

Catching the Union Bug:¹ Graduate Student Employees and Unionization

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1. "Union bug" is a term referring to a label indicating that a product was produced with union labor. The union "bug" is also used as a mascot of sorts by the AFL-CIO at http://www.aflcio.org/familyfunresources/games/game_unionbug.cfm (last visited Sept. 3, 2003).

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I. INTRODUCTION

Graduate students often assume multiple roles as they simultaneously struggle to keep pace with their academic coursework while serving as instructors in undergraduate classrooms, conducting research for faculty, or fulfilling some other type of university position that helps to subsidize their graduate studies.² Similarly, blurred lines exist in the relationships between graduate students and the faculty acting as the students' employers, advisors, and teachers.³ Questions over the employment status of graduate students have engendered significant debate in recent years.⁴ Union supporters claim that graduate students employed by universities deserve the same collective bargaining rights as other university employees.⁵ University officials respond that graduate students working as teaching and research assistants are primarily students and warn that treating such graduate students as employees threatens academic freedom and the relationships between students and their faculty advisors.⁶

An important reason for increased discussion and controversy stems from a relatively recent change on the part of the National Labor Relations Board ("NLRB" or "Board") regarding the status of graduate students employed by private universities under the National Labor Relations Act ("NLRA" or "Act").⁷ In *New York University* ("NYU"), the NLRB reversed a long-standing position that excluded graduate student workers at private universities from the purview of the NLRA.⁸ The decision opened the door for graduate students at private institutions to exercise their collective bargaining rights under the NLRA. The NLRB's new position may be short-lived, however, with appointees to the NLRB by President George W. Bush ready to potentially reverse the decision in *NYU*.⁹

Although garnering attention in recent years, the issue of graduate student unionization is not new. In 1969, graduate students at the University of Wisconsin-Madison gained recognition for their union.¹⁰ Since that time, graduate student unions have grown slowly and, as a result of a growth spurt in the 1990s, now bargain on behalf of graduate students at more than sixty public and private colleges and

2. Jon Curtiss, *Workers/Teachers/Students: Graduate Student Employee Collective Bargaining at the University of Michigan* (1994) (ERIC Document Reprod. Serv. No. ED 374 711).

3. *Id.*

4. New York Univ., No. 2-RC-22082, 2000 WL 1643529, at *1 (N.L.R.B. Oct. 31, 2000).

5. *Id.* at *2-3.

6. *Id.* at *1.

7. *Id.*

8. *Id.*

9. Steven Greenhouse, *5,000 Workers at Yale Are Set to Strike over Pensions and Wages*, N.Y. TIMES, Mar. 1, 2003, at B1.

10. Lori J. Cavell, *Graduate Student Unionization in Higher Education* (2000) (ERIC Document Reprod. Serv. No. ED 446 647).

universities.¹¹ The NLRB's decision in *NYU* initiated a new round of unionization attempts.¹²

Unionization efforts have sparked well-publicized debates at universities in recent years.¹³ The ongoing controversy at Yale University over graduate student unionization illustrates the potential divisiveness of the issue.¹⁴ Graduate assistants at Yale began organization efforts in 1989.¹⁵ In the spring of 2003, a new wave of graduate student unionization efforts occurred in which approximately 1,000 graduate assistants joined in a strike with some 4,000 clerical and service employees.¹⁶ Yale officials resisted the recognition attempt and supported the efforts of Brown University to seek reversal of the decision announced in *NYU*.¹⁷

This article focuses on the continuing conflict surrounding graduate students' roles as workers and students in the context of graduate student unionization. After this introduction, Part II provides an overview of the rights of graduate students to organize at public and private institutions. In looking at the potential conflict between the NLRA and the Family Educational Right to Privacy Act ("FERPA"), Part III examines the potential problems encountered in determining when to apply the law of "student" or "employee." Finally, Part IV considers various arguments raised for and against granting graduate students the right to organize.

11. Coalition of Graduate Employee Unions, *Frequently Asked Questions About Graduate Employee Unions: The Basics*, at <http://www.cgeu.org/FAQbasics.html> (last visited Sept. 12, 2003). For a summary of the status of graduate student unions at colleges and universities in the United States as of October 2002, see Daniel J. Julius & Patricia J. Gumpert, *Graduate Student Unionization: Catalysts and Consequences*, 26 REV. HIGHER EDUC. 187, 187-98 (2002). For an in-depth examination of the identities, ideologies, and strategies of recognized and organizing graduate student unions, see Gary Rhoades & Robert A. Rhoads, *The Public Discourse of U.S. Graduate Employee Unions: Social Movement Identities, Ideologies, and Strategies*, 26 REV. HIGHER EDUC. 163 (2002).

12. Yilu Zhao, *Columbia Graduate Assistants Strike to Support Union Effort*, N.Y. TIMES, Apr. 30, 2002, at B2 (noting unionization efforts at such high-profile institutions as Columbia, Yale, Harvard, and Brown).

13. Matthew M. Bodah, *Significant Labor and Employment Law Issues in Higher Education During the Past Decade and What to Look for Now: The Perspective of an Academician*, 29 J.L. & EDUC. 317, 317-19 (2000) ("Union organizing by graduate students was the most widely-reported higher education labor relations issue of the 1990s.").

14. Grant M. Hayden, *"The University Works Because We Do": Collective Bargaining Rights for Graduate Assistants*, 69 FORDHAM L. REV. 1233, 1238-40 (2001) (providing an overview of the struggle at Yale).

15. *Id.* at 1239.

16. Greenhouse, *supra* note 9, at B1. A non-NLRB poll conducted a few months later, however, surprisingly revealed that a majority of the graduate students who participated did not favor unionization. See Steven Greenhouse, *Grad Students Reject Union in Yale Vote*, N.Y. TIMES, May 2, 2003, at B1.

17. Greenhouse, *supra* note 9, at B1.

II. COLLECTIVE BARGAINING RIGHTS OF GRADUATE STUDENTS

A. *Public Versus Private Universities*

The legal standards governing the organizational rights of graduate students depend on whether the university is public or private.¹⁸ State law governs the organizational rights of graduate students at public universities.¹⁹ Employees of state governments are specifically exempted from protection under the NLRA.²⁰ State employees, including employees at public universities, are governed by state labor laws that vary greatly in their perspectives towards collective action by employees.²¹ Under these state law schemes, some states have recognized graduate students' status as employees as well as their corollary right to organize and negotiate collective bargaining agreements.²²

According to the Coalition of Graduate Employee Unions ("CGEU"), an organization that promotes the unionization of graduate students, public university graduate employees are explicitly eligible for collective bargaining rights in fourteen states.²³ In eleven states, public university employees are generally allowed collective bargaining rights, but the eligibility of graduate student employees remains undetermined.²⁴ One state, Ohio, specifically excludes graduate employees from those public university employees eligible for coverage under collective bargaining agreements.²⁵ According to the CGEU, twenty-three states deny collective bargaining rights to all university employees.²⁶ The significant variation between state labor laws means that emerging unions and public university administrators must look to the specific statutory scheme of the state in order to determine which policies and procedures govern the rights of public university graduate assistants.

18. Coalition of Graduate Employee Unions, *Frequently Asked Questions About Graduate Employee Unions: Legal Issues*, at <http://www.cgeu.org/FAQlegal.html> (last visited Sept. 18, 2003).

19. *Id.*

20. National Labor Relations Act (NLRA) § 2(2), 29 U.S.C. § 152(2) (2000).

21. Coalition of Graduate Employee Unions, *Frequently Asked Questions About Graduate Unions: Legal Issues*, at <http://www.cgeu.org/FAQlegal.html> (last visited Sept. 18, 2003).

22. *Id.*

23. *Id.* (noting the eligibility of graduate employees in California, Florida, Illinois, Iowa, Kansas, Massachusetts, Michigan, Minnesota, New Jersey, New York, Oregon, Rhode Island, Pennsylvania, and Wisconsin).

24. *Id.* (noting the uncertainty of the eligibility of graduate employees in Alaska, Connecticut, Delaware, Hawaii, Maine, Montana, Nebraska, New Hampshire, New Mexico, South Dakota, and Vermont).

25. *Id.*

26. Coalition of Graduate Employee Unions, *Frequently Asked Questions About Graduate Unions: Legal Issues*, at <http://www.cgeu.org/FAQlegal.html> (last visited Sept. 9, 2003) (noting the exclusion of graduate employees in Alabama, Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, and Wyoming). In Washington, two-year college employees are eligible, but not university employees. *Id.*

At private universities, however, the NLRB's current designation of graduate student workers as employees for purposes of the NLRA places them under the purview of the Act and provides substantial federal rights regarding organizational activities.²⁷ The NLRA safeguards the rights of covered employees to organize, join labor organizations, and engage in collective bargaining and other activities for mutual aid and protection.²⁸ Therefore, a private university cannot discriminate against a graduate student as a result of union activity protected by the NLRA.

If a graduate student union gains majority support and wins an election, the university is required to bargain in good faith with the union over wages, hours, and the working conditions of student assistants.²⁹ A union may not automatically force a university to meet its demands, but may engage in a strike under the NLRA to pressure university officials to agree to such terms.³⁰ The university can also initiate a lockout of student employees in order to pressure the union to meet its conditions.³¹ The NLRA does not grant graduate assistants the rights to have their demands met, but simply to receive protection of their concerted activity.³²

1. The NLRB's Discretionary Jurisdiction over Private Universities

Although the NLRA grants broad authority, the NLRB does not assert jurisdiction over all private employers that could be covered under the Act. Further, this discretionary jurisdiction was not exercised over private universities until 1970.³³ In *Cornell University*,³⁴ the Board reversed its 1951 decision in *Columbia University* where the Board declined to assert jurisdiction over non-profit educational institutions.³⁵ The Board explained that, under the NLRA, it possesses "statutory jurisdiction over nonprofit educational institutions whose operations affect commerce."³⁶ The Board decided that although education was the primary goal of

27. *Id.*

28. See NLRA § 7, 29 U.S.C. § 157 (2000). According to section 8(a)(1), a university engages in an unfair labor practice when it attempts "to interfere with, restrain, or coerce employees in the exercise of their rights" to self-organization, to bargain collectively, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection. See NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (2003). Because only "employees" have rights under § 8(a)(1), it is of primary importance whether graduate students are considered "students" or "employees." *Id.* Section 8(a)(1) prohibits any action undertaken by employers that effects employees' free exercise of the rights granted to them in the NLRA. See 1 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 82-83 (Patrick Hardin, et. al. eds., 4th ed. 2001) [hereinafter 1 THE DEVELOPING LABOR LAW].

29. NLRA § 8(d), 29 U.S.C. § 158(d) (2000).

30. NLRA § 13, 29 U.S.C. § 163 (2000); NLRA § 8(d), 29 U.S.C. § 158(d).

31. NLRA § 8(d), 29 U.S.C. § 158(d).

32. NLRA § 7, 29 U.S.C. § 157.

33. See *Cornell Univ.*, 183 N.L.R.B. 329 (1970).

34. *Id.* at 334.

35. 97 N.L.R.B. 424 (1951).

36. *Cornell Univ.*, 183 N.L.R.B. at 331.

universities, institutions were required to "become involved in a host of activities which are commercial in character" in fulfilling their educational missions.³⁷ In elaborating on the effect of private universities and colleges on interstate commerce, the Board looked at the aggregate operating budgets, expenditures, government appropriations, and profits of ancillary services of universities.³⁸ The Board saved for later determination an appropriate dollar amount that would cause it to assert jurisdiction.³⁹ The current amount is one million dollars in gross annual revenue.⁴⁰

2. The Process of Unionization Under the NLRA

The NLRA prescribes the methods by which a union gains recognition as the exclusive bargaining agent for a group of employees.⁴¹ Section 9 of the NLRA deals with these procedures.⁴² A union seeking certification as the exclusive bargaining agent for a group of employees must file a Request for Clarification petition describing the group to be represented, called the bargaining unit,⁴³ along with documentation that at least thirty percent of the employees in the bargaining unit support the call for an election.⁴⁴ The sufficient documentation requirements are generally met by employees who sign cards stating that they support the calling of an election.⁴⁵ The NLRB conducts the representation election according to certain procedures meant to safeguard the purpose and spirit of the NLRA.⁴⁶ Among the rules governing elections is the *Excelsior* Rule, which requires the employer to provide the NLRB and the union with a list of the names and addresses of employees eligible to vote in the election.⁴⁷ The *Excelsior* list serves the dual purpose of providing a voting list that the NLRB will use to conduct the election and facilitating employees' free choice in decision making by ensuring that the union can communicate with employees.⁴⁸

37. *Id.* at 332.

38. *Id.*

39. *Id.* at 334.

40. 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 640.

41. *Id.* at 499.

42. See NLRA § 9, 29 U.S.C. § 159 (2000).

43. An appropriate bargaining unit is comprised of employees with a common "community of interest." See ARCHIBALD COX ET AL., LABOR LAW 274-75 (13th ed. 2001). In determining whether workers share a community of interest, the Board looks to a variety of factors including similarity in work, wages, and working conditions. *Id.*

44. 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 501-03.

45. *Id.* at 682-83. These are called authorization cards. *Id.* Card drives can also seek to have employees sign cards called dual purpose cards that, in addition to indicating an employee's interest in an election, also designate the union as the employee's bargaining agent. *Id.* at 694-95.

46. 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 547-62.

47. *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239-40 (1966); 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 549-52.

48. *Excelsior Underwear, Inc.*, 156 N.L.R.B. at 1239-40. For a detailed discussion of the *Excelsior* Rule's application in the context of graduate student unionization efforts, see *infra* Part III.

To attain majority status and recognition as the exclusive bargaining agent for a group of employees in a bargaining unit, the union must garner the votes of fifty percent plus one of the employees comprising the unit.⁴⁹ Once the NLRB certifies that a union has attained the majority of votes in an election, the union becomes certified as the exclusive representative of each of the employees in the bargaining unit for the purpose of collective bargaining.⁵⁰ Following certification of a union, the employer acquires a duty to meet and confer with the union and to bargain in good faith over terms and conditions of employment.⁵¹

Neither the union nor the employer may unilaterally make the other assent to specific terms; each must adhere to the good-faith requirements of the NLRA during negotiations.⁵² Once an impasse—a situation in the negotiations where both sides have become entrenched in their positions—occurs, the two parties may attempt to pressure each other into accepting terms through the use of economic weapons.⁵³ The primary economic weapon of the union is the strike.⁵⁴ The employer's counterpart to the strike is the lockout, where employees are prevented from working.⁵⁵ The ability of a party to engage its economic weapons—whether a union can garner support for a strike or an employer can afford a lockout—affects its bargaining position. In a university setting, a strike by graduate teaching assistants could disrupt a university's teaching mission if solidarity existed among graduate students refusing to teach and faculty members honored the picket line. The university might also have to deal with unwanted press coverage regarding the dispute.⁵⁶ Conversely, a university might successfully counter union efforts by encouraging graduate assistants not to honor a picket line or by successfully using full-time faculty or replacement workers.

3. Employees' Rights to Organize Under the NLRA

Recognizing private universities as employers for purposes of the NLRA results in the protection of concerted activity of those considered "employees" under the Act, a designation not given to all workers. Supervisors and managers, for instance, are

49. 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 585.

50. *Id.*

51. NLRA § 8(a)(5), (d), 29 U.S.C. § 158(a)(5), (d) (2000).

52. NLRA § 8(d), 29 U.S.C. § 158(d) (2000).

53. 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 918-20. Impasse represents an inherently vague concept. It occurs when both parties are "warranted in assuming that further bargaining would be futile" and are "at the end of their rope." A.M.F. Bowling Co., 314 N.L.R.B. 969, 978 (1994).

54. 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1453-54 (Patrick Hardin et al. eds., 4th ed. 2001) [hereinafter 2 THE DEVELOPING LABOR LAW].

55. *Id.* at 1513.

56. See, e.g., Greenhouse, *supra* note 9, at B1; Steven Greenhouse, *Yale Oxymoron: Labor Relations*, N.Y. TIMES, Mar. 6, 2003, at B5.

not considered “employees” under the Act.⁵⁷ In *NLRB v. Yeshiva University*, the United States Supreme Court found that full-time faculty members were not covered “employees” as defined by the NLRA.⁵⁸ The Court held that the professors were managerial employees under the Act because of their significant autonomy and ability to make final and authoritative decisions regarding academic matters.⁵⁹ The Court found that “To the extent that the industrial analogy applies, the faculty determines within each school the product to be produced, terms upon which it will be offered, and the customers who will be served.”⁶⁰ The “absolute authority” of the faculty and their role in decision-making led the Court to require that faculty, as other managerial employees, remain loyal to the employer, thereby denying full-time faculty the right to organize.⁶¹ Although it found that full-time faculty were not covered under the NLRA, the *Yeshiva* Court affirmed the NLRB’s assertion of jurisdiction over universities as employers covered by the Act.⁶² Even after *Yeshiva*, full-time faculty at particular institutions have been allowed to engage in collective bargaining after a determination that they do not exercise managerial authority.⁶³

Faculty considered “management” and excluded from the NLRB’s definition of employee may be subject to reprisals for engaging in concerted activity without violating the NLRA.⁶⁴ A university, however, cannot discipline or discharge faculty or others considered supervisors under the Act, if such action interferes with employees’ rights under the NLRA.⁶⁵ Therefore, a university could face an unfair labor practice charge for firing or otherwise punishing a faculty member who testifies against the university in an NLRB proceeding or who refuses to commit an unfair labor practice ordered by university officials.⁶⁶ In addition, while allowing an employer to require absolute loyalty from managerial employees may make sense in an industrial setting, the application of such principles in an academic context raises First Amendment concerns and illustrates one of the potential conflicts present when applying the NLRA in university settings.

57. NLRA § 2(3) & (11), 29 U.S.C. § 152(3) & (11) (2000).

58. 444 U.S. 672, 674-79 (1980).

59. *Id.* at 679-86.

60. *Id.* at 686.

61. *Id.* at 682-90.

62. *Id.* at 679-81.

63. The Board determines whether a particular higher education institution’s faculty are management or supervisors by examining their roles and duties in governing the institution’s academic and administrative matters. *See, e.g., Univ. of Great Falls*, 325 N.L.R.B. 83 (1997); *see also* 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 645.

64. NLRA § 2(11), 29 U.S.C. § 152(11) (2000); 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 168.

65. 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 168-69.

66. *See id.*; Karen W. Arenson, *Labor Board Rules that N.Y.U. Denied Tenure to Union Backer*, N.Y. TIMES, Feb. 28, 2002, at B2.

B. Graduate Students' Status Under the NLRA

1. Yale University

In *Yale University*, the NLRB dealt with a labor dispute between Yale University and its graduate employees, but did not decide if graduate students are employees under the NLRA.⁶⁷ A group of 200 graduate assistants at Yale, frustrated with no recognition after years of concerted organizing activity, refused to submit their grades for the semester in a "grade strike."⁶⁸ The students were then coerced into submitting the grades through threats and reprisals.⁶⁹ The Board did not consider whether the students held the status of "employees."⁷⁰ Rather, the Board found that the students' activity constituted a partial strike because the graduate assistants continued to perform other aspects of their employment.⁷¹ Partial strikes never receive protection under the NLRA.⁷² The strike also failed to gain protection under the Act because the withholding of papers and test materials amounted to misappropriation of university property.⁷³ Although the Board remanded the case for further investigation of a Section 8(a)(1) union animus charge, it failed to address the status of Yale graduate assistants for purposes of the NLRA.⁷⁴

2. Boston Medical Center

The NLRB's decision in *Boston Medical Center Corp.*⁷⁵ laid the groundwork for its decision in *New York University* to recognize graduate students as employees.⁷⁶ In *Boston Medical Center*, the "house staff"—medical residents and teaching fellows—in a teaching hospital sought the ability to engage in collective bargaining.⁷⁷ The residents received compensation and benefits from the hospital as employees.⁷⁸ Taxes were deducted from the house staff's pay and the hospital treated them as employees under all other applicable federal and state laws that regulate employment.⁷⁹ *Boston Medical Center* marked a reversal of previous Board

67. 330 N.L.R.B. 246 (1999).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 247.

72. *Yale Univ.*, 330 N.L.R.B. at 247.

73. *Id.* at 248.

74. *Id.* at 249-50.

75. 330 N.L.R.B. 152 (1999).

76. New York Univ., No. 2-RC-22082, 2000WL 1643529, at *1 (N.L.R.B. Oct. 31, 2000).

77. *Boston Med. Ctr.*, 330 N.L.R.B. at 156-57.

78. *Id.* at 160.

79. *Id.*

precedent defining house staff primarily as students and not employees under the NLRA.⁸⁰

While acknowledging the similarity of house staff to other students, the Board noted that “[house staff] are unlike many others in the traditional academic setting. Interns, residents, and fellows do not pay tuition or student fees. They do not take typical examinations in a classroom setting, nor do they receive grades as such.”⁸¹ The Board also stated that status as a student did not automatically preclude a group from designation as an employee under the NLRA: “In prior cases, there has been no question that students are statutory employees. Rather, the issue has been the eligibility of student workers based on community of interest considerations.”⁸² Instead of focusing on the student aspects associated with serving as a member of the house staff, the Board contemplated the broad meaning of the term “employee,” looking to the master/servant relationship in its determination, and found the status of house staff closely analogous to apprentices.⁸³ The Board also stated that although the house staff had gained skills and expertise in their terms of service, this failed to negate their right to engage in collective action.⁸⁴

The NLRB also rejected the notion that allowing the house staff to engage in collective bargaining imperiled academic freedom.⁸⁵ According to the Board, such arguments put “the proverbial cart before the horse. The contour of collective bargaining is dynamic with new issues frequently arising out of new factual contexts. . . .”⁸⁶ If academic freedom required the exclusion of certain issues from collective bargaining, then the parties could designate such issues in the bargaining process or follow the appropriate procedures provided for by the NLRA if unable to reach resolution.⁸⁷

3. New York University

In *New York University* (“NYU”), the NLRB determined that graduate student assistants at the university were employees entitled to the protection of the NLRA.⁸⁸ Section 2(3) of the Act provides:

80. *Id.* at 152; *St. Clare’s Hosp. & Health Ctr.*, 229 N.L.R.B. 1000, 1004 (1977); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 251 (1976).

81. *Boston Med. Ctr.*, 330 N.L.R.B. at 161.

82. *Id.*

83. *Id.*

84. *Id.* (“Members of all professions continue learning throughout their careers, and many professions . . . require individuals to be trained further after graduation in order to be licensed or received in the field.”).

85. *Id.* at 164.

86. *Boston Med. Ctr.*, 330 N.L.R.B. at 164.

87. *Id.*

88. *New York Univ.*, No. 20-RC-22082, 2000 WL 1643529, at *1 (N.L.R.B. Oct. 31, 2000).

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . as amended from time to time, or by any other person who is not an employer as herein defined.⁸⁹

New York University argued that graduate students failed to fall within the definition of employees and instead were “predominately students.”⁹⁰ The university also contended that the graduate assistants received financial aid instead of compensation for their services.⁹¹ Alternatively, the school argued that even if the graduate assistants met the definition of “employee” under the NLRA, policy reasons dictated excluding the assistants from the rights granted by the NLRA.⁹²

The Board began its analysis in the *NYU* decision by noting the broad scope of the language of § 2(3), the application of the section to any employer, and the Supreme Court’s interpretation of the section to include categories of workers as long as they are not specifically exempted in the statute.⁹³ To guide its determination of the issue, the Board applied the common law master/servant standard, which asks whether one performs under the control of another and receives payment.⁹⁴ The members found that it was “uncontradicted” that the graduate students performed services under the control of the employer and were compensated, thereby making the relationship indistinguishable from other master/servant relationships.⁹⁵

Though the university argued that the students received financial aid rather than compensation,⁹⁶ the Board found that not to be the case for almost all of the graduate assistants.⁹⁷ Unlike financial aid, the students performed duties for their pay and did not receive academic credit for such work.⁹⁸ While recognizing that students could receive educational benefits from their work, the Board rejected the university’s

89. NLRA §2(3), 29 U.S.C. § 152(3) (2000).

90. *See New York Univ.*, 2000WL 1643529, at *1-2.

91. *Id.* at *4.

92. *Id.* at *1.

93. *Id.* at *1-2.

94. *Id.* at *2.

95. *New York Univ.*, 2000WL 1643529, at *3.

96. *Id.* at *4.

97. *Id.*

98. *Id.*

claims that the graduate assistants' duties were primarily educational.⁹⁹ The Board noted that, in most departments, working as a graduate assistant was not a requirement for graduation.¹⁰⁰ In differentiating between compensation and financial aid, graduate assistants received payment through the personnel department while students receiving scholarships or fellowships received payment from the accounting and financial aid offices.¹⁰¹ The graduate assistants also had to complete Internal Revenue Service W-4 forms and Immigration and Naturalization Service I-9 employment forms as well as make contributions to payroll taxes, all factors that the Board found indicative of the students' status as employees.¹⁰²

The Board also rejected the university's alternative argument that even if graduate assistants were deemed statutory employees, they should be excluded from the Act's protection for policy reasons.¹⁰³ New York University tried to rely on cases that excluded clients of rehabilitative programs like Goodwill Enterprises, which the Board distinguished as lying outside traditional economic relationships and working conditions.¹⁰⁴ The Board did uphold the regional director's findings that graduate students whose assistantships operated like a scholarship or students whose positions were funded by external grants were excluded from the NLRA.¹⁰⁵ While allowing the exclusion of certain graduate assistants, the Board stated that, in general, graduate assistants are employees at private universities for purposes of the NLRA as long as they are employed by the institution and have a master/servant relationship with the university in which they work for compensation.¹⁰⁶

4. Beyond *NYU*

Despite the favorable decision in *NYU*, the recognition of graduate student unions at private universities is not a *fait accompli*. Though teaching assistants at Brown University,¹⁰⁷ Columbia University,¹⁰⁸ and the University of Pennsylvania¹⁰⁹ have won the right to engage in collective action, university officials at the schools are challenging the decisions.¹¹⁰ The Board has granted review of the decisions in

99. *Id.*

100. *New York Univ.*, 2000WL 1643529, at *4.

101. *Id.* at *16.

102. *Id.*

103. *Id.* at *5.

104. *Id.*

105. *See New York Univ.*, 2000WL 1643529, at *7, n.10.

106. *Id.* at *2-3.

107. *Brown Univ.*, No. 1-RC-21368, slip op. (N.L.R.B. Nov. 16, 2001).

108. *Columbia Univ.*, No. 2-RC-22358, slip op. (N.L.R.B. Feb. 11, 2002).

109. *Univ. of Pennsylvania*, No. 4-RC-20353, slip op. (N.L.R.B. Nov. 21, 2002).

110. Donna R. Euben, *Annual Legal Update: "Hot" Topics in Higher Education Law* (2003), at <http://www.aaup.org/Legal/info%20outlines/03legalupdate.htm> (last visited Aug. 29, 2003).

Brown and *Columbia*¹¹¹ and could well reverse the decision of *NYU*. The president of Brown University has said she will “fight as hard as [she] can to prevent the unions from entering the university on behalf of the students.”¹¹² Eventually, the matter may result in litigation in the courts of appeals and could potentially require resolution by the Supreme Court.

III. THE CLASH BETWEEN GRADUATE ASSISTANTS’ STATUS AS BOTH STUDENT AND EMPLOYEE: LABOR LAWS VERSUS FERPA

Dealing with the issue of the dual roles of graduate assistants as workers and students does not end with the inquiry of whether to categorize a graduate assistant as an employee. Labor law’s *Excelsior* Rule, which applies to employees, presents a potential conflict with the Family Educational Right to Privacy Act (“FERPA”),¹¹³ which is meant to safeguard student privacy. The possible clash between the two federal laws illustrates the potential problems with viewing graduate students as both employees and students.

A. Federal Standards in Possible Conflict

1. The *Excelsior* Rule

The NLRB can promulgate rules and regulations by rulemaking procedures and by adjudication.¹¹⁴ One such adjudicated rule, the *Excelsior* Rule, requires management to provide the names and addresses of all employees qualified to vote seven days before a representation election.¹¹⁵ The adjudicated *Excelsior* Rule is mandatory and failing to provide the list of names is grounds for the Board to set aside the results of an election.¹¹⁶ The Board has summarized its reasoning for the rule as follows: “[N]ot only does knowledge of employee names and addresses increase the likelihood of an informed employee choice for or against representation, but, in the absence of employer disclosure, a list of names and addresses is extremely difficult if not impossible to obtain.”¹¹⁷ Additionally, the NLRB’s rule seeks to reduce challenged ballots in elections resulting from disputes over voter eligibility and to

111. Pratt Inst. & United Auto., No. 29-RC-10016, 2003 WL 21928340, at *1, n.1 (N.L.R.B. Aug. 8, 2003).

112. John L. Pulley, *Brown U. TA’s Have Right to Form Union*, NLRB Regional Director Rules, CHRON. HIGHER EDUC., Nov. 19, 2001, at 12, at <http://chronicle.com/weekly/v48/i14/14a01202.htm> (last visited Aug. 28, 2003).

113. 20 U.S.C. § 1232g (2000).

114. 2 THE DEVELOPING LABOR LAW, *supra* note 54, at 2486-87.

115. *Id.*; 1 THE DEVELOPING LABOR LAW, *supra* note 28 at 549; *see also* *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239 (1966).

116. 1 THE DEVELOPING LABOR LAW, *supra* note 28, at 549.

117. *Excelsior Underwear, Inc.*, 156 N.L.R.B. at 1241.

“further the public interest in the speedy resolution of questions of representation.”¹¹⁸ Some state labor laws also require *Excelsior* disclosures.¹¹⁹

2. FERPA

The requirements of the *Excelsior* Rule create a potential conflict with the requirements of FERPA, a federal statute that protects students' privacy interests in their educational records.¹²⁰ FERPA requires that educational institutions receiving federal funds maintain the confidentiality of students' "education records" and protects the information in such records from being released without the student's consent.¹²¹ Any institution that does not comply with the provisions of FERPA could lose its eligibility to receive federal education funds.¹²²

Under FERPA, "education records" are defined as "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."¹²³ In addition, federal regulations provide that records relating to a student "who is employed as a result of his or her status as a student are education records" for purposes of FERPA and are subject to the Act's requirements.¹²⁴ In general, a university may disclose education records protected by FERPA only with the consent of the student.¹²⁵ A university does not need consent for the release of all student information, however.¹²⁶ A university may choose to designate certain information about students as "directory information" that is excluded from the privacy requirements of FERPA.¹²⁷ Federal regulations provide that directory information may include, but is not limited to, the following:

the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, dates of attendance, grade level, enrollment status, (e.g., undergraduate or graduate; full-time or part-time), participation in officially recognized activities and sports, weight and height of members of athletic teams, degrees, honors and awards received, and the most recent educational agency or institution attended.¹²⁸

118. *Id.* at 1243.

119. *See* Graduate Teaching Fellows Fed'n Local 3544 v. Oregon Univ. Sys., No. UP-18-00, slip op. (Or. Empl. Relations Bd. Oct. 17, 2001); OR. REV. STAT. § 243.672(1)(g) (2003).

120. 20 U.S.C. § 1232g (2000).

121. 20 U.S.C. § 1232g(a)(4)(A), (b)(1) (2000); 20 U.S.C. § 1232g(d) (2000); 20 U.S.C. § 1232g(b) (2000).

122. 20 U.S.C. § 1232g(b).

123. 20 U.S.C. § 1232g(a)(4)(A).

124. 34 C.F.R. § 99.3 (2002).

125. 20 U.S.C. § 1232g(b)(1), (2)(A) (2000).

126. 20 U.S.C. § 1232g(b)(1).

127. *Id.*

128. 34 C.F.R. § 99.3.

As discussed in Part III section B of this article, universities have sought guidance regarding the release of student information in the context of graduate student unions¹²⁹ from an office within the United States Department of Education charged with providing assistance to institutions regarding the requirements of FERPA.¹³⁰

B. *United States Department of Education Opinion Letters*

Final resolution of the apparent conflict between the statutory requirements of FERPA and the adjudicated *Excelsior* Rule remains uncertain. Prior to the *NYU* decision by the NLRB, conflicts between state labor laws that required *Excelsior*-type disclosures and FERPA did arise.¹³¹ Though no court has weighed in on the issue, the United States Department of Education has issued guidance in relation to public institutions and state labor law provisions.¹³² The Family Policy Compliance Office ("FPCO")¹³³—the office within the United States Department of Education charged with providing guidance and technical information with regard to FERPA—has suggested that releasing information required by the *Excelsior* Rule potentially violates FERPA under certain circumstances.¹³⁴ The FPCO has issued three letters of guidance addressing the issue of releasing information regarding graduate student employees in relation to union representation.¹³⁵ In all three instances, the FPCO dealt with a public university and a state labor statute or collective bargaining agreement.¹³⁶

129. See *infra* Part III.B.

130. For information regarding the Family Policy Compliance Office (FPCO), see <http://www.ed.gov/policy/gen/guid/fpc/index.html> (last visited Sept. 13, 2003).

131. LeRoy S. Rooker, *Letter of Technical Assistance to the Regents of the University of California re: Disclosures to Employment Relations Board* (Sept. 17, 1999), at http://www.ed.gov/print/policy/gen/guid/fpc/ferpa/library/oakland_ca.html (last visited Sept. 12, 2003) [hereinafter *Univ. of Cal. Opinion Letter*].

132. *Id.*; Leroy S. Rooker, *Letter of Technical Assistance to American Federation of Teachers re: Disclosure of Information on Teaching Assistants* (Aug. 21, 2000), at <http://www.ed.gov/print/policy/gen/guid/fpc/ferpa/library/aft.html> (last visited Sept. 10, 2003) [hereinafter *Am. Fed'n of Teachers Opinion Letter*]; LeRoy S. Rooker, *Letter to University of Massachusetts Relating to Teaching Assistants* (Feb. 25, 2002), at <http://www.ed.gov/print/policy/gen/guid/fpc/ferpa/library/josephambash.html> (last visited Sept. 10, 2003) [hereinafter *Univ. of Mass. Opinion Letter*].

133. For the website of the FPCO, see <http://www.ed.gov/policy/gen/guid/fpc/index.html> (last visited Sept. 13, 2003).

134. *Univ. of Cal. Opinion Letter*, *supra* note 131; *Am. Fed'n of Teachers Opinion Letter*, *supra* note 132; *Univ. of Mass. Opinion Letter*, *supra* note 132.

135. *Univ. of Cal. Opinion Letter*, *supra* note 131; *Am. Fed'n of Teachers Opinion Letter*, *supra* note 132; *Univ. of Mass. Opinion Letter*, *supra* note 132.

136. *Univ. of Cal. Opinion Letter*, *supra* note 131; *Am. Fed'n of Teachers Opinion Letter*, *supra* note 132; *Univ. of Mass. Opinion Letter*, *supra* note 132.

1. Letter to the Regents of the University of California

In a September 17, 1999 letter to the Regents of the University of California, the FPCO issued guidance regarding FERPA and state labor laws.¹³⁷ The University of California was concerned about divulging information that might be subpoenaed by the California Public Employment Relations Board ("PERB") as required by state statute in advance of a representation election by graduate teaching assistants.¹³⁸ In its letter, the FPCO determined that the information requested by the PERB was an education record and could not be obtained absent consent of the student or an exception to FERPA.¹³⁹ Because one cannot be a teaching assistant without being a student, the FPCO determined that the teaching assistants' records were educational records under FERPA.¹⁴⁰ In considering the status of two other classes of employees, readers and tutors, the FPCO stated that there was not enough information to determine if they were covered by FERPA.¹⁴¹ However, the FPCO letter stated that if the readers' and tutors' employment was predicated on the fact that they were a student in the institution, then FERPA would prevent the release of information regarding such employees absent consent or an exception to FERPA as well.¹⁴²

Although information covered by FERPA can be released in response to a subpoena or court order, the FPCO determined that, absent prior written consent of the student, the information could not be voluntarily released to the PERB without violating FERPA.¹⁴³ Although FERPA specifically excludes directory information,¹⁴⁴ the FPCO said the fact that the student is a teaching assistant is not necessarily directory information that could be released without prior student consent.¹⁴⁵ The FPCO distinguished the PERB disclosure from other identical disclosures made to other governmental agencies and insurance providers.¹⁴⁶

2. Letter to the American Federation of Teachers Regarding the University of Oregon

The FPCO issued guidance to the American Federation of Teachers ("AFT") in an August 21, 2000 letter regarding the release of information pertaining to graduate teaching assistants at the University of Oregon.¹⁴⁷ An AFT union represented

137. *Univ. of Cal. Opinion Letter*, *supra* note 131.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Univ. of Cal. Opinion Letter*, *supra* note 131.

143. *Id.*

144. 20 U.S.C. § 1232g(b)(1) (2000).

145. *Univ. of Cal. Opinion Letter*, *supra* note 131.

146. *Id.*

147. *Am. Fed'n of Teachers Opinion Letter*, *supra* note 132.

graduate teaching fellows at the University of Oregon.¹⁴⁸ Under the collective bargaining agreement, the university would release the names, addresses, and other information related to the employment of graduate students to the union.¹⁴⁹ Following the release of the FPCO's letter to the University of California discussed above, the University of Oregon notified the union that, per the letter, this information would no longer be released because it was prohibited by FERPA.¹⁵⁰ The AFT requested review, claiming that the records were employment rather than educational records.¹⁵¹ The AFT argued that the students were employed at the university, not because they were students, but because the university chose to teach its undergraduate students by using a staff of graduate students.¹⁵² The AFT also asserted that if the students were considered employees, then, under applicable labor law, the information would be an employment record.¹⁵³ Alternatively, the AFT argued that status as a graduate assistant should be added to the directory information exception to FERPA.¹⁵⁴

The FPCO's response was that the university's decision to use graduate students to teach classes failed to show that employment of the students was not contingent on their status as students.¹⁵⁵ Likewise, the FPCO asserted that because the graduate assistants' employment was predicated on their enrollment as a student, the records were educational records under the statute rather than employment records.¹⁵⁶ The FPCO did concede that if the university published or posted the name of graduate assistants on course schedules or in departmental employee directories, the information would be excepted from FERPA as directory information and could be released to the union.¹⁵⁷ The FPCO also suggested that as a legislative solution to the problem, FERPA could be amended to make an exception for employment information about graduate assistants.¹⁵⁸ This would end the conflict between FERPA and labor laws. As discussed below, the Oregon Public Employment Board ultimately found the university's actions to constitute an unfair labor practice.

3. Letter Regarding the University of Massachusetts

In a letter involving the University of Massachusetts,¹⁵⁹ the FPCO explicitly emphasized the position that "a graduate fellow's/assistant's status as a graduate

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Am. Fed'n of Teachers Opinion Letter, supra* note 132.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Am. Fed'n of Teachers Opinion Letter, supra* note 132.

158. *Id.*

159. *Univ. of Mass. Opinion letter, supra* note 132.

fellow/assistant and his/her teaching assignment may be designated as directory information, should an educational agency or institution so choose.”¹⁶⁰ In the letter, the FPCO noted that the university had chosen to include the names of teaching associates as directory information.¹⁶¹ The FPCO also stated that the other information requested by the union—the home addresses and telephone numbers of teaching assistants—potentially fell under the directory information category.¹⁶² The letter cautioned, however, that certain employment information would constitute education records protected by FERPA:

[A]s with all student education records, FERPA would prevent the University from disclosing information such as the student ID number, social security number, number of hours contracted for, stipend, length of contract, employment category and, entrance date to the Union absent another provision that allows for disclosure.¹⁶³

C. *Oregon Employment Relations Board Decisions*

When the Oregon graduate student union took its case to the Oregon Employment Relations Board, both the administrative law judge, at a hearing, and the board, on appeal, found the university guilty of an unfair labor practice because of its refusal to release the information required by the collective bargaining agreement.¹⁶⁴ Since there was no dispute between the parties that the agreement required the release of the name, identification number, department, and term of appointment of all bargaining unit and non-bargaining unit graduate assistants and that the school stopped releasing the information after it had done so for more than twenty years, the board’s decision focused on the university’s affirmative defense of following FERPA.¹⁶⁵ The university contended that FERPA made the release of the information illegal and thus the provision unenforceable.¹⁶⁶

The board rejected the university’s defense and found that there was not an irreconcilable conflict between labor laws and FERPA.¹⁶⁷ In discussing FERPA, the board noted the exemption of directory information from information that required affirmative consent on the part of students for disclosure.¹⁶⁸ The board also pointed out that the penalty for violation of FERPA—the revocation of federal funds—was not immediate and that the regulations allowed a university the opportunity to correct

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. Graduate Teaching Fellows Fed’n Local 3544 v. Oregon Univ. Sys., No. UP-18-00, slip op. (Or. Empl. Relations Bd. Oct. 17, 2001).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

compliance problems.¹⁶⁹ Although FERPA regulations included mechanisms for investigation and enforcement, the decision noted that the University of Oregon did not refuse to turn over the information as the result of a final order pursuant to an administrative process finding a FERPA violation based on the release of protected information.¹⁷⁰ The board also commented that the advisory opinion regarding the Oregon dispute was not obtained until after the refusal to turn over information.¹⁷¹ Because there was no adjudicated FERPA violation, the board found the conflict only “potential.”¹⁷² The university could point to no binding order or decree that indicated “a direct and irreconcilable legal conflict.”¹⁷³ The board also emphasized that the university could have turned over directory information without violating FERPA at all.¹⁷⁴

According to the board, even after the university received the letter from the FPCO stating that releasing some of the information would violate FERPA, the institution continued to mishandle the situation.¹⁷⁵ The board found that the university should have followed designated FERPA and/or state labor board procedures for resolving conflicts of law rather than simply refusing to provide information required by contract that the university had provided for more than twenty years.¹⁷⁶ Although acknowledging a potential conflict, the board ordered the university to turn over the information and admonished it for picking and choosing among legal obligations without seeking formal adjudication.¹⁷⁷

D. *The Uncertain Outcome of the Excelsior/FERPA Conflict*

The outcome of the potential conflict between state and federal labor laws and FERPA remains unclear. While the letters of guidance from the FPCO are informative, a court would not necessarily give deference to the FPCO’s interpretation of the statute. According to the Supreme Court in *Christensen v. Harris County*,¹⁷⁸ opinion letters are not given the same “*Chevron*-style deference” as published rules or regulations.¹⁷⁹ Because the letters are not the product of formal rulemaking or adjudicative procedures, they are only “entitled to respect” by the

169. Graduate Teaching Fellows Fed’n Local 3544 v. Oregon Univ. Sys., No. UP-18-00, slip op. (Or. Empl. Relations Bd. Oct. 17, 2001).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Graduate Teaching Fellows Fed’n Local 3544 v. Oregon Univ. Sys., No. UP-18-00, slip op. (Or. Empl. Relations Bd. Oct. 17, 2001).

175. *Id.*

176. *Id.*

177. *Id.* at n.8.

178. 529 U.S. 576 (2000).

179. *Id.* at 586-87.

courts in their "power to persuade" that the agency's interpretation of the statute is correct.¹⁸⁰

The letters from the FPCO, however, support the position that universities are permitted to disclose information such as the name of teaching assistants if the university has treated such information as directory information. Yet, the FPCO has not answered the question of what happens if a university decides to exclude the names or addresses and telephone numbers of graduate assistants from directory information in order to hamper organizational efforts. Such a move would still leave open the question of whether or not unions have the right under the NLRA or similar state statutes to seek information regarding the names, addresses, and telephone numbers of graduate assistants. For now, the final resolution of the *Excelsior*/FERPA issue remains uncertain.

IV. PROS AND CONS OF GRADUATE STUDENT UNIONS

As discussed in the preceding sections, the employment status of graduate students represents an issue involving complex statutory schemes at the federal and state levels.¹⁸¹ In addition, consideration of graduate student unionization involves weighing the employment responsibilities of graduate students against their roles as students and merits careful reflection of the overall impact that collective bargaining rights have on higher education institutions. This section examines arguments for and against allowing graduate student unions and emphasizes how economic challenges have altered the higher education landscape in recent decades.

A common argument against allowing unionization centers on the potential harm to the mentoring or apprenticeship model in which graduate assistants are viewed primarily as students.¹⁸² The argument contends that graduate students' primary status as students should override consideration of them as employees and hence any right to collective bargaining.¹⁸³ Many faculty have strongly opposed graduate student organization on such grounds.¹⁸⁴ Such resistance on the part of faculty is likely grounded in a belief that graduate student unions undermine their relationships with students and threaten academic freedom.¹⁸⁵ One author notes, however, that

180. *Id.* at 587 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

181. *See supra* Part II.-III.

182. Julius & Gumpert, *supra* note 11, at 201 (exploring the issue in-depth in a 2002 study of graduate student unionization and finding no conclusive evidence based on archival data and interviews with faculty and graduate students that collective bargaining compromises student-faculty mentoring relationships). Instead, the authors suggest that collective bargaining may actually serve to clarify graduate students' roles. *Id.*

183. *See generally* Cavell, *supra* note 10 (outlining arguments in the debate over graduate student unionization).

184. *Id.*; *see also* Elena Sharnoff, *Neither Fish nor Fowl: Graduate Students, Unionization, and the Academy* (1993) (ERIC Document Reprod. Serv. No. ED 375 473).

185. *See* Daniel J. Julius, *The Current Status of Graduate Student Unions: An Employer's Perspective* (1999) (ERIC Document Reprod. Serv. No. ED 446 638).

collective bargaining rights would probably have little impact on student-professor relationships since students would not engage in bargaining with faculty, but with other university officials.¹⁸⁶ Despite claims on both sides, a dearth of empirical research hampers discussion and analysis of the impact of graduate student unions on professor-student relationships.¹⁸⁷

The charge that collective bargaining rights threaten academic freedom at universities represents an issue requiring careful consideration. Academic freedom forms one of the most important facets of university life and, as stated by the United States Supreme Court in *Regents of University of Michigan v. Ewing*,¹⁸⁸ represents "a special concern of the First Amendment."¹⁸⁹ In that case, the Court discussed the special autonomy higher education institutions enjoy. The majority stated that "When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."¹⁹⁰ The Court continued that "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions."¹⁹¹

Nevertheless, it is unclear whether graduate student unionization would imperil the First Amendment rights of institutions. As pointed out by a student writer, organizations such as the American Association for University Professors ("AAUP") and the National Education Association ("NEA") have long labored on behalf of professors and teachers for collective bargaining rights *and* for academic freedom.¹⁹² In recent years, the AAUP has also sought to promote the cause of part-time instructors, a group with grievances similar to many graduate assistants.¹⁹³ The AAUP, in fact, officially supports the position that graduate students, like other university employees, should enjoy the right to engage in collective bargaining.¹⁹⁴

186. Hayden, *supra* note 14, at 1263.

187. *Id.* (noting only one "large scale study" of the impact of graduate unions).

188. 474 U.S. 214 (1985).

189. *Id.* at 226 (quoting *Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967)).

190. *Id.* at 225 (footnote omitted).

191. *Id.*

192. Joshua Rowland, Note, "Forecasts of Doom": The Dubious Threat of Graduate Teaching Assistant Collective Bargaining to Academic Freedom, 42 B.C. L. REV. 941, 950-51 (2001).

193. See, e.g., Richard Moser, *The AAUP Organizes Part-Time Faculty*, ACADEME, Nov.-Dec. 2000, at 34. In discussing the AAUP's attempts to help organize part-time faculty in Boston, the author writes: "As tenured faculty become an increasingly slender minority, academic values, including academic freedom and the right to share in university government, are undermined." *Id.* at 36.

194. AAUP, *Statement on Graduate Students*, at <http://www.aaup.org/statements/Redbook/Gradst.htm> (last visited Aug. 26, 2003).

As the Association's Council affirmed in November 1998, graduate student assistants, like other campus employees, should have the right to organize to bargain collectively. Where state legislation permits, administrations should honor a majority request for union representation. Graduate student assistants must not

Most significantly, the 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. One way to analyze unionization efforts is to view them, at least in part, as a backlash against higher education trends in recent decades where universities have increasingly sought to contain costs and function more like businesses.¹⁹⁵ As noted by one author, increased emphasis on the “bottom line” constituted one of the key elements that “influenced the course of higher education labor relations and labor law in the 1990s and will continue to do so into the near future.”¹⁹⁶ While enrollment in higher education has increased in recent decades, tuition costs have also risen and resulted in increased criticism and resistance on the part of consumers.¹⁹⁷ In response to rising costs, contemporary administrative trends in higher education have increasingly stressed business models in an effort to save money.¹⁹⁸

As noted by Robert Birnbaum, universities have increasingly attempted to rely on corporate and business models with numerous higher education reform movements in recent decades derived from business.¹⁹⁹ He criticizes unquestioned reliance on these new business management models for higher education and asserts that attempting to “compare the acquisition of knowledge in a college classroom with purchasing chicken nuggets” creates a process bound to create problems for higher education.²⁰⁰ As institutions have sought to become more efficient financially and operate on a more business-like basis, tensions involving graduate students and their roles as university employees are perhaps symptomatic of the kind of problems warned of by Birnbaum.

In an effort to contain costs, colleges and universities have increasingly relied on graduate students and non-tenure-track instructors. Adjuncts and graduate students represent a cheaper form of labor than full-time faculty and are often assigned the duties that full-time faculty do not want such as teaching undergraduates or engaging in tedious research.²⁰¹ By the 1990s, part-time faculty grew to comprise more than forty percent of the teaching force in post-secondary education.²⁰² Research institutions overall are less likely to use part-time faculty, but these are the kind of

suffer retaliation from professors or administrators because of their activity relating to collective bargaining.

Id.

195. See Julius & Gumport, *supra* note 11, at 197.

196. Bodah, *supra* note 13, at 317.

197. Julius, *supra* note 185, at 93.

198. See *id.* at 94.

199. See generally ROBERT BIRNBAUM, *MANAGEMENT FADS IN HIGHER EDUCATION: WHERE THEY COME FROM, WHAT THEY DO, WHY THEY FAIL* (2000).

200. *Id.* at 107 (citation omitted).

201. Julius, *supra* note 185, at 96.

202. Gregory M. Saltzman, *Union Organizing and The Law: Part-Time Faculty and Graduate Teaching Assistants*, in NEA 2000 ALMANAC OF HIGHER EDUCATION 44 (2000), <http://www.nea.org/he/healma2k/index.html> (last visited Sept. 13, 2003).

institutions that have increasingly relied on graduate students.²⁰³ The concern of full-time faculty over the loss of tenure-track positions at many institutions provides support for the argument that universities rely on graduate assistants as a form of labor less costly than full-time faculty.²⁰⁴ As noted by the journal for the AAUP, "institutions faced with budget limitations find part-time and adjunct faculty appointments irresistibly cost-effective."²⁰⁵ An intellectually credible argument against graduate student unionization should address charges that universities have largely shifted much of the undergraduate teaching load to graduate students in an effort to save money, rather than as the result of careful academic decision-making.²⁰⁶

Since graduate assistants have come to fill a role similar to that of adjuncts in the context of their employment duties, the employment status of adjuncts under the NLRA is potentially instructive as to the appropriate treatment of graduate assistants for purposes of the Act. Unlike most full-time faculty, who the Supreme Court held were managerial employees in *NLRB v. Yeshiva University*, part-time instructors may engage in collective bargaining.²⁰⁷ In *University of San Francisco*,²⁰⁸ the NLRB held that part-time faculty at private institutions enjoyed collective bargaining rights.²⁰⁹ If many graduate assistants, in their employment capacities, perform essentially the same role as adjunct instructors, then the reasoning employed in *University of San Francisco* appears applicable in determining their collective bargaining rights for purposes of the NLRA or similar state statutes.²¹⁰ Arguments that seek to characterize the duties of graduate assistants as an inherent part of the educational process should articulate how the employment capacities of such graduate students differs fundamentally from that of adjuncts.²¹¹

One should also note that a particular university may employ graduate students in positions not involving teaching or research, such as a resident hall director. Though the percentage of non-teaching or non-research assistants currently may not be large,²¹² economic factors could increase the future use of such students. A

203. *Id.*

204. See Ellen Schrecker, *The Incredible Shrinking Faculty: An Interview with Lawrence Poston*, ACADEME, May-June 2000, at 26.

205. *Statement from the Conference on the Growing Use of Part-Time and Adjunct Faculty*, ACADEME, Jan.-Feb. 1998, at 56.

206. See, e.g., John H. Summers, *The Workload is Heavy, the Pay is Paltry, the Prospect for Tenure Even Slimmer. A Grad Student Makes the Case for Labor Unions*, WASH. POST, Apr. 9, 2000, at W24.

207. 444 U.S. 672, 679 (1980).

208. 265 N.L.R.B. 1221 (1982).

209. *Id.* at 1224.

210. *Id.* at 1223-24 (holding that part-time faculty share a "community of interest" establishing them as a "unit" for collective bargaining purposes).

211. See, e.g., Gregory Gartland, Comment, *Of Ducks and Dissertations: A Call for a Return to the National Labor Relations Board's "Primary Purpose Test" in Determining the Status of Graduate Assistants under the National Labor Relations Act*, 4 U. PA. J. LAB. & EMP. L. 623, 639-40 (2002).

212. Hayden, *supra* note 14, at 1236, n.11.

graduate student's supervisor may also potentially be someone who is not a faculty member in the student's program or department.²¹³ Thus, some of the positions held by graduate assistants make it more difficult for institutions to argue that their responsibilities are closely related to the students' educational endeavors. At the other end of the spectrum, students required to teach classes or engage in research as part of their educational program who are given close supervision and involved in a *true* mentoring relationship might merit exclusion from the purview of the NLRA or similar state statute. In determining whether a graduate student is an employee for purposes of the NLRA or an applicable state labor act, the actual facts defining the work experience of the student appear more significant than abstract declarations of an idealized graduate student existence.

In addition to relying on graduate student workers for financial reasons rather than for academic reasons, several universities have also engaged in the kind of anti-union behavior that the NLRA seeks to prohibit. At New York University, the NLRB charged that the university denied tenure to a professor in retaliation for testifying before the Board in support of allowing students to organize.²¹⁴ While denying the allegations, the university reached a settlement with the former professor in which it paid \$15,000 and expunged all records related to the tenure denial.²¹⁵

As discussed in Part III, universities have sought to use FERPA as a means to prohibit organizers from gaining information.²¹⁶ While some university officials are likely concerned with following the provisions of FERPA, institutions also appear to have used the privacy law as a shield to hamper organizational efforts without pushing federal agencies for resolution of the issue.²¹⁷ As discussed, opinion letters by the FPCO state that universities may choose to list the names of graduate assistants and their addresses and telephone numbers as directory information exempted from FERPA.²¹⁸ As noted by the Oregon Employment Relations Board, institutions may also follow various procedures to seek clarification of the issue, such as a court ruling.²¹⁹ The NLRB or a state labor board might balk at an attempt by an institution to remove the names, addresses, and/or telephone numbers of graduate assistants from the category of directory information if the university has published such information in the past.

213. *Id.* at 1263.

214. Piper Fogg, *NYU Settles with Scholar Who Was Denied Tenure after Backing TA Union*, CHRON. OF HIGHER EDUC., May 17, 2002, at 1, at <http://chronicle.com/weekly/v48/i36/36a01601.htm> (last visited Aug. 28, 2003).

215. *Id.*

216. *See supra* Part III.

217. Courtney Leatherman, *Universities Wield Privacy Law in Clashes with T.A. Unions*, CHRON. OF HIGHER EDUC., Oct. 27, 2000, at A12, at <http://www.cgeu.org/news/2000-2001/FERPA tactic.html> (last visited Aug. 26, 2003).

218. *Univ. of Mass. Opinion Letter*, *supra* note 132.

219. *See Graduate Teaching Fellows Fed'n Local 3544 v. Oregon Univ. Sys.*, No. UP-18-00, slip op. (Or. Empl. Relations Bd. Oct. 17, 2001).

The recent decision by the United States Supreme Court in *Gonzaga University v. Doe* also lessens the concerns of institutions.²²⁰ In *Gonzaga University*, the United States Supreme Court held that FERPA created no private rights enforceable under 42 U.S.C. § 1983.²²¹ Thus, a FERPA violation—if one actually exists—stemming from release of student records for an organizational drive would only subject an institution to the administrative proceedings of the United States Department of Education.²²² The penalty provided under FERPA is the loss of federal funds.²²³ It appears highly unlikely that the Department of Education would make universities forfeit their federal funds for releasing information in an effort to comply with applicable federal or state labor laws.

One should also consider the actual impact that the legal right to organize might have on institutions. Many students might not support a union, which was the outcome of a recognition campaign at Cornell in which students voted against forming a collective bargaining unit and joining with the United Automobile Workers.²²⁴ In a non-NLRB poll of Yale students in the spring of 2003, union organizers were shocked when a majority of students voted against supporting a group seeking to represent Yale graduate students.²²⁵ Universities adverse to student unions can also take steps to convince students that they should not support a union. Graduate employee unions tend to focus on basic issues in collective bargaining such as wages, health-care benefits, hours, office space, and grievance arbitration procedures.²²⁶ Preemptive steps on the part of a university to deal with reasonable and basic student concerns could quash enthusiasm for a union. A university could also communicate to students that union success could translate into fewer full-time graduate positions if the school has to pay more in health benefits, tuition, or stipends.²²⁷

Looking at graduate assistants in the context of the larger trends in higher education employment provides a helpful framework in which to view increasing struggles over the employment status of graduate students. Just as many adjunct faculty have reacted against their low place on the academic ladder, graduate students also appear to be reacting against reliance on their labor as a way to save money. Universities do not appear to have shifted a greater teaching burden to graduate students as a means to enhance the educational experience of such students. Instead, increased reliance on graduate students at many institutions seems to be a result of

220. See *Gonzaga University v. John Doe*, 536 U.S. 273, 276, 292 (2002).

221. *Id.*

222. *Id.* at 289-90.

223. *Id.* at 278-80.

224. Scott Smallwood, *United Auto (or Is That 'Academic'?) Workers*, CHRON. OF HIGHER EDUC., Jan. 17, 2003, at 8, at <http://chronicle.com/free/v49/i19/19a00801.htm> (last visited Aug. 26, 2003).

225. Greenhouse, *supra* note 16, at B1.

226. See generally *Frequently Asked Questions about Graduate Employee Unions: The Basics*, at <http://www.cgeu.org/FAQbasics.html> (last visited Aug. 26, 2003).

227. See Julius, *supra* note 185, at 101.

economic necessity rather than the kind of academic decision closely guarded by the First Amendment.

V. CONCLUSION

The unique role of graduate assistants—an amorphous mix of student and employee—presents complex legal questions regarding their ability to engage in collective bargaining. At the federal level, the recent decisions on the part of the NLRB have further roiled the debate at private universities. Despite the Board's decision in *NYU*,²²⁸ resolution of the issue appears far from over. Even if the NLRB vacillates again and revives the pre-*NYU* standards denying graduate students the employee rights found in the NLRA, it is highly unlikely that the graduate student organizational movement will cease. As discussed in Part IV, graduate student unionization is entangled with broader labor issues in higher education in which universities have come to rely heavily on graduate assistants and adjunct faculty as a cheaper substitute for full-time faculty members.²²⁹ The conflict between *Excelsior*-type disclosures and FERPA also demonstrates the potential difficulties in sorting out the dual status of graduate assistants as employees and students when graduate students are granted collective bargaining rights. It remains to be seen whether the role of student or worker ultimately emerges as the dominant role of graduate assistants in the eyes of labor law. Still, at least some graduate students likely will continue to catch the union bug as long as universities rely so heavily on their labor.

228. No. 2-RC-22082, 2000 WL 1643529, at *1 (N.L.R.B. Oct. 31, 2000).

229. See *supra* Part IV.