note that the Act countenances broad units where there are factors establishing a community of interest. For example, the Board has held, consistent with the Act's text, that similarly situated employees can form an appropriate employer-wide unit.[122] We find under these circumstances that differences in level and type of compensation[123] and some differences in the nature of work assignments, do not negate the shared community of interest of employees in the petitioned-for unit, given the many other relevant similarities.

Columbia also argues that, because they are in shorter-term degree programs geared toward rapid graduation and job-market entry, Master's and undergraduate student assistants are less likely to be concerned with issues of housing costs, quality of health care, and availability of dependent health coverage. Assuming the veracity of Columbia's speculation regarding Master's and undergraduate students' likely priorities, it is nonetheless the case that classifications in a unit need not have complete identity of interests for the unit to be appropriate. While Master's and undergraduate assistants may, arguably,

[117] *Specialty Healthcare*, supra, 357 NLRB at 942 (quoting *United Operations, Inc.,* 338 NLRB 123, 123 (2002)).

[118] *Marks Oxygen Co.,* 147 NLRB 228, 230 (1964).

[119] *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 442 (1965).

[120] 357 NLRB at 946.

[121] Notably, a Columbia Vice-Provost testified to "considerable similarity" between the teaching duties of a Master's degree teaching assistant and a Ph.D. appointed as a teaching fellow, ostensibly a higher-difficulty position. The record also indicates that, while Ph.D. assistants take on the most advanced and independent teaching assignments, there are various types of discrete teaching duties, such as grading and leading discussion sections, that are performed by both undergraduate/Master's student assistants and Ph.D. assistants.

[122] Sec. 9(b) provides, inter alia, that: "The Board shall decide in each case whether . . . the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." 29 U.S.C. 159(b). See also *Hazard Express, Inc.*, 324 NLRB 989 (1997) (finding appropriate a unit including "drivers, dockworkers, and helpers and excluding clericals); *Jackson's Liquors*, 208 NLRB 807, 808 (1974) ("not[ing] that the employerwide unit, being one of the units listed in the Act as appropriate for bargaining, is presumptively appropriate").

[123] See *Los Angeles Water & Power Employees' Assn.*, 340 NLRB 1232, 1236 (2003) (difference in pay not controlling as to unit determination in light of other similarities); *Four Winds Services*, 325 NLRB 632, 632 (1998) (same).

have some different priorities from those of Ph.D. assistants, there are also overarching common interests. For most student assistants, there will be a shared desire to successfully balance coursework with job responsibilities, as well as a shared desire to mitigate the tuition and opportunity costs of being a student. Additionally, all student assistants are likely to share a desire to address policies affecting job postings, pay periods, stipend disbursement, and personal health insurance coverage. Student assistants also have common interests in developing guidelines for discipline and discharge and establishing a grievance-and-arbitration procedure. While Ph.D. assistants, as longer-term students, may be somewhat more concerned with certain types of remuneration, such as housing subsidies, their interests are certainly not at odds with those of the shorter-term employees. Indeed the unit's overarching interest in addressing issues pertaining to one's simultaneous employment and enrollment as a student provides ample basis on which to pursue a common bargaining agenda.

Therefore, applying traditional community of interest factors to these facts, we conclude that the petitioned-for unit is an appropriate unit.[124]

D. None of the Petitioned-for Classifications Contain Temporary Employees Who Must Be Excluded From the Unit

Columbia argues that certain classifications must be excluded from the unit because they comprise temporary employees, who may not be included in the unit. We reject this argument.

In its analysis of whether an employee should be excluded from a unit as a "temporary employee," the Board focuses on "the critical nexus between an employee's temporary tenure and the determination whether he shares a community of interest with the unit employees."[125] To determine whether an alleged temporary employee shares a community of interest, the Board examines various factors, including "whether or not the employee's tenure is finite and its end is reasonably ascertainable, either by reference to a calendar date, or the completion of a specific job or event, or the satisfaction of the condition or contingency by which the temporary employment was created."[126]

However, the determination is not based on the nature of an employee's tenure in a vacuum; rather, the nature of the alleged temporary employees' employment must be considered relative to the interests of the unit as a whole. The practice of excluding temporary employees from a unit merely recognizes that, "as a general rule," employees of a defined, short tenure are "likely" to have divergent interests from the rest of the unit.[127]

Here, Columbia argues that undergraduate and terminal Master's assistants in the petitioned-for unit are "temporary" in the sense that they are employed for relatively short, finite periods of time, averaging only about two (not necessarily continuous) semesters of work. However, all the employees in this unit, which we find to be an appropriate, serve finite terms. Although the Ph.D. student assistants typically serve for the longest periods, all the classifications perform similar duties in (not necessarily continuous) semester increments.[128] Thus, in some sense, one could argue that all the student assistants here are temporary. Yet the Board has made clear that finite tenure alone cannot be a basis on which to deny bargaining rights, because "[i]n many employment relationships, an employee may have a set tenure and, in that sense, may not have an indefinite departure date . . . . To extend the definition of 'temporary employee' to [all] such situations, however, would be to make what was intended to be a limited exception swallow the whole."[129] Therefore we must look beyond the finite tenure of the student assistants at issue, and consider whether and to what extent their tenure affects their community of interest with the unit or their ability to engage in meaningful bargaining.[130]

Further, we find that Master's and undergraduate student assistants' relatively short tenure, within the context of this unit, does not suggest a divergence of interests that would frustrate collective bargaining.[131] In *Manhat-*

[124] We stress that the bargaining relationship here pertains only to undergraduates' employment relationship and does not interfere with any other role the university may play with respect to students' academic or personal development. Since undergraduate student assistants share a community of interest with the other student assistants, they are appropriately included in the same unit.

[125] *Marian Medical Center*, 339 NLRB 127, 128 (2003).

[126] Id.

[127] Id.

[128] Indeed, to exclude Master's and undergraduate student assistants here who share a community of interest with the unit as a whole might undercut the integrity of the overall bargaining unit, because these employees perform not-readily differentiable work compared to Ph.D. student assistants, and thus could easily be utilized as substitutes for bargaining unit employees. See generally *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263, 263 (2001) (temporary employees who worked work side-by-side at same jobs under same supervision as other employees were properly included in unit).

[129] *Boston Medical*, supra, 330 NLRB at 166.

[130] To the extent that cases like *San Francisco Art Institute*, 226 NLRB 1251 (1976), suggest that the mere fact of being a *student* in short-term employment with one's school renders one's interests in the employment relationship too "tenuous," such cases are incompatible with our holding here today and are overruled.

[131] This case is distinguishable from *Goddard College*, 216 NLRB 457, 458 (1975), cited by the dissent. In that case there was a significant difference in employment expectations between the visiting pro-

tan College, 195 NLRB 65, 65–66 (1972), the Board found that faculty members on terminal contracts shared a community of interest with their colleagues for the duration of their employment and were therefore properly included in a faculty bargaining unit.[132] The Board has never held that, regardless of community of interest with the broader unit, arguably temporary employees should be denied bargaining rights altogether.[133] If, under the specific circumstances of a case, alleged temporary employees possess a sufficient interest in bargaining over terms and conditions of employment to allow for successful and stable collective bargaining on their behalf, they are permitted to bargain collectively within an appropriate unit.[134]

Here, even the Master's and undergraduate student assistants typically serve more than one semester—and thus their tenure is not so ephemeral as to vitiate their interest in bargaining over terms and conditions of employment. Indeed, a semester at Columbia is not some insignificant or arbitrary period of time spent performing a task, but rather it constitutes a recurring, fundamental unit of the instructional and research operations of the University. And notwithstanding the length of any individual assistant's tenure, the University will continuously employ groups of Master's and undergraduate student assistants to perform research and instructional duties across semesters (and, although the precise composition of these groups will differ from semester to semester, there will typically be some individual student assistants who are carried over from one semester to another).[135] Because the University's employment of Master's and undergraduate student assistants is regularly recurring, with some carryover between semesters, and their individual tenures are neither negligible nor *ad hoc*, we believe that as a group, they, together with the Ph.D. assistants, form a stable unit capable of engaging in meaningful collective bargaining.[136]

Accordingly, we find that none of the petitioned-for classifications consists of temporary employees who should be excluded from the unit by virtue of their finite tenure of employment.

E. Voting Eligibility Formula

There remains the issue of which of the employees in the petitioned-for unit—some of whom, on account of intermittent semester appointments, may not be eligible to vote under the Board's traditional eligibility date approach—should nonetheless be permitted to vote because of their continuing interest in the unit. In this connection, although it does not fully address the eligibility question, the Petitioner has suggested in its brief that student assistants who have been appointed for at least one semester should be deemed eligible.

We observe that the unique circumstances of student assistants' employment manifestly raise potential voter eligibility issues. The student assistants here tend to work for a substantial portion of their academic career, but not necessarily in consecutive semesters; thus, during any given semester, individuals with a continuing interest in the terms and conditions of employment of the unit may not be working. The Board has long recognized that certain industries and types of employment, particularly those with patterns of recurring employment, may necessitate rules governing employee eligibility. The Board

fessors, who typically worked at the university less than a year, and tenured faculty. The question there was whether it would be appropriate to combine individuals with a long-term relationship to an employer with those whose long-term interests lay elsewhere. Here, as we have noted, all the employees—both the allegedly temporary Master's and undergraduate assistants, as well as the Ph.D. assistants—serve finite periods in semester increments, during which they perform similar services to the University. Further, as student assistants working during academic semesters, they will share common interests in addressing issues unique to their status, such as those involving the balancing of work and academic obligations. See *Goucher College*, 364 NLRB No. 71, slip op. at 2 & fn. 7 (2016) (finding that terminal-appointment faculty should be included in unit because they share a community of interest with nontenure faculty "that is more significant than whether or not they have a reasonable expectation of reappointment"). Also, unlike the visiting faculty in *Goddard*, most student assistants possess a long-term goal of achieving employment elsewhere, as opposed to cultivating a permanent relationship with the University.

[132] See also *Rensselaer Polytechnic Institute*, 218 NLRB 1435, 1437 (1975).

[133] See *Kansas City Repertory Theatre*, 356 NLRB 147, 147 (2010) ("The logical consequence of the Employer's argument is that temporary or intermittent employees cannot exercise the rights vested in employees by Section 9 of the Act. However, no such exclusion appears in the definition of employees or elsewhere in the Act.").

[134] See *Manhattan College*, supra, at 65–66.

[135] We are not, as the dissent suggests, establishing a special rule for student assistants. Rather, we are applying relevant principles concerning the establishment of units of employees, including some with relatively short, finite tenures, to the particular circumstances of student assistants. The question we must ask before denying a category of employees the right to bargain collectively is whether their tenure precludes meaningful bargaining. Otherwise, to deny bargaining rights merely because one has a short tenure, would be antithetical to the Act. The evidence here indicates that meaningful bargaining is possible within such a unit. Notably, student assistant collective bargaining at public universities sometimes involves units of students without exclusions based on expected duration of employment; yet there is no evidence that this has proven an impediment to effective bargaining. See, e.g., Collective Bargaining Agreement between Michigan State University and The Graduate Employees Union, Local 6196, AFT-Michigan/AFL–CIO (May 2015—May 2019), supra.

[136] Cf. *Kelly Bros. Nurseries*, 140 NLRB 82, 85 (1962) (category of seasonal employees properly included in a bargaining unit where the employer relied on these employees to serve over recurring production seasons, and where there was some employee holdover from season to season).

attempts to strike a balance between the need for an ongoing connection with a unit and concern over disenfranchising voters who have a continuing interest notwithstanding their short-term, sporadic, or intermittent employment.[137] Setting such rules on a pre-election basis by use of eligibility formulas also serves the efficiency goal of avoiding protracted post-election litigation over challenges to individual voters.

Such eligibility formulas attempt to include employees who, despite not being on the payroll at the time of the election, have a past history of employment that would tend to signify a reasonable prospect of future employment.[138] We have traditionally devised these formulae by examining the patterns of employment within a job or industry, and determining what amount of past employment serves as an approximate predictor of the likelihood of future employment.

For example, in a case involving adjunct faculty, the Board noted the importance of "prevent[ing] an arbitrary distinction" which disenfranchises employees with a continuing interest in their employment within the unit but who happen not to be working at the time of the election.[139] In the particular circumstances of that case, the Board looked at factors including whether adjuncts had signed teaching contracts and the extent to which they had actually taught over previous semesters.[140]

Here, the record contains data concerning the average number of semesters worked relative to a student assistant's time enrolled at the University, as well as data concerning typical patterns of work over the academic career of a Ph.D. student assistant. But neither the Regional Director nor the parties have specifically addressed what an appropriate formula would be under these circumstances. Having determined the appropriate unit, we therefore remand this case and instruct the Regional Director to take appropriate measures, including reopening the record, if necessary, to establish an appropriate voting eligibility formula.

ORDER

The Regional Director's Decision is reversed. The proceeding is remanded to the Regional Director for further appropriate action consistent with this Decision and Order.

Dated, Washington, D.C. August 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues decide that college and university students are "employees" for purposes of collective bargaining under the National Labor Relations Act (NLRA or Act) when serving in a variety of academic assistant positions. An assortment of student positions are involved here: the petitioned-for bargaining unit includes all "student employees" who engage in "instructional services," including "graduate and undergraduate Teaching Assistants," "Teaching Fellows," "Preceptors," "Course Assistants," "Readers," and "Graders," plus "Graduate Research Assistants" and "Departmental Research Assistants." No distinctions are drawn based on subject, department, whether the student must already possess a bachelor's or master's degree, whether a particular position has other minimum qualifications, whether graduation is conditioned on successful performance in the position, or whether different positions are differently remunerated. As a result of today's decision, all of these university student assistant positions[1] are made part of a single, expansive, multi-faceted bargaining unit.

I believe the issues raised by the instant petition require more thoughtful consideration than the Board majority's decision gives them. In particular, my colleagues

[137] See *Steiny & Co.*, 308 NLRB 1323, 1325 (1992); *Trump Taj Mahal Casino*, 306 NLRB 294 (1992).

[138] See *Trump Taj Mahal Casino*, supra, 306 NLRB at 296 (reiterating Board's obligation to be "flexible in . . . devis[ing] formulas . . . to afford employees with a continuing interest in employment the optimum opportunity for meaningful representation").

[139] *C.W. Post Center*, 198 NLRB 453, 454 (1972).

[140] Id. See also *Steiny*, supra, 308 NLRB at 1326 (articulating formula for construction work that accounts for non-continuous work patterns).

[1] For ease of reference, I use the terms *college* and *university* interchangeably. For the same reason, I use the term *student assistants* to refer to all types of students encompassed within the petitioned-for bargaining unit—i.e., all "student employees" who engage in "instructional services," including "graduate and undergraduate Teaching Assistants," "Teaching Assistants," "Teaching Fellows," "Preceptors," "Course Assistants," "Readers," and "Graders," as well as "Graduate Research Assistants" and "Departmental Research Assistants."

disregard a fundamental fact that should be the starting point when considering whether to apply the NLRA to university students. Full-time enrollment in a university usually involves one of the largest expenditures a student will make in his or her lifetime, and this expenditure is almost certainly the most important financial investment the student will ever make. In the majority of cases, attending college imposes enormous financial burdens on students and their families, requiring years of preparation beforehand and, increasingly, years of indebtedness thereafter. Many variables affect whether a student will reap any return on such a significant financial investment, but three things are certain: (i) there is no guarantee that a student will graduate, and roughly 40 percent do not;[2] (ii) college-related costs increase substantially the longer it takes a student to graduate, and roughly 60 percent of undergraduate students do not complete degree requirements within four years after they commence college;[3] and (iii) when students do not graduate at all, there is likely to be no return on their investment in a college education.[4]

I respect the views presented by my colleagues and by advocates on all sides regarding the issues in this case. However, Congress never intended that the NLRA and collective bargaining would be the means by which students and their families might attempt to exercise control over such an extraordinary expense. This is not a commentary on the potential benefits associated with collective bargaining in the workplace. Rather, it is a recognition that for students enrolled in a college or university, their instruction-related positions do not turn the academic institution they attend into something that can fairly be characterized as a "workplace." For students, the least important consideration is whether they engage in collective bargaining regarding their service as research assistants, graduate assistants, preceptors, or fellows, which is an incidental aspect of their education. If one regards college as a competition, this is one area where "winning isn't everything, it is the only thing," and I believe winning in this context means fulfilling degree requirements, hopefully on time.[5]

The Board has no jurisdiction over efforts to ensure that college and university students satisfy their postsecondary education requirements. However, Congress has certainly weighed in on the subject: an array of federal statutes and regulations apply to colleges and universities, administered by the U.S. Department of Education, led by the Secretary of Education. My colleagues disregard the Board's responsibility to accommodate this extensive regulatory framework. In addition, I believe collective bargaining and, especially, the potential resort to economic weapons protected by our statute fundamentally change the relationship between university students, including student assistants, and their professors and academic institutions. Collective bargaining often produces short-term winners and losers, and a student assistant in some cases may receive some type of transient benefit as a result of collective bargaining pursuant to today's decision. Yet there are no guarantees, and they might end up worse off. Moreover, I believe collective bargaining is likely to detract from the far more important goal of completing degree requirements in the allotted time, especially when one considers the potential consequences if students and/or universities resort to economic weapons against one another. I also believe that the Board's processes and procedures are poorly suited to deal with representation and unfair labor practice cases involving students. Add these up, and the sum total is uncertainty instead of clarity, and complexity instead of

[2] U.S. Department of Education, National Center for Education Statistics (NCES), *The Condition of Education 2016*, Undergraduate Retention and Graduation Rates (excerpted at https://nces.ed.gov/fastfacts/display.asp?id=40) (last visited Aug. 5, 2016). The NCES reports that the "6-year graduation rate for first-time, full-time undergraduate students who began their pursuit of a bachelor's degree at a 4-year degree-granting institution in fall 2008 was 60 percent. That is, 60 percent of first-time, full-time students who began seeking a bachelor's degree at a 4-year institution in fall 2008 completed the degree at that institution by 2014." Id.

[3] Dr. Peter Cappelli, *Will College Pay Off?*, p. 18 (Public Affairs 2015) (hereinafter "Cappelli"). See also Complete College America, *Four-Year Myth: Make College More Affordable—Restore the Promise of Graduating on Time*, pp. 4, 6 (2014) (http://completecollege.org/wp-content/uploads/2014/11/4-Year-Myth.pdf) (reporting that only 36 percent of students attending flagship 4-year college bachelor degree programs graduate on time); Danielle Douglas-Gabriel, *Why So Many Students Are Spending Six Years Getting a College Degree*, Washington Post, Dec. 2, 2014 (https://www.washingtonpost.com/news/wonk/wp/2014/12/02/why-so-many-students-are-spending-six-years-getting-a-college-degree/) (last visited Aug. 5, 2016).

[4] University coursework may result in various personal benefits even if students fail to earn a degree. However, there is little doubt that the financial return on the investment required to attend college requires graduation. See, e.g., Cappelli, p. 48 ("The biggest cost associated with going to college, though, is likely to be the risk that a student does not graduate on time or, worse, drops out altogether. There is virtually no payoff from college if you don't graduate.").

[5] The expression "winning isn't everything, it's the only thing" is commonly attributed to legendary football coach Vince Lombardi, who was the head coach for the Green Bay Packers from 1959 to 1967. However, it appears to have been originated by Henry Russell (Red) Sanders, who was the head coach of the University of California, Los Angeles (UCLA) Bruins football team from 1949 to 1957. See Wikipedia, Winning isn't everything; it's the only thing (https://en.wikipedia.org/wiki/Winning_isn%27t_everything;_it%27s_the_only_thing) (last visited Aug. 5, 2016). Red Sanders also referred to the rivalry between UCLA and the University of Southern California (USC) and famously stated: "Beating [USC] is not a matter of life or death, it's more important than that." Id.

simplicity, with the risks and uncertainties associated with collective bargaining—including the risk of breakdown and resort to economic weapons—governing the single most important financial decision that students and their families will ever make.

For these reasons, I agree with former Member Brame, who stated that the Board resembles the "foolish repairman with one tool—a hammer—to whom every problem looks like a nail; we have one tool—collective bargaining—and thus every petitioning individual looks like someone's 'employee.'" *Boston Medical Center Corp.,* 330 NLRB 152, 182 (1999) (Member Brame, dissenting). Accordingly, as explained more fully below, I respectfully dissent.

DISCUSSION

The Board here changes the treatment that has been afforded student assistants throughout the Act's history of 80 years, with the exception of a four-year period that was governed by the Board's divided opinion in *New York University* (*NYU*).[6] Prior to *NYU*, the Board in *Adelphi University*[7] and *The Leland Stanford Junior University*[8] held that various student assistants could not be included in petitioned-for units. After *NYU*, the Board similarly held that various student assistants were not employees in *Brown University*.[9]

I disagree with my colleagues' decision to apply the Act to college and university student assistants. In my view, this change is unsupported by our statute, and it is ill-advised based on substantial considerations, including those that far outweigh whether students can engage in collective bargaining over the terms and conditions of education-related positions while attempting to earn an undergraduate or graduate degree.

The Supreme Court has stated that "the authority structure of a university does not fit neatly within the statutory scheme" set forth in the NLRA. *NLRB v. Yeshiva University*, 444 U.S. 672, 680 (1980). Likewise, the Board has recognized that a university, which relies so heavily on collegiality, "does not square with the traditional authority structures with which this Act was designed to cope in the typical organizations of the commercial world." *Adelphi University,* 195 NLRB at 648. The obvious distinction here has been recognized by the Supreme Court and the Board: the lecture hall is not the factory floor, and the "industrial model cannot be imposed blindly on the academic world." *Syracuse University*, 204 NLRB 641, 643 (1973); see also *Yeshiva*, 444 U.S. at 680.

The Board has an uneven track record in its efforts to apply the NLRA to colleges, universities and other educational institutions. In *Yeshiva*, the Board summarily rejected the university's position that its faculty members were managerial employees who were exempt from the Act. The Supreme Court reversed, finding that the faculty members constituted managerial employees and that the Board's conclusions were neither consistent with the Act nor rationally based on articulated facts. 444 U.S. at 686–691.

In *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), the Supreme Court rejected the Board's exercise of jurisdiction over lay faculty members at two groups of Catholic high schools, concluding that to do so would give rise to "serious First Amendment questions" involving church/state entanglement and that there was insufficient evidence Congress intended that "teachers in church-operated schools should be covered by the Act." Id. at 504–507; see also *Pacific Lutheran University*, 361 NLRB No. 157 (2014).[10]

In *Boston Medical Center*, a divided Board found that interns, residents and fellows at a teaching hospital were employees under the Act.[11] However, the majority did not change the status of university student assistants, whom the Board had previously determined not to be employees.[12] And as noted previously, except for the four-year period governed by *NYU*,[13] the Board has consistently held that university student assistants are *not* employees,[14] most recently in *Brown University*,[15] where the Board reaffirmed that a student assistant's relationship with a university is "primarily educational." *Brown*, 342 NLRB at 487.

[6] 332 NLRB 1205 (2000).
[7] 195 NLRB 639, 640 (1972).
[8] 214 NLRB 621(1974).
[9] 342 NLRB 483 (2004).

[10] Cf. *Northwestern University*, 362 NLRB No. 167 (2015) (declining to exercise jurisdiction over grant-in-aid scholarship football players without reaching the question of "employee" status under the NLRA).

[11] 330 NLRB at 159–165. Members Hurtgen and Brame dissented. Id. at 168–170 (Member Hurtgen, dissenting); id. at 170–182 (Member Brame, dissenting).

[12] The majority in *Boston Medical* explained that hospital interns, residents and fellows—referred to as "house staff"—were materially different from students, including student assistants:

> [W]hile house staff possess certain attributes of student status, they are unlike many others in the traditional academic setting. Interns, residents, and fellows do not pay tuition or student fees. They do not take typical examinations in a classroom setting, nor do they receive grades as such. They do not register in a traditional fashion. Their education and student status is geared to gaining sufficient experience and knowledge to become Board-certified in a specialty.

Id. at 161 (footnote omitted).

[13] 332 NLRB at 1205.

[14] See fns. 7-9, supra.

[15] 342 NLRB at 483.

I agree with the Board majority's reasoning in *Brown*. There, the Board considered whether "graduate student assistants who are admitted into, not hired by, a university, and for whom supervised teaching or research is an integral component of their academic development" should be deemed employees under the Act. *Brown*, 342 NLRB at 483. The Board majority held that these individuals were not "employees," based on the conclusion that "graduate student assistants, who perform services at a university in connection with their studies, have a predominately academic, rather than economic, relationship with their school." Id. The Board majority stated that the "fundamental premise of the Act" was "to cover economic relationships," and the majority recognized "the simple, undisputed fact that all the petitioned-for individuals [were] students and must first be enrolled at Brown" before they could be graduate assistants. Id. at 488. The majority emphasized that the work done by graduate assistants was "part and parcel of the core elements of the Ph.D. degree." Id. In the case of most doctoral students who provided instruction, for example, the majority observed that "teaching is so integral to their education that they will not get the degree until they satisfy that requirement." Id.; see also *Leland Stanford*, 214 NLRB at 621, 622 (student research assistants who received stipends to perform research projects were not employees, since the research was "part of the learning process" and a step leading to the "thesis and . . . toward[s] the goal of obtaining the Ph.D. degree"). The Board majority in *Brown* concluded it was likely that collective bargaining would impermissibly interfere with academic freedom and be "detrimental to the educational process."[16] The majority explained:

> Imposing collective bargaining would have a deleterious impact on overall educational decisions by the . . . faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution . . . .[17]

Apart from my belief that the Board correctly addressed these issues in *Brown*, I especially disagree with several aspects of my colleagues' opinion to the contrary.

[16] *Brown*, 342 NLRB at 493.

[17] *Brown*, 342 NLRB at 490. Cf. *Yeshiva*, 444 U.S. at 686 (recognizing that academic freedom applies not only to the clash of ideas among faculty but also to debate concerning "which students will be admitted, retained, and graduated").

1. The Financial Investment Associated With a University Education, and the Mistake of Making Academic Success Subservient to the Risks and Uncertainties of Collective Bargaining and the Potential Resort to Economic Weapons. Given the critical importance of higher education, I believe the time is long past when the question of whether to apply the NLRA to students can appropriately be decided based on the standard lines of division that are commonplace in matters that come before the Board. Many parties tend to favor union representation and collective bargaining generally, and one can reasonably expect many of these parties to support union representation and collective bargaining for university student assistants. Likewise, when some parties tend to oppose union representation or collective bargaining, it is unsurprising when they oppose these things for student assistants as well. The Board's role should be different. We administer a statute enacted by Congress that was adopted with a focus on conventional workplaces, not universities. For this reason, as noted above, the Board and the courts have recognized that unique issues arise in applying the NLRA to academic work settings, even when dealing with college and university faculty. Moreover, the NLRB has no regulatory authority over efforts to ensure that undergraduates and graduate students at colleges and universities satisfy their degree requirements. And the Board should not ignore the fact that, for the vast majority of students, attendance at a college or university has a paramount goal—to obtain a degree—and this goal, if attained, is usually achieved at enormous expense. Neither should the Board disregard the unfortunate reality in the United States that many students never receive their degree.[18]

I believe my colleagues—though armed with good intentions—engage in analysis that is too narrow, excluding everything that is unique about the situation of college and university students. In particular, my colleagues disregard what hangs in the balance when a student's efforts to attain an undergraduate or graduate degree are governed by the risks and uncertainties of collective bargaining and the potential resort to economic weapons by students and universities. What hangs in the balance has

[18] College graduation rates in a significant number of other countries are higher than in the United States (although it appears difficult to obtain recent data that permit a reliable comparison). See, e.g., Institute of Education Sciences, National Center for Education Statistics, Youth Indicators 2011 (identifying 12 countries having higher college graduation rates than the United States among first-time college students, and 11 countries having lower rates) (https://nces.ed.gov/pubs2012/2012026/chapter2_23.asp and https://nces.ed.gov/pubs2012/2012026/figures/figure_23.asp) (last viewed Aug. 1, 2016); Cappelli, p. 29 ("[T]he United States has among the worst [college] graduation rates of any country.").

immense importance, and it does not come cheap for the great majority of undergraduate and graduate students and their families. As one commentator has explained, "college is for many people *the biggest financial decision they will ever make*," it "makes *more demands on our cognitive abilities than most of us will ever see again in our lives*," and the "*biggest cost associated with going to college* . . . is likely to be the risk that a student *does not graduate on time or, worse, drops out altogether. There is virtually no payoff from college if you don't graduate.*"[19]

My colleagues ignore these considerations, and they disclaim any responsibility to address anything other than the need to promote collective bargaining. In their words:

> We have put suppositions aside today and have instead carefully considered the text of the Act as interpreted by the Supreme Court, the Act's clearly stated policies, the experience of the Board, and the relevant empirical evidence drawn from collective bargaining in the university setting. This is *not* a case . . . where the Board must accommodate the National Labor Relations Act *with some other federal statute related to private universities that might weigh against permitting student assistants to seek union representation and engage in collective bargaining*.[20]

Regarding examples where bargaining involving student assistants (according to Columbia University and other parties) "has proven detrimental to the pursuit of the school's educational goals," my colleagues state that "labor disputes *are a fact of economic life*," and "the Act is *intended to address them*."[21] They conclude:

> The National Labor Relations Act . . . *governs only the employee-employer relationship*. For deciding the legal and policy issues in this case, then, *it is not dispositive that the student-teacher relationship involves different interests than the employee-employer relationship; that the educational process is individual, while collective bargaining is focused on the group; and that promoting equality of bargaining power is not an aim of higher education*. Even conceded, all these points simply confirm that collective bargaining and education *occupy different institutional spheres*.[22]

I disagree with this analysis because it is contrary to what the Supreme Court has stated repeatedly is the "'primary function and responsibility of the Board,'" which is "'applying the general provisions of the Act to the complexities of industrial life.'" *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979) (quoting *NLRB v. Insurance Agents*, 361 U.S. 477, 499 (1960); *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963)); see also *NLRB v. J. Weingarten, Inc.,* 420 U.S. 251, 266-267 (1975) ("The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.").

The instant case does not involve "industrial life."[23] Yet this only serves to reinforce the inappropriateness of "blindly" imposing collective bargaining and the rest of the NLRA on students in "the academic world." *Syracuse University*, 204 NLRB at 643; see also *Yeshiva*, 444 U.S. at 680; *Adelphi University,* 195 NLRB at 648. The Board has applied the NLRA to college and university faculty members, which has presented its own challenges, as noted previously. The best interests of *students*, however, necessarily revolves around whether they obtain the education that costs so much in time and money and means so much to their future. The Board has no expertise regarding these issues, and Congress did not adopt our statute to advance the best interests of college and university students. This makes it inappropriate to summarily dismiss concerns in this area as being "not dispositive."

Even more objectionable is my colleagues' statement that the instant case involves no need to "accommodate the National Labor Relations Act with some other federal statute related to private universities that might weigh against permitting student assistants to seek union representation and engage in collective bargaining."[24] This is contrary to *Southern Steamship Co. v. NLRB,* 316 U.S. 31, 47 (1942), where the Supreme Court stated that "the Board has not been commissioned to effectuate the policies of the [Act] *so single-mindedly that it may wholly ignore other and equally important Congressional objectives*."

Regarding the need to accommodate other "Congressional objectives," id., there is no shortage of federal mandates applicable to colleges and universities that, to borrow my colleagues' words, "might weigh against permitting student assistants to seek union representation and engage in collective bargaining." Again, a broad range of federal statutes and regulations apply to colleges

[19] *Cappelli*, pp. 8, 26, 48 (emphasis added). See also fns. 2-3, supra and accompanying text.

[20] Majority opinion, supra, slip op. at 12 (emphasis added).

[21] Majority opinion, supra, slip op. at 10 (emphasis added).

[22] Majority opinion, supra, slip op. at 7 (emphasis added).

[23] When the NLRA was adopted, Congress contemplated that the Act would primarily apply to industrial plants and manufacturing facilities. Sec. 1 of the Act refers to "industrial strife or unrest" and sets forth a policy to encourage "practices fundamental to the adjustment of industrial disputes," and the Supreme Court has acknowledged that the "Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry." *Yeshiva*, 444 U.S. at 680.

[24] Majority opinion, supra, slip op. at 12.

and universities, with significant involvement by the U.S. Department of Education, led by the Secretary of Education. Relevant laws include, among many others, the Higher Education Opportunity Act, enacted in 2008,[25] which reauthorized the Higher Education Act of 1965,[26] and the Family Educational Rights and Privacy Act (FERPA), enacted in 1974.[27] These statutes govern, among other things, the accreditation of colleges and universities, the enhancement of quality, the treatment of student assistance, graduate/postsecondary improvement programs, and the privacy of student records. In 2015, a task force created by a bipartisan group of U.S. Senators reviewed the Department of Education's regulation of colleges and universities and recommended, among other things, that the Department's regulations "be related to education, student safety, and stewardship of federal funds" and "not stray from clearly stated legislative intent."[28] The extensive federal regulation of colleges and universities focuses on access, availability, affordability and effectiveness, all of which relate to the ability of students to satisfy *educational* objectives. This supports my view that collective bargaining—and especially the resort to economic weapons between and among student assistants, faculty members, and administrators—is likely to substantially affect the educational process, separate from any impact on the economic interests of student assistants.

Furthermore, it is already clear that current Board law, if applied to university student assistants, may contradict federal education requirements. For example, FERPA broadly restricts the disclosure of educational records, including student disciplinary records.[29] However, current Board law, if applied to university students, would *require* the disclosure of confidential witness statements (absent proof that the witnesses required protection from retaliation in the particular circumstances presented),[30] and Board law would prevent university officials from routinely requesting nondisclosure of matters discussed in investigatory interviews involving student assistants.[31]

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[25] Pub. L. 110–315 (2008).

[26] Pub. L. 89–329 (1965). The Higher Education Act of 1965 was reauthorized in 1968, 1972, 1976, 1980, 1986, 1992, 1998, and 2008. It was extended through 2015, and reauthorization bills remain pending in Congress. See U.S. News University, House Approves Five Bipartisan Bills to Improve Higher Education Act (July 15, 2016) (https://www.usnewsuniversitydirectory.com/news/paying-for-school/house-approves-five-bipartisan-bills-to-improve-higher-education-act/) (last viewed July 28, 2016).

[27] Pub. L. 93–380 (1974). FERPA has been amended multiple times since its initial passage and may be found in its current form at 20 U.S.C. § 1232g.

[28] Task Force on Federal Regulation of Higher Education, Recalibrating Regulation of Colleges and Universities, pp. 2, 4 (2015) (http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf) (last visited Aug. 5, 2016). The Senate Committee on Health, Education, Labor, and Pensions also held a hearing on February 24, 2015 devoted to the Task Force's report. See http://www.help.senate.gov/hearings/recalibrating-regulation-of-colleges-and-universities-a-report-from-the-task-force-on-government-regulation-of-higher-education (Feb. 24, 2015) (last viewed July 28, 2016).

[29] See http://www2.ed.gov/policy/gen/guid/fpco/brochures/postsec.html (last viewed Aug. 3, 2016) (indicating that "student disciplinary records are protected as education records under *FERPA*," although disclosure without the student's consent is permitted in certain circumstances). FERPA regulations indicate that "education records" do not include records relating to employees of an educational institution, but this exclusion applies only if employment-related records "[r]elate exclusively to the individual in that individual's capacity as an employee." 34 CFR § 99.3 (defining "education records"). According to the U.S. Department of Education, the employment-related records of "graduate student teaching fellows/assistants," whose appointments are contingent on being students, constitute "education records" subject to FERPA's nondisclosure requirements. See Department of Education, *Letter of technical assistance to American Federation of Teachers re: disclosure of information on teaching assistants*, available at: http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/aft.html (Aug. 21, 2000) (last viewed Aug. 3, 2016) (hereinafter "Dept. of Education, AFT letter"). In short, if a student complains about sex harassment by a student assistant, which may result in *academic* suspension or expulsion, for example, it appears clear that FERPA confidentiality requirements would apply to the investigative records, possibly including witness statements, directly contrary to NLRB law potentially requiring their disclosure. See fns. 30-31, infra. Because of FERPA's privacy requirements, there will undoubtedly be additional conflicts with NLRB disclosure obligations in other contexts, including union information requests to which employers must respond under NLRA Sec. 8(a)(5). See Dept. of Education, AFT letter, supra (information requested by union representing public university student assistants cannot be disclosed without the student assistants' consent); see also http://www2.ed.gov/policy/gen/guid/fpco/ferpa/library/josephambash.html (Feb. 25, 2002) (last viewed Aug. 3, 2016) (teaching assistants' hours of work, stipend, length of contract, employment category, and selection for layoff are educational records protected from disclosure by FERPA).

Even before the Board majority decided to apply the NLRA to student assistants and thus create inconsistencies with other federal regulations applicable to colleges and universities, the Board's interpretation of the NLRA was contrary to other federal agency requirements and recommendations. For example, the Board's disclosure requirements applicable to workplace investigations and witness statements conflict with guidance from the Equal Employment Opportunity Commission (EEOC) regarding precisely the same issues. See *American Baptist Homes of the West d/b/a Piedmont Gardens*, 362 NLRB No. 139, slip op. at 12–13 (2015) (Member Johnson, dissenting in part); Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace, available at: http://www.btlaborrelations.com/wp-content/uploads/2016/06/eeoc-report-on-sexual-harassment.pdf (June 2016) (last viewed Aug. 4, 2016) (noting "strong support" from stakeholders "for the proposition that workplace investigations should be kept as confidential as is possible," but also observing that "an employer's ability to maintain confidentiality . . . has been limited in some instances by decisions of the National Labor Relations Board," and concluding that the "privacy of both the accuser and the accused should be protected to the greatest extent possible, consistent with legal obligations").

[30] See *Piedmont Gardens*, supra, 362 NLRB No. 139.

[31] See *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015).

My colleagues apparently agree that "promoting equality of bargaining power is not an aim of higher education."[32] It is also clear that collective bargaining by students is not the focus of the numerous federal laws and regulations that apply to colleges and universities. These laws and regulations are designed, directly or indirectly, to enhance the quality of education, to strengthen equal access to higher education, and to eliminate potential obstacles to academic success. There is no reasonable justification for the Board's failure to acknowledge the overriding importance of these non-employment issues for college and university students.

Nor can the Board freely disregard the fact that the potential resort to economic weapons is part and parcel of collective bargaining. Therefore, applying our statute to university student assistants may prevent them from completing undergraduate and graduate degree requirements in the allotted time, which is the primary reason they attend colleges and universities at such great expense. It is not an adequate response to summarily dismiss this issue, as the majority does, with the commonplace observation that "labor disputes are a fact of economic life." For the students who may find themselves embroiled in them, labor disputes between universities and student assistants may have devastating consequences.

Conventional work settings feature many examples of constructive collective-bargaining relationships. Likewise, one cannot assume that all or most negotiations involving student assistants at universities would result in strikes, slowdowns, lockouts, and/or litigation. However, there is no doubt that economic weapons and the threatened or actual infliction of economic injury are central elements in collective bargaining to which resort may be made when parties are unable to reach agreement. As I stated in *American Baptist Homes of the West d/b/a Piedmont Gardens,* 364 NLRB No. 13, slip op. at 9 (2016) (Member Miscimarra, dissenting in part), one must "differentiate between what one would prefer to see in collective bargaining, and what role Congress contemplated for economic weapons as part of the collective-bargaining process." I elaborated as follows:

> What one hopes to see in any collective-bargaining dispute is its successful resolution without any party's resort to economic weapons. But what Congress intended was for the Board to preserve the balance of competing interests—including potential resort to economic weapons—that Congress devised as the engine driving parties to resolve their differences and to enter into successful agreements. As the Supreme Court stated in *NLRB v. Insurance Agents' International Union*, 361 U.S. 477, 487–489 (1960), employers and unions in collective bargaining "proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . *The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized*."[33]

When the Board transplants our statute into the university setting and places students in a bargaining relationship with the university, experience demonstrates that we cannot assume bargaining will be uneventful. Collective bargaining may evoke "extraordinarily strong feelings" and give rise to a "sharp clash between seemingly irreconcilable positions," and when parties resort to various tactics in support of their respective positions, "such tactics are indeed 'weapons,'" and "[n]obody can be confused about their purpose: they are exercised with the intention of inflicting severe and potentially irreparable injury, often causing devastating damage to businesses and terrible consequences for employees."[34] As the court stated in *NLRB v. Wire Products Mfg. Corp*., 484 F.2d 760, 765 (7th Cir. 1973), "[t]he strike is a potent economic weapon which may, and often is, wielded with disastrous effect on its employer target."[35]

[32] Majority opinion, supra, slip op. at 7.

[33] Id., slip op. at 9 (Member Miscimarra, dissenting in part) (emphasis in original and emphasis added).

[34] Id., slip op. at 10 (Member Miscimarra, dissenting in part).

[35] My colleagues refer to what they characterize as "empirical evidence" that, in their view, suggests collective bargaining involving student assistants has been undertaken successfully at public universities (where bargaining is typically governed by state public sector labor laws, which generally restrict or eliminate the right to strike) and at a private university on a non-NLRB-supervised basis (New York University). My colleagues state that certain agreements provide for "defined rights concerning courses, course content, course assignments, exams, class size, grading policies and methods of instruction, as well as graduate students' progress on their own degrees," and according to the majority, this shows that "parties can and successfully have navigated delicate topics near the intersection of the university's dual role as educator and employer." Majority opinion, supra, slip op. at 9. Columbia University and other parties have identified cases where bargaining by student assistants "has proven detrimental to the pursuit of the school's educational goals," with "strikes and grievances over teaching workload and tuition waivers" and "grievances over classroom assignments and eligibility criteria for assistantships," but my colleagues dismiss these examples as "labor disputes" that are merely a "fact of economic life." Majority opinion, supra, slip op. at 10.

I disagree with my colleagues' selective attachment of significance to the examples of peaceful negotiations involving student assistants—none of which involves economic weapons permitted under the NLRA—and with their summary discounting of examples that go the other way. In my view, what should be controlling here are two unassailable propositions: collective bargaining under the NLRA involves the potential use of leverage through threatened or inflicted economic injury; and even among parties that negotiate in good faith with the best intentions, disputes involving resort to protected economic weapons by

Of course, determining that student assistants are "employees" and have the right to be represented by a union under the NLRA does not mean they will choose to be represented. Likewise, as stated above, I am not predicting that most negotiations involving student assistants will involve resort to economic weapons. Nonetheless, in this particular context, I believe collective bargaining and its attendant risks and uncertainties will tend to detract from the primary reason that students are enrolled at a university—to satisfy graduation requirements, including in many cases the satisfactory completion of service in a student assistant position. And in some cases involving student assistants, it is predictable that breakdowns in collective bargaining will occur, and the resulting resort to economic weapons may have devastating consequences for the students, including, potentially, inability to graduate *after* paying $50,000 to $100,000 or more for the opportunity to earn a degree.[36]

Now that, with today's decision, student assistants are employees under the NLRA, what economic weapons are available to student assistants and the universities they attend? They would almost certainly include the following:

- *Strikes*. Student assistants could go on strike, which would mean that Teaching Assistants, Teaching Fellows, Preceptors, Course Assistants, Readers, Graders, Graduate Research Assistants and Departmental Research Assistants would cease working, potentially without notice, and the university could suspend all remuneration.[37]
- *Lockouts*. The university could implement a lockout, which would require student assistants to cease working, and all remuneration would be suspended.
- *Loss, Suspension or Delay of Academic Credit*. If a student assistant ceases work based on an economic strike or lockout, it appears clear they would have no entitlement to credit for requirements that are not completed, such as satisfactory work in a student assistant position for a prescribed period of time. For example, if a particular degree required two semesters of service as a Teaching Assistant, and a student assistant could not satisfy that requirement because of a strike or lockout that persisted for two semesters, it appears clear the student assistant would not be entitled to receive his or her degree.
- *Suspension of Tuition Waivers*. In the event of a strike or lockout where the university suspended tuition waivers or other financial assistance that was conditioned on the student's work as a student assistant, students would likely be foreclosed from attending classes unless they paid the tuition. Thus, the student assistant's attendance at university could require the immediate payment of tuition, which averages $32,410 annually at private universities.[38]
- *Potential Replacement.* In the event of a strike, the university would have the right to hire temporary or permanent replacements. If permanent replacements were hired during an economic strike, this would mean that even if a student unconditionally offered to resume working at the end of the strike, the university could retain the replacements, and the student assistant would not be reinstated unless and until a vacancy arose through the departure of a replacement or the creation of a new position. Here as well, one would expect that the student would be required to pay full tuition in order to be permitted to attend classes, without regard to whatever tuition waiver or other financial aid was previously provided in consideration of the student's services as a student assistant. Similarly, any failure to satisfy degree requirements associated with a student assistant's work as a student assistant would preclude attainment of the degree.

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one or both parties arise with regularity under our statute. I have no quarrel with the notion that colleges and universities should constructively engage with their students, including student assistants, in a variety of ways. Yet I believe such engagement need not necessarily take the form of collective bargaining under the NLRA and instead may take place (and, I am sure, has taken place and is taking place) "without the intervention of the Board enforcing a statutory requirement." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 681 fn. 19 (1981).

[36] The College Board reports that average annual tuition and fees at a private four-year college total $32,410, which means that four years' worth of average tuition and fees total $129,640 at private universities. See https://bigfuture.collegeboard.org/pay-for-college/college-costs/college-costs-faqs (last viewed July 29, 2016). If a college career stretches to six years, which is the most common time period used to evaluate whether incoming students will graduate from a four-year college (see fn. 3, supra and accompanying text), average tuition and fees at a private university would total $194,460. These figures do not include additional expenditures for room, board, and other living expenses.

[37] In the event of a strike or lockout, an employer under the NLRA has the right to discontinue all wages and other forms of remuneration, with the sole exception of those wages or benefits that have already accrued, the payment of which does not depend on the performance of work. See *Texaco, Inc.*, 285 NLRB 241, 245 (1987) ("[A]n employer is not required to finance a strike against itself by paying wages or similar expenses dependent on the continuing performance of services for the employer," absent proof that the benefits in question were "accrued," which means "due and payable on the date on which the employer denied [them]."). See also *Ace Tank & Heater Co*., 167 NLRB 663, 664 (1967).

[38] See fn. 33, supra.

- *Loss of Tuition Previously Paid*. If a student assistant paid his or her own tuition (again, currently averaging $32,410 per year at a private university)[39] and only received a cash stipend as compensation for work as a student assistant, there appears to be little question that the student's tuition could lawfully be retained by the university even if a strike by student assistants persisted for an entire year, during which time the student was unable to satisfy any requirements for satisfactory work in his or her student assistant position.
- *Misconduct, Potential Discharge, Academic Suspension/Expulsion Disputes*. During and after a strike, employees remain subject to discipline or discharge for certain types of strike-related misconduct. Correspondingly, there is little question that a student assistant engaged in a strike would remain subject to academic discipline, including possible suspension or expulsion, for a variety of offenses. In such cases, I anticipate that parties will initiate Board proceedings alleging that students were unlawfully suspended or expelled for NLRA-protected activity, even though nothing in the Act permits the Board to devise remedies that relate to an individual's academic standing, separate and apart from his or her "employment."

It is also a mistake to assume that today's decision relates only to the creation of collective-bargaining rights. Our statute involves wide-ranging requirements and obligations. For example, existing Board cases require employers subject to the NLRA to tolerate actions by employees that most reasonable people would find objectionable, and it is unlawful for employers to adopt overly broad work rules to promote respect and civility by employees. Therefore, parents take heed: if you send your teenage sons or daughters to college, the Board majority's decision today will affect their "college experience" in the following ways:

- *Non-Confidential Investigations*. If your son or daughter is sexually harassed by a student assistant and an investigation by the university ensues, the university will violate federal law (the NLRA) if it routinely asks other student-assistant witnesses to keep confidential what is discussed during the university's investigation.[40]
- *Witness Statement Disclosure*. In the above example, witness statements submitted by your son or daughter about sexual harassment by a student assistant must be disclosed to the union, unless (i) the university can prove that the statement's submission was conditioned on confidentiality, and (ii) even then, the statement must be disclosed unless the university can prove that your son or daughter needs protection, or other circumstances outweigh the union's need for the witness statement.[41]
- *Invalidating Rules Promoting Civility*. The university will be found to have violated the NLRA if it requires student assistants to maintain "harmonious interactions and relationships" with other students.[42]
- *Invalidating Rules Barring Profanity and Abuse*. The university cannot adopt a policy against "loud, abusive or foul language" or "false, vicious, profane or malicious statements" by student assistants.[43]
- *Outrageous Conduct by Student Assistants*. The university must permit student assistants to have angry confrontations with university officials in grievance discussions, and the student assistant cannot be lawfully disciplined or removed from his or her position even if he or she repeatedly screams, "I can say anything I want," "I can swear if I want," and "I can do anything I want, and you can't stop me."[44]
- *Outrageous Social Media Postings by Student Assistants.* If a student assistant objects to actions by a professor-supervisor named "Bob," the university must permit the student to post a message on Facebook stating: "Bob is such a nasty mother fucker, don't know how to talk to people. Fuck his mother and his entire fucking family."[45]
- *Disrespect and Profanity Directed to Faculty Supervisors.* The university may not take action against a student assistant who screams at a professor-supervisor and calls him a "fucking crook," a "fucking mother fucking" and an "asshole" when

[39] See fn. 33, supra.

[40] See, e.g., *Banner Estrella Medical Center*, supra, 362 NLRB No. 137. These disclosures, though required by the NLRB, may directly conflict with nondisclosure obligations under the Family Educational Rights and Privacy Act (FERPA). See fn. 29, supra.

[41] See, e.g., *Piedmont Gardens*, supra, 362 NLRB No. 139. These disclosures, though required by the NLRB, may also directly conflict with nondisclosure obligations under FERPA. See fn. 29, supra.

[42] See, e.g., *William Beaumont Hospital*, 363 NLRB No. 162 (2016); *2 Sisters Food Group*, 357 NLRB 1816 (2011).

[43] See *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999); *Lafayette Park Hotel*, 326 NLRB 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Cincinnati Suburban Press, Inc*., 289 NLRB 966, 975 (1988).

[44] See *United States Postal Service*, 364 NLRB No. 62 (2016).

[45] See *Pier Sixty, LLC*, 362 NLRB No. 59 (2015).

> the student assistant is complaining about the treatment of student assistants.[46]

The above examples constitute a small sampling of the unfortunate consequences that will predictably follow from the majority's decision to apply our statute to student assistants at colleges and universities. The primary purpose of a university is to educate students, and the Board should not disregard that purpose in finding that student assistants are employees and therefore subject to all provisions of the NLRA.

2. The Board's Processes and Procedures Are Incompatible with Applying the Act to University Student Assistants. Another frailty associated with applying the NLRA to student assistants at universities relates to the cumbersome and time-consuming nature of the Board's processes and procedures, which makes those processes and procedures especially ill suited to students in a university setting.

The Board has engaged in well-publicized efforts to expedite the handling of representation cases, and in 2014 the Board issued an election rule that dramatically revised the Agency's representation-case procedures. See 79 Fed. Reg. 74, 308 (2014) (Election Rule). However, notwithstanding the Board's commitment to resolve representation cases as quickly as possible, doing so has sometimes proven difficult in cases involving colleges and universities. In part, these difficulties and resulting delays are owing to the fact that the religious affiliation of a college or university may entirely preclude the Board's exercise of jurisdiction.[47] However, even when representation cases involve universities that are not religiously affiliated, Board proceedings may still involve significant time, and the filing of election-related unfair labor practice charges may delay scheduled elections for months or years under the Agency's "blocking charge" doctrine.[48]

The Board's handling of alleged unfair labor practices (ULPs) takes even more time. Our procedures require the filing of a ULP charge, which is investigated by one of the Board's regional offices, which decides whether to issue a complaint, and if complaint issues, this is followed by a hearing before an administrative law judge, with posthearing briefing in most cases. After the judge issues a decision, parties have the right to file exceptions to that decision with the Board (in other words, they may appeal), with further briefing by the parties. Ultimately, the Board renders a decision, which may be appealed to a federal court of appeals. In addition, when the Board has found a violation and has ordered backpay and other remedial measures, there are additional compliance proceedings handled by the Board's regional offices, which can result in additional hearings before administrative law judges, additional posthearing briefs, supplemental decisions by the judges, and further appeals to the Board and the courts. In spite of everyone's best efforts, this lengthy litigation process consumes substantial time and too often causes unacceptable delays before *any* Board-ordered relief becomes available to the parties. Unfair labor practice cases may easily be litigated for three to five years before the Board issues a decision, and some cases take even longer. See, e.g., *CNN America, Inc*., 361 NLRB No. 47 (2014) (alleged ULPs requiring 82 days of trial, more than 1,300 exhibits, more than 16,000 transcript pages, and more than 10 years of Board litigation, and the case still remains pending on appeal); *Dubuque Packing Co*., 287 NLRB 499 (1987), remanded sub nom. *UFCW Local 150-A v. NLRB*, 880 F.2d 1422 (D.C. Cir. 1989), on remand 303 NLRB 386 (1991), enfd. in relevant part sub nom. *UFCW Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted 511 U.S. 1016 (1994), cert. dismissed 511 U.S. 1138 (1994) (alleged ULPs requiring 13 years of Board and court litigation).[49]

In the time it takes a typical NLRA case to be litigated and decided by the Board and the courts, the academic world may experience developments that dramatically change or even eliminate entire fields of study. Moreover, not only does a student assistant's position have a fixed duration, but the student status of the individual

[46] See *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014).

[47] See, e.g., *Seattle University*, 364 NLRB No. 84 (2016) (representation proceedings involving religiously affiliated university where representation petition was filed February 20, 2014, and the Board's decision issued on August 23, 2016); *St. Xavier University*, 364 NLRB No. 85 (2016) (representation proceedings involving religiously affiliated university where representation petition was filed April 12, 2011, and the Board's decision issued on August 23, 2016); *Duquesne University*, Case 6-RC-80933 (representation proceedings involving religiously affiliated university where representation petition was filed May 14, 2012 and remains pending before the Board). See generally *Pacific Lutheran University*, 361 NLRB No. 157 (2014).

[48] The Board's treatment of delays associated with blocking charges was not materially changed in the Election Rule. See 79 Fed. Reg. at 74,455–74,456 (dissenting views of Members Miscimarra and Johnson).

[49] Sec. 10(j) of the NLRA authorizes the Board's General Counsel to initiate proceedings in federal district court seeking interim injunctive relief in certain cases, but the ultimate resolution of those disputes does not occur until the Board's disposition on the merits (subject to further appellate review). Moreover, the General Counsel is necessarily selective when evaluating whether particular cases warrant efforts to seek Sec. 10(j) relief, and there is no certainty that such relief, when sought, will be granted by the court. See, e.g., *Osthus v. Ingredion, Inc.*, Case No. 16-CV-38-LRR, 2016 WL 4098541 (N.D. Iowa July 28, 2016) (denying Sec. 10(j) petition on the basis that the Board "failed to meet its burden to demonstrate that irreparable injury is likely to occur absent injunctive relief").

occupying that position may itself come to an end long before a Board case affecting him or her is resolved. Students generally attend university for the purpose of doing something else—i.e., to obtain post-graduation employment, or to go on to post-doctoral or other post-graduate studies. Moreover, it is not uncommon for students to change majors, and faculty members also come and go. In these respects, treating student assistants as employees under the NLRA is especially poorly matched to the Board's representation and ULP procedures.[50]

3. Other Considerations Undermine the Appropriateness of the Petitioned-For Bargaining Unit. I believe the Board should find that student assistants are not employees for purposes of Section 2(3) of the Act. Therefore, I need not reach whether the bargaining unit sought in the instant case is an appropriate bargaining unit. Nonetheless, I will address two considerations that render the petitioned-for unit particularly problematic.

Preliminarily, however, I address an issue that is prior to appropriate-unit considerations: the majority's decision to reject not only *Brown University* but an unbroken, decades-old line of precedent holding that research assistants are not employees under Section 2(3) of the Act. Research assistants are graduate students, usually in the hard sciences, who conduct research projects funded by private institutions or the government, and Columbia requires this research to be directly related to the research officer's dissertation. The Board has consistently declined to find student research assistants to be employees under the Act. In *Adelphi University*, the Board declined to include graduate student research assistants in a unit of regular faculty on the basis that the research assistants were "primarily students," 195 NLRB at 640, and it distinguished student research assistants from a research assistant deemed eligible in another case who "was not simultaneously a student but already had his doctoral degree," id. at 640 fn. 8. Similarly, in *Leland Stanford Junior University*, 214 NLRB at 621, the Board again concluded that student research assistants "are primarily students [and] not employees." Id. at 623. Even during the brief period when the Board considered student instructors to be employees under the Act, the Board adhered to precedent holding that student research assistants are *not* Section 2(3) employees. See *NYU*, 332 NLRB at 1209 fn. 10 (applying *Leland Stanford* and finding that student research assistants were not employees); see also *Brown*, 342 NLRB at 483 (graduate student assistants, including research assistants, are not employees under Section 2(3) of the Act).

The facts regarding the research officers here differ in no material respect from those of the student research assistants in *Leland Stanford*, *NYU*, and *Brown*. Here, as in each of those cases, the students perform research as part of their progress towards a degree and are primarily students. Accordingly, based on a line of precedent that remained unbroken for more than 40 years, I believe the Board cannot reasonably find that research assistants are employees for purposes of the Act.

Turning to appropriate-unit considerations, I believe the Board cannot find that the broad array of student assistants here share a sufficient community of interests to warrant their inclusion in a single bargaining unit. The Petitioner seeks to represent all "student employees" who engage in "instructional services," including "graduate and undergraduate Teaching Assistants," "Teaching Fellows," "Preceptors," "Course Assistants," "Readers," "Graders," "Graduate Research Assistants" and "Departmental Research Assistants." The students within the various classifications in the petitioned-for unit vary considerably in terms of their duties, levels of responsibility, remuneration, and expected length of service. Although I would decline jurisdiction over the entire proposed unit on the basis that student assistants are not "employees," and therefore I need not and do not reach or analyze the various issues relating to whether the proposed unit is appropriate, the evidence in the record demonstrates that what various student officers do and how they are remunerated vary enormously.

For example, some student assistants teach, and research assistants perform research. Course assistants do neither: they perform clerical duties, such as filing and copying, to help faculty administer courses. Generally, doctoral students have greater autonomy and responsibility in performing their instructional duties than do master's degree candidates and undergraduates. Some doctoral students serve as preceptors, fully designing and implementing their own courses. By contrast, non-

[50] At various points, my colleagues analogize student assistants to intermittent workers, "seasonal" workers, and "workforces . . . with significant turnover." These analogies fail to reflect substantial differences that exist between conventional employees whose work may be sporadic and student assistants. Even if conventional employees perform sporadic work, their employment most often contemplates that they will remain in the workforce, often in the same line of work and with the same employer. Student assistants nearly always occupy their positions on a short-term basis, with plans to permanently abandon their status as student assistants to complete their education, graduate, and obtain other positions. (My colleagues admit as much, noting that "student assistants possess a long-term goal of achieving employment elsewhere." Majority opinion, supra, slip op. at 21 fn. 131). This is merely one additional reason that the Act is such an imperfect fit for student assistants. See *Saga Food Service*, 212 NLRB 786, 787 fn. 9 (1974) (finding a unit comprised solely of part-time student cafeteria workers would not "effectuate the purposes of the Act" "[i]n view of the nature of their employment tenure and our conclusion that their primary concern is their studies rather than their part-time employment").

doctoral students predominantly grade papers or provide tutoring to their fellow students in laboratory or discussion sections.

Course assistants perform work that is intermittent in nature, and they are paid from Columbia's casual payroll. Remuneration for master's degree students and undergraduates is awarded only during the semesters that the students actually perform duties as student assistants. By contrast, doctoral students receive the same funding during the entire time spent pursuing their degree, whether they are performing duties as a student assistant during a certain semester or academic year or not. In contrast to the intermittent tenure of the course assistants, doctoral students generally must spend at least one year teaching, and sometimes multiple years, in order to obtain their degree. Undergraduate and master's degree students are not required to serve as student assistants in connection with their degree requirements.

In view of these and other fundamental dissimilarities, I believe the petitioned-for unit would likely be inappropriate under any community-of-interest test, including the one stated in *Specialty Healthcare*.[51]

The second consideration that, in my view, undermines the appropriateness of the petitioned-for unit relates to the Board's treatment of temporary employees, who are generally excluded from petitioned-for bargaining units. Here, I disagree with my colleagues' evaluation of the student assistants "as a group" and their application of a special rule to all of them—namely, that their tenure "is not so ephemeral as to vitiate their interest in bargaining over terms and conditions of employment."[52] This standard inappropriately deviates from the Board's existing principles pertaining to temporary employees by creating a special rule for them. See, e.g., *Fordham University*, 214 NLRB 971, 975 (1974) (rejecting creation of a special rule for temporary employee status governing faculty in academia). The Board has recognized that short-term or finite employment may not be conclusive as to temporary status, but it may nonetheless require a finding that certain members of a petitioned-for unit do not share a community of interests with the rest of the unit. Compare *Boston Medical Center*, 330 NLRB at 166 (finding appropriate a unit of house staff, where all employees in the proposed unit were generally employed by the employer for 3 to 7 years) with *Goddard College*, 216 NLRB 457, 458 (1975) (excluding from a unit of full-time faculty visiting faculty who generally stay for only one semester or one year). Regarding the petitioned-for unit in this case, I do not believe the Board can appropriately recognize a single bargaining unit that combines course assistants who work a few intermittent hours with doctoral candidates who may teach for several years.

CONCLUSION

There is a remarkable, life-changing procedure available for those fortunate enough to undergo it. During this procedure, the participants remain awake, they are closely evaluated while answering complex questions for an extended period of time, and they are monitored while performing other tasks as directed, which includes interacting with others. This life-changing procedure is enormously expensive, and many individuals receive financial assistance while undergoing it. The procedure is so demanding that many participants never complete it. Yet, research shows that successful completion of the procedure improves the rest of the person's life. It produces substantially more opportunities, higher compensation, enhanced satisfaction, and greater upward mobility both for the participants and for future generations.

This describes the role played by colleges and universities in the United States. My colleagues apply a distorted and highly selective lens to this life-changing procedure. Dismissing everything else as "not dispositive," they conclude that some participants satisfy the definition of an "employee" because (i) they perform tasks as directed, and (ii) they receive financial assistance. Even more erroneous, in my view, is the notion that public policy favors taking participants who are trying to complete this life-changing procedure and—while it is being conducted—having them engage in collective bargaining, which is governed by leverage and the potential clash of economic interests. It will wreak havoc to have economic weapons wielded by or against participants during this expensive procedure, especially since the weapons include strikes and lockouts—which can stop the procedure in its tracks—and the permanent replacement of the participants themselves!

[51] See *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934, 942 (2011) (citing, among the factors the Board must examine to determine if a unit is appropriate, "whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; . . . have distinct terms and conditions of employment; and are separately supervised") (citations omitted); see also *NYU*, 332 NLRB at 1205 fn. 5, 1209 fn. 10 (excluding research assistants funded by external grants and students who acted as graders and tutors from a unit of graduate assistants).

Specialty Healthcare does not govern the appropriateness of the petitioned-for unit in this case because there is no argument that the petitioned-for unit inappropriately excludes other putative employees. In any event, however, I would not apply *Specialty Healthcare* for the reasons stated in my dissenting opinion in *Macy's, Inc.*, 361 NLRB No. 4, slip op. at 31–33 (2014) (Member Miscimarra, dissenting).

[52] Majority opinion, supra, slip op. at 21.

The Board has a responsibility to acknowledge the enormous complexity, demands and benefits associated with every student's potential graduation from a college and university. In particular, I believe my colleagues improperly focus on the NLRA and "wholly ignore other and equally important Congressional objectives,"[53] especially the overriding importance of facilitating each student's satisfaction of degree requirements. Given the importance of this policy objective—which is reflected in numerous federal statutes and regulations governing education, and as to which the Board has no expertise—I believe the Board cannot reasonably apply our statute to student assistants at colleges and universities "without a clear expression of an affirmative intention of Congress."[54] No such evidence of Congressional intent exists.

"The 'business' of a university is education,"[55] and students are not the means of production—they are the "product." Their successful completion of degree requirements results from the combined commitment of faculty, administrators, and the students' own academic efforts. It is true that the Board has asserted jurisdiction over faculty members in private, non-exempt colleges and universities, notwithstanding the significant differences that exist between the academic and industrial worlds.[56] In my view, however, obstacles to fitting the square peg of the NLRA into the round hole of academia become insuperable when the petitioned-for "employees" are university student assistants.

The question here is not whether colleges and universities should constructively engage their students, including student assistants, in a variety of ways.[57] The question is whether Congress intended—and whether our statute can be reasonably interpreted—to make the NLRA govern the relationship between students and their universities merely because students may occupy a variety of academic positions in connection with their education. As noted above, for most students including student assistants, attending college is the most important investment they will ever make. I do not believe our statute contemplates that it should be governed by bargaining leverage, the potential resort to economic weapons, and the threat or infliction of economic injury by or against students, on the one hand, and colleges and universities, on the other.

For these reasons, and consistent with the Board's prior holding in *Brown University*, I believe the Board should find that the relationship between Columbia and the student assistants in the petitioned-for unit in this matter is primarily educational, and that student assistants are not employees under Section 2(3) of the Act.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 23, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

[53] *Southern Steamship Co. v. NLRB*, 316 U.S. at 47.

[54] *Catholic Bishop*, 440 U.S. at 504.

[55] *Yeshiva*, 444 U.S. at 686.

[56] *C.W. Post Center*, 189 NLRB 904 (1971) (faculty members are professional employees who may bargain collectively).

[57] See fn. 35, supra.