Brown University *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW AFL–CIO, Petitioner. Case 1–RC–21368

July 13, 2004

DECISION ON REVIEW AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, WALSH, AND MEISBURG

On November 16, 2001, the Regional Director for Region 1 issued a Decision and Direction of Election in which she applied *New York University*, 332 NLRB 1205 (2000) *(NYU)*, to find that teaching assistants, research assistants, and proctors are employees within the meaning of Section 2(3) of the Act and constitute an appropriate unit for collective bargaining. Thereafter, in accordance with Section 102.67 of the Board's Rules and Regulations, Brown University (Brown) filed a timely request for review, urging the Board, inter alia, to reconsider *NYU*. The Petitioner filed an opposition. On March 22, 2002, the Board granted the request for review. Brown and the Petitioner filed briefs on review. Amicus curiae briefs also were filed.[1]

The case presents the issue of 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, must be treated as employees for purposes of collective bargaining under Section 2(3) of the Act. The Board in *NYU* concluded that graduate student assistants are employees under Section 2(3) of the Act and therefore are to be extended the right to engage in collective bargaining. That decision reversed more than 25 years of Board precedent.[2] That precedent was never successfully challenged in court or in Congress. In our decision today, we return to the Board's pre-*NYU* precedent that graduate student assistants are not statutory employees.

Until *NYU*, the Board's principle was that graduate student assistants are primarily students and not statutory employees. See *Leland Stanford*, supra. The Board concluded 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. Accordingly, the Board held that they were not employees within the intendment of the Act.

This longstanding approach towards graduate student assistants changed abruptly with *NYU*. The Board decided that graduate student assistants meet the test establishing a conventional master-servant relationship with a university,[3] and that they are statutory employees who necessarily have "statutory rights to organize and bargain with their employer." 332 NLRB at 1209.[4]

After carefully considering the record herein, and the briefs of the parties and amici, and for the reasons detailed in this decision, we reconsider *NYU* and conclude that the 25-year precedent was correct, and that *NYU* was wrongly decided and should be overruled.[5]

I. THE PETITION AND THE REGIONAL DIRECTOR'S FINDINGS

The Petitioner sought to represent a unit of approximately 450 graduate students employed as teaching assistants (TAs),[6] research assistants (RAs) in certain social sciences and humanities departments,[7] and proctors. The Petitioner, relying on *NYU*, supra, contended to the Regional Director that the petitioned-for TAs, RAs, and proctors are employees within the meaning of Section 2(3) and that they constitute an appropriate unit for collective bargaining.

[1] Amicus curiae briefs were filed by the following: Joint brief of the American Council on Education and the National Association of Independent Colleges and Universities; American Association of University Professors; American Federation of Labor-Congress of Industrial Organizations; Committee of Interns and Residents; Joint brief of Harvard University, Massachusetts Institute of Technology, Stanford University, George Washington University, Tufts University, University of Pennsylvania, University of Southern California, Washington University in St. Louis, and Yale University; National Right to Work Legal Defense Foundation; and Trustees of Boston University.

[2] See, e.g., *Leland Stanford Junior University*, 214 NLRB 621 (1974).

[3] "This relationship exists when a servant performs services for another, under the other's control or right of control, and in return for payment." *NYU*, 332 NLRB at 1206, relying on *NLRB v. Town & Country Electric* , 516 U.S. 85, 90–91, 93–95 (1995).

[4] *NYU* was preceded by *Boston Medical Center*, 330 NLRB 152 (1999), a case involving the employee status of medical school graduates serving as interns, residents, and house staff at a teaching hospital. The Board in *Boston Medical Center* overruled *St. Clare's Hospital & Health Center*, 229 NLRB 1000 (1977), and *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976). Applying the master-servant test, the Board found that these medical professionals were statutory employees and constituted an appropriate unit for collective bargaining. In our decision today, we express no opinion regarding the Board's decision in *Boston Medical Center*.

[5] Brown's request for oral argument is denied as the record and the briefs adequately present the issues and positions of the parties and amici.

[6] Included among the TAs are senior TAs, assistants, supplemental TAs, and teaching fellows. The union also seeks to represent the few medical students who are seeking a Ph.D. and serving as a TA.

[7] The Petitioner did not seek to represent other RAs, who are largely in the life and physical sciences departments of the university. In its Brief on Review, however, the Petitioner for the first time takes the position that all RAs should be included in the unit. The Petitioner did not file a request for review of the Regional Director's finding, discussed infra, that the RAs in life and physical sciences should be excluded from the unit.

Brown contended to the Regional Director that the petitioned-for individuals are not statutory employees because this case is factually distinguishable from *NYU*. Brown asserted that, unlike *NYU*, where only a few departments required students to serve as a TA or RA to receive a degree, most university departments at Brown require a student to serve as a TA or RA to obtain a degree. Brown contended that these degree requirements demonstrate that the petitioned-for students have only an educational relationship and not an employment relationship with Brown. Brown also argued that the TA, RA, and proctor awards constitute financial aid to students, emphasizing that students receive the same stipend, regardless of whether they "work" for those funds as a TA, RA, or proctor, or whether they receive funding for a fellowship, which does not require any work. Finally, Brown argued that even assuming the petitioned-for individuals are statutory employees, they are temporary employees who do not have sufficient interest in their ongoing employment to entitle them to collectively bargain.[8]

The Regional Director, applying *NYU*, rejected Brown's arguments. She also concluded that the petitioned-for unit was appropriate, and she directed an election.

The election was conducted on December 6, 2001, and the ballots were impounded pending the disposition of this request for review.

II. FACTS AND CONTENTIONS OF THE PARTIES

A. Overview of Brown and the Graduate Assistants

Brown is a private university located in Providence, Rhode Island. It was founded in 1764 and is one of the oldest colleges in the United States.[9] The mission of Brown is to serve as a university in which the graduate and undergraduate schools operate as a single integrated facility. Brown has over 50 academic departments, approximately 37 of which offer graduate degrees.[10] Brown employs approximately 550 regular faculty members, and has an unspecified number of short-term faculty appointments. Although student enrollment levels vary, over 1300 are graduate students, 5600 are undergraduate students, and 300 are medical students in various degree programs. Most graduate students seek Ph.D. degrees, with an estimated 1132 seeking doctorates and 178 seeking master's degrees as of May 1, 2001.

Each semester many of these graduate students are awarded a teaching assistantship, research assistantship, or proctorship, and others receive a fellowship. At the time of the hearing, approximately 375 of these graduate students were TAs, 220 served as RAs, 60 were proctors,[11] and an additional number received fellowships.[12]

Although varying somewhat among the departments, a teaching assistant generally is assigned to lead a small section of a large lecture course taught by a professor. Although functions of research assistants vary within departments, these graduate students, as the title implies, generally conduct research under a research grant received by a faculty member. Proctors perform a variety of duties for university departments or administrative offices. Their duties depend on the individual needs of the particular department or the university administrative office in which they work and, thus, include a wide variety of tasks. Unlike TAs and RAs, proctors generally do not perform teaching or research functions. Fellowships do not require any classroom or departmental assignments; those who receive dissertation fellowships are required to be working on their dissertation.

B. Educational Relationship Between Brown and the Graduate Student Assistants

Brown's charter describes the school's mission as "educating and preparing students to discharge the office of life with usefulness and reputation." To educate and prepare its students, Brown uses the university/college model, which "furnishes the advantages of both a small teaching college and a large research university," according to Brown's Bulletin of the University for the years 2001–2003. The Bulletin describes the Ph.D. degree as "primarily a research degree" and emphasizes that "[t]eaching is also an important part of most graduate programs." The testimony of nearly 20 department heads, and the contents of numerous departmental brochures and other Brown brochures, all point to graduate programs steeped in the education of graduate students through research and teaching.

[8] Further, Brown argued that there is no basis for treating groups of RAs differently for the purposes of collective bargaining. Thus, although Brown argues that none of the RAs are employees, it asserts that all RAs should be treated the same; either all are employees or all are not employees.

[9] The University was originally named Rhode Island College. In 1804, the school was renamed Brown University to honor local merchant, Nicholas Brown.

[10] At least 32 departments bestow doctorates, while 5 award masters degrees only.

[11] These figures are for a moment in time. During a given period, a much higher number will have served in one of these positions at some point during that period. Thus, as noted infra, the students in 21 of approximately 32 departments require teaching as a condition of getting a Ph.D. degree.

[12] Approximately 50 graduate students receive a dean's fellowship, and a university fellowship is offered to 60 candidates. Each department also has fellowships. The Employer asserts in its posthearing brief that there are at least 300 fellowships, although the record is not entirely clear as to the precise number overall.

In their pursuit of a Ph.D. degree, graduate students must complete coursework, be admitted to degree candidacy (usually following a qualifying examination), and complete a dissertation, all of which are subject to the oversight of faculty and the degree requirements of the department involved. In addition, most Ph.D. candidates must teach in order to obtain their degree. Although these TAs (as well as RAs and proctors) receive money from the Employer, that is also true of fellows who do not perform any services. Thus, the services are not related to the money received.

The faculty of each department is responsible for awarding TAs, RAs, or proctorships to its students. To receive an award, the individual usually must be enrolled as a student in that department.

TAs generally lead small groups of students enrolled in a large lecture class conducted by a faculty member in the graduate student's department. The duties and responsibilities vary with the department involved. In the sciences, TAs typically demonstrate experiments and the proper use of equipment, and answer questions. In the humanities and social sciences, TAs lead discussions of what was discussed in the lecture by the professor.[13] All the TAs' duties are under the oversight of a faculty member from the graduate department involved.

During semesters when these students do not act as TAs, RAs, or proctors, they enroll in courses and work on dissertations. Even during those semesters when they are acting in one of these capacities, they nonetheless participate in taking courses and writing dissertations.

The content of the courses that the TAs teach, and the class size, time, length, and location are determined by the faculty members, departmental needs, and Brown's administration. Although undergraduate enrollment patterns play a role in the assignment of many TAs, faculty often attempt to accommodate the specific educational needs of graduate students whenever possible. In addition, TAs usually lead sections within their general academic area of interest. In the end, decisions over who, what, where, and when to assist faculty members as a TA generally are made by the faculty member and the respective department involved, in conjunction with the administration. These are precisely the individuals or bodies that control the academic life of the TA.

Research assistantships are typically generated from external grants from outside Brown, i.e., Federal agencies, foundations, and corporate sponsors. A faculty member, referred to as the "principal investigator," typically applies for the grant from the Government or private source, and funds are included for one or more RAs. The general process is for students to work with or "affiliate with" a faculty member, who then applies for funds and awards the student the RA. The students supported by the grant will work on one of the topics described in the grant. The faculty member who serves as a principal investigator most typically also serves as the advisor for that student's dissertation. Although technically the principal investigator on the grant, the faculty member's role is more akin to teacher, mentor, or advisor of students. Although the RAs in the social sciences and humanities perform research that is more tangential to their dissertation, the students still perform research functions in conjunction with the faculty member who is the principal investigator.

Proctors perform a variety of duties for university departments or administrative offices. The Regional Director cited a representative list of these duties, which include working in Brown's museums or libraries, editing journals or revising brochures, working in the office of the dean, advising undergraduate students, and working in various university offices. Although a few perform research and at least one teaches a class in the Hispanic studies department, they generally do not perform research or teaching assistant duties.

C. Financial Support for Graduate Students

The vast majority of incoming and continuing graduate students receive financial support. In the preceding academic year, 85 percent of continuing students and 75 percent of incoming students received some financial support from Brown. Brown gives assurances to some students that additional support will be available in the future. Thus, at the discretion of each department and based on the availability of funds, some incoming students are told in their award letters that if they "maintain satisfactory progress toward the Ph.D., you will continue to receive some form of financial aid in your second through fourth years of graduate study at Brown, most probably as a teaching assistant or research assistant." Brown's ultimate goal is to support all graduate students for up to 5 years, typically with a fellowship in the first and fifth years, and TA or RA positions in the intervening years. As noted above, the financial support is not dependent on whether the student performs services as a TA, RA, or proctor.

Brown considers academic merit and financial need when offering various forms of support, although support is not necessarily issued to those with the greatest finan-

[13] A few TAs in some departments do not lead sections or labs, but teach a course, although under the supervision of a faculty member. In addition, teaching fellows, who constitute less than 10 percent of all TAs, teach courses independently. The vast majority of TAs, however, typically lead sections or labs that are subsections of a large lecture.

cial need.[14] This support may include a fellowship, TA, RA, or proctorship, which may include a stipend for living expenses, payment of university health fee for on-campus health services, and tuition "remission" (payment of tuition). Priority is given to continuing students when awarding financial support.

The amount of funding for a fellowship, TA, RA, and proctorship generally is the same. The basic stipend for a fellowship, TA, RA, or proctorship is $12,800, although some fellowships, RAs, and TAs are slightly more.[15] Tuition remission and health fee payments generally are the same for TAs, RAs, proctors, and fellows, although the amount of tuition remission depends on the number of courses taken by a student.[16]

Brown treats funds for TA, RAs, proctors, and fellowships as financial aid and represents them as such in universitywide or departmental brochures. Graduate student assistants receive a portion of their stipend award twice a month, and the amount of stipend received is the same regardless of the number of hours spent performing services. The awards do not include any benefits, such as vacation and sick leave, retirement, or health insurance.

D. Contentions of the Parties

1. Brown

In its Brief on Review, Brown argues that *New York University*, 332 NLRB 1205 (2000), was wrongly decided, contending that it reversed 25 years of precedent "without paying adequate attention to the Board's role in making sensible policy decisions that effectuate the purposes of the Act." Brown contends that the Board "did not adequately consider that the relationship between a research university and its graduate students is not fundamentally an *economic* one but an *educational* one." Further, Brown contends that the support to students is part of a financial aid program that pays graduate students the same amount, regardless of work, and regardless of the value of those services if purchased on the open market (i.e., hiring a fully-vetted Ph.D.). Brown also emphasizes that "[c]ommon sense dictates that students who teach and perform research as part of their academic curriculum cannot properly be considered employees without entangling the . . . Act into the intricacies of graduate education." Brown also incorporates arguments made in its request for review that, at a minimum, *NYU*, supra, is distinguishable from this case because of the extent that teaching and research are required for a graduate degree, and because the graduate assistants are temporary employees.

2. Petitioner

The Petitioner argues that the Regional Director correctly followed the Board's decision in *NYU*, and that *NYU* must be upheld. The Petitioner contends that the petitioned-for employees clearly meet the statutory definition of "employee" because they meet the common law test. The Petitioner disputes Brown's contention that TA and RA stipends, like fellowship stipends, are "financial aid." The Petitioner argues that Brown's contention that TAs or RAs lose their status as employees because the TAs and RAs are academically required to work is based on the false notion that there is no way to distinguish between a graduate student's academic requirements and the "work appointments" of the TAs or RAs. Further, even assuming that these individuals usually are satisfying an academic requirement, this is not determinative of employee status.

With regard to the RAs in the life and physical sciences that the Regional Director excluded, the Petitioner now asserts that these individuals should be included in the unit because they provide a service to Brown and are compensated for such service in a manner consistent with a finding that they are employees within the meaning of the Act.

Finally, the Petitioner contends that the petitioned-for individuals are not temporary employees.

III. DISCUSSION AND ANALYSIS

A. Pre-NYU Board Decisions

In *Adelphi University*, 195 NLRB 639 (1972), the Board held that graduate student assistants are primarily students and should be excluded from a unit of regular faculty. In *Leland Stanford*, 214 NLRB 621 (1974), the Board went further. It held that graduate student assistants "are not employees within the meaning of Section 2(3) of the Act." The common thread in both opinions is that these individuals are students, not employees. The Board found that the research assistants were not statutory employees because, like the graduate students in

[14] The University requires all students to submit a Free Application for Federal Student Aid (FAFSA). Because proctorships usually are paid with Federal work-study funds, those students must financially qualify for this support. The University also provides Federal loans, such as the Federal Direct Student Loan Program.

[15] Students receiving the dean and dissertation fellowships receive $14,500, while university fellowships receive $13,300. Some departments, particularly in the sciences, offer RA stipends from $13,200 to $14,250. Some departments, mostly in sciences and social sciences, use senior TAs who receive $13,300, while teaching fellows receive from $14,300 to 14,800. Our colleagues say that the graduate assistantships are "modest," citing the $12,800 stipend paid by Brown as an example. However, Brown may also provide these individuals with tuition remission worth $26,000 per year, and in addition pays the University's health fee on their behalf.

[16] As indicated above, TAs, RAs, and proctors participate in taking courses and are permitted to take a maximum of three courses during the semester that they serve. Fellows, however, are permitted to take a maximum of five courses with four courses being most typical.

Adelphi, supra, they were "primarily students." In support of this conclusion, the Board cited to the following: (1) the research assistants were graduate students enrolled in the Stanford physics department as Ph.D. candidates; (2) they were required to perform research to obtain their degree; (3) they received academic credit for their research work; and (4) while they received a stipend from Stanford, the amount was not dependent on the nature or intrinsic value of the services performed or the skill or function of the recipient, but instead was determined by the goal of providing the graduate students with financial support. For over 25 years, the Board adhered to the *Leland Stanford* principle.

In each of these Board decisions, the Board's view of graduate students enrolled at a college or university remained essentially the same. In *Adelphi University*, supra, the graduate student assistants were graduate students working towards their advanced academic degrees, and the Board noted that "their employment depends entirely on their status as such." 195 NLRB at 640. Further, the Board emphasized that graduate student assistants "are guided, instructed, assisted, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned." Id. The Board concluded that graduate student assistants were primarily students and contrasted them with research associates in *C. W. Post Center of Long Island University*, 189 NLRB 904 (1971), because the research associates "[were] not simultaneously a student but already had . . . [a] doctoral degree and, under the Center's statutes, [were] eligible for tenure." 195 NLRB at 640 fn. 8. As noted above, the rationale was similar in *Leland Stanford*, supra, in which the Board likewise contrasted the research assistants there to research associates, again emphasizing that research associates are not simultaneously students and concluding that "these research assistants are like the graduate teaching and research assistants who we found were primarily students in *Adelphi University*." 214 NLRB at 623.

In *St. Clare's Hospital*, 229 NLRB 1000 (1977), and *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), the Board reaffirmed its treatment of students "who perform services at their educational institutions which are directly related to their educational program" and stated that the Board "has universally excluded students from units which include nonstudent employees, and in addition has denied them the right to be represented separately." *St. Clare's Hospital*, 229 NLRB at 1002. The Board emphasized the rationale that they are "serving primarily as students and not primarily as employees . . . [and] the mutual interests of the students and the educational institution in the services being rendered are predominately academic rather than economic in nature." Id. Although the Board later overruled *St. Clare's Hospital* and *Cedars-Sinai* in *Boston Medical Center*, 330 NLRB 152 (1999), and asserted jurisdiction over the individuals there, those individuals were interns, residents, and fellows who had already completed and received their academic degrees. The Board in *Boston Medical* did not address the status of graduate assistants who have not received their academic degrees. In the instant case, the graduate assistants are seeking their academic degrees and, thus, are clearly students. We need not decide whether *Boston Medical* (where the opposite is true) was correctly decided.

B. Return to the Pre-NYU Status of Graduate Student Assistants

The Supreme Court has recognized that principles developed for use in the industrial setting cannot be "imposed blindly on the academic world." *NLRB v. Yeshiva University*, 444 U.S. 672, 680–681 (1980), citing *Syracuse University*, 204 NLRB 641, 643 (1973). While graduate programs may differ somewhat in their details, the concerns raised in *NYU*, supra, and here forcefully illustrate the problem of attempting to force the student-university relationship into the traditional employer-employee framework. After carefully analyzing these issues, we have come to the conclusion that the Board's 25-year pre-*NYU* principle of regarding graduate students as nonemployees was sound and well reasoned. It is clear to us that graduate student assistants, including those at Brown, are primarily students and have a primarily educational, not economic, relationship with their university. Accordingly, we overrule *NYU* and return to the pre-*NYU* Board precedent**.**

Leland Stanford, supra, was wholly consistent with the overall purpose and aim of the Act. In Section 1 of the Act, Congress found that the strikes, industrial strife and unrest that preceded the Act were caused by the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership . . . ."[17] To remove the burden on interstate commerce caused by this industrial unrest, Congress extended to and protected the right of employees, if they so choose, to organize and bargain collectively with their employer, encouraging the "friendly adjustment of industrial disputes arising out of differences as to wages, hours or other conditions . . . ." Id.[18] The Act was premised on the view that there is a

[17] Sec. 1, 29 U.S.C. § 151.

[18] 1 Leg. Hist. 318 (NLRA 1935). See also *American Ship Building Co. v. NLRB*, 380 U.S. 300, 316 (1965) (a purpose of the Act is "to

fundamental conflict between the interests of the employers and employees engaged in collective-bargaining under its auspices and that "'[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest'"[:][19]

> [T]he damage caused to the nation's commerce by the inequality of bargaining power between employees and employers was one of the central problems addressed by the Act. A central policy of the Act is that the protection of the right of employees to organize and bargain collectively restores equality of bargaining power between employers and employees and safeguards commerce from the harm caused by labor disputes. *The vision of a fundamentally economic relationship between employers and employees is inescapable.*[20]

The Board and the courts have looked to these Congressional policies for guidance in determining the outer limits of statutory employee status. Thus, the Supreme Court held, in *NLRB v. Bell Aerospace Co.*,[21] that managerial employees, while not excluded from the definition of an employee in Section 2(3), nevertheless are not statutory employees. As the Court explained:

> [T]he Wagner Act was designed to protect "laborers" and "workers," not vice-presidents and others clearly within the managerial hierarchy. Extension of the Act to cover true "managerial employees" would indeed be revolutionary, for it would eviscerate the traditional distinction between labor and management. If Congress intended a result so drastic, it is not unreasonable to expect that it would have said so expressly.[22]

This interpretation of Section 2(3) followed the fundamental rule that "a reviewing court should not confine itself to examining a particular statutory provision in isolation."[23] We follow that principle here. We look to the underlying fundamental premise of the Act, viz. the Act is designed to cover economic relationships. The Board's longstanding rule that it will not assert jurisdiction over relationships that are "primarily educational " is consistent with these principles.

We emphasize the simple, undisputed fact that all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship. Even students who have finished their coursework and are writing their dissertation must be enrolled to receive these awards. Further, students serving as graduate student assistants spend only a limited number of hours performing their duties, and it is beyond dispute that their principal time commitment at Brown is focused on obtaining a degree and, thus, being a student. Also, as shown below, their service as a graduate student assistant is part and parcel of the core elements of the Ph.D. degree. Because they are first and foremost students, and their status as a graduate student assistant is contingent on their continued enrollment as students, we find that that they are primarily students.

We also emphasize that the money received by the TAs, RAs, and proctors is the same as that received by fellows. Thus, the money is not "consideration for work." It is financial aid to a student.

The evidence demonstrates that the relationship between Brown's graduate student assistants and Brown is primarily educational. As indicated, the first prerequisite to becoming a graduate student assistant is being a student. Being a student, of course, is synonymous with learning, education, and academic pursuits. At Brown, most graduate students are pursuing a Ph.D. which, as described by the Brown's University Bulletin, is primarily a research degree with teaching being an important component of most graduate programs. The educational core of the degree, research, and teaching, reflects the essence of what Brown offers to students: "the advantage of a small teaching college and large research university." At least 21 of the 32 departments that offer Ph.D. degrees require teaching as a condition of getting that degree. Sixty-nine percent of all graduate students are enrolled in these departments. Thus, for a substantial majority of graduate students, teaching is so integral to their education that they will not get the degree until they satisfy that requirement.[24] Graduate student assistant

redress the perceived imbalance of economic power between labor and management."); 1 Leg. His. 15 (NLRA 1935) (remarks of Sen. Wagner, 78 Cong.Rec. 3443 (Mar. 1, 1934).

[19] *NLRB v. Insurance Agents*, 361 U.S. 477, 488 (1960).

[20] *WBAI Pacifica Foundation*, 328 NLRB 1273, 1275 (1999) (emphasis added).

[21] 416 U.S. 267 (1974).

[22] Id. at 284.

[23] *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 132–133 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme.") (Citations and internal quotations omitted.) See also Sutherland, *Statutory Construction* (5th ed. 1994) § 46.05: "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed."

[24] This fact is relevant to our analysis, but it is not necessarily critical. That is, if the fact were to the contrary, we would not necessarily find employee status. Indeed, the fact was contra in *NYU* and employee status was found, but we have overruled that case.

positions are, therefore, directly related to the core elements of the Ph.D. degree and the educational reasons that students attend Brown. The relationship between being a graduate student assistant and the pursuit of the Ph.D. is inextricably linked, and thus, that relationship is clearly educational.

We recognize that a given graduate student may be a teacher, researcher, or proctor for only a portion of his or her tenure as a student. However, as described above, that task is an integral part of being a graduate student, and cannot be divorced from the other functions of being a graduate student.

Because the role of teaching assistant and research assistant is integral to the education of the graduate student, Brown's faculty oversees graduate student assistants in their role as a research or teaching assistant. Although the duties and responsibilities of graduate student assistants vary among departments and faculty, most perform under the direction and control of faculty members from their particular department. TAs generally do not teach independently, and even teaching fellows who have some greater responsibilities follow faculty-established courses. RAs performing research do so under grants applied for by faculty members, who often serve as the RA's dissertation adviser. In addition, these faculty members are often the same faculty that teach or advise the graduate assistant student in their coursework or dissertation preparation.

Besides the purely academic dimension to this relationship is the financial support provided to graduate student assistants because they are students. Attendance at Brown is quite expensive. Brown recognizes the need for financial support to meet the costs of a graduate education. This assistance, however, is provided only to students and only for the period during which they are enrolled as students. Further, the vast majority of students receive funding. Thus, in the last academic year, 85 percent of continuing students and 75 percent of incoming students received assistance from Brown. In addition, as noted above, the amounts received by graduate student assistants generally are the same or similar to the amounts received by students who receive funds for a fellowship, which do not require any assistance in teaching and research. Moreover, a significant segment of the funds received by both graduate student assistants and fellows is for full tuition. Further, the funds for students largely come from Brown's financial aid budget rather than its instructional budget.

Thus, in light of the status of graduate student assistants as students, the role of graduate student assistantships in graduate education, the graduate student assistants' relationship with the faculty, and the financial support they receive to attend Brown, we conclude that the overall relationship between the graduate student assistants and Brown is primarily an educational one, rather than an economic one.

Over 25 years ago, the Board in *St. Clare's Hospital*, supra, clearly and cogently explained the rationale for declining to extend collective-bargaining rights to students who perform services at their educational institutions, that are directly related to their educational program, i.e.,

> The rationale . . . is a relatively simple and straightforward one. Since the individuals are rendering services which are directly related to—and indeed constitute an integral part of—their educational program, they are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process. It is for this reason that the Board has determined that the national labor policy does not require—and in fact precludes—the extension of collective-bargaining rights and obligations to situations such as the one now before us.

229 NLRB at 1002 (footnote omitted).

The Board explained, "[i]t is important to recognize that the student-teacher relationship is not at all analogous to the employer-employee relationship." Thus, the student-teacher relationship is based on the "mutual interest in the advancement of the student's education," while the employer-employee relationship is "largely predicated on the often conflicting interests" over economic issues. Because the collective-bargaining process is fundamentally an economic process, the Board concluded that subjecting educational decisions to such a process would be of "dubious value" because educational concerns are largely irrelevant to wages, hours, and working conditions. In short, the Board 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."

The Board noted that "the educational process—particularly at the graduate and professional levels—is an intensely personal one." The Board emphasized that the process is personal, not only for the students, but also for faculty, who must educate students with a wide variety of

backgrounds and abilities. In contrast to these individual relationships, collective bargaining is predicated on the collective or group treatment of represented individuals. The Board observed that in many respects, collective treatment is "the very antithesis of personal individualized education."

The Board also emphasized that collective bargaining is designed to promote equality of bargaining power, "another concept that is largely foreign to higher education." The Board noted that while teachers and students have a mutual interest in the advancement of the student's education, in an employment relationship such mutuality of goals "rarely exists."

Finally, the Board concluded that collective bargaining would unduly infringe upon traditional academic freedoms. The list of freedoms detailed in *St. Clare's Hospital*, 229 NLRB at 1003, includes not only the right to speak freely in the classroom, but many "fundamental matters" involving traditional academic decisions, including course length and content, standards for advancement and graduation, administration of exams, and many other administrative and educational concerns. The Board opined that once academic freedoms become bargainable, "Board involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away."[25]

The concerns expressed by the Board in *St. Clare's Hospital* 25 years ago are just as relevant today at Brown. Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. These decisions would include broad academic issues involving class size, time, length, and location, as well as issues over graduate assistants' duties, hours, and stipends. In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research—the principal prerogatives of an educational institution like Brown. Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and decisions, which are based on different, and often individualized considerations.[26]

Based on all of the above-statutory and policy considerations, we concluded that the graduate student assistants are not employees within the meaning of Section 2(3) of the Act. Accordingly, we decline to extend collective bargaining rights to them, and we dismiss the petition.[27]

Our dissenting colleagues question our analysis of pre-*NYU* precedent. More specifically, they assert that the holding of *Leland Stanford*, 214 NLRB 621 (1974), is confined to research assistants and that research assistants are unlike graduate teaching assistants. The language of the Board in that case is directly contrary to this assertion. The Board said:

> *In sum, we believe these research assistants are like the graduate teaching and research assistants who we*

[25] In citing *St. Clare's*, we do not necessarily register our agreement with all aspects of that case. That is, we do not hold that residents and interns are not employees for purposes of collective bargaining. Nor do we hold that the Act "precludes" residents and interns from employee status under Sec. 2(3). We simply say that, for many of the same policy considerations that underlie *St. Clare's*, we have chosen not to treat graduate assistants as employees for purposes of collective bargaining.

[26] Academic freedom includes the right of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Sweezy v. State of New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J, concurring). As our dissenting colleagues note, the Supreme Court found that these freedoms were not infringed by the EEOC's efforts to subpoena tenure-related documents in *University of Pennsylvania v. EEOC*, 493 U.S. 182 (1990). In reaching this conclusion, the Court stressed that the application of Title VII to tenure decisions would not usurp the university's authority to determine employment criteria for professors except by precluding the use of those proscribed by Title VII. The imposition of collective bargaining on the relationship between a university and its graduate student assistants, in contrast, would limit the university's freedom to determine a wider range of matters. Because graduate student assistants are students, those limitations intrude on core academic freedoms in a manner simply not present in cases involving faculty employees.

[27] Member Schaumber agrees with his colleagues that graduate student assistants are not statutory employees for the reasons stated above. He finds further support for this conclusion in the fact that graduate student assistants fit poorly within the common law definition of "employee," "which the Supreme Court has held is relevant to the question of whether an individual is an "employee" under the Act, although not controlling. *NLRB v. Town & Country Electric*, 516 U.S. 85, 94 (1995) (contrasting interpretation of term "employee" under other Federal laws, applying common law standards, with the "'considerable deference'" given to the Board's construction of that term when administering the Act). Under the common law, an employee is a person who performs services *for another* under a contract *of hire*, subject to the other's control or right of control, and *in return for payment*. Id. Here, graduate student assistants are not "hired" to serve as graduate teaching or research assistants. They are admitted to a graduate program that includes a requirement for service as a graduate student assistant. The teaching and research are not performed "for" the university, as such, but rather as an integral part of the student's educational course of study. The financial arrangements for graduate student stipends further confirm the fundamentally educational nature of service as a TA or RA, as the stipends are based upon status—enrollment in a graduate program. They do not depend on the nature or value of the services provided, and, thus, are not a quid pro quo for services rendered. In disagreeing with this analysis, Member Schaumber believes that his dissenting colleagues focus too narrowly on the mechanics of the work performed by graduate student assistants without considering it in context with the controlling academic relationship of which it is an integral part. This parallels the dissent's application of the definition for "employee" set forth in Sec. 2(3) of the Act. Member Schaumber believes that the dissenters read the definition in isolation while the breadth of the term's application—its intended contours—can only be determined accurately by reading the definition in the context of the Act, see, e.g., Sec. 1 in which it appears.

> *found were primarily students in Adelphi University*, 195 NLRB 639, 640 (1972). We find, therefore, that the research assistants in the physics department are primarily students, and we conclude they are not employees within the meaning of Section 2(2) of the Act.

214 NLRB at 623 (emphasis added). Our colleagues' assertions, therefore, turn a blind eye to the Board's longstanding policy, discussed above, of declining to extend collective-bargaining rights to graduate students and holding that graduate students are not employees under Section 2(3) of the Act. See *Adelphi University*, supra; *Leland Stanford University*, supra; and *St. Clare's*, supra.[28]

The broad applicability of this policy to graduate student assistants is clear from *St. Clare's*, in which the Board carefully delineated several categories of Board cases involving students, including those students who perform services at an educational institution where those services are directly related to the university's educational programs. Discussing this category of cases, and citing *Leland Stanford* and *Adelphi University*, the Board stated, "[i]n such cases, the Board has universally excluded students from units which include nonstudent employees, and in addition has denied them the right to be represented separately." Id. at 1002.[29] Until *NYU*, this had been the Board's unbroken policy towards the issue of collective-bargaining rights for graduate students. Although the Board may not have been presented the precise facts of *NYU* in earlier cases, the dissent chooses either to ignore or simply to disregard what had been Board law regarding this category of students for over 25 years. This Board law is also consistent with nearly one-half century of Board decisions holding that the disabled who are in primarily rehabilitative rather than an economic or industrial work relationships are not statutory employees and that it would not effectuate the policies of the Act to subject the rehabilitative program into which they have been admitted to collective bargaining.[30]

Our colleagues argue that graduate student assistants are employees at common law. Even assuming arguendo that this is so, it does not follow that they are employees within the meaning of the Act. The issue of employee status under the Act turns on whether Congress intended to cover the individual in question. The issue is not to be decided purely on the basis of older common-law concepts. For example, a managerial employee may perform services for, and be under the control of, an employer. Indeed, the Supreme Court used the term "managerial *employee*" in *Bell Aerospace Co.*, 416 U.S. 267 (1974). And yet, the Court held that these persons were not statutory employees.

Similarly, our colleagues say that we never address the language of Section 2(3). In fact, we do. The difference is that our colleagues stop their analysis with the recitation of the statutory words "the term "employee" shall include any employee." We go further than this tautology. We examine the underlying purposes of the Act.

Our colleagues rely on *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995), and *Sure-Tan v. NLRB*, 467 U.S. 883 (1984), to support their contention that the absence of an express exclusion in Section 2(3) for graduate student assistants mandates a finding that the assistants are statutory employees. As the foregoing discussion makes clear, that is simply not so. Further, neither of these cases supports the dissent's position. In both *Town & Country* and *Sure-Tan*, the individuals found to be employees worked in fundamentally economic relationships. Moreover, and consistent with our approach, the Court in both cases examined the underlying purposes of the Act in determining whether paid union organizers and illegal aliens, respectively, were statutory employees. *Town & Country*, supra, 516 U.S. at 91; *Sure-Tan*, supra, 467 U.S. at 891–892. We have examined and rely upon those same statutory purposes in determining that Brown's graduate student assistants are not employees within the meaning of the Act.

Contrary to the dissent, our decision today is also consistent with the Board's recent decision in *Alexandria Clinic*, 339 NLRB 1262 (2003), which considered whether a union satisfied Section 8(g)'s 10-day strike notice requirement when it issued a 10-day notice, but deliberately delayed the start of the strike for 4 hours after the time specified in the notice. Section 8(g) contains detailed requirements for strike notices at healthcare facilities, and the Board properly relied on those explicit

[28] Our colleagues say that, under *St. Clare's*, house staff were not employees for bargaining purposes but they could be employees for other statutory purposes. Our colleagues complain that, in the instant case, we are holding that graduate student assistants are not employees for any statutory purposes. In our view, that result flows from our interpretation of Sec. 2(3). Of course, *St. Clare's* is not now the law, and we decline to consider its holding here.

[29] Although the dissent cites language from *Cedars-Sinai*, supra, to the effect that the Board has included students in some bargaining units and in a few instances, authorized elections in units composed solely of students, the Board clarified this general assertion in *St. Clare's* by making clear that this does not include the category of students who perform services at their university related to their educational programs.

[30] *Sheltered Workshops of San Diego*, 126 NLRB 961(1960), *Goodwill of Tidewater*, 304 NLRB 767 (1991); and *Goodwill of Denver*, 304 NLRB 764 (1991).

statutory provisions in concluding that the notice in *Alexandria Clinic*, supra, was deficient. Section 2(3), by contrast, contains no detailed provisions for determining statutory employee status. That issue, therefore, must be examined in the context of the Act's overall purpose.

The dissent's further contention that we "fail to come to grips" with the statutory principles of Section 2(3) is nothing more than a disagreement with our interpretation and application of the statute. In reality, the *NYU* decision on which our colleagues rely was contrary to historic Board precedent. It was also contrary to Supreme Court and Circuit Court precedent, in that it read Section 2(3) out of the context in which it appears. We are unprepared to do so. As discussed above, the absence of "students" from the enumerated exclusions of Section 2(3) is not the end of the statutory inquiry. Rather, although Section 2(3) contains explicit exceptions for groups that must be excluded from the statutory definition of "employee," other groups also have been held to be excluded.

Moreover, even if graduate student assistants are statutory employees, a proposition with which we disagree, it simply does not effectuate the national labor policy to accord them collective bargaining rights, because they are primarily students. In this regard, the Board has the discretion to determine whether it would effectuate national labor policy to extend collective–bargaining rights to such a category of employees. Indeed, the Board has previously exercised that discretion with respect to medical residents and interns. See *St. Clare's Hospital*, supra. Thus, assuming arguendo that the petitioned-for individuals are employees under Section 2(3), the Board is not compelled to include them in a bargaining unit if the Board determines it would not effectuate the purposes and policies of the Act to do so.

We also reject the dissent's contention that our policy is unsound because we "minimize the economic relationship between graduate student assistants and their universities." Contrary to the dissent, the "academic reality" for graduate student assistants has not changed, in relevant respects, since our decisions over 25 years ago. See, e.g., the description of graduate assistants in *Adelphi University*, 195 NLRB at 640. As the Board explained in *St. Clare's*, the conclusion that these graduate student assistants are primarily students "connotes nothing more than the simple fact that when an individual is providing services at the educational institution itself as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic." 229 NLRB at 1003. That is the essence of the relationship between a university and graduate student assistants, and why we decline to accord collective–bargaining rights to them.

Although the dissent theorizes how the changing financial and corporate structure of universities may have given rise to graduate student organizing, these theories do not contradict the following facts demonstrating that the relationship between Brown and its graduate student assistants is primarily academic: (1) the petitioned-for individuals are *students*; (2) working as a TA, RA, or proctor, and receipt of a stipend and tuition remission, depends on continued enrollment as a *student;* (3) the principal time commitment at Brown is focused on obtaining a degree, and, thus, being a *student*; and (4) serving as a TA, RA, or proctor, is part and parcel of the core elements of the Ph.D. degree, which are teaching and research. Although the structure of universities, like other institutions, may have changed, these facts illustrate that the basic relationship between graduate students and their university has not.

The dissent gives a few examples of collective-bargaining agreements in which there is assertedly no intrusion into the educational process. However, inasmuch as graduate student assistants are not statutory employees that is the end of the inquiry. Nevertheless, we will respond to our dissenting colleagues. Even if some unions have chosen not to intrude into academic prerogatives, that does not mean that other unions would be similarly abstemious. The certification sought by the Petitioner here has no limitations. As discussed above, the broad power to bargain over all Section 8(d) subjects would, in the case of graduate student assistants, carry with it the power to intrude into areas that are at the heart of the educational process. In contrast to the broad power to bargain under Section 8(d) of the Act, all states have the authority to limit bargaining subjects for public academic employees, and at least some have exercised that authority.[31]

[31] See, e.g., Cal. Gov't Code Sec. 3562(q) (West 2004) (excluding, from collective bargaining, admission requirements for students, conditions for awarding degrees, and content and supervision of courses, curricula, and research programs), applied in *Regents of the University of California*, 23 PERC P 30025 (1998); see also *Central State University v. American Assn. of University Professors*, 526 U.S. 124 (1999) (per curiam) (Ohio statute exempting university professors' instructional workload standards from collective bargaining does not violate equal protection); *University Education Association v. Regents of the University of Minnesota*, 353 N.W. 2d 534 (Minn. 1984) (criteria to determine promotion and tenure, review of faculty evaluations, and academic calendar, are matters of inherent management policy, which are not negotiable under labor relations statute); and *Regents of the University of Michigan v. Michigan Employment Relations Commission*, 389 Mich. 96, 204 N.W. 2d 218 (1973) (scope of bargaining limited if subject matter falls clearly within the educational sphere).

The dissent also faults us for acting in the absence of "empirical evidence," and for allegedly engaging in policymaking reserved to Congress. Once again, inasmuch as graduate student assistants are not statutory employees, that is the end of our inquiry. It is our dissenting colleagues who are intruding on the domain of the Congress. In addition, as to the former point, 25 years of untroubled experience under pre-*NYU* standards seem to us a far more sound empirical basis for action than that offered by the studies our colleagues cite. And, as to the latter point, we note that Congress voiced no disapproval of the Board's 25-year rule that graduate students are not employees. See *American Totalisator*, 243 NLRB 314 (1979), affd. 708 F.2d 46 (2d. Cir. 1983), cert. denied 464 U.S. 914 (1983) ("Congress is well aware of the Board's historic stance of declining to assert jurisdiction over horseracing and dogracing, . . . [a]bsent an indication from Congress that the Board's refusal to assert jurisdiction is contrary to congressional mandate, we are not persuaded that we should exercise our discretion to reverse our prior holdings on this issue.").

Finally, our colleagues suggest that we have concluded that "there [is] no room in the ivory tower for a sweatshop." Although the phrase is a catchy one, it does nothing to further the analysis of this case. Our decision does not turn on whether our nation's universities are ivory towers or sweatshops (although we do not believe that either has been shown). Rather, our decision turns on our fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act.

For the reasons we have outlined in this opinion, there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process. Although the dissent dismisses our concerns about collective bargaining and academic freedom at private universities as pure speculation, their confidence in the process in turn relies on speculation about the risks of imposing collective bargaining on the student-university relationship. We decline to take these risks with our nation's excellent private educational system. Although under a variety of state laws, some states permit collective bargaining at public universities, we choose to interpret and apply a single Federal law differently to the large numbers of private universities under our jurisdiction. Consistent with longstanding Board precedent, and for the reasons set forth in this decision, we declare the Federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act.

ORDER

The Regional Director's Decision and Direction of Election is reversed, and the petition is dismissed.

MEMBERS LIEBMAN AND WALSH, dissenting.

Collective bargaining by graduate student employees is increasingly a fact of American university life.[1] Graduate student unions have been recognized at campuses from coast to coast, from the State University of New York to the University of California. Overruling a recent, unanimous precedent, the majority now declares that graduate student employees at private universities are not employees protected by the National Labor Relations Act and have no right to form unions. The majority's reasons, at bottom, amount to the claim that graduate-student collective bargaining is simply incompatible with the nature and mission of the university. This revelation will surely come as a surprise on many campuses—not least at New York University, a first-rate institution where graduate students now work under a collective-bargaining agreement reached in the wake of the decision that is overruled here.[2]

Today's decision is woefully out of touch with contemporary academic reality. Based on an image of the university that was already outdated when the decisions the majority looks back to, *Leland Stanford*[3] and *St. Clare's Hospital*,[4] were issued in the 1970's, it shows a troubling lack of interest in empirical evidence. Even worse, perhaps, is the majority's approach to applying the Act. It disregards 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—to make a policy decision that rightly belongs to Congress. The reasons offered by the majority for its decision do not stand up to

[1] See Neal H. Hutchens & Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZAGA L. REV. 105, 106–107 (2004) (surveying history and status of graduate student unions); Daniel J. Julius & Patricia J. Gumport, *Graduate Student Unionization: Catalysts and Consequences*, 26 REVIEW OF HIGHER EDUCATION 187, 191–196 (2002) (same); Grant M. Hayden, *"The University Works Because We Do": Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233, 1236–1243 (2001) (same); Douglas Sorrelle Streitz & Jennifer Allyson Hunkler, *Teaching or Learning: Are Teaching Assistants Students or Employees*, 24 JOURNAL OF COLLEGE & UNIVERSITY LAW 349, 358–370 (1997) (same). By one recent count, 23 American universities have recognized graduate student unions or faculty unions including graduate students, beginning in 1969 with the University of Wisconsin-Madison. See Coalition of Graduate Employee Unions, *Frequently Asked Questions about Graduate Employee Unions* at http://www.cgeu.org/FAQ basics.html.

[2] *New York University*, 332 NLRB 1205 (2000) (*NYU*).

[3] *Leland Stanford Junior University*, 214 NLRB 621 (1974).

[4] *St. Clare's Hospital & Health Center*, 229 NLRB 1000 (1977).

scrutiny. But even if they did, it would not be for the Board to act upon them. The result of the Board's ruling is harsh. Not only can universities avoid dealing with graduate student unions, they are also free to retaliate against graduate students who act together to address their working conditions.

I.

We would adhere to the Board's decision in *NYU* and thus affirm the Regional Director's decision in this case.

In *NYU*, applying principles that had recently been articulated in *Boston Medical Center*,[5] the Board held that the graduate assistants involved there were employees within the meaning of Section 2(3) of the Act, because they performed services under the control and direction of the university, for which they were compensated by the university. The Board found "no basis to deny collective-bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students." 332 NLRB at 1205. It was undisputed, the Board observed, that "graduate assistants are not within any category of workers that is excluded from the definition of 'employee' in Section 2(3)." Id. at 1206.

In turn, the Board rejected policy grounds as a basis for effectively creating a new exclusion. Rejecting claims that graduate assistants lacked a traditional economic relationship with the university, the Board pointed out that the relationship in fact paralleled that between faculty and university, which was amenable to collective bargaining. 332 NLRB at 1207–1208. The university's assertion that extending collective-bargaining rights to graduate students would infringe on academic freedom was also rejected. Such concerns, the Board explained, were speculative. Citing 30 years of experience with bargaining units of faculty members, and the flexibility of collective bargaining as an institution, the Board concluded that the "parties can 'confront any issues of academic freedom as they would any other issue in collective bargaining.'" Id., quoting *Boston Medical Center*, supra, 330 NLRB at 164.

Here, the Regional Director correctly applied the Board's decision in *NYU*. She concluded that the teaching assistants (TAs), research assistants (RAs), and proctors were statutory employees, because they performed services under the direction and control of Brown, and were compensated for those services by the university. With respect to the TAs, the Regional Director rejected, on both factual and legal grounds, Brown's attempt to distinguish *NYU* on the basis that teaching was a degree requirement at Brown. Finally, she found that the TAs, RAs, and proctors were not, as Brown contended, merely temporary employees who could not be included in a bargaining unit. Accordingly, she directed a representation election, so that Brown's graduate students could choose for themselves whether or not to be represented by a union.

We agree with the Regional Director's decision in each of these respects.

II.

Insisting that it is simply restoring traditional precedent, the majority now overrules *NYU* and reverses the Regional Director's decision. It concludes that because graduate assistants "are primarily students and have a primarily educational, not economic, relationship with their university," they are not covered by the National Labor Relations Act and the Board cannot exercise jurisdiction over them. According to the majority, "[p]rinciples developed for use in the industrial setting cannot be 'imposed blindly on the academic world.'"[6]

There are two chief flaws in the majority's admonition. First, the majority fails to come to grips with the statutory principles that must govern this case. Second, it errs in seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there was no room in the ivory tower for a sweatshop.[7] Before addressing those flaws, we question the majority's account of Board precedent in this area.

[5] *Boston Medical Center*, 330 NLRB 152 (1999). That decision concerned hospital interns, residents, and fellows (house staff) involved in medical training as well as in patient care. In upholding their right to engage in collective bargaining, despite their status as students, the Board overruled *St. Clare's Hospital*, supra. The Board's decision today explicitly notes that it "express[es] no opinion regarding" *Boston Medical Center*. We believe that *Boston Medical Center* was correctly decided.

[6] The majority quotes from the Supreme Court's decision in *NLRB v. Yeshiva University*, 444 U.S. 672, 680–681 (1980), in which the Court held that, given their role in university governance, the faculty members involved there were managerial employees, not covered by the Act. The Court made clear, however, that not all faculty members at every university would fall into the same category. 444 U.S. at 690 fn. 31. Following *Yeshiva*, the Board has continued to find faculty-member bargaining units appropriate. See, e.g., *Bradford College*, 261 NLRB 565 (1982).

[7] Graduate assistantships are modest, even at top schools. The Regional Director found that at Brown the "basic stipend for a fellowship, teaching assistantship, research assistantship, or proctorship is $12,800 for the 2001–2002 academic year." According to a 2003 report, the "average amount received by full-time, full-year graduate and first-professional students with assistantships was $9,800." Susan P. Choi & Sonya Geis, "Student Financing of Graduate and First-Professional Education, 1999–2000," National Center for Education Statistics, Institute of Education Sciences, U.S. Dept. of Education 22 (2003). It stands to reason that graduate student wages are low because, to quote Sec. 1 of the Act, the "inequality of bargaining power" between schools and graduate employees has the effect of "depressing wage rates." 29 U.S.C. §151.

A.

Seeking to avoid the consequences of overruling such a recent precedent, the majority contends that *Leland Stanford*, not *NYU*, correctly resolves the issue presented here. The majority argues, moreover, that *Leland Stanford* itself was consistent with a decision that came before it, *Adelphi University*.[8] In fact, until today, the Board has never held that graduate teaching assistants (in contrast to certain research assistants and medical house staff) are not employees under the Act and therefore should not be allowed to form bargaining units of their own—or, indeed, enjoy any of the Act's protections.

In *Adelphi University*, decided in 1972, the Board excluded graduate assistants from a bargaining unit of faculty members because they did not share a community of interest with the faculty, not because they were not statutory employees. 195 NLRB at 640. The Board pointed out, among other things, that "graduate assistants are guided, instructed, and corrected in the performance of their assistantship duties by the regular faculty members to whom they are assigned." Id. Nothing in the Board's decision suggests that the graduate assistants could not have formed a bargaining unit of their own.

The *Leland Stanford* Board, as the majority acknowledges, "went further" in 1974. It concluded that because the research assistants (RAs) there were "primarily students" (citing *Adelphi University*), they were "not employees within the meaning of . . . the Act." 214 NLRB at 623. How the conclusion followed from the premise was not explained. The rationale of *Leland Stanford*, moreover, turned on the particular nature of the research assistants' work. The Board observed that:

> [T]he relationship of the RA's and Stanford is not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by the employer. Rather it is a situation of students within certain academic guidelines having chosen particular projects on which to spend the time necessary, as determined by the project's needs.

Id. at 623. This narrow rationale is not inconsistent with *NYU*, where the Board actually applied *Leland Stanford* to exclude certain graduate assistants from the bargaining unit. 332 NLRB at 1209 fn. 10.

Finally, the majority cites *Cedars-Sinai Medical Center*, 223 NLRB 251 (1976), and *St.Clare's Hospital*, supra, which involved medical interns, residents, and clinical fellows. The medical housestaff decisions, issued over the sharp dissents of then-Chairman Fanning, were correctly overruled in *Boston Medical Center*, supra, which the majority leaves in place.

Notably, in *St. Clare's Hospital*, the Board made clear that while "housestaff are not 'employees,'" the Board was *not* "renouncing entirely [its] jurisdiction over such individuals," but rather was simply holding that they did not have "bargaining privileges" under the Act. 229 NLRB at 1003 (footnote omitted). The majority here does not seem to make this distinction—which would give graduate assistants at least some protections under the Act—and thus itself seems to depart from the precedent it invokes.

In sum, while the *NYU* Board did not write on a clean slate, it hardly abandoned a long line of carefully reasoned, uncontroversial decisions. And, as we will explain, much has changed in the academic world since the 1970's.

B.

The principle applied in *NYU*—and the one that should be followed here—is that the Board must give effect to the plain meaning of Section 2(3) of the Act and its broad definition of "employee," which "reflects the common law agency doctrine of the conventional master-servant relationship." *NYU*, 332 NLRB at 1205, citing *NLRB v. Town & Country Electric*, 516 U.S. 85, 93–95 (1995). See also *Seattle Opera v. NLRB*, 292 F.3d 757, 761–762 (D.C. Cir. 2002), enfg. 331 NLRB 1072 (2000) (opera's auxiliary choristers are statutory employees, applying common-law test). Section 2(3) provides in relevant part that the "term 'employee' shall include *any* employee . . . ." 29 U.S.C. §152(3) (emphasis added). Congress specifically envisioned that professional employees—defined in Section 2(12) in terms that easily encompass graduate assistants—would be covered by the Act.

We do not understand the majority to hold that the graduate assistants in this case are *not* common-law employees, a position that only Member Schaumber reaches toward.[9] Here, the Board's "departure from the common

[8] *Adelphi University*, 195 NLRB 639 (1972).

[9] Member Schaumber asserts that "graduate student assistants fit poorly within the common law definition of 'employee.'" He maintains that graduate assistants are "not 'hired' to serve" in that capacity, that their work is "not performed 'for' the university, as such," and that their stipends "are not a quid pro quo for services rendered." We disagree in each respect, as a factual matter. As the Regional Director found, graduate assistants carry out the work of the university, not their own projects, and they are compensated for it. There can be no doubt, of course, that Brown had the right to control the performance of the graduate assistants' work for the university, a key test for employee status at common law. See *RESTATEMENT (SECOND) OF AGENCY* §2(2) (1958) ("A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master").

law of agency" with respect to employee status is unreasonable. Compare *Town & Country Electric*, supra, 516 U.S. at 94 (upholding Board's interpretation of term "employee" as "consistent with the common law"). See also *Seattle Opera*, 292 F.3d at 765 fn. 11 (Board's hypothetical "neglect of the common law definition could have rendered its decision arbitrary and capricious").

Nothing in Section 2(3) excludes statutory employees from the Act's protections, on the basis that the employment relationship is not their "primary" relationship with their employer. In this respect, the majority's approach bears a striking resemblance to the Board's original "economic realities" test for employee status, which Congress expressly rejected when it passed the Taft-Hartley Amendments in 1947. That test was based on economic and policy considerations, rather than on common-law principles, but it did not survive.[10]

Absent compelling indications of Congressional intent, the Board simply is not free to create an exclusion from the Act's coverage for a category of workers who meet the literal statutory definition of employees. As the *NYU* Board observed, there is no such exclusion for "students." 332 NLRB at 1206. Cf. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891–892 (1984) (observing that the "breadth of [the Act's] definition is striking" and noting lack of express exemption for undocumented aliens). Here, the majority cites nothing in the text or structure of the Act, nothing in the Act's legislative history, and no other Federal statute that bears directly on the issues presented. It goes without saying that the Board's own policymaking is bounded by the limits Congress has set.

The Supreme Court's decision in *Yeshiva*, supra, is instructive on this point. There, the Court considered whether university faculty members at one institution were managerial employees and so excluded from coverage. It observed that it could not

> decide this case by weighing the probable benefits and burdens of faculty collective bargaining. That, after all, is a matter for Congress, not this Court.

444 U.S. at 690 fn. 29 (citation omitted). Other Federal courts have made similar observations in analogous cases, choosing to follow the plain language of the Act, rather than "attempting to 'second guess' Congress on a political and philosophical issue." *Cincinnati Assn. for the Blind v. NLRB*, 672 F.2d 567, 571 (6th Cir. 1982), cert. denied 459 U.S. 835 (1982) (refusing to find exception to Sec. 2(3) of Act for disabled workers employed in sheltered workshops).[11] In a recent case where the Act's language was far less clear, our colleagues themselves have insisted that the statutory text alone dictated the outcome—indeed, they were content to "examine a particular statutory provision [Section 8(g) of the Act] in isolation" (to quote their words here).[12] The approach taken in this case stands in sharp contrast.

The majority never addresses the language of Section 2(3), which the Supreme Court has described as "broad." *Town & Country Electric*, 516 U.S. at 90 (citing dictionary definition of "employee" as including any "person who works for another in return for financial or other compensation"). Instead, it proceeds directly to consult "Congressional policies for guidance in determining the outer limits of statutory employee status." The majority cites the exclusion for managerial employees, which is not based on the Act's text. But in that example, as the Supreme Court explained, the "legislative history strongly suggests that there . . . were . . . employees . . . regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 283 (1974). Graduate assistants simply do not fall into that category.

The Board's decision in *WBAI Pacifica Foundation*, 328 NLRB 1273 (1999), quoted by the majority, does not support its position here. That case involved the unpaid staff of a noncommercial radio station, who did not receive compensation or benefits of any kind, and whose work hours were "a matter within their discretion and desire." Id. at 1273. The Board found "*no* economic aspect to their relationship with the Employer, either actual or anticipated." Id. at 1275 (emphasis added). "Unpaid staff," the Board observed, "do not depend upon the Employer, even in part, for their livelihood or for the improvement of their economic standards." Id. at 1276. Rather, the Board explained, unpaid staff "work[ed] out of an interest in seeing the station continue to exist and thrive, out of concern for the content of the programs they produce, and for the personal enrichment of doing a

Graduate students are clearly neither volunteers nor independent contractors.

[10] See *NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968) (discussing Congressional overruling of *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944)). As we will explain, we believe that the economic realities here do support finding statutory coverage in any case.

[11] See also *NLRB v. Lighthouse for the Blind of Houston*, 696 F.2d 399, 404 fn. 21 (5th Cir. 1983) (rejecting argument that Board lacked jurisdiction over sheltered workshop and disabled workers employed there). We believe that the Board's approach in this area—the Board chooses to exercise jurisdiction only where the relationship between disabled workers and their employer is "typically industrial," as opposed to "primarily rehabilitative"—is ripe for reconsideration, particularly in light of the evolution of Federal policy toward disabled workers. See *NYU*, 332 NLRB at 1207 (discussing disabled-worker cases). The issue is now pending before the Board in *Brevard Achievement Center, Inc.*, Case 12–RC–8515 (review granted Aug. 23, 2000).

[12] *Alexandria Clinic*, 339 NLRB 1262, 1264 fn. 8 (2003).

service to the community and receiving recognition from the community." Id. at 1275.

The relationship between Brown and its graduate assistants is clearly different in nature. Teaching assistants, the Regional Director found, "perform services under the direction and control of Brown"—they teach undergraduates, just as faculty members do[13]—and "are compensated for these services by Brown," by way of a stipend, health fee, and tuition remission. As for research assistants in the social sciences and humanities (who were included in the bargaining unit), the Regional Director observed that they "have expectations placed upon them other than their academic achievement, in exchange for compensation."[14] The proctors, finally, are "performing services that are not integrated with an academic program," such as working in university offices and museums. Notably, the Regional Director found that Brown withholds income taxes from the stipends of teaching assistants, research assistants, and proctors and requires them to prove their eligibility for employment under Federal immigration laws.

The majority is mistaken, then, when it insists that the graduate assistants here do not receive "consideration for work," but merely financial aid. While it is true, as the majority observes, that "all the petitioned-for individuals are students and must first be enrolled at Brown to be awarded a TA, RA, or proctorship," that fact does not foreclose a meaningful economic relationship (as well as an educational relationship) between Brown and the graduate assistants. The Act requires merely the existence of such an economic relationship, not that it be the only or the primary relationship between a statutory employee and a statutory employer.[15]

C.

Even assuming that the Board were free to decide this case essentially on policy grounds, the majority's approach, minimizing the economic relationship between graduate assistants and their universities, is unsound. It rests on fundamental misunderstandings of contemporary higher education, which reflect our colleagues' unwillingness to take a close look at the academic world. Today, the academy is also a workplace for many graduate students, and disputes over work-related issues are common. As a result, the policies of the Act—increasing the bargaining power of employees, encouraging collective bargaining, and protecting freedom of association—apply in the university context, too. Not only is the majority mistaken in giving virtually no weight to the common-law employment status of graduate assistants, it also errs in failing to see that the larger aims of Federal labor law are served by finding statutory coverage here. Indeed, the majority's policy concerns are not derived from the Act at all, but instead reflect an abstract view about what is best for American higher education—a subject far removed from the Board's expertise.

American higher education was being transformed even as the Board's "traditional" approach to graduate-student unionization developed. Nearly a decade before the Board decided *St. Clare's Hospital*, distinguished scholar and Columbia University administrator Jacques Barzun described changes that were tearing "apart the fabric of the former, single-minded" American university. He warned that "a big corporation has replaced the once self-centered company of scholars."[16] In deciding to exercise jurisdiction over private, nonprofit universities more than 30 years ago (and reversing longstanding precedent in doing so), the Board recognized this development.[17]

After the 1980's, financial resources from governments became more difficult for universities to obtain.[18] "[A]s financial support for colleges and universities lag behind escalating costs, campus administrators increasingly turn to ill-paid, overworked part- or full-time adjunct lecturers and graduate students to meet instructional needs."[19] By December 2000, 23.3 percent of college instructors were graduate teaching assistants.[20]

[13] The Regional Director found that the number of teaching assistantships, and the assignment of assistants to particular courses, is tied to undergraduate enrollment. She also found that Brown had "failed to demonstrate that most teaching assistantships at Brown are undertaken in order to fulfill a degree requirement."

[14] The Regional Director found "insufficient evidence . . . upon which to conclude that as a general rule the RAs in the social sciences and humanities departments perform research as part of their studies in order to complete their dissertations," in contrast to RA's in the physical sciences, who were not included in the unit.

[15] See, e.g., *Seattle Opera*, 292 F.3d at 762 ("[T]he person asserting 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").

[16] Jacques Barzun, The American University: How It Runs, Where It Is Going 3 (1968).

[17] See *Cornell University*, 183 NLRB 329, 331–333 (1970), overruling *Trustees of Columbia University*, 97 NLRB 424 (1951).

[18] See, e.g., Clark Kerr, Troubled Times for American Higher Education: The 1990s and Beyond 3 (1994).

[19] COMMITTEE ON PROFESSIONAL EMPLOYMENT, MODERN LANGUAGE ASSOCIATION, FINAL REPORT 3 (1997) at http://www.mla.org/resources/documents/rep_employment/prof-employment1 (examining higher education's pedagogical and professional crisis and proposing ways to increase the effectiveness of higher education).

[20] *Reliance on Part-Time Faculty Members and How They Are Treated, Selected Disciplines*, CHRON. HIGHER EDUC., Dec. 1, 2000, available at http://chronicle.com/prm/weekley/v47/i14/14a01301.htm. See also Hutchens & Hutchens, supra, *Catching the Union Bug*, 39 GONZAGA L. REV. at 126 ("In an effort to contain costs, colleges and

The reason for the widespread shift from tenured faculty to graduate teaching assistants and adjunct instructors is simple: cost savings. Graduate student teachers earn a fraction of the earnings of faculty members.[21]

Two perceptive scholars have recently described the context in which union organizing among graduate students has developed. Their description is worth quoting at length:

> The post World War II expansion of universities is a well-documented phenomenon. Enrollments, resources, and activities increased and diversified. Universities were transformed into mega-complexes. But by the late 1980s and throughout the 1990s, the realization spread that expansion was not limitless. In response to heightened accountability demands, universities adopted management strategies that entailed belt-tightening and restructuring of the academic workplace . . . . [M]any universities replaced full-time tenure-track faculty lines with non-tenure-line and part-time appointments.
>
> . . . .
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> Expansion of doctoral degree production has continued nonetheless . . . . The discrepancy between ideals and realities prompt graduate students to consider unionization a viable solution to their concerns and an avenue to redress their sense of powerlessness.
>
> . . . .
>
> Among the primary reasons for graduate student unionization is the lengthened time required to complete a degree, coupled with an increased reluctance on the part of students to live in what they perceive as academic ghettos. Many older graduate students desire to start families, need health care coverage and job security, and perceive the faculty with whom they work to be living in comparative luxury…. *[D]ata show that the unionization of these individuals is driven fundamentally by economic realities.*

Daniel J. Julius & Patricia J. Gumport, *Graduate Student Unionization: Catalysts and Consequences*, 26 REVIEW OF HIGHER EDUC. No. 2, 187 at 191, 196 (2002) (emphasis added; citations omitted).

Describing the same process, another scholar observes that the "increased dependence on graduate assistantships has created a group of workers who demand more economic benefits and workplace rights."[22] The question, then, is whether the collective efforts of these workers will be protected by Federal labor law and channeled into the processes the law creates. Given the likelihood that graduate students will continue to pursue their economic interests through union organizing—even those who live the life of the mind must eat—there are powerful reasons to apply the Act and so encourage collective bargaining to avoid labor disputes, as Congress envisioned.[23] The prospect of continued labor unrest on campus, with or without Federal regulation, is precisely what prompted the Board to assert jurisdiction over private nonprofit universities in the first place, three decades ago.[24]

The majority ignores the developments that led to the rise of graduate student organizing or their implications for the issue decided today. Instead, it treats the Board's 1974 decision in *Leland Stanford*, together with the 1977 decision in *St. Clare's Hospital*, as the last word. Like other regulatory agencies, however, the Board is "neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday," but rather must "adapt [its] rules and practices to the Nation's needs in a volatile changing economy." *American Trucking Associations v. Atchison Topeka & Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967).[25] The majority's failure to do so in this case is arbitrary.

III.

At the core of the majority's argument are the twin notions that (1) issues related to the terms and conditions of graduate student employment are "not readily adaptable to the collective-bargaining process," *St. Clare's Hospital*, 229 NLRB at 1002; and (2) imposing collective bargaining will harm "academic freedom" (as the majority

universities have increasingly relied on graduate students and non-tenure-track instructors"). Illustrating this trend, the New York Times recently reported that graduate students "teach more than half of the core courses that all Columbia [University] students must take." Karen W. Arenson, *Pushing for Union, Columbia Grad Students Are Set to Strike*, NEW YORK TIMES, p. A-11 (April 17, 2004).

[21] Ana Marie Cox, *More Professors Said to Be Off Tenure Track, for Graduate Assistants*, CHRON. HIGHER EDUC. (July 6, 2001) available at http://chronicle.com/prm/weekly/v47/i43/43a01201.htm. See also *Stipends for Graduate Assistants, 2001*, CHRON. HIGHER EDUC., Sept. 28, 2002, available at http://chronicle.com/stats/stipends/.

[22] 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, 154 (2000). See also Hutchens & Hutchens, supra, *Catching the Union Bug*, 39 GONZAGA L. REV. at 126 ("[T]he reality at many institutions likely belies a picture of students carefully mentored by faculty in their employment capacities, especially in the context of teaching assistants.").

[23] See Sec. 1, 29 U.S.C. §151.

[24] See *Cornell University*, supra, 183 NLRB at 333.

[25] The Board's recent failure to face contemporary economic realities threatens to become a recurring theme of its decisions. See *MV Transportation*, 337 NLRB 770, 776 (2002) (Member Liebman, dissenting) (criticizing Board's reversal of successor-bar doctrine, despite large increase in corporate mergers and acquisitions that destabilize workplaces).

defines it) and the quality of higher education. Neither notion is supported by empirical evidence of any kind. In fact, the evidence refutes them.

How can it be said that the terms and conditions of graduate-student employment are not adaptable to collective bargaining when collective bargaining over these precise issues is being conducted successfully in universities across the nation? New York University, ironically, is a case in point, but it is hardly alone. The recently-reached collective–bargaining agreement there addresses such matters as stipends, pay periods, discipline and discharge, job posting, a grievance-and-arbitration procedure, and health insurance. It also contains a "management and academic rights" clause, which provides that:

> Decisions regarding who is taught, what is taught, how it is taught and who does the teaching involve academic judgment and shall be made at the sole discretion of the University.

Collective–Bargaining Agreement between New York University and International Union, UAW, AFL–CIO and Local 2110, Technical Office and Professional Workers, UAW (Sept. 1, 2001–Aug. 31, 2005), Art. XXII.[26] The NYU agreement neatly illustrates the correctness of the *NYU* Board's view that the institution of collective bargaining is flexible enough to succeed in this context, as it has in so many others, from manufacturing to entertainment, health care to professional sports.

The NYU agreement cannot be dismissed as an anomaly. The amicus briefs to the Board submitted by the American Federation of Labor-Congress of Industrial Organizations (AFL–CIO) and the American Association of University Professors (AAUP) inform us of many other, established collective–bargaining relationships between graduate student unions and universities.[27] To be sure, most involve public universities, but there is nothing fundamentally different between collective bargaining in public-sector and private-sector universities.[28] The majority concedes that the subjects of graduate student collective bargaining "give the appearance of being terms and conditions of employment." Obviously, they *are* terms and conditions of employment, as found in a particular setting.

There remains the majority's claim that collective bargaining can only harm "academic freedom" and educational quality. Putting aside the issue of the Board's authority to serve as an expert guardian of these interests, the question is one of evidence. Here, too, the majority's claims are not simply unsupported, but are actually contradicted. The majority emphasizes that collective bargaining is "predicated on the collective or group treatment of represented individuals," while the "educational process" involves personal relationships between individual students and faculty members. The issue, if one is presented at all by this difference, is whether the two processes can coexist. Clearly, they can. The evidence is not just the ongoing collective-bargaining relationships between universities and graduate students already mentioned. It also includes studies ignored by the majority, which show that collective bargaining has not harmed mentoring relationships between faculty members and graduate students.[29] These conclusions are not surprising. Collective bargaining is typically conducted by representatives of the university and graduate students' unions, not individual mentors and their students.

After a careful review, scholars Daniel Julius and Patricia Gumport, for example, concluded not only that "fears that [collective bargaining] will undermine mentoring relationships . . . appear to be foundationless," but also that data "suggest that the clarification of roles and employment policies can *enhance* mentoring relationships."[30] Scholar Gordon Hewitt reached a similar conclusion based on an analysis of the attitudes of almost 300 faculty members at five university campuses with at least 4-year histories of graduate-student collective bargaining. Summarizing the results of his survey, Hewitt observes that:

[26] The collective-bargaining agreement is posted on the University's Internet website at http://www.nyu.edu/hr/.

[27] The AFL–CIO, for example, cites bargaining relationships at the University of California, the University of Florida, the University of South Florida, the University of Iowa, the University of Kansas, the University of Massachusetts, Michigan State University, the University of Michigan, Rutgers, the City University of New York, New York University, the State University of New York, the University of Oregon, Temple University, the University of Wisconsin, and Wayne State University. Brief of Amicus Curiae AFL–CIO in Support of Petitioner at 36 (May 20, 2002). See also Julius & Gumport, supra, *Graduate Student Unionization*, 26 Review of Higher Education at 192–193 (Table 1: "The Status of Graduate Student Unions in U.S. Institutions").

[28] The majority points out that "states have the authority to limit bargaining subjects for public academic employees." But under the Act, not every subject of interest to graduate assistants would be a mandatory subject of bargaining. The Board presumably would be free to take into account the nature of the academic enterprise in deciding which subjects are mandatory and which merely permissive. See fn. 32, infra (discussing statutory bargaining obligations).

[29] See Julius & Gumport, supra, Graduate Student Unionization, 26 Review of Higher Education at 201–209; Hewitt, supra, Graduate Student Employee Collective Bargaining and the Educational Relationship between Faculty and Graduate Students, 29 Journal of Collective Negotiations in the Public Sector at 159-164.

[30] Julius & Gumport, supra, 26 Review of Higher Education at 201, 209.

> It is clear . . . that faculty do not have a negative attitude toward graduate student collective bargaining. It is important to reiterate that the results show faculty feel graduate assistants are employees of the university, support the right of graduate students to bargain collectively, and believe collective bargaining is appropriate for graduate students. *It is even more important to restate that, based on their experiences, collective bargaining does not inhibit their ability to advise, instruct, or mentor their graduate students.*

Hewitt, supra, 29 Journal of Collective Negotiations in the Public Sector at 164 (emphasis added). Amicus AAUP echoes these views in its brief to the Board. These findings should give the majority some pause, as should the obvious fact that whether or not the rights of graduate student employees are to be recognized under the Act, economic concerns have already intruded on academic relationships.

Finally, the majority invokes "academic freedom" as a basis for denying graduate student employees any rights under the Act. This rationale adds insult to injury. To begin, the majority defines "academic freedom" so broadly that it is necessarily incompatible with *any* constraint on the managerial prerogatives of university administrators. But academic freedom properly focuses on efforts to regulate the "content of the speech engaged in by the university or those affiliated with it." *University of Pennsylvania v. EEOC*, 493 U.S. 182, 197 (1990). On the majority's view, private universities should not be subject to the Act at all. But, of course, they are—just as are newsgathering organizations, whose analogous claims of First Amendment immunity from the Act were rejected by the Supreme Court long ago.[31]

The *NYU* Board correctly explained that, the threat to academic freedom in this context—properly understood in terms of free speech in the university setting—was pure conjecture. 332 NLRB at 1208 fn. 9. We hasten to add that graduate students themselves have a stake in academic freedom, which they presumably will be reluctant to endanger in collective bargaining. As demonstrated in the amicus brief of the AAUP (a historical champion of academic freedom), collective bargaining and academic freedom are not incompatible; indeed, academic freedom for instructors can be strengthened through collective bargaining.[32]

IV.

"[W]e declare the federal law to be that graduate student assistants are not employees within the meaning of Section 2(3) of the Act," says the majority. But the majority has overstepped its authority, overlooked the economic realities of the academic world, and overruled *NYU* without ever coming to terms with the rationale for that decision. The result leaves graduate students outside the Act's protection and without recourse to its mechanisms for resolving labor disputes. The developments that brought graduate students to the Board will not go away, but they will have to be addressed elsewhere, if the majority's decision stands. That result does American universities no favors. We dissent.

[31] *Associated Press v. NLRB*, 301 U.S. 103, 130–133 (1937).

[32] The majority contends (1) that the "imposition of collective bargaining on the relationship between a university and its graduate students . . . " would limit the university's [academic] freedom to determine a wide range of matters;" and (2) that "because graduate student assistants are students, those limitations intrude on core academic freedoms in a manner simply not present in cases involving faculty employees." We disagree with both claims.

First, under Sec. 8(d) of the Act, collective bargaining would be limited to "wages, hours, and other terms and conditions of employment" for graduate student assistants. 29 U.S.C. §158(d). And with respect to those mandatory subjects of bargaining, the "Act does not compel agreements between employers and employees," just the "free opportunity for negotiation," as the *NYU* Board correctly observed. 332 NLRB at 1208, quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

Second, the basis for the majority's distinction between faculty-member bargaining and graduate-assistant bargaining escapes us. In our view, there is no harm to genuine academic freedom in either case. But under the majority's view, faculty-member bargaining would interfere with the prerogatives of university management at least as much as graduate-student bargaining would. It is surely the subjects of bargaining that matter, not the identity of the bargaining party. In that respect, the similarities between graduate assistants and faculty members (in contrast to clerical or maintenance staff members, for example) is clear.