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AFTER *BOSTON MEDICAL CENTER*: WHY TEACHING ASSISTANTS SHOULD HAVE THE RIGHT TO BARGAIN COLLECTIVELY

I. INTRODUCTION

At Yale University, New York University (NYU), and other private universities, graduate students employed as teaching assistants (TAs)¹ assist professors by meeting with students in discussion groups and individually to provide tutorial assistance and by grading exams and papers.² Some Yale and NYU TAs even independently develop and teach their own courses.³ By some counts, Yale TAs are responsible for forty percent of all classroom contact hours between students and instructors and NYU TAs teach twenty percent of all classes.⁴ Yale and NYU TAs provide these services, which would otherwise have to be provided by a professor, at considerably less than the cost of a professor.⁵ Not surprisingly, Yale University is

1. The term “teaching assistant” or “TA” covers various job categories, all of which consist of students who are still studying towards their undergraduate or graduate degrees and who at the same time are paid either to teach or to assist in the teaching of other students. Thus defined, TAs should be contrasted with “research assistants” or “RAs.” The latter term again covers various job categories, all of which consist of students who are also still studying towards their undergraduate or graduate degrees but who at the same time are paid either to conduct or to assist in the conducting of their own research or that of others.

2. See Yale Univ., 330 N.L.R.B. No. 28, 1999 WL 1076116, at *13 (Nov. 29, 1999); New York Univ., 66 Daily Lab. Rep. (BNA) E-22, E-23 (NLRB Apr. 3, 2000).

3. See Yale Univ., 1999 WL 1076116, at *13; New York Univ., 66 Daily Lab. Rep. (BNA) at E-23 to E-24.

4. See New York Univ., 66 Daily Lab. Rep. (BNA) at E-23 n.16; Graduate Employees and Students Org., *Casual in Blue: Yale and the Academic Labor Market* (visited Nov. 9, 1999) <<http://www.yale.edu/geso/casual>>.

5. See New York Univ., 66 Daily Lab. Rep. (BNA) at E-23 nn.7-8 (NYU TA and RA “stipends” range from \$6500 to \$20,000; generally, NYU TAs and RAs do not receive insurance or retirement benefits); Douglas Sorrelle Streitz

increasingly relying on cheap TA labor: Whereas the number of faculty slightly decreased from 688 in 1980 to 653 in 1997, the number of TAs sharply increased from 778 to 1039 over the same period.⁶ The situation is similar at other universities.⁷

Despite the valuable services that TAs provide at private universities such as Yale or NYU, they have so far been denied the status of "employees" within the meaning of the National Labor Relations Act⁸ (NLRA) and, consequently, the right to bargain collectively over their meager wages and other terms and conditions of their employment that is afforded those with this status. Concretely, the National Labor Relations Board (NLRB) has held that students who are employed by their university are not employees within the meaning of the NLRA because they seek employment primarily for educational rather than economic purposes.⁹ This approach has been referred to by commentators as the "primary purpose test."¹⁰

The period of TA disenfranchisement may, however, finally be over. On November 26, 1999, the NLRB abandoned the old primary purpose test and held that students who are employed by their university *are* employees within the meaning of the NLRA if they

& Jennifer Allyson Hunkler, *Teaching or Learning: Are Teaching Assistants Students or Employees?*, 24 J.C. & U.L. 349, 374 (1997) (employing a Yale TA costs between \$25,000 and \$27,000 a year, including health and fringe benefits, while the average tenure track professor earns \$60,000 a year).

6. See Graduate Employees and Students Org., *supra* note 4.

7. See Stephen L. Ukeiley, *Confusion at the National Labor Relations Board: The Misapplication of Board Precedent to Resolve the Yale University Grade-Strike*, 14 HOFSTRA LAB. L.J. 527, 535 n.34 (1997) (citing national studies that indicate that graduate students teach between 50% and 60% of undergraduate students).

8. 29 U.S.C. §§ 151-169 (1988).

9. See *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976) (holding that medical house staff who are primarily students are therefore not employees); see also *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1001-02 (1977) (holding that student employees other than medical house staff who are primarily students are likewise not employees). The term "medical housestaff" refers to medical students who already have their medical degrees and who are now paid to work in a teaching hospital, usually as a prerequisite for qualifying to practice in general medicine or a medical (sub)specialty. See *Cedars-Sinai*, 223 N.L.R.B. at 251.

10. See, e.g., Stephen L. Sepinuck, *Hospital Residents and Interns: Inconsistent Treatment under Federal Law*, 29 ST. LOUIS U. L.J. 665, 668 (1985).

provide compensated services.¹¹ This new approach will be referred to below as the “service test.” Only three days after it pronounced the service test, the NLRB remanded unfair labor practice charges brought by the Yale TA union against Yale University back to the Administrative Law Judge (ALJ) to determine, inter alia, whether these TAs are employees within the meaning of the NLRA.¹² On March 29, 2000, the ALJ approved a settlement between the NLRB and Yale University that resolved the unfair labor practice charges but did not address whether the Yale TAs are employees.¹³ On April 3, 2000, NLRB Regional Director Daniel Silverman applied the new service test to a representation petition on behalf of NYU TAs and RAs and found that they were employees within the meaning of the NLRA,¹⁴ the first such application and finding. The university sought review of the *New York University* decision by the NLRB which was granted on May 10, 2000.¹⁵ Moreover, on the day after—and undoubtedly encouraged by—the *New York University* decision, the Yale TA union appealed the settlement in that case.¹⁶ Thus the question of which test should be applied to the Yale and NYU TAs and RAs and whether they are employees under one, both, or neither of the tests continues to await final adjudication by the NLRB or, possibly, a federal court.

This Comment argues that all TAs (as well as some RAs) at Yale, NYU, and other private universities should be recognized as employees under the service test, because they provide compensated services, and even under the old primary purpose test, because they

11. See *Boston Med. Ctr. Corp.*, 330 N.L.R.B. No. 30, 1999 WL 1076118, at *13-15 (Nov. 26, 1999) (holding that medical house staff are employees *inter alia* because they provide compensated services).

12. See *Yale Univ.*, 330 N.L.R.B. No. 28, 1999 WL 1076116, at *6 (Nov. 29, 1999).

13. See Martha Kessler, *Education: NLRB, Yale University Reach Accord in Dispute Arising from 1995 Grade Strike*, DAILY LAB. REP., Mar. 31, 2000, at A8.

14. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-29 to E-30 (NLRB Apr. 3, 2000).

15. See *UAW Blasts NYU Interference with Vote Count in Student Employee Recognition Election*, PR NEWSWIRE, May 11, 2000.

16. See e-mail message to the author from Michael T. Anderson of the law firm of Davis, Cowell & Bowe, Apr. 7, 2000.

seek employment primarily for economic reasons.¹⁷ It further argues that these TAs should not be excluded from NLRA coverage for public policy reasons.¹⁸ Both arguments are supported by two recent California Public Employment Relations Board (PERB) decisions, each holding that TAs are employees within the meaning of California's Higher Education Employer-Employee Relations Act¹⁹ (HEERA), and that coverage of TAs under HEERA would further the purposes of HEERA.²⁰

The analysis set forth in this Comment calls for a comparison of California and federal law for several reasons. First, HEERA balances the old primary purpose test against the new service test. Second, the purposes of HEERA are similar to the public policies behind the NLRA. Third, employees have similar rights under HEERA and the NLRA, including the right to strike. Finally, in the first of its two recent decisions, the NLRB invited such a comparison by quoting from a California Supreme Court decision which held that coverage

17. In his decision in the *New York University* case, Regional Director Silverman did not address the issue whether the TAs and RAs at that university are employees under the old primary purpose test. See *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-22 to E-34. Since it is far from clear that the NLRB or a federal court will apply the service test instead of the primary purpose test to TAs and RAs, as well as medical house staff, a discussion of not only the former but also the latter test is called for.

18. Regional Director Silverman only briefly addressed one type of frequently cited public policy argument against coverage of TAs and RAs (infringement upon academic issues) and did not address at all another important type of argument (increase in the number of TA and RA strikes). See *id.* In fact, Regional Director Silverman appears to be somewhat hostile toward such arguments, stressing "the danger of the [NLRB] relying on 'policy reasons' to exclude from the [NLRA]'s coverage those who otherwise fall within [its] broad definition of 'employee'." *Id.* at E-31 n.48. The NLRB and, especially, a federal court can be expected to be more receptive to such arguments, and their discussion in this context is therefore particularly important.

19. CAL. GOV'T CODE §§ 3560-3595 (West 1998 & Supp. 2000).

20. See *Association of Student Employees*, 22 PERC ¶ 29084 (Cal. Pub. Employment Relations Bd. 1998); *Student Ass'n of Graduate Employees*, 23 PERC ¶ 30025 (Cal. Pub. Employment Relations Bd. 1998); see also *Student Ass'n of Graduate Employees*, 23 PERC ¶ 30065 (Cal. Pub. Employment Relations Bd. 1999); *Association of Student Employees*, 22 PERC ¶ 29152 (Cal. Pub. Employment Relations Bd. 1998); *Regents of the Univ. of Cal.*, 20 PERC ¶ 27129 (Cal. Pub. Employment Relations Bd. A.L.J. 1996). Regional Director Silverman did not refer to any of these cases in his decision in *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-22 to E-34.

of medical house staff by HEERA would further the purposes of HEERA.²¹ The NLRB relied on this quote to support its decision that coverage of house staff under the NLRA would not violate the public policies behind the NLRA.²² Interestingly, the California PERB has twice relied on the same quote from the California Supreme Court to support its decision that coverage of TAs by HEERA would further the statute's purposes.²³ By the same token, the NLRB should similarly rely on this quote and accordingly hold that coverage of the Yale and NYU TAs by the NLRA would not violate the public policies behind this act. As a result, the NLRB should decide that the Yale and NYU TAs have the right to bargain collectively, and thereby open the door to the unionization of TAs at all private universities.

Parts II and III summarize the federal and California laws, respectively, as they pertain to student employees. Part IV synthesizes—to a degree—these two bodies of law and argues that coverage of TAs at California's public universities under California's HEERA supports coverage of TAs at America's private universities under the federal NLRA. Part V concludes that such coverage is desirable, legally supported, and thus, in a word, appropriate.

II. THE NLRA AND STUDENT EMPLOYEES AT AMERICA'S PRIVATE UNIVERSITIES: SUMMARY OF THE FEDERAL LAW

A. Introduction

Student employees at private universities are covered by federal law, that is, by the NLRA as interpreted by the NLRB and the federal courts. The remainder of this Part provides a summary of the federal law and, in particular, of the rights and obligations of employees and employers under the NLRA, the status of private universities as employers within the meaning of the NLRA, and the status of student

21. See *Boston Med. Ctr. Corp.*, 330 N.L.R.B. No. 30, 1999 WL 1076118, at *21 (Nov. 26, 1999) (quoting *Regents of the Univ. of Cal. v. PERB*, 41 Cal. 3d 601, 623, 715 P.2d 590, 604-05, 224 Cal. Rptr. 631, 645-46 (1986)).

22. See *id.*

23. See *Student Employees*, 22 PERC ¶ 29084, at 354; *Graduate Employees*, 23 PERC ¶ 30025, at 87.

employees at such universities as employees within the meaning of the NLRA.

*B. Rights and Obligations of Employees and Employers
Under the NLRA*

The NLRA gives employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as "the right to refrain from any or all of such activities."²⁴ The NLRA further makes it an unfair labor practice, *inter alia*, for an employer "to interfere with, restrain, or coerce employees in the exercise of [these] rights,"²⁵ "to encourage or discourage membership in any labor organization" "by discrimination in regard to hire or tenure of employment or any term or condition of employment,"²⁶ or "to refuse to bargain collectively with the representatives of his employees"²⁷ who have been "designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes."²⁸ Thus, under the NLRA, it is, for example, illegal for employers to threaten their employees with the loss of their jobs should they elect a union,²⁹ to lay off some of their employees after they have elected a union to discourage other employees from doing likewise,³⁰ or to

24. 29 U.S.C. § 157 (1988).

25. *Id.* § 158(a)(1).

26. *Id.* § 158(a)(3).

27. *Id.* § 158(a)(5).

28. *Id.* § 159(a).

29. *See, e.g.,* NLRB v. Gissel Packing Co., 395 U.S. 575, 619 (1969) (finding that the employer violated 29 U.S.C. § 158(a)(1) where, upon learning of a unionization drive, the employer told employees the union was a strike-happy outfit, a possible strike would jeopardize the continued operation of the plant, and age and lack of education would make their re-employment difficult).

30. *See, e.g.,* Textile Workers Union of Am. v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965) (holding that "a partial closing is an unfair labor practice under [29 U.S.C. § 158(a)(3)] if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect").

refuse to bargain or to engage in “surface” (that is, bad faith) bargaining with a properly elected union.³¹

To whom these rights and obligations extend is less clear than one might initially think. The NLRA itself offers only circular³² definitions of the key terms “employer” and “employee”: “The term ‘employer’ includes any person acting as an agent of an employer”³³ “The term ‘employee’ shall include any employee, . . . unless this subchapter explicitly states otherwise”³⁴ Explicitly excluded from the employer category are, among others, “the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof”³⁵ As a consequence, only private, not public employees enjoy the protection of the NLRA. Explicitly excluded from the employee category are, among others, independent contractors and supervisors.³⁶ In addition, the NLRB and the federal courts have excluded managerial³⁷ and confidential³⁸ employees from the employee category on public policy grounds. The policy underlying the NLRA is “to eliminate . . . certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining”³⁹ Extending collective bargaining rights to managerial and confidential employees would place these vital employees and their employers on different sides of the bargaining table, thus arguably erecting rather

31. *See, e.g.*, NLRB v. A-1 King Size Sandwiches, Inc., 732 F.2d 872, 877 (11th Cir. 1984) (holding that the NLRB “correctly inferred bad faith” in violation of 29 U.S.C. § 158(a)(5) from the employer’s proposals, which were “so unusually harsh and unreasonable” that they were “predictably unworkable”).

32. *See* Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 254 (1976) (Fanning, Member, dissenting).

33. 29 U.S.C. § 152(2).

34. *Id.* § 152(3).

35. *Id.* § 152(2).

36. *See id.* § 152(3).

37. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 283 (1974) (holding that the legislative history suggests that Congress regarded managerial employees as “so clearly outside the [NLRA] that no specific exclusionary provision was thought necessary”).

38. *See, e.g.*, NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170, 179 (1981) (excluding employees with advance information of the employer’s position on labor relations matters from coverage by the NLRA).

39. 29 U.S.C. § 151.

than eliminating obstructions to the free flow of commerce, contrary to public policy.

It follows that only student employees at private (but not public) universities are potentially covered by the NLRA. Whether they are actually covered initially hinges on two questions: whether private universities are employers within the meaning of the NLRA, and whether student employees at these universities are employees within the meaning of the NLRA. Even if it appears that the NLRB should answer these two questions affirmatively, the NLRB may still exclude student employees, like managerial or confidential employees, from coverage by the act on public policy grounds. Each of these issues will be discussed below in detail.

*C. Private Universities Are Employers Within the
Meaning of the NLRA*

Until 1970, the NLRB declined to assert jurisdiction over private universities. Under the NLRA, the NLRB directs a union election and certifies the results thereof only if "a question of representation affecting commerce exists."⁴⁰ In *Columbia University*,⁴¹ a union filed a petition to represent clerical employees in the university libraries.⁴² The NLRB dismissed the petition on jurisdictional grounds, reasoning that "[a]lthough the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute . . . it would [not] effectuate the policies of the [NLRA] for the [NLRB] to assert jurisdiction . . . where the activities involved are noncommercial in nature and intimately connected with the charitable purposes and educational activities of the institution."⁴³

In 1970, the NLRB reversed its position and asserted jurisdiction over private universities in *Cornell University*.⁴⁴ In that case, the university filed a petition seeking elections to determine the bargaining representatives of some of its nonacademic employees.⁴⁵

40. *Id.* § 159(c)(1).

41. 97 N.L.R.B. 424 (1951).

42. *See id.* at 424.

43. *Id.* at 425, 427.

44. 183 N.L.R.B. 329 (1970).

45. *See id.* at 329.

The NLRB reached the merits of the case, concluding, on the basis of changed economic realities, that being “[c]harged with providing peaceful and orderly procedures to resolve labor controversy, . . . [the NLRB] can best effectuate the policies of the Act by asserting jurisdiction over nonprofit, private educational institutions . . . whose operations have a substantial effect on commerce”⁴⁶ Only after this decision was the NLRB faced with the question of whether student employees at private universities are employees for the purposes of the NLRA. The discussion of this more controversial question will occupy the remaining two sections of this Part.

D. The Old “Primary Purpose” Test:

Only Students Who Take Employment for Primarily Economic Rather than Primarily Educational Purposes Are Employees

1. *Adelphi*⁴⁷ and *Leland Stanford*⁴⁸

In a series of cases in the early 1970s, the NLRB found that student employees were *primarily students* rather than primarily employees and were therefore precluded from joining with nonstudent employees in a single bargaining unit⁴⁹ or forming a bargaining unit of their own.⁵⁰ Two of these cases, *Adelphi* and *Leland Stanford*, involve fact patterns that resemble the fact patterns in *Yale* and *New York University* more closely than the fact patterns in *Cedars-Sinai*

46. *Id.* at 334.

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

48. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621 (1974).

49. *See Barnard College*, 204 N.L.R.B. 1134 (1973) (office clerical and other nonprofessional administrative staff employees, including graduate students employed in the residence halls, as desk attendants at the bowling alley, and at the entrance of the college activities building, and undergraduate students who work as typists in the college activities office); *Cornell Univ.*, 202 N.L.R.B. 290 (1973) (full-time and regular part-time dining facilities employees, including students); *Georgetown Univ.*, 200 N.L.R.B. 215 (1972) (full-time and regular part-time service and maintenance employees, including students); *College of Pharm. Sciences*, 197 N.L.R.B. 959 (1972) (graduate student TAs with full-time and regular part-time faculty); *Adelphi*, 195 N.L.R.B. at 639 (graduate student TAs and RAs with full-time and regular part-time faculty).

50. *See San Francisco Art Inst.*, 226 N.L.R.B. 1251 (1976) (part-time student janitors); *Leland Stanford*, 214 N.L.R.B. at 621 (graduate student RAs).

and *St. Clare's. Adelphi* and *Leland Stanford* are therefore discussed in some detail in this subsection.

As noted previously, the NLRA requires employers to bargain with “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a *unit appropriate for such purposes . . .*.”⁵¹ In determining whether a unit is appropriate for collective bargaining purposes, the NLRB relies on a “community of interests” test that essentially asks whether the employees in the unit have enough in common to allow for effective collective bargaining on their behalf.⁵²

In *Adelphi*, one hundred graduate student TAs and twenty-five graduate student RAs sought to join with six hundred faculty members and professional librarians in a single bargaining unit.⁵³ Approximately two-thirds of the TAs worked in the sciences where they taught laboratory courses and recitation classes that were part of faculty-led courses.⁵⁴ TAs working outside the sciences had no regular classes but sometimes substituted for absent faculty members and assisted in preparing examinations and grading papers.⁵⁵ All RAs worked in the sciences where they did not teach but instead worked with faculty members on research projects.⁵⁶ Graduate assistants were expected to devote twenty hours per week to these duties for which they received free tuition plus compensation ranging from \$1200 to \$2900 per academic year.⁵⁷ After noting that the employment of graduate assistants depended entirely on their continued status as graduate students working toward their degree,⁵⁸ the NLRB observed that graduate assistants

do not have faculty rank, are not listed in the University’s

51. 29 U.S.C. § 159(a) (1988) (emphasis added).

52. See *NLRB v. Purnell’s Pride, Inc.*, 609 F.2d 1153, 1156 (5th Cir. 1980) (whether a group of employees is united by “community of interest” depends on such factors as bargaining history, operational integration, geographic proximity, common supervision, similarity in job function, and degree of employee interchange (quoting *NLRB v. J.C. Penny Co.*, 559 F.2d 373, 375 (5th Cir. 1977))).

53. See *Adelphi*, 195 N.L.R.B. at 639-40.

54. See *id.* at 640.

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.*

catalogues as faculty members, have no vote at faculty meetings, are not eligible for promotion or tenure, are not covered by the University personnel plan, have no standing before the University's grievance committee, and, except for health insurance, do not participate in any of the fringe-benefits available to faculty members.⁵⁹

Moreover, graduate assistants, unlike faculty members, were supervised by faculty members.⁶⁰ On these facts, the NLRB found "that the graduate teaching and research assistants here involved, although performing some faculty-related functions, are *primarily students* and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit."⁶¹

A comparison of the characteristics of student employees and nonstudent employees is appropriate where the question is whether student employees may join with nonstudent employees in a single bargaining unit under the community of interest test. However, such a comparison is arguably not appropriate where the question is whether student employees may form a bargaining unit of their own. Yet, the NLRB seems to have engaged in precisely this kind of comparison in *Leland Stanford*.⁶² There, eighty-three graduate student RAs of the physics department sought to form a bargaining unit of their own.⁶³ These RAs performed research required by their program which ultimately led towards their theses and degrees.⁶⁴ The assistantships were one of several ways in which the university provided financial aid for its graduate students to do what was required of them to earn their degrees.⁶⁵ The NLRB observed that "there is no correlation between what is being done and the amount received by the student, nor is there a correlation between the hours spent in research and the amount received."⁶⁶ The NLRB went on to say that
although RA's are paid through Stanford's payroll machin-

59. *Id.*

60. *See id.*

61. *Id.* (emphasis added).

62. 214 N.L.R.B. 621 (1974).

63. *See id.* at 621.

64. *See id.*

65. *See id.* at 622.

66. *Id.*

ery, they do not share the fringe benefits of employees but do have the privileges enjoyed by other students. Thus they have the student health care and insurance, share in various campus activities, and may use student housing; they get no vacation, sick leave, or retirement benefits and have no schooling benefits for their children. Significantly, the payments to the RA's are tax exempt income.⁶⁷

Accordingly, the NLRB concluded "that the research assistants in the physics department are *primarily students*, and . . . they are not employees within the meaning of . . . the Act."⁶⁸

However, while the fact that student employees do not share the fringe benefits of other employees may prove that student employees do not have enough in common with other employees to join with them in a single bargaining unit, this fact does little to prove that student employees should not form a bargaining unit of their own. After all, lack of fringe benefits may be precisely the reason why these employees want to engage in collective bargaining, and fringe benefits are a typical example of "other conditions of employment" which are mandatory subjects of collective bargaining under the NLRA.⁶⁹

While in *Leland Stanford*, the NLRB held that *RAs* should not be allowed to form bargaining units of their own, it has never similarly held that *TAs* should not be allowed to form bargaining units of their own, either. This fact will become important below, in the discussion of the cases involving the Yale and NYU *TAs*.

2. *Cedars-Sinai*⁷⁰ and *St. Clare's*⁷¹

Adelphi and *Leland Stanford* established that student employees who are primarily students are not employees for the purposes of the NLRA.⁷² These decisions, however, did not provide much guidance with respect to the question of what, beyond the specific fact patterns presented there, makes student employees primarily students.

67. *Id.*

68. *Id.* at 623 (emphasis added).

69. 29 U.S.C. § 159(a).

70. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251 (1976).

71. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000 (1977).

72. See *supra* notes 61, 68 and accompanying text.

Two subsequent cases involving medical house staff clarified the matter but raised new questions of their own.

In *Cedars-Sinai*, which was decided in 1976, thirty-four interns, eighty-six residents, and twenty-four clinical fellows working at a private nonprofit medical center sought recognition as a collective bargaining unit.⁷³

An intern is a medical school graduate serving his first period of graduate medical training in a hospital. Most states . . . require an internship of 1 year to qualify for the examination to practice medicine. A resident is a physician who has completed an internship and serves a period of more advanced training, lasting from 1 to 5 years, in a specialty. A clinical fellow is a physician who has completed an internship and a residency and is taking an educational post-graduate program to qualify for certification in an identifiable subspecialty of medicine.⁷⁴

The majority of the *Cedars-Sinai* NLRB found that “[w]hile the house staff spends a great percentage of their time in direct patient care, this is simply the means by which . . . [they] acquire the necessary diagnostic skills and experience to practice [their] profession.”⁷⁵ Accordingly, the majority held that the house staff “participate in these programs not for the purpose of earning a living; instead they are there to pursue the graduate medical education that is a requirement for the practice of medicine.”⁷⁶ This made interns, residents, and clinical fellows “primarily students . . . that . . . are not employees within the meaning of Section 2(3) of the Act.”⁷⁷

The primary purpose test that was developed by the NLRB majority in *Cedars-Sinai* made the student’s subjective motivation for taking employment the crucial factor in determining whether he or she is or is not an employee within the meaning of the NLRA: Only students who took employment for primarily economic purposes—but not students who took employment for primarily educational purposes—were employees within the meaning of the NLRA.

73. See *Cedars-Sinai*, 223 N.L.R.B. at 252.

74. *Id.* at 251.

75. *Id.* at 253.

76. *Id.*

77. *Id.*

From its conception, the primary purpose test has come under vigorous attack. In his dissent in *Cedars-Sinai*, NLRB Member Fanning argued that there was no basis for excluding student employees who take employment for primarily educational purposes from the employee category.⁷⁸ Fanning's dissent articulated the position that the NLRB adopted last year in *Boston Medical*. In particular, Member Fanning noted that "[s]ection 2(3) of the [NLRA] states that the term 'employee' is meant to 'include any employee . . . unless the [NLRA] explicitly states otherwise,'"⁷⁹ as, for example, in the case of independent contractors or supervisors.⁸⁰ He further noted that the only exceptions to this rule are those mandated by federal labor law policy, as in the case of managerial and confidential employees.⁸¹ Member Fanning further noted that the NLRA did not explicitly exclude from the employee category students who take employment for primarily educational purposes and that federal labor law policy does not mandate such an exclusion, either.⁸² Accordingly, in Member Fanning's view, student employees should be employees under the NLRA as long as they are covered by the conventional meaning of the term "employee,"⁸³ regardless of the purpose for which they take employment.

Although all house staff are M.D.'s,⁸⁴ and their situation is thus quite distinct from student employees who are still working toward their academic degrees, the NLRB held a year later, in *St. Clare's*,⁸⁵ that "*Cedars-Sinai* . . . is primarily a decision about students."⁸⁶ Thus the NLRB made clear that the rule and rationale of *Cedars-Sinai* covered not only hospital house staff but also student employees still working toward their degrees.

The majority in *St. Clare's* also responded to some of the criticism voiced a year earlier in Member Fanning's *Cedars-Sinai*

78. *See id.* at 254 (Fanning, Member, dissenting).

79. *Id.* (Fanning, Member, dissenting) (quoting 29 U.S.C. § 152(3)).

80. *See supra* note 36 and accompanying text.

81. *See Cedars-Sinai*, 223 N.L.R.B. at 254 (Fanning, Member, dissenting); *see also supra* notes 37-38 and accompanying text.

82. *See Cedars-Sinai*, 223 N.L.R.B. at 254 (Fanning, Member, dissenting).

83. *See infra* Part II.E.1.

84. *See Cedars-Sinai*, 223 N.L.R.B. at 255 (Fanning, Member, dissenting).

85. 229 N.L.R.B. 1000 (1977).

86. *Id.* at 1000.

dissent.⁸⁷ In *St. Clare's*, the NLRB majority for the first time supplied policy reasons for its decision to deny representation to students performing services at their educational institutions which are directly related to their educational program. The NLRB majority observed that

the mutual interests of [such] students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests . . . 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 [these students]*.⁸⁸

The NLRB majority went on to say that

the student-teacher relationship . . . is predicated upon a mutual interest in the advancement of the student's education and is thus academic in nature. The [employee-employer relationship] is largely predicated upon conflict-

87. In addition, the majority in *St. Clare's* set up four rigid categories of student employees to determine their status as employees for the purposes of the NLRA. See *id.* at 1000-02. The second category involved students who "are employed by their own educational institution in a capacity unrelated to their course of study. In such cases, the Board has historically excluded the students from [bargaining] units which include nonstudent employees and have [sic] not afforded them the privilege of being represented separately." *Id.* at 1001. The fourth category consists of students who "perform services at their educational institutions which are directly related to their educational program. In such cases, the Board has universally excluded students from [bargaining] units which include nonstudent employees, and in addition has denied them the right to be represented separately." *Id.* at 1002. This classificatory scheme roundly denied the right to bargain collectively to both TAs and RAs, who fall into either of these two categories just described. The NLRB, however, has not stuck to this scheme. In *University of West Los Angeles*, 321 N.L.R.B. 61, 63 (1996), the NLRB granted five student law library clerks the right to join with four nonstudent clerks in a single bargaining unit, although these student clerks fell into the second of the four categories. Under *St. Clare's*, they therefore would not even have had the right to form a bargaining unit of their own. Although *West Los Angeles* did not formally overrule *St. Clare's* or *Cedars-Sinai*, in retrospect it created the first crack in the legal structure built on the foundation of the latter two cases. That crack opened wide three years later in the outright reversal of both *St. Clare's* and *Cedars-Sinai*.

88. *St. Clare's*, 229 N.L.R.B. at 1002 (emphasis added).

ing interests of the employer to minimize costs and the employees to maximize wages, and is thus economic in nature The inevitable change in emphasis from quality education to economic concerns which would accompany *injection of collective bargaining into the student-teacher relationship would . . . prove detrimental to both labor and educational policies.*⁸⁹

In addition, the NLRB majority voiced concerns that if collective bargaining rights were extended to students performing services at their educational institutions that are directly related to their educational program,

many academic freedoms would become bargainable as wages, hours, or terms and conditions of employment [Further,] failure to recommend program continuation would be tantamount to discharge and thus a mandatory subject of bargaining [In addition,] other academic prerogatives such as examinations, grading, course content and materials, program duration and teaching methods would be likely to find their way eventually to the bargaining table.⁹⁰

These concerns are independent of the question of what constitutes the appropriate test for student employee status—primary purpose (discussed in this section) or services (discussed in the next section). Under either test, concerns about the potential interference of collective bargaining with academic issues may be grounds for exclusion of student employees from coverage under the NLRA. These concerns will therefore remain important throughout the remainder of this Comment.

In conclusion, under the primary purpose test developed in *Cedars-Sinai* and confirmed in *St. Clare's*, the NLRB would have granted collective bargaining rights only to those students who took employment for primarily economic rather than primarily educational reasons. As applied, the test prevented virtually all student employees at America's private universities from bargaining

89. *Id.* (emphasis added).

90. *Id.* at 1003.

collectively.⁹¹ This might soon change dramatically, now that the NLRB has overruled *Cedars-Sinai* and *St. Clare's in Boston Medical*, replacing the primary purpose test with the more student employee organizing-friendly service test. The next section discusses the latter case and the new test.

E. The New "Services" Test:

All Students Who Provide Compensated Services Are Employees

1. Member Fanning's *Cedars-Sinai* dissent

As discussed above, Member Fanning argued in his *Cedars-Sinai* dissent against the NLRB majority's primary purpose test, and maintained that student employees are employees under the NLRA as long as they are covered by the conventional meaning of the term employee, regardless of the purpose for which they take employment.⁹² Member Fanning noted that "[t]he term 'employee' is the outgrowth of the common law concept of the 'servant'" and that "[a]t common law, a servant was a 'person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right of control.[']"⁹³ He further observed that "it is generally conceded, today, that . . . consideration is necessary for classification as an 'employee'" and concluded that "[t]he conventional meaning of the word ['employee'] implies someone who works or performs a service for another from whom he or she receives compensation."⁹⁴ According to this service test, anyone who provides compensated services is an employee. Member Fanning then applied this test to the medical house staff at issue in *Cedars-Sinai*:

[A] housestaff officer can be called upon . . . to open the chest wall of a 3-year-old child; hold the heart of a patient in his hands; remove breast tissues, kidneys, veins; deliver

91. For a rare exception, see *University of West Los Angeles*, 321 N.L.R.B. 61 (1996), discussed *supra* note 87.

92. See *supra* notes 78-83 and accompanying text.

93. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 254-55 (1976) (Fanning, Member, dissenting) (quoting RESTATEMENT (SECOND) OF AGENCY § 200 (1957)).

94. *Cedars-Sinai*, 223 N.L.R.B. at 255 (Fanning, Member, dissenting).

babies; insert tubes in the trachea of newborns and catheters into abdominal cavities; administer closely controlled and potentially lethal medications; and perform a host of similar procedures. For those services . . . the hospital pays the housestaff officer what my colleagues call a "stipend." . . . These "stipends" are compensation for services rendered The recipients are, therefore, employees.⁹⁵

For almost a quarter of a century, Member Fanning's service test represented only a minority position on the NLRB, while the primary purpose test represented the majority position. However, during this period, the service test was influential in the development of state labor law.⁹⁶ Moreover, twenty-three years after *Cedars-Sinai*, a three-to-two majority of the NLRB, in *Boston Medical*, discarded the primary purpose test and adopted instead the service test.

2. *Boston Medical*

In *Boston Medical*,⁹⁷ about 430 house staff at the health center of the same name sought recognition as a collective bargaining unit.⁹⁸ As pointed out by the NLRB's regional director in his Decision and Order, these house staff were in substantially the same situation as the house staff in *Cedars-Sinai*.⁹⁹ Thus, the house staff at Boston Medical Center were responsible for hospital admissions, including initiating treatment and ordering medication, and hospital discharges, including care instructions and prescription orders.¹⁰⁰ These house staff started intravenous lines or drew blood, mostly without supervision by an attending physician.¹⁰¹ They also responded to "codes," i.e., life-threatening emergencies, again without attending physicians.¹⁰² The house staff helped families make life or death decisions regarding the level of intervention to be used in the case of critically ill infants and children, and wrote "do not

95. *Id.* at 255 & 256 n.17 (Fanning, Member, dissenting).

96. *See infra* note 189.

97. Boston Med. Ctr. Corp., 330 N.L.R.B. No. 30, 1999 WL 1076118 (Nov. 26, 1999).

98. *See id.* at *2.

99. *See id.* at *76.

100. *See id.* at *4.

101. *See id.*

102. *See id.*

resuscitate” orders for terminally ill patients at the request of patients or their families, although such orders had to be cosigned by an attending physician within twenty-four hours.¹⁰³ House staff took care of entire wards at night without an attending physician.¹⁰⁴ They performed increasingly complicated surgery as their experience grew, with a physician in attendance only during the critical portion of each operation.¹⁰⁵ For these services, the house staff received annual compensation ranging from about \$34,000 to over \$44,000, which was generally unrelated to the number of hours they worked.¹⁰⁶ In addition, they received paid vacation, sick, parental, and bereavement leave, were entitled to health, dental, and life insurance, and use of the employee health services, but could not participate in the retirement program.¹⁰⁷

The NLRB majority started its analysis by adopting Member Fanning’s service test:

In his dissent in *Cedars-Sinai*, then-Member Fanning traced the Act’s definition of “employee” as an out-growth of the common law concept of the “servant.” . . . At common law, a servant was one who performed services for another and was subject to the other’s control or right of control. Consideration, i.e. payment, is strongly indicative of employee status *We agree with this analysis.*¹⁰⁸

The NLRB majority then applied the service test to the situation of the house staff at Boston Medical Center: “First, house staff work for an employer within the meaning of the Act. Second, house staff are compensated for their services Third, house staff provide patient care for the Hospital.”¹⁰⁹ The NLRB concluded that these “essential elements of the house staff’s relationship with the Hospital obviously define an employer-employee relationship.”¹¹⁰

103. *See id.*

104. *See id.* at *5.

105. *See id.*

106. *See id.* at *7.

107. *See id.*

108. *Id.* at *13 (emphasis added).

109. *Id.* at *14-15.

110. *Id.* at *14.

The employer in *Boston Medical* raised many of the same policy concerns against coverage of the house staff under the NLRA that had already been brought up by the NLRB majority in *St. Clare's*.¹¹¹ Thus, the employer argued that graduate medical education was not compatible with the economic relationship contemplated by the NLRA, that bargaining would undermine both the educational process and academic freedom, and that the academic nature of the relationship between house staff and hospital did not allow for equal participation by a labor organization in determining standards for evaluation, promotion, discipline, and dismissal.¹¹²

The two NLRB dissenters in *Boston Medical* shared these concerns. Member Hurtgen concluded that "as a policy matter, the Board should continue . . . to exclude [house staff] for purposes of collective bargaining."¹¹³ In his more detailed dissent, Member Brame first argued that "[b]ecause education requires inequality, the concept of bargaining parity on which the Act is based, and the view that equal bargaining strength will serve the national interest, are simply inapplicable."¹¹⁴ Member Brame next contended that "[e]ven when such core subjects of bargaining as job assignment and rotations, training opportunities, starting dates, and 'promotions' are considered, it is evident that traditional collective bargaining is completely unsuited to resolve differences that many [sic] arise" because these subjects may be under the control of individual attending physicians or governed by national standards and thus out of the control of the employer, Boston Medical Center.¹¹⁵ Member Brame finally claimed that tools of economic warfare, primarily strikes and lock-outs, contemplated by the NLRA to resolve differences when efforts to bargain break down, "fit poorly with graduate medical education" because "by striking a [house staff] would on the one hand extend by the duration of the strike the amount of time required to complete the [house staff] program, and, on the other hand, be limited, relative to striking employees, in his or her ability to secure equivalent

111. See *supra* notes 88-90 and accompanying text.

112. See *Boston Med.*, 1999 WL 1076118, at *8.

113. *Id.* at *28 (Hurtgen, Member, dissenting).

114. *Id.* at *43 (Brame, Member, dissenting).

115. *Id.* at *44 (Brame, Member, dissenting).

employment with another program.”¹¹⁶ In other words, in the dissent’s view, a strike is an ineffective tool in the hands of medical house staff.

If house staff cannot effectively use economic weapons, this of course greatly reduces the likelihood that house staff will actually resort to economic weapons, a fact that should assuage the employer’s and the minority’s fear of house staff strikes, rather than give rise to concern.

The *Boston Medical* NLRB majority addressed the alleged inappropriateness of collective bargaining between house staff and hospitals principally by suggesting that the NLRB could use its power under the NLRA to preclude collective bargaining over any subject ill-suited for this process.¹¹⁷ Under the NLRA, employer and employees are only obligated to bargain collectively over “mandatory” subjects of bargaining, i.e., “wages, hours, and other terms and conditions of employment,”¹¹⁸ but they do not have to do so over other, “permissive” subjects of bargaining.¹¹⁹ Thus the parties must bargain only over “issues that [directly] settle an aspect of the relationship between the employer and employees,”¹²⁰ but not over issues that “have only an indirect and attenuated impact on the employment relationship.”¹²¹ Furthermore, employers and employees may resort to economic weapons only in connection with mandatory subjects of bargaining, but not in connection with permissive subjects of bargaining.¹²² As a consequence, by determining that academic issues and other subjects ill-suited for collective bargaining have only an indirect impact on the employment relationship and are therefore permissive rather than mandatory subjects of bargaining, the NLRB

116. *Id.* at *45 (Brame, Member, dissenting).

117. *See id.* at *20.

118. 29 U.S.C. § 158(d) (1988).

119. *See Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-86 (1971).

120. *Id.* at 178.

121. *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 677 (1981) (citing *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring)).

122. *See Dobbs Houses, Inc. v. NLRB*, 325 F.2d 531, 537 (5th Cir. 1963) (holding that the discharge of a supervisor was a “managerial prerogative,” i.e., not a mandatory subject of bargaining, and that a strike over the supervisor discharge was, therefore, unprotected).

could preclude bargaining, as well as striking, over these subjects. The NLRB majority reserved this task for the future:

The contour of collective bargaining is dynamic . . . : *what can be bargained about . . . may change* We need not define here the boundaries between permissive and mandatory subjects of bargaining concerning [house staff], and between what can be bargained over and what cannot. *We will address those issues later, if they arise.*¹²³

The NLRB majority addressed the issue of house staff strikes from an additional angle:

[S]ince an overriding purpose of the 1974 Healthcare Amendments was the elimination of recognition strikes and picketing, according house staff employee status will have the beneficial purpose of bringing them within the ambit of the Act, and providing a mechanism for resolving recognition and other representation issues without resort to such tactics.¹²⁴

According to the NLRB majority, coverage under the NLRA *decreases*, rather than *increases*, the danger of house staff strikes, a claim that (together with the other policy issues) will be discussed more deeply below.

In conclusion, under the new service test adopted by the *Boston Medical* NLRB majority, students are employees within the meaning of the NLRA if they provide compensated services and if coverage by the NLRA would not violate the purposes of the NLRA. In *Boston Medical*, the NLRB applied this test to medical house staff and granted them collective bargaining rights under the NLRA. Three days after the NLRB decided *Boston Medical*, it decided *Yale*,¹²⁵ in which it set the stage for the application of the service test to student employees other than medical house staff, namely, teaching assistants.

123. *Boston Med.*, 1999 WL 1076118, at *20 (emphasis added).

124. *Id.*

125. 330 N.L.R.B. No. 28, 1999 WL 1076116 (Nov. 29, 1999).

3. *Yale*

At Yale University, 1100 graduate teaching assistants and part-time acting instructors (collectively, "TAs") in the humanities and social sciences departments are seeking recognition as a collective bargaining unit.¹²⁶ In support of their demands, they staged a three-day strike in February of 1992 by refusing to teach their classes.¹²⁷ A second conventional strike was staged in April of 1995 and lasted one week.¹²⁸ Neither of these two job actions, nor an election among the graduate students in the humanities and social sciences conducted by the League of Women Voters, resulted in recognition of the union by the university.¹²⁹

At the end of the 1995 fall semester, the TAs engaged in a third job action that became the subject of the current litigation, in which approximately 200 TAs refused to submit their students' final grades for the semester to the university.¹³⁰ The university retaliated by issuing a number of statements threatening adverse consequences of prolonged grade-withholding, which the TA union charged interfered with the TAs' exercise of section 7 rights in violation of section 8(a)(1) of the NLRA.¹³¹ The university further allegedly discriminated against striking TAs by disciplining them, removing them from teaching assignments, subjecting them to closer supervision, and eliminating their classes—actions which the TA union charged discriminated with respect to tenure of employment and terms or conditions of employment in order to discourage union membership in violation of section 8(a)(3) of the NLRA.¹³²

In order for these charges to succeed, the activities with which and because of which the university allegedly interfered and discriminated must be protected by section 7 of the NLRA. Further, the TAs with whose section 7 rights the university allegedly

126. See Ukeiley, *supra* note 7, at 531-32.

127. See *Yale*, 1999 WL 1076116, at *14.

128. See *id.*

129. See *id.*

130. See *id.* at *1.

131. See *id.*; see also *supra* notes 25, 29 and accompanying text.

132. See *Yale*, 1999 WL 1076116, at *1; see also *supra* notes 26, 30 and accompanying text.

interfered and against whom it allegedly discriminated must be employees within the meaning of the NLRA.

With respect to the first of these two issues, a majority of the NLRB in *Yale* agreed with the ALJ that the grade-withholding itself was not a protected activity because it was a partial strike, and because it involved misappropriation of university property.¹³³ Partial strikes are unprotected because “[w]hile . . . employees ha[ve] the undoubted right to go on a strike . . . , they [can]not continue to work and remain at their positions, accept the wages paid to them, and at the same time select what part of their allotted tasks they care[] to perform”¹³⁴ Here, the TAs continued to perform some job-related duties while they were withholding grades, including meeting with students, proctoring exams, grading materials, writing letters of evaluation, and preparing for the next term’s classes.¹³⁵ Misappropriation of employer property is unprotected because Congress, in passing the NLRA, did not intend “to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer’s property”¹³⁶ Here, The TAs withheld papers and test materials that were university property.¹³⁷

Although the grade-withholding itself was thus not a protected activity, a different majority of the NLRB in *Yale* disagreed with the ALJ and found that some of the threatening statements were overbroad in that they referred to protected conduct other than the grade strike.¹³⁸ Two statements “broadly declared that a union is not appropriate in academe,” another statement “referred to the ‘[f]ailure to perform *any* aspect of a graduate teaching assignment’ as providing grounds for negative evaluations and loss of teaching opportunities,” and yet another statement “condemned strike activity by graduate students ‘under any circumstances.’”¹³⁹ Since these statements

133. See *Yale*, 1999 WL 1076116, at *2.

134. *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946).

135. See *Yale*, 1999 WL 1076116, at *2-3.

136. *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 255 (1939).

137. See *Yale*, 1999 WL 1076116, at *3.

138. See *id.* at *5-6.

139. *Id.* at 5.

applied not only to the partial and therefore unprotected strike, but also to any complete and therefore protected strikes, the *Yale* NLRB majority concluded that the general counsel had satisfied its burden to establish a prima facie case that these statements violated section 8(a)(1) of the NLRA.¹⁴⁰ The majority thus remanded the case for further hearings before the ALJ, in which the university was to present its defense.¹⁴¹

With respect to the question of whether the TAs are employees within the meaning of the NLRA, the *Yale* NLRB majority directed the ALJ on remand to “provide the Board with findings of fact and conclusions of law on the issue of the employee status of the T[A]s under Section 2(3) of the Act, regardless of his ultimate findings on the issue of whether the [university] violated Section 8(a)(1) of the Act.”¹⁴²

This order seemed to ensure that the question of whether TAs are employees within the meaning of the NLRA would be answered in the *Yale* case.¹⁴³ However, on March 29, 2000, the ALJ approved a settlement between the NLRB and Yale University that resolved the unfair labor practice charges but did not address whether the Yale TAs are employees.¹⁴⁴ Under the agreement, the NLRB would withdraw the unfair labor charges and in return, Yale University would post notices describing the rights of employees under the NLRA and promising not to violate these rights.¹⁴⁵ These notices are not admissions that Yale University committed any unfair labor practices or that the Yale TAs are, in fact, employees under the NLRA.¹⁴⁶ On the day after NLRB Regional Director Daniel Silverman’s decision that TAs and RAs at NYU are employees under the NLRA,¹⁴⁷ the Yale

140. *See id.*

141. *See id.* at *6.

142. *Id.*

143. The question of whether RAs are employees within the meaning of the NLRA, on the other hand, will not be answered in the *Yale* case. Part IV below, which deals with the employee status of Yale student employees, will therefore focus on TAs, although it will also briefly discuss RAs.

144. *See* Kessler, *supra* note 13, at A8.

145. *See id.*

146. *See id.*

147. *See* New York Univ., 66 Daily Lab. Rep. (BNA) E-22, E-29, E-30 (NLRB Apr. 3, 2000); *see also infra* Part II.E.4.

TA union appealed the settlement in that case.¹⁴⁸ New York University also having appealed the ruling in that case,¹⁴⁹ the NLRB will now have to address the employee status of TAs and RAs at Yale, NYU, and ultimately all private universities in light of the new service test.

4. *New York University*

At NYU, a union sought to represent 1700 graduate student employees of which more than half were TAs and the rest were RAs.¹⁵⁰

Some of the TAs worked as “graders” or “tutors” and were excluded from the bargaining unit by NLRB Regional Director Daniel Silverman because their employment was “sporadic” and “irregular.”¹⁵¹ Other TAs assisted faculty members in the teaching of large introductory survey or lecture courses by conducting “recitation” or “lab” sections, holding office hours, and preparing, proctoring, or grading exams or other work assignments.¹⁵² Yet other TAs acted as the “stand-alone” teacher or “teacher-of-record” for undergraduate courses, especially in the Expository Writing Program, where TAs taught ninety-five percent of the classes, and with respect to foreign language instruction, which were also primarily provided by TAs.¹⁵³ These TAs were responsible for the entire course: They taught classes, graded exams and assignments, and held office hours.¹⁵⁴ In the remainder of this Comment, the term “TA” as applied to NYU refers only to these latter types of TAs but not to graders or tutors.

The RAs whom the union sought to represent assisted a professor in his or her research by checking references, doing bibliographical work, obtaining research materials, proofreading, and performing archival work, or by recruiting subjects for experiments, collecting

148. See e-mail message to the author from Michael T. Anderson of the law firm of Davis, Cowell & Bowe, Apr. 7, 2000.

149. See *supra* note 15 and accompanying text.

150. See *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E23.

151. See *id.* at E-33 (citing Owens-Corning Fiberglass Corp., 140 N.L.R.B. 1323 (1963); E.F. Drew & Co., 133 N.L.R.B. 155 (1961); Indiana Bottled Gas Co., 128 N.L.R.B. 1441 (1960); Sealite, Inc., 125 N.L.R.B. 619 (1959)).

152. See *id.* at E-23.

153. See *id.* at E-23 to E-24.

154. See *id.* at E-24.

and analyzing data, and entering data into computers.¹⁵⁵ Other RAs whom the union did not seek to represent received funding from external faculty research grants and simply performed the research required for their dissertation: No other services were required from these RAs.¹⁵⁶ In the remainder of this Comment, the term "RA" as applied to NYU refers only to the former type of RA unless explicitly stated otherwise.

TAs and RAs were expected to work twenty hours per week in these capacities.¹⁵⁷ They were selected primarily on the basis of their merits as opposed to their financial needs.¹⁵⁸ In a few departments, service as a TA or RA was a degree requirement.¹⁵⁹ In exchange for their services, TAs and RAs received "stipends" ranging from \$6500 to \$20,000, full tuition remission, and a bookstore discount.¹⁶⁰ They generally did not receive the insurance or retirement benefits available to other NYU employees but were covered by workers' compensation.¹⁶¹

NLRB Regional Director Daniel Silverman applied to these TAs and RAs the new service test adopted last year by the full NLRB in *Boston Medical* for medical house staff.¹⁶² The Regional Director concluded that the TAs and RAs "perform services under the control and direction of the Employer, in exchange for compensation," and that they therefore "meet the statutory definition of employee."¹⁶³ The Regional Director further rejected the university's argument that the TAs and RAs should be excluded from coverage for policy reasons, stressing "the danger of the [NLRB] relying on 'policy reasons' to exclude from [NLRA] coverage those who otherwise fall within the [NLRA]'s broad definition of 'employee'."¹⁶⁴ In particular, the Regional Director responded to the by now familiar university argument that "collective bargaining will interfere with the four essential

155. *See id.* at E-25.

156. *See id.* at E-26 to E-27.

157. *See id.* at E-26.

158. *See id.* at E-27.

159. *See id.* at E-24 to E-25.

160. *See id.* at E-23 n.7.

161. *See id.* at E-23 n.8.

162. *See id.*; *supra* Parts II.E.1, II.E.2.

163. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-29 to E-30.

164. *See id.* at E-31 n.48.

academic freedoms of ‘who may teach, what may be taught, how it shall be taught and who may be admitted to study’¹⁶⁵ with the *Boston Medical*-inspired assertion that

[t]he conclusion that [TAs and RAs] are employees entitled to engage in collective bargaining, of course, does not imply that the four essential elements of academic freedom . . . are necessarily mandatory subjects of collective bargaining . . . [,] because collective bargaining negotiations can be limited to only those matters affecting wages, hours and other terms and conditions of employment[, so] that the critical elements of academic freedom need not be compromised.¹⁶⁶

The Regional Director further suggested that “[t]he asserted anticipated interference with academic freedom essentially appears to be a fear that collective action over graduate student conditions of employment will be more influential and powerful than individual action” and observed that to exclude TAs and RAs from coverage under the NLRA on such grounds would “run[] directly contrary to the express purposes of the [NLRA] . . . ‘to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by *encouraging the practice and procedure of collective bargaining*”¹⁶⁷

With respect to those RAs whom the union did not seek to represent and who received funding from external faculty research grants, the Regional Director observed that these RAs, like the ones involved in *Leland Stanford*,¹⁶⁸ did not perform any compensated services for the university but rather performed “the same research they would perform as part of their studies in order to complete their dissertation, regardless of whether they received funding,” and concluded that they were therefore not employees within the meaning of the NLRA.¹⁶⁹

165. *Id.* at E-32 (quoting *Sweezy v. New Hampshire*, 354 U.S. 234 (1957)).

166. *Id.* See *supra* notes 117-23 and accompanying text.

167. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-32 (quoting 29 U.S.C. § 151).

168. See *supra* notes 64-68, *infra* notes 340-43 and accompanying text.

169. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-32 to E-33.

While Yale's TA union hailed the *New York University* decision as "a landmark ruling" which established "a precedent for the entire country,"¹⁷⁰ Yale's President Richard C. Levin reportedly "said that the New York ruling did not apply to the Connecticut school."¹⁷¹ The NYU administration sought review of the Regional Director's decision by the NLRB, which was granted on May 10, 2000.¹⁷² This appeal, together with the Yale TA union's decision to appeal the settlement in that case in the wake of the favorable *New York University* decision,¹⁷³ ensures that the issue of the employee status of TAs and RAs at private universities will continue to occupy the NLRB and, possibly, the federal courts for some time to come.

The discussion now turns to a summary of the California student employee law, which influenced the NLRB in *Boston Medical*, and which can also be expected to influence the future of the *Yale*¹⁷⁴ and *New York University* cases, before returning to these latter cases in Part IV.

III. HEERA AND STUDENT EMPLOYEES AT CALIFORNIA'S PUBLIC UNIVERSITIES: SUMMARY OF THE CALIFORNIA LAW

A. Introduction

Student employees at public universities are covered by state law. In California, they are covered by HEERA,¹⁷⁵ as interpreted by the California PERB and the California courts. The remainder of this Part provides a summary of California law and in particular of the rights and obligations of employees and employers under HEERA. This Part further discusses the status of student employees at California's public universities as employees within the meaning of HEERA.

170. Graduate Employees and Students Org., "Graduate Teachers are Employees" (visited Apr. 4, 2000) <<http://www.yale.edu/geso/links/NYUNLRB.htm>>.

171. Marc J. Armbrinder, *New York U. Grad Students Permitted to Unionize*, U-WIRE, Apr. 4, 2000, available in 2000 WL 17591351.

172. See *UAW Blasts NYU Interference With Vote Count in Student Employee Recognition Election*, *supra* note 15.

173. See *supra* note 148.

174. See *supra* note 21 and accompanying text.

175. CAL. GOV'T CODE §§ 3560-3595 (West 1998 & Supp. 2000).

*B. Rights and Obligations of Employees and Employers
Under HEERA*

California's HEERA gives public university employees rights that are similar to those which the NLRA gives America's private employees. Thus, HEERA grants higher education employees "the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring," as well as the right to refuse to do so.¹⁷⁶ HEERA further makes it an unlawful employer practice to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [HEERA],"¹⁷⁷ to "[d]eny to employee organizations rights guaranteed to them by [HEERA],"¹⁷⁸ or to "[r]efuse or fail to engage in meeting and conferring with"¹⁷⁹ "any recognized or certified employee organization or person it authorizes to act on its behalf."¹⁸⁰

Unlike the NLRA, HEERA makes it reasonably clear to whom these rights and obligations extend. In particular, although the statute generally replicates the circularity of the NLRA definition of the term "employee"¹⁸¹ by stating that "'[e]mployee' or 'higher education employee' means any employee of the Regents of the University of California, the Directors of Hastings College of the Law, or the Trustees of the California State University" except "managerial" and "confidential employees,"¹⁸² HEERA specifically addresses the status of student employees:

176. CAL. GOV'T CODE § 3565 (West 1998). See *supra* note 24 and accompanying text for the corresponding NLRA provision.

177. CAL. GOV'T CODE § 3571(a) (West 1998). See *supra* notes 25-26 and accompanying text for the corresponding NLRA provisions.

178. CAL. GOV'T CODE § 3571(b).

179. *Id.* § 3571(c). See *supra* note 27 and accompanying text for the corresponding NLRA provision.

180. CAL. GOV'T CODE § 3562(i) (West Supp. 2000).

181. See *supra* note 32 and accompanying text for the same problem regarding the NLRA.

182. CAL. GOV'T CODE § 3562(e). See *supra* note 34 and accompanying text for the corresponding NLRA provision.

The board may find student employees whose employment is contingent on their status as students are employees only if the services they provide are unrelated to their educational objectives, or, that *those educational objectives are subordinate to the services they perform and that coverage under [HEERA] would further the purposes of [HEERA]*.¹⁸³

This HEERA test contains four prongs: a “contingency” prong, a “relatedness” prong, a “balancing” prong, and a “policy” prong.

The first two prongs of the HEERA test are of little interest as far as TAs and RAs are concerned, because their employment is virtually always contingent on their status as students, and the services they provide are, in the normal case, related to their educational objectives. The remainder of this Part discusses how California’s PERB and state courts, which are charged with the interpretation of HEERA, have answered the third and fourth prongs of the HEERA test: Are the educational objectives of the student employees subordinate to the services they provide, and would coverage of the student employees under HEERA further the purpose of HEERA? The first part of this question represents a compromise between the old NLRB primary purpose test and the new NLRB service test. For this reason, an answer to the balancing prong of the HEERA test regarding California’s public TAs can provide guidance for the application of the NLRB tests to Yale’s and NYU’s private TAs and RAs. Moreover, the purposes of HEERA are similar to the public policies behind the NLRA.¹⁸⁴ For this reason, determining whether coverage

183. CAL. GOV’T CODE § 3562(e) (emphasis added).

184. Compare CAL. GOV’T CODE § 3560(a) (West 1998) (“The people of the State of California have a fundamental interest in the development of *harmonious and cooperative labor relations* between the public institutions of higher education and their employees” (emphasis added)), and CAL. GOV’T CODE § 3561(c) (West 1998) (“It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the *free exchange of ideas* among the faculty, students, and staff of [California’s public universities]” (emphasis added)), with 29 U.S.C. § 151 (1988) (“[P]rotection by law of the right of employees to organize and bargain collectively safeguards commerce from injury . . . by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the *friendly adjustment of industrial disputes* arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees It is . . . the policy of

of California's public TAs under HEERA would further HEERA's purposes can provide guidance as to whether coverage of Yale's and NYU's private TAs and RAs under the NLRA would violate the public policies behind the NLRA. These questions are addressed below in Part IV.C.

*C. HEERA's Balancing Test:
Only Students Whose Educational Objectives
Are Subordinate to the Services They Provide and Whose Coverage
under HEERA Would Further
HEERA Are Employees*

1. *Regents*

HEERA was first applied to student employees in *Regents of the University of California v. Public Employment Relations Board*,¹⁸⁵ which was decided a decade after *Cedars-Sinai*. There, a union comprised of medical house staff at various UC campuses sought recognition as their collective bargaining representative.¹⁸⁶ Upon facts that closely paralleled the facts in *Cedars-Sinai*,¹⁸⁷ the PERB found that the house staff's educational objectives were subordinate to the services they performed, that coverage of the house staff under HEERA would further the purposes of HEERA, and, accordingly, that the house staff were employees within the meaning of HEERA.¹⁸⁸

the United States to eliminate the causes of certain substantial obstructions to the *free flow of commerce* . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection" (emphasis added)).

185. 41 Cal. 3d 601, 715 P.2d 590, 224 Cal. Rptr. 631 (1986).

186. *See id.* at 604, 715 P.2d at 592, 224 Cal. Rptr. at 633.

187. *See id.* at 648, 715 P.2d at 622, 224 Cal. Rptr. at 663 (Lucas, J., dissenting).

188. *See id.* at 606, 715 P.2d at 593, 224 Cal. Rptr. at 634.

The California Supreme Court affirmed the PERB's decision.¹⁸⁹ In doing so, the court clarified the meaning of the balancing prong of the HEERA test. It rejected the dissent's view that by requiring the educational objectives of student employees to be subordinate to the services they perform, "[t]he [California] Legislature chose the [*Cedars-Sinai* and *St. Clare's*] NLRB majority approach."¹⁹⁰ On the basis of the plain language of the statute and its legislative history, the court instead concluded that

in defining "employees" under HEERA, the [California] Legislature specifically *rejected* the NLRB rulings [in *Cedars-Sinai* and *St. Clare's*]. Under the NLRB precedent, the relevant inquiry is whether the student's objectives are primarily academic. Under HEERA, even if the PERB finds that housestaff are motivated by "educational objectives," it may nevertheless classify them as "employees" if their objectives are "subordinate to the services they perform"

. . . .¹⁹¹

HEERA thus requires the students' subjective educational objectives, which are the focus of the *Cedars-Sinai* and *St. Clare's* primary purpose test, to be balanced against the objective nature of the services they perform, which is the focus of the service test of Member Fanning's *Cedars-Sinai* dissent and *Boston Medical*.¹⁹² The court correctly observed that HEERA section 3562(f) "represents a compromise between the majority and dissenting opinions expressed in the NLRB decisions" in *Cedars-Sinai* and *St. Clare's*.¹⁹³

189. *See id.* at 624, 715 P.2d at 605, 224 Cal. Rptr. at 646. California thus joined the District of Columbia, Florida, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, New York, and Ohio in holding that medical house staff at public institutions are employees entitled to collective bargaining. *See* Jennifer A. Shorb, Note, *Working Without Rights: Recognizing Housestaff Unionization—An Argument for the Reversal of Cedars-Sinai Medical Center and St. Clare's Hospital*, 52 VAND. L. REV. 1051, 1072 & nn.131-32 (1999). Only one jurisdiction, Pennsylvania, has chosen to follow the NLRB and hold that house staff are not employees. *See id.* at 1072 & n.132.

190. *Regents*, 41 Cal. 3d at 625, 715 P.2d at 606, 224 Cal. Rptr. at 647 (Lucas, J., dissenting).

191. *Id.* at 612-13, 715 P.2d at 597, 224 Cal. Rptr. at 638 (emphasis added).

192. *See id.* at 614, 715 P.2d at 598, 224 Cal. Rptr. at 639.

193. *Id.* at 615, 715 P.2d at 599, 224 Cal. Rptr. at 640.

The court also addressed some public policy objections against extending collective bargaining rights to house staff that had already been raised in *St. Clare's* and that would later be raised again in *Boston Medical* and *New York University*.¹⁹⁴ “The University asserts that if collective bargaining rights were given to housestaff the University’s educational mission would be undermined by requiring bargaining on subjects which are intrinsically tied to the educational aspects of the [house staff] programs.”¹⁹⁵ To the court, “[t]his ‘doomsday cry’” seemed “somewhat exaggerated” and “premature”: “The argument basically concerns the appropriate scope of representation under the [NLRA]. Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the [PERB] when they arise”¹⁹⁶ Thus the court in *Regents* dealt with the alleged inappropriateness of collective bargaining between house staff and hospitals in much the same way as the NLRB majority and the Regional Director did later in *Boston Medical* and *New York University*, namely, through the distinction between mandatory and permissive subjects of bargaining.¹⁹⁷ In *Regents*, the university also argued that permitting collective bargaining for house staff might lead to strikes.¹⁹⁸ The court counterargued that “it is widely recognized that collective bargaining is an alternative dispute resolution mechanism which diminishes the probability that vital services will be interrupted.”¹⁹⁹ The NLRB majority later raised a similar counterargument in *Boston Medical*.²⁰⁰

Not only is the language of the *Regents* decision mirrored in the language of the *Boston Medical* decision, but, as discussed in Part IV.C.2, the *Boston Medical* NLRB majority in fact directly quoted the *Regents* decision as support for its own decision.²⁰¹ With this

194. See *supra* notes 88-90, 112-15, 165 and accompanying text.

195. *Regents*, 41 Cal. 3d at 623, 715 P.2d at 604, 224 Cal. Rptr. at 645.

196. *Id.*, 715 P.2d at 604-05, 224 Cal. Rptr. at 645-46 (citation omitted).

197. See *supra* notes 118-23, 166 and accompanying text.

198. See *Regents*, 41 Cal. 3d at 623, 715 P.2d at 605, 224 Cal. Rptr. at 646.

199. *Id.*

200. See *supra* note 124 and accompanying text.

201. See *Boston Med. Ctr. Corp.*, 330 N.L.R.B. No. 30, 1999 WL 1076118, at *21 (Nov. 26, 1999).

reference to *Regents*, the NLRB invited reference to other California decisions, particularly those applying *Regents* to TAs and RAs, as support for granting or denying the TAs and RAs in *Yale* and *New York University* collective bargaining rights. These California decisions are discussed next.

2. Berkeley

Medical house staff such as those involved in *Regents*, who already have their doctorates, are in a different situation than TAs and RAs, who are still working towards their degree, and who are the focus of this Comment. The policy prong of the HEERA test was first applied to TAs and RAs in *Association of Graduate Student Employees v. PERB*.²⁰² There, about 2400 graduate student TAs and 1600 graduate student RAs at the University of California, Berkeley, sought union representation for the purposes of collective bargaining.²⁰³ The TAs were responsible for fifty-eight percent of the class meetings in lower-division classes.²⁰⁴ Only 16 out of 101 departments required that graduate students teach undergraduate courses,²⁰⁵ and according to one witness, sixty percent of the large departments and forty percent of the small departments hired TAs from outside their departments.²⁰⁶

Accordingly, most TAs called as witnesses by the union testified that they took employment in order to earn enough money to support themselves during graduate school,²⁰⁷ that is, for primarily economic rather than academic purposes. TA (as well as RA) positions were awarded on the basis of academic merit rather than economic need.²⁰⁸ TAs (and RAs) received only limited fringe benefits, and TA appointments were limited to fifty percent of full-time employment.²⁰⁹ University witnesses testified that teaching helped TAs to master and review fundamentals, study new developments, and

202. 6 Cal. App. 4th 1133, 8 Cal. Rptr. 275 (1992) [hereinafter *Berkeley*].

203. *See id.* at 1136, 8 Cal. Rptr. at 276.

204. *See id.*

205. *See id.*

206. *See id.* at 1137, 8 Cal. Rptr. at 277.

207. *See id.* at 1138, 8 Cal. Rptr. at 277.

208. *See id.* at 1136, 8 Cal. Rptr. at 277.

209. *See id.* at 1137, 8 Cal. Rptr. at 277.

acquire the skill of transmitting information to others.²¹⁰ Although some RAs performed only clerical duties which provided little benefit to their education, and others performed research that did not directly relate to their own research and dissertation work, many RAs performed research that provided them with some or all of the data necessary for their dissertations.²¹¹

On these facts, the PERB decided that neither TAs nor RAs were employees within the meaning of HEERA.²¹² The court of appeals subsequently found that the PERB had misconstrued the balancing prong of the HEERA test.²¹³ However, the court also found that the PERB had correctly applied the policy prong of the HEERA test and therefore upheld the PERB's decision to deny both TAs and RAs collective bargaining rights.²¹⁴ In particular, the court found that the PERB's conclusion that coverage of TAs and RAs under HEERA would not further the purposes of HEERA was supported by substantial evidence on the whole record and that this conclusion, therefore, had to be upheld.²¹⁵ In HEERA, the legislature declared, "The people of the State of California have a fundamental interest in the development of harmonious and cooperative labor relations between the public institutions of higher education and their employees."²¹⁶ HEERA further states: "It is the policy of the State of California to encourage the pursuit of excellence in teaching, research, and learning through the free exchange of ideas among the faculty, students, and staff" of the covered institutions.²¹⁷ The PERB concluded that coverage of TAs and RAs would not further these purposes because

- (1) the mentor relationship between professors and students would be damaged;
- (2) it might interfere with the University's use of employment opportunities to attract the most qualified students;
- (3) it could create arbitrary distinctions

210. *See id.* at 1138, 8 Cal. Rptr. at 278.

211. *See id.*

212. *See id.* at 1135, 8 Cal. Rptr. at 276.

213. *See id.* at 1141-44, 8 Cal. Rptr. at 279-82.

214. *See id.* at 1144-48, 8 Cal. Rptr. at 282-84.

215. *See id.* at 1148, 8 Cal. Rptr. at 284.

216. CAL. GOV'T CODE § 3560(a) (West 1998).

217. *Id.* § 3561(c).

between the work conditions for graduate students working for pay and those doing unpaid research; (4) it could interfere with the selection procedures for instructors and researchers, causing economic considerations to replace academic considerations; (5) it would split employed graduate students into two competing labor groups, [TAs] and [RAs], and undermine the harmony of the present situation; [and] (6) the free exchange of ideas would be sacrificed by bargaining because economic issues and academic issues could not be separated.²¹⁸

The appellate court found these concerns, which echoed concerns raised and rejected earlier in *Regents* in connection with medical house staff,²¹⁹ “reasonable” in connection with TAs and RAs.²²⁰ However, half a decade later, the PERB effectively reversed the decision underlying *Berkeley* by holding in the two decisions discussed in the next subsection that coverage under HEERA of TAs but not RAs, in circumstances similar to those involved in *Berkeley*, would further the purposes of HEERA.

3. UCSD²²¹ and UCLA²²²

The PERB recently revisited the issue of student employees in two related decisions involving recognition requests by unions seeking to represent student employees at the San Diego and Los Angeles campuses of the University of California.

In *UCSD*, students employed as readers, tutors, and associates (collectively TAs) sought union representation for the purposes of collective bargaining.²²³

218. *Berkeley*, 6 Cal. App. 4th at 1145, 8 Cal. Rptr. at 282.

219. See *supra* notes 195-99 and accompanying text.

220. *Berkeley*, 6 Cal. App. 4th at 1145, 8 Cal. Rptr. at 283.

221. Association of Student Employees, 22 PERC ¶ 29084 (Cal. Pub. Employment Relations Bd. 1998) [hereinafter *UCSD I*]; Association of Student Employees, 22 PERC ¶ 29152 (Cal. Pub. Employment Relations Bd. 1998) [hereinafter *UCSD II*].

222. Student Ass'n of Graduate Employees, 23 PERC ¶ 30065 (Cal. Pub. Employment Relations Bd. 1999); Student Ass'n of Graduate Employees, 23 PERC ¶ 30025 (Cal. Pub. Employment Relations Bd. 1998); Regents of the Univ. of Cal., 20 PERC ¶ 27129 (Cal. Pub. Employment Relations Bd. A.L.J. 1996).

223. See *UCSD I*, 22 PERC ¶ 29084, at 348.

Readers assist in teaching by “reading and grading homework assignments, quizzes, mid-term and final exams and papers.”²²⁴ From the fall of 1993 through the fall of 1994, there were 681 undergraduate, 376 graduate, and 21 nonstudent readers.²²⁵

While most tutors do one-on-one or group tutoring within a program designed to maximize student performance and retention, a significant minority in this group work as undergraduate TAs within various departments where they meet with students during office hours, lead discussion and review sessions, and help grade exams.²²⁶ From the fall of 1993 through the fall of 1995, there were 879 undergraduate, 203 graduate, and 173 nonstudent tutors.²²⁷

Associates teach a course for which they have the same responsibilities regular faculty members have when teaching the course, including selecting textbooks and reading lists, preparing and delivering lectures, holding office hours, designing all course assignments and exams, and grading.²²⁸ All associates are graduate students.²²⁹

Graduate students holding any combination of reader, tutor, or associate positions in excess of twenty-five percent of a full-time position receive, in addition to pay, health insurance, and registration and educational fee remissions.²³⁰ Undergraduate and nonstudent employees receive neither of these two additional benefits.²³¹

The PERB majority concluded, under the contingency and the relatedness prongs of the HEERA test, that the employment of students as readers, tutors, and associates was contingent on their status as students, and that the services they provide were related to their educational objectives, the most fundamental of which was “to become educated—to learn and master a subject matter or field of study.”²³²

Next, the PERB majority concluded under the balancing prong of the HEERA test that these educational objectives were

224. *Id.* at 364.

225. *See id.* at 365.

226. *See id.* at 368.

227. *See id.* at 371.

228. *See id.*

229. *See id.*

230. *See id.* at 365.

231. *See id.*

232. *Id.* at 351.

subordinate to the services performed by TAs.²³³ This conclusion of law was based on earlier findings of fact by the ALJ which the PERB majority adopted as its own.

With respect to the first category of TAs, the ALJ found that “first and foremost, readers are looking for an opportunity to generate income.”²³⁴ The PERB majority agreed, adding that “the value and effectiveness of employment as a reader does not appear to be substantial in meeting students’ educational objectives.”²³⁵ Since, on the other hand, “the value and effectiveness of *the services provided by readers are essential* to the University’s educational mission,” the PERB majority concluded that “the educational objectives of readers are subordinate to the services they perform.”²³⁶

Regarding the second category of TAs, the ALJ found that “[w]hile generating income was a common theme, it was not as universal a primary motive [for tutors] as it was for readers.”²³⁷ Nevertheless, the ALJ listed economic reasons as the first (and thus arguably overall most important) of various factors motivating students to seek employment as tutors, and did not suggest any other “common theme,” let alone another “universal primary motive.”²³⁸ The PERB majority again agreed, pointing to testimony by tutors that “while obtaining an income was a motivating factor in seeking a tutor position, serving as a tutor helped them achieve certain educational objectives.”²³⁹ Since, however, “*tutors are absolutely vital* to the University’s ability to fulfill its teaching mission,” the PERB majority concluded once more that “the educational objectives of student tutors are subordinate to the services they perform.”²⁴⁰

Regarding the third and last category of TAs, the ALJ found that “associates are motivated to take the associate job for three main reasons[:] to build their teaching skills and gain teaching experience, to add teaching experience to their curriculum vitae, and to generate

233. *See id.* at 352.

234. *Id.* at 367 (emphasis omitted).

235. *Id.* at 352.

236. *Id.* (emphasis added).

237. *Id.* at 370.

238. *Id.*

239. *Id.* at 352.

240. *Id.* (emphasis added).

income.”²⁴¹ Although the ALJ listed economic reasons last among the factors motivating students to seek employment as associates, and the PERB majority found that “[e]mployment as an associate meets several educational objectives, such as providing students with teaching skills and experience,”²⁴² the PERB majority, nevertheless, concluded that “the educational objectives of associates are subordinate to the services they provide to the University” because “[t]he employment of associates is necessary to meet the service needs of the University.”²⁴³

Finally, the PERB majority concluded under the policy prong of the HEERA test that coverage of TAs would further the purposes of HEERA.²⁴⁴ In doing so, the PERB majority effectively reversed its decision underlying *Berkeley*,²⁴⁵ and rejected renewed arguments that “granting collective bargaining rights to these student employees would interfere with academic policy and result in difficult and protracted efforts to define the scope of representation in relation to academic matters.”²⁴⁶ The PERB majority pointed out that “[t]he *Regents* court characterized similar arguments by the University in that case as a ‘doomsday cry’ which was ‘somewhat exaggerated’ and ‘premature.’”²⁴⁷ The PERB majority further reasoned that various safeguards and exclusions contained in HEERA adequately addressed the university’s concerns.²⁴⁸ As a result of these safeguards and exclusions, coverage of TAs would not stand in the way of HEERA’s purpose to develop “harmonious and cooperative labor

241. *Id.* at 372.

242. *Id.* at 352.

243. *Id.* (emphasis added).

244. *See id.* at 355.

245. The *UCSD I* PERB majority, however, noted that “[t]he Board’s decision [underlying *Berkeley*] was based on conditions and job duties existing on the UC Berkeley campus in 1984. We do not find those conditions and duties, or the Board decision based on them, determinative of the status of student employees at UCSD more than a decade later.” *Id.* at 353.

246. *Id.* at 354.

247. *Id.*

248. *See id.* HEERA, for example, provides that the scope of representation shall not include “[a]dmission requirements for students, conditions for the award of certificates and degrees to students, and the content and supervision of courses, curricula, and research programs” CAL. GOV’T CODE § 3562(q)(1)(C) (West Supp. 2000).

relations” and encourage “excellence in teaching, research, and learning.”²⁴⁹ On the contrary, coverage of these student employees would further HEERA’s purpose to “permit the full participation by employees in the determination of the conditions of their employment by providing for a system of collective bargaining” and “to establish a process designed to promote the orderly resolution of disputes.”²⁵⁰ Thus, coverage does not impede, but rather furthers, the purposes of HEERA. Since TAs passed both the third and fourth prong of the third part of the HEERA test, the PERB majority held that they were employees within the meaning of that act.²⁵¹

The PERB reached a similar result in *UCLA*,²⁵² where students employed as graduate student researchers (RAs), graduate student instructors, readers, special readers, tutors, and remedial tutors (collectively TAs) sought union representation for the purpose of collective bargaining.²⁵³

At UCLA, the vast majority of RAs hold half-time positions that are attached to certain research grants, mostly in the sciences and engineering fields.²⁵⁴ Newly-admitted RAs might first perform research of a very basic nature to learn standard laboratory skills and also to assist faculty members, postdoctoral researchers, and more advanced students.²⁵⁵ Later, RAs conduct more advanced research in their dissertation chair’s lab. RAs often co-author research papers with their dissertation chairs; this not only helps to build the RA’s curriculum vitae but the research papers may sometimes also be reworked into the RA’s dissertation.²⁵⁶ A small minority of RAs hold hourly positions performing work for a faculty member who

249. CAL. GOV’T CODE §§ 3560(a), 3561(c) (West 1998).

250. *UCSD I*, 22 PERC ¶ 29084, at 353 (citing CAL. GOV’T CODE §§ 3560(e), 3561(a)).

251. *See id.* at 348.

252. Student Ass’n of Graduate Employees, 23 PERC ¶ 30065 (Cal. Pub. Employment Relations Bd. 1999) [hereinafter *UCLA III*]; Student Ass’n of Graduate Employees, 23 PERC ¶ 30025 (Cal. Pub. Employment Relations Bd. 1998) [hereinafter *UCLA II*]; Regents of the Univ. of Cal., 20 PERC ¶ 27129 (Cal. Pub. Employment Relations Bd. A.L.J. 1996) [hereinafter *UCLA I*].

253. *See UCLA I*, 20 PERC ¶ 27129, at 424-25.

254. *See id.* at 425.

255. *See id.* at 426.

256. *See id.*

requires research for a book or other special project; such work is not tied to the student's own dissertation or course work.²⁵⁷

Graduate student instructors hold half- or part-time appointments teaching courses or leading discussion or lab sections.²⁵⁸ Where graduate student instructors teach courses, their responsibilities are comparable to those of associates at UCSD.²⁵⁹ Almost all Spanish I through IV, ninety percent of English IV—critical reading and writing—and sixty percent of English III—writing, composition, rhetoric, and language—courses are taught by graduate student instructors.²⁶⁰ Where graduate student instructors lead discussion or lab sections, they explain or augment materials introduced during larger lecture classes by faculty. They also meet with students during office hours, hold review sessions, and assign and grade homework assignments and projects which are usually based upon general guidelines determined by the faculty member teaching the course.²⁶¹

Special readers usually function in much the same way as graduate student instructors except that they work in upper division or graduate courses.²⁶²

Remedial tutors conduct review sessions, do one-on-one tutoring and work in small groups with first year medical students.²⁶³ They also show pre-med students how to study the medical curriculum and teach undergraduate students subjects which are prerequisites to medical school.²⁶⁴ Hired to teach learning and communication skills, as well as personal and career development, remedial tutors set the curriculum; develop a syllabus; develop, administer, and grade assignments and exams; and evaluate the students' performance.²⁶⁵ Some remedial tutors are nonstudents who typically have an advanced degree in the relevant subject area and who

257. *See id.* at 425.

258. *See id.* at 426.

259. *See id.*; *supra* note 228 and accompanying text.

260. *See UCLA I*, 20 PERC ¶ 27129, at 426.

261. *See id.* at 427.

262. *See id.* at 428.

263. *See id.*

264. *See id.*

265. *See id.*

often have teaching experience at the community college or university level.²⁶⁶

The reader and tutor positions at UCLA are virtually identical to the same positions at UCSD.²⁶⁷ Readers are usually graduate or undergraduate students; most tutors are undergraduate students.²⁶⁸

Student employees in all of these categories receive graduate student health insurance and are eligible for registration and educational fee remissions.²⁶⁹

The PERB majority concluded in *UCLA*, as it had done in *UCSD*, under the contingency and relatedness prongs of the HEERA test, that the employment of students in all of these positions was contingent on their status as students and that the services provided by them were related to their educational objectives.²⁷⁰

Next, the PERB majority adopted the ALJ's conclusion under the balancing prong of the HEERA test that the educational objectives of TAs, but not those of RAs, were subordinate to the services they provided.²⁷¹ In *UCLA*, the ALJ's findings of fact were, if anything, more central to the PERB's holding than they had been in *UCSD*.

With respect to RAs, the ALJ found that employment in that category "meets practically every educational objective that students possess."²⁷² In particular, RAs "learn[] the very skills essential for them to complete their dissertation and obtain their degree, . . . perform duties leading directly to their dissertation and degree[,] and receive[] pay as a means of support for a fungible portion of that work."²⁷³ Because "*the value of [RA] positions accrue [sic] primarily to the [RA]s and their educational objectives*" and "*[t]he value of the services received by the University is not nearly as significant*," the ALJ concluded that "services provided to the University are subordinate to the educational objectives of most [RA]s."²⁷⁴ Since the

266. *See id.*

267. *See id.* at 428-29; *see also supra* notes 224, 226 and accompanying text.

268. *See UCLA I*, 20 PERC ¶ 27129, at 429.

269. *See id.* at 425.

270. *See UCLA II*, 23 PERC ¶ 30025, at 85.

271. *See id.* at 83, 86; *see also UCLA I*, 20 PERC ¶ 27129, at 441, 443.

272. *UCLA I*, 20 PERC ¶ 27129, at 440.

273. *Id.*

274. *Id.* at 440-41 (emphasis added). The ALJ noted that the limited number

union did not offer any exceptions to this finding, the PERB adopted it without discussion.

With respect to TAs, the ALJ found "employment in the disputed titles does very little or nothing at all in meeting the most fundamental educational objective of all student employees, which is to complete their degree program."²⁷⁵ In light of "[t]he inadequacy of employment in these titles to meet educational objectives," the ALJ concluded that "[m]ost individuals in these classifications are drawn to their jobs for economic reasons."²⁷⁶ Balancing "[t]he limited value that employment in these titles has in meeting [the student's] educational objectives" against "*the great value of services provided [by TAs] to the University,*" which "*could not continue in its current structure without the services of the disputed titles,*"²⁷⁷ the ALJ concluded that "the educational objectives of [TAs] . . . are subordinate to the services received by the University."²⁷⁸ The university excepted to this finding, but the PERB majority adopted it without much discussion, observing that "*the services performed by [TAs] are vital to the University and must be performed without regard to whether they provide any educational benefit to student employees.*"²⁷⁹

Finally, the PERB majority adopted the ALJ's conclusion, under the policy prong of the HEERA test, that coverage of TAs, but not RAs, would further the purposes of HEERA.²⁸⁰

Regarding the majority of RAs whose educational objectives were not subordinate to the services they provided, the ALJ found it unnecessary to decide whether coverage of these RAs would further the purposes of HEERA.²⁸¹ With respect to the limited number of hourly RAs not working in their field of study,²⁸² the ALJ felt that

it would not further the purposes of [HEERA] to . . . pro-

of hourly TAs not working in their field of study, *see supra* note 257 and accompanying text, might be an exception to this conclusion. *See UCLA I*, 20 PERC ¶ 27129, at 441.

275. *Id.*

276. *Id.*

277. *Id.* at 442 (emphasis added).

278. *Id.* at 443.

279. *UCLA II*, 23 PERC ¶ 30025, at 86 (emphasis added).

280. *See id.* at 83, 88; *see also UCLA I*, 20 PERC ¶ 27129, at 444, 449.

281. *See UCLA I*, 20 PERC ¶ 27129, at 443.

282. *See supra* note 257.

vide coverage to [these RA]s . . . because there is no administratively practical method for the parties to clearly and easily determine on a person-by-person, hour-by-hour basis which hourly [RA]s might be subject to coverage, and because this group constitutes a small portion of the total expended [RA] funds.²⁸³

Since the union did not challenge this finding, the PERB, as before, adopted it without discussion.²⁸⁴

With respect to TAs, the ALJ concluded that “it would further the purposes of [HEERA] to extend coverage to the employees in question,”²⁸⁵ and the PERB majority adopted this conclusion for much the same reasons as those discussed above in connection with the *UCSD* decision.²⁸⁶ In doing so, the PERB majority relied somewhat more heavily on the *Regents* decision than it had in *UCSD*: “In considering similar arguments by the University, the court in *Regents* characterized the arguments as a ‘doomsday cry’ which was ‘somewhat exaggerated’ and ‘premature.’ *Moreover, the court held that ‘The argument basically concerns the appropriate scope of representation.’*”²⁸⁷ The PERB majority then referred to the same statutory safeguards and exclusions regarding the scope of student employee representation which it had already referred to in *UCSD* and concluded, as before, that these safeguards and exclusions would ensure that coverage of TAs under HEERA would further the purposes of that act.²⁸⁸ Since TAs, but not RAs, passed both the third and the fourth prong of the HEERA test, the PERB majority held that TAs, but not RAs, were employees under that act.²⁸⁹

283. *UCLA I*, 20 PERC ¶ 27129, at 444. The Regional Director in *New York University*, on the other hand, included in the bargaining unit created in that case those RAs who provided compensated services and excluded from it those RAs who did not. See *supra* notes 163-64, 169 and accompanying text.

284. See *UCLA II*, 23 PERC ¶ 30025, at 83.

285. *UCLA I*, 20 PERC ¶ 27129, at 449.

286. See *UCLA II*, 23 PERC ¶ 30025, at 88; see also *supra* notes 247-50 and accompanying text.

287. *UCLA II*, 23 PERC ¶ 30025, at 87 (emphasis added).

288. See *id.* at 88; see also *supra* notes 248-50 and accompanying text.

289. See *UCLA II*, 23 PERC ¶ 30025, at 83, 88.

The PERB subsequently declined to join the university in seeking judicial review of the *UCSD* and *UCLA* decisions.²⁹⁰ Faced with pressure from a newly-elected state legislature whose leaders "made clear to university officials that if the dispute remained unresolved it would adversely affect state funds for the university's budget,"²⁹¹ the university then decided not to challenge the PERB decisions in state court.²⁹² Instead, the university decided to accept the outcome of union elections not only at UCSD and UCLA, but also at the other UC campuses: UC Davis and UC Santa Barbara, for which union recognition requests were pending before the PERB,²⁹³ and UC Irvine, UC Riverside, UC Santa Cruz, and UC Berkeley, for which apparently no such requests were pending. By the end of June 1999, TAs at all eight campuses had voted in favor of union representation, and collective bargaining got underway.²⁹⁴ In March 2000, the union

290. See *UCSD II*, 22 PERC ¶ 29152; *UCLA III*, 23 PERC ¶ 30065.

291. *Graduate Students at Six Campuses of University of California Vote for UAW*, DAILY LABOR REP., June 22, 1999, at A4 (hereinafter *Graduate Students*).

292. California thus joined the growing number of states that allow student employees at public universities to bargain collectively. By one recent count, student employee unions were recognized at the University of Florida, the University of South Florida, the University of Iowa, the University of Kansas, the University of Massachusetts at Amherst, the University of Massachusetts at Lowell, the State University of New York, the University of Michigan, the University of Oregon at Eugene, Rutgers University, the University of Wisconsin at Milwaukee, and the University of Wisconsin at Madison. See David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 227, 250 (1998). Some states, such as New York, extended collective bargaining rights to student employees in the same way as California, namely via rulings of state labor relations boards. See Streitz & Hunkler, *supra* note 5, at 357 n.50. In other states, such as Illinois, the state legislature is in the process of amending the state labor law to clarify that graduate student employees have employee rights. See Amanda Criner, *Illinois House Passes Unionizing Bill for Graduate Student Employees*, U-WIRE, Mar. 22, 1999. In yet other states, such as Wisconsin, graduate student employees gained collective bargaining rights themselves through strikes and without judicial or legislative assistance. See Gregory, *supra*, at 249-50. Success of graduate student employee unionizing at public universities is, however, by no means universal. Graduate student employees at the University of Minnesota, for example, voted down union representation three times. See HR ON CAMPUS, July 1, 1999.

293. See *UCLA I*, 20 PERC ¶ 27129, at 426.

294. See *Graduate Students*, *supra* note 291, at A4.

charged that the university had violated its duty to bargain in good faith²⁹⁵ and TAs at all eight campuses authorized a strike in protest of this unfair labor practice that was to commence on March 17, 2000.²⁹⁶ One day before the strike date, the union agreed to a three-week truce during which the parties would try to resolve their differences with the help of a mediator appointed by California Governor Gray Davis.²⁹⁷ After renewed strike threats,²⁹⁸ both sides reached an agreement on May 10, 2000, which among other things provides for a seven and a half percent pay raise over three years and a waiver of the cost of attending UCLA by 2002.²⁹⁹

IV. UNDER FEDERAL AND CALIFORNIA LAW, TAs SHOULD HAVE THE RIGHT TO BARGAIN COLLECTIVELY

A. Introduction

This Part argues that under the federal law summarized in Part II as informed by the California law summarized in Part III, the NLRB should grant the TAs and RAs involved in *Yale* and *New York University* the right to bargain collectively. Section B argues that all TAs and some RAs are employees within the meaning of the NLRA under both the new service test and the old primary purpose test. Section C argues that coverage of these TAs and RAs under the NLRA will not violate the public policies behind the NLRA because collective bargaining over terms and conditions of their employment will not infringe upon purely academic matters and because coverage of these TAs and RAs will actually reduce the number of TA and RA strikes.

California law should inform the application of federal law to the Yale and NYU TAs and RAs for three reasons. First,

295. See *supra* notes 27, 31 and accompanying text.

296. See Jeff Ristine, *Student Aides at UC Call Walkout: Timing Would Disrupt Grading of Exams*, SAN DIEGO UNION-TRIB., Mar. 14, 2000, at A3.

297. See Kenneth R. Weiss, *UC's Teaching Assistants Postpone Strike*, L.A. TIMES, Mar. 17, 2000, at A3.

298. See Tanya Schevitz, *UC Grad Assistants Threaten to Strike After Talks Hit Snag*, SAN FRANCISCO CHRON., May 3, 2000, at A5.

299. See Meredith May, *UC Grad Students Reach Labor Deal*, SAN FRANCISCO CHRON., May 11, 2000, at A8.

California's HEERA test represents a compromise between the new service test and the old primary purpose test;³⁰⁰ therefore, California law is especially relevant for the application of either of these two federal tests. Moreover, HEERA-governed California public employees, like NLRA-governed private employees but unlike most other state law-governed public employees, have the right to strike,³⁰¹ and granting student employees collective bargaining rights under HEERA has, therefore, at least some of the consequences of doing the same under the NLRA. Second, as discussed below, the NLRB already looked to California law for support for its decision to grant the house staff involved in *Boston Medical* the right to bargain collectively.³⁰² Logic dictates that it should do the same in the case of the Yale and NYU TAs and RAs. Third, there are other indications that the NLRB will in fact take guidance from California law when it decides the fate of the Yale and NYU TAs and RAs. Thus former NLRB Member William Gould IV, who brought the Yale case before the NLRB, apparently believes that "[a]lthough recent legal victories for graduate students in California are matters of state law,

... these cases will be cited when the NLRB rules on the issue," and that "[t]heoretically, the cases could be used to establish that graduate student unions do not interfere with the goals of education"³⁰³

B. TAs Are Employees Within the Meaning of the NLRA

1. Under the service test, TAs are employees because they provide compensated services

As mentioned above, under the service test first developed in Member Fanning's *Cedars-Sinai* dissent and later adopted by the *Boston Medical* NLRB majority, anyone who provides compensated services is an employee within the meaning of the NLRA.³⁰⁴ The

300. See *supra* note 193 and accompanying text.

301. See *infra* Part IV.C.3.

302. See *infra* note 372 and accompanying text.

303. Michael Kelly, *Grad Student Unionization: The Fight for Yale's Future*, YALE DAILY NEWS, Apr. 14, 1999, available in 1999 WL 15036898.

304. See *supra* notes 93-94, 108 and accompanying text.

NLRB should now apply this test to the Yale and NYU TAs and RAs and conclude that they are employees.

Boston Medical, like *Cedars-Sinai*, “is primarily a decision about *students*,”³⁰⁵ that is TAs and RAs as well as medical house staff. The *Boston Medical* NLRB said, “Review of our decisions concerning students does not lead to a different result. 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.”³⁰⁶ Although the NLRB does not cite to any cases, it is clear from the context that it is referring to student employees other than medical house staff. The NLRB thus based its decision in *Boston Medical*, a case involving medical house staff, on decisions in cases involving student employees *other than* medical house staff. By the same token, the NLRB should now base its decisions in *Yale* and *New York University*, cases involving student employees other than medical house staff, on the medical house staff case *Boston Medical*. Accordingly, it should apply here the service test for employee status which it adopted there. Furthermore, an application of this test to the Yale and NYU TAs and RAs should come to the conclusion that they are statutory employees.³⁰⁷

Yale part-time acting instructors independently develop and teach their own courses.³⁰⁸ Other Yale TAs assist faculty in the undergraduate programs by doing the following: conducting discussion

305. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1000 (1977).

306. *Boston Medical Ctr. Corp.*, 330 N.L.R.B. No. 30, 1999 WL 1076118, at *16 (Nov. 26, 1999) (emphasis added). This generalization is not entirely correct, as should be clear from the earlier discussion of *Leland Stanford*. See *supra* notes 63-68 and accompanying text; see also *San Francisco Art Inst.*, 226 N.L.R.B. 1251 (1976) (student workers whose work is incidental to academic objectives are not employees).

307. After *Boston Medical*, the NLRB seems predisposed to find TAs to be statutory employees. As one commentator with decidedly anti-union views wrote: “While [*Yale*] is yet to be decided, it appears clear that the NLRB has extended its grasp to encompass students who perform work as part of their graduate educational programs [*Boston Medical* and *Yale*] may suggest that the once hallowed ground of academia is no longer spared from unions’ infiltration.” Ursula L. Haerter, *NLRB Stretches its Jurisdictional Muscles*, CONN. EMPLOYMENT L. LETTER, Jan. 2000.

308. See *Yale Univ.*, 330 N.L.R.B. No. 28, 1999 WL 1076166, at *13 (Nov. 29, 1999).

sections and pre-examination reviews; meeting individually with students; helping to prepare quizzes, problem sets, and examinations; and assigning, correcting, and grading papers and exams.³⁰⁹ Since they are better acquainted with the students than are the professors, TAs also write letters of recommendation when requested by the students.³¹⁰ According to a study commissioned by the TA union, nine percent of courses have a graduate student's name listed as the primary instructor, forty percent of classroom contact hours between student and instructor involve TAs, and ninety and ninety-six percent of the grading in the history and chemistry departments, respectively, is done by TAs.³¹¹ With a few limited exceptions, service as a TA is not a degree requirement in any educational discipline.³¹² The situation is similar at NYU, where TAs help professors teach classes³¹³ or, in a significant number of cases, teach classes on their own,³¹⁴ and where such service is a degree requirement only in a few departments.³¹⁵

The ALJ who first heard the Yale case found in his decision that although TAs "gain valuable teaching experience . . . [,] the material they teach is generally more basic than the work they are doing toward their doctorate"³¹⁶ In some cases, students in professional schools such as law or architecture, which usually lead to non-teaching careers, taught outside their professional schools.³¹⁷ Given the limited educational value of TA service to the TAs themselves, it is not surprising that the amount of time a student may spend in teaching is expressly limited by the university's policies.³¹⁸ The ALJ concluded that "[h]owever significant their teaching functions may be to their own educational progress and career plans, it is abundantly clear that *the [TAs] are a major resource for the University* in

309. *See id.*

310. *See id.*

311. *See Graduate Employees and Students Org., supra* note 4.

312. *See Yale*, 1999 WL 1076166, at *12.

313. *See supra* note 152 and accompanying text.

314. *See supra* notes 153-54 and accompanying text.

315. *See supra* note 159 and accompanying text.

316. *Yale*, 1999 WL 1076166, at *13.

317. *See id.*

318. *See id.* at *12.

providing undergraduate education.”³¹⁹ For their services, the TAs are compensated based, at least in part, on the approximate amount of time and effort required.³²⁰ Similarly, the NYU TA union asserted that TAs (as well as RAs) there “often teach outside of their areas of academic concentration” and “teach courses or perform duties which involve skills and content with which they are already fully versed” and that these positions “often interfere with rather than enhance the graduate students’ academic programs.”³²¹ Without evaluating this assertion, the Regional Director found that “it is clear that TAs ‘play a large role in the undergraduate educational experience at NYU’” because “TAs teach a significant number of NYU’s courses” which would otherwise have to be taught by “instructors who may be statutory employees.”³²²

On these facts, the conclusion is inescapable that Yale and NYU TAs provide services to their universities for which they are compensated. While the ALJ in *Yale* remained silent on this issue, the Regional Director in *New York University* reached precisely this conclusion³²³ and ruled that under the service test, they are, therefore, employees within the meaning of the NLRA.³²⁴ The ALJ’s conclusion that the services of Yale TAs are “a major resource for the University in providing undergraduate education”³²⁵ echoes the California PERB’s conclusion that the services of UCSD and UCLA TAs are “essential to the University’s educational mission,”³²⁶ “absolutely vital to the University’s ability to fulfill its teaching mission,”³²⁷

319. *Id.* at *13 (emphasis added).

320. *See id.* at *12.

321. New York Univ., 66 Daily Lab. Rep. (BNA) E-22, E-30 (NLRB Apr. 3, 2000).

322. *Id.* at E-31 (quoting the NYU “Handbook for Teaching Assistant” [sic]).

323. “The [TAs and RAs] perform services under the control and direction of the Employer, in exchange for compensation.” *Id.*

324. “[I]t is clear that the [TAs and RAs] sought by the Petitioner meet the statutory definition of employee under Section 2(2) of the Act.” *Id.* (citing 29 U.S.C. § 152(2) (1988)).

325. *Yale*, 1999 WL 1076166, at *13.

326. Association of Student Employees, 22 PERC ¶ 29084, at 352 (Cal. Pub. Employment Relations Bd. 1998) [hereinafter *UCSD I*].

327. *Id.*

“necessary to meet the service needs of the University,”³²⁸ and “vital to the University.”³²⁹ The PERB therefore held that the UCSD and UCLA TAs performed services for the university whose value to the university outweighed the TAs’ educational objectives. Surely the NLRB must hold here on largely identical facts³³⁰ that the Yale and NYU TAs are also performing services for the university. Since these services are compensated, the Yale and NYU TAs are employees within the meaning of the NLRA.

According to Jane Clark Schnabel, Assistant General Counsel for the Regional Advice Branch of the NLRB, the NLRB considers the Yale TAs to be employed by Yale in areas unrelated to their graduate programs,³³¹ i.e., away from their own education. Since their studies do not directly benefit from such employment, it can be argued that the Yale TAs always perform a service for the university rather than for themselves and are therefore always employees within the meaning of the NLRA under the service test.

The situation is more complex for RAs. Regarding those RAs whom the union in *New York University* sought to represent, the Regional Director observed that “[a]s in the case of TAs, . . . RAs are required to perform certain services in exchange for their stipend and tuition remission”³³² and concluded that like TAs, they were therefore statutory employees.³³³ These NYU RAs are like the small minority of UCLA RAs whose work was not tied to their own dissertation or course work and whom the ALJ in *UCLA* mentioned as a possible exception to his conclusion that UCLA RAs were not employees within the meaning of HEERA.³³⁴ These RAs should

328. *Id.*

329. Student Ass’n of Graduate Employees, 23 PERC ¶ 30025, at 86 (Cal. Pub. Employment Relations Bd. 1998) [hereinafter *UCLA II*].

330. Compare the description of the duties of the Yale TAs in the previous paragraph with that of the UCSD and UCLA TAs in *supra* notes 224, 226, 228, 258-65, 267 and accompanying text.

331. See Ukeiley, *supra* note 7, at 560.

332. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-25; see also *supra* note 323.

333. See *supra* note 324.

334. See *supra* notes 257, 276 and accompanying text.

generally also be recognized as employees within the meaning of the NLRA under the service test.³³⁵

On the other hand, regarding those RAs whom the union in *New York University* did not seek to represent, the Regional Director observed that these RAs “are not required to perform specific services” for NYU³³⁶ and concluded that they were therefore not statutory employees.³³⁷ These RAs are like the majority of UCLA RAs whose work was tied to their own dissertation or course work. Regarding these RAs, the ALJ in *UCLA* found on the one hand that “the value of [their] positions accrue [sic] primarily to the [RA]s”³³⁸ and on the other hand that “[t]he value of the services received by the University is not nearly as significant” and concluded that these RAs were therefore not employees under the HEERA balancing test.³³⁹ These RAs are also like the RAs in *Leland Stanford* who performed research required by their program that ultimately led towards their thesis and degree and who sought to form a bargaining unit of their own.³⁴⁰ The NLRB rejected this request, ostensibly applying the primary purpose test, but it also said that “the 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 an employer*.”³⁴¹ This is the language of the service test, not the primary purpose test.³⁴² In his *Cedars-Sinai* dissent, Member Fanning put the matter more clearly:

The research they conducted was thesis oriented, that is to

335. There may, however, be other reasons to exclude even these RAs from coverage. For example, the *UCLA* ALJ felt that it was impracticable to determine which RAs fell into the category deserving HEERA coverage and which did not. See *supra* note 285 and accompanying text. On the other hand, the *New York University* Regional Director made precisely this determination, extending NLRA coverage to some RAs but not others. See *supra* notes 163-64, 169-70 and accompanying text.

336. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-25 n.19.

337. See *supra* note 169 and accompanying text.

338. Regents of the Univ. of Cal., 20 PERC ¶ 27129, at 440 (Cal. Pub. Employment Relations Bd. A.L.J. 1996) [hereinafter *UCLA I*].

339. *Id.*

340. See *supra* notes 63-64 and accompanying text.

341. *Leland Stanford Junior Univ.*, 214 N.L.R.B. 621, 623 (1974) (emphasis added).

342. See *supra* notes 93, 108 and accompanying text.

say, . . . the research assistants did not perform a service *for* Stanford They performed that research for *themselves*. In terms of the actual research conducted, Stanford was, essentially, a disinterested party. Stanford did not control the research All of which is to say, . . . the research assistants did not *work for* the alleged employer and, therefore, were not employees.³⁴³

These RAs are thus not employees within the meaning of the NLRA under the service test because they do not provide compensated services in the required sense.³⁴⁴

343. Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 255 n.14 (1976) (Fanning, Member, dissenting).

344. Ironically, NYU argued that the RAs whom the union in *New York University* did not seek to represent “do perform services for the University in that they help NYU fulfill its obligations under the research grant” and “otherwise enhance NYU’s reputation as a research university.” *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-32 n.50. The university raised this argument in support of its assertion that if *any* TA or RA bargaining unit were to be created, the only appropriate unit would be one including *all* TAs and RAs. *See id.* at E-22. Behind this assertion lurks presumably the university’s hope that an election would be harder to win in such a larger unit. The Regional Director, however, flatly rejected the university’s argument by stating that “all of this . . . is not directly relevant to the inquiry of whether or not an individual is providing services to the Employer under its control in exchange for compensation.” *Id.* at E-32 n.50. Nevertheless, the argument is far from frivolous. Given its complexity, I will not pursue this argument in this Comment.

It could also be argued that RAs, like TAs, are apprentices or trainees, whom the NLRB has generally considered as employees. *See Shorb, supra* note 189, at 1071 & n.124 (citing *United Aircraft Corp. v. NLRB*, 333 F.2d 819 (2d Cir. 1964) (trainees); *General Motors Corp.*, 133 N.L.R.B. 1063 (1961) (apprentices)). For example, Yale Graduate School Dean Thomas Appelquist claims that “working as a teaching assistant ‘is a kind of apprenticeship.’” *Grad Students Plan Walkout to Seek Recognition as a Union*, N.Y. TIMES, Apr. 2, 1995, at A42. Similarly, state courts have supported the classification of medical house staff as employees with the observation that “[m]embers of all professions continue their learning throughout their careers. For example, fledgling lawyers employed by a law firm spend a great deal of time acquiring new skills, yet no one would contend that they are not employees of the law firm.” *Regents of Univ. of Mich. v. Employment Relations Comm’n*, 204 N.W.2d 218, 226 (Mich. 1973) (cited in *House Officers Ass’n for the Univ. of Neb. Med. Ctr. v. University of Neb. Med. Ctr.*, 255 N.W.2d 258, 262 (Neb. 1977)). On the other hand, commentator Jennifer A. Shorb suggests that “[a]rguably, apprentices are distinguishable from students,” although she does not supply any arguments in support of this suggestion.

In conclusion, all TAs and some RAs perform compensated services and are therefore employees within the meaning of the NLRA under the service test. Other RAs, however, do not perform such services and are therefore not employees.³⁴⁵

2. Under the primary purpose test, TAs are employees because they take employment for primarily economic purposes

Should the NLRB or a court of appeals reject the service test and apply the primary purpose test instead, the Yale and NYU TAs and RAs are nevertheless employees within the meaning of the NLRA because they take employment for primarily economic rather than primarily educational purposes.

As pointed out by one pair of scholars, “[n]one of the NLRB decisions regarding students at private educational institutions have considered students within the classification of the Yale graduate assistants.”³⁴⁶ In particular, the NLRB has never had before it a request by TAs to be recognized in a bargaining unit of their own. Moreover, neither the ALJ or the NLRB in *Yale* nor the Regional Director in *New York University* made findings about the purposes for which Yale and NYU graduate students take employment as TAs or RAs.³⁴⁷ Guidance can, however, be gleaned from the findings made

Shorb, *supra* note 189, at 1071. Like the argument sketched in the previous paragraph, the argument outlined in this paragraph is complex and will not be pursued in this Comment.

345. For comparisons of TAs and RAs reaching the same conclusion, see Martin H. Malin, *Student Employees and Collective Bargaining*, 69 KY. L.J. 1, 33 (1980), and Streitz & Hunkler, *supra* note 5, at 372-73.

346. Streitz & Hunkler, *supra* note 5, at 370.

347. According to the NYU TA and RA union, “graduate students accept . . . assistantships generally because they need the money.” *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-30. Similarly, according to Professor Ukeiley, “[former TA-union chairwoman] Robin Brown stated that a significant percentage of [TA-union] members accepted teaching responsibilities merely because they needed the money to pay for tuition and living expenses.” Ukeiley, *supra* note 7, at 563. From this, and the fact that TAs must complete their degree to obtain full-time faculty positions at universities or colleges, Professor Ukeiley concludes that “Yale graduate students are students primarily concerned with completing their dissertation and supplementing their incomes, and therefore, . . . they are not entitled to coverage under the Act.” *Id.* However, if Yale graduate students took employment as TAs “merely because they needed the money” and for the purpose of “supplementing their incomes,” this would actually support the opposite conclusion under the primary purpose test,

by the ALJ and adopted by the PERB in *UCSD* and *UCLA* about the purposes for which students at these universities under similar circumstances take employment as TAs and RAs.

Most of the Yale and NYU TAs have duties that match those of the readers in *UCSD*: They all assist in teaching by reading and grading quizzes, papers, and exams.³⁴⁸ In reference to the *UCSD* readers, the ALJ said (and the PERB agreed),³⁴⁹ “*first and foremost, readers are looking for an opportunity to generate income.*”³⁵⁰ In other words, *UCSD* readers take employment primarily for economic rather than educational purposes. It is reasonable to assume the same for the similarly situated Yale and NYU TAs; therefore, the Yale and NYU TAs are employees within the meaning of the NLRA under the primary purpose test.

Yale and NYU TAs also have some of the duties of the *UCSD* tutors: They all lead discussion and review sessions and meet individually with students.³⁵¹ The ALJ noted in *UCSD I* (and the PERB again agreed)³⁵² that “[w]hile generating income was a common theme [for tutors], it was not as universal a primary motive as it was for readers.”³⁵³ However, the ALJ listed economic reasons as the first (and thus arguably overall most important) of the various factors motivating *UCSD* students to seek employment as tutors. This suggests that *UCSD* tutors and the similarly situated Yale and NYU TAs take employment for primarily economic rather than educational reasons and that they would be or are, respectively, employees within the meaning of the NLRA under the primary purpose test.

Some Yale TAs, namely part-time acting instructors, and some NYU TAs, primarily expository writing and foreign language instructors, have some of the duties of *UCSD* associates: They all independently develop and teach their own courses.³⁵⁴ The ALJ stated

that is, Yale TAs take employment for primarily economic rather than primarily educational reasons and are therefore entitled to coverage under the NLRA.

348. Compare *supra* notes 152, 309 and accompanying text, with *supra* note 224 and accompanying text.

349. See *supra* note 235 and accompanying text.

350. *UCSD I*, 22 PERC ¶ 29084, at 367.

351. Compare *supra* notes 152, 309 and accompanying text, with *supra* note 226 and accompanying text.

352. See *supra* note 239 and accompanying text.

353. *UCSD I*, 22 PERC ¶ 29084, at 370.

354. Compare *supra* notes 154, 308 and accompanying text, with *supra* note

that UCSD “associates are motivated to take the associate job for three main reasons: to build their teaching skills and gain teaching experience, to add teaching experience to their curriculum vitae, and to generate income.”³⁵⁵ Economic motivation apparently ranks last among these reasons. Assuming the same to be true for Yale part-time acting instructors, an argument can be made that these Yale and NYU TAs are not employees within the meaning of the NLRA under the primary purpose test. However, about the UCLA TAs, some of whom have the same duties as UCSD readers, tutors, associates, and Yale and NYU TAs,³⁵⁶ the ALJ said that “most individuals in these classifications are drawn to their jobs for economic reasons.”³⁵⁷ Significantly, this statement covers those UCLA TAs who, like UCSD associates, Yale part-time acting instructors, and NYU expository writing and foreign language instructors, teach their own courses.³⁵⁸ Economic motivation apparently ranks high among the reasons why these UCLA TAs take their jobs. Assuming the same to be true for Yale part-time acting instructors and NYU expository writing and foreign language instructors, an argument can also be made that these Yale and NYU TAs are employees within the meaning of the NLRA under the primary purpose test. In other words, a comparison of Yale part-time acting instructors and NYU expository writing and foreign language instructors with their counterparts at UCSD and UCLA yields conflicting results: If these Yale and NYU TAs share the motivation of UCSD associates, they are not employees under the primary purpose test. On the other hand, if they share the motivation of those UCLA associates who teach their own courses, they are employees under this test.

Overall, however, UCSD and UCLA TAs seek employment for primarily economic rather than primarily educational reasons and would be employees within the meaning of the NLRA under the primary purpose test. Crucially, the same can be assumed to be true for the similarly situated Yale and NYU TAs, who should therefore also be granted collective bargaining rights even under this test. This

228 and accompanying text.

355. *UCSD I*, 22 PERC ¶ 29084, at 372.

356. *Compare supra* notes 258-67 and accompanying text, *with supra* notes 152, 154, 224, 226, 228, 308-10 and accompanying text.

357. *UCLA I*, 20 PERC ¶ 27129, at 441.

358. *See supra* note 259 and accompanying text.

argument is, to a degree, speculative, but it rests upon the zero hypothesis, namely, that Yale and NYU TAs share the motivation of UCSD and UCLA TAs because their situation is practically the same. In the absence of evidence to the contrary, this assumption is reasonable and the argument which is based on it is valid.

The situation is again arguably different for RAs who perform dissertation work. The ALJ in *UCLA* made no specific finding as to the reasons for which graduate students sought employment as RAs,³⁵⁹ but he stressed that “[e]mployment as a[n] [RA] meets practically every educational objective that students possess.”³⁶⁰ Since more advanced RAs worked in the lab of their dissertation chair, and often co-authored research papers with that dissertation chair, and since these research papers may sometimes be reworked into their dissertation,³⁶¹ the RAs might have accepted these positions for predominantly educational rather than predominantly economic reasons. If that is correct, they would not have been employees within the meaning of the NLRA under the primary purpose test, and the same can be assumed for those NYU RAs whom the union did not seek to represent and who performed dissertation-related work.³⁶² As before, the small minority of UCLA RAs whose work is not tied to their own dissertation or course work are an exception to this conclusion; this is also true for those NYU RAs whom the union sought to represent and who did not perform dissertation-related work.³⁶³ Such RAs should be recognized as employees within the meaning of the

359. RAs are, however, covered by the ALJ’s general remark that “[a]most all student employees seek and accept student employment due to the money they receive.” *UCLA I*, 20 PERC ¶ 27129, at 451 n.10. If the answer to the question “would students become RAs if the work was related to their dissertations but uncompensated?” is indeed “no,” and the answer to the question “would students become RAs if the work was unrelated to their dissertations but compensated?” is indeed “yes,” then RAs are employees within the meaning of the NLRA under the primary purpose test. Thus, it might be easier for RAs to be classified as employees under the primary purpose test than under the service test. Insofar as it is not desirable to classify RAs as employees, this might be another argument against the primary purpose test and in support of the service test.

360. *Id.* at 440.

361. *See supra* note 256 and accompanying text.

362. *See supra* note 156 and accompanying text.

363. *See supra* notes 155, 257, 283 and accompanying text.

NLRA under the primary purpose test because they probably take employment for predominantly economic rather than predominantly educational reasons.

In conclusion, all TAs and some RAs take employment for primarily economic rather than primarily educational purposes, and they are therefore employees within the meaning of the NLRA under the primary purpose test. Other RAs, on the other hand, take employment for primarily educational purposes and are therefore not employees under this test.

C. Coverage of TAs Under the NLRA Will Not Violate the Public Policies Behind the NLRA

1. Introduction

Even if TAs and RAs are employees within the meaning of the NLRA, they might be excluded from coverage under that act on public policy grounds. Two different types of arguments are frequently raised in connection with this proposition: first, that collective bargaining over terms and conditions of TA and RA employment will infringe upon academic matters, and second, that coverage of TAs and RAs under the NLRA will lead to increased labor unrest. The following two subsections argue that neither of these arguments is convincing and that coverage of TAs and RAs under the NLRA would therefore not violate the public policies behind that act.

2. Collective bargaining over terms and conditions of TA employment will not infringe upon academic matters

According to Yale's president Richard Levin, "there is . . . a direct educational relationship between a student and faculty member who serves as his or her teacher, research advisor, or supervisor in teaching," and "interposition of a third party, whether [the TA union] or any other, into such a relationship would . . . chill, rigidify and diminish it."³⁶⁴ NYU officials are similarly concerned that "collective bargaining with graduate assistants will discourage mentoring relationships between graduate students and their faculty

364. Yale Univ., 330 N.L.R.B. No. 28, 1999 WL 1076116, at *14 (Nov. 29, 1999).

advisors.”³⁶⁵ In addition, “NYU officials say they are most concerned about the bargaining impinging on academic considerations, like class sizes or what to teach.”³⁶⁶ Such concerns had been raised already by the *St. Clare’s* majority which worried that “[t]he inevitable change in emphasis from quality education to economic concerns which would accompany injection of collective bargaining into the student-teacher relationship would . . . prove detrimental to both labor and educational policies”³⁶⁷ and that “many academic freedoms” and “other academic prerogatives” would become mandatory subjects of collective bargaining.³⁶⁸ These concerns were later shared by the *Boston Medical* dissenters.³⁶⁹ They were, however, not shared by the *Boston Medical* majority, which, in granting collective bargaining rights to medical house staff, stated:

The contour of collective bargaining is dynamic . . . : *what can be bargained about . . . may change* We need not define here the boundaries between permissive and mandatory subjects of bargaining concerning [house staff], and between what can be bargained over and what cannot. We will address these issues later, if they arise.³⁷⁰

The Regional Director in *New York University* later asserted along similar lines that “collective bargaining negotiations can be limited to only those matters affecting wages, hours and other terms and

365. *New York Univ.*, 66 Daily Lab. Rep. (BNA) E-22, at 31 (NLRB Apr. 3, 2000).

366. Karen W. Arenson, *Union Cleared for Students Who Teach*, N.Y. TIMES, Apr. 4, 2000, at B1.

367. *St. Clare’s Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977); *see also supra* notes 88-89 and accompanying text. According to University of California President Richard C. Atkinson, the troubled negotiations between that university and its TA union have “snagged” on such academic matters. *See Weiss, supra* note 297, at A37; *see also supra* text accompanying notes 295-97. Thus, the university views union attempts to limit the number of hours TAs can work in a single week as an “infringement on the academic judgment of the faculty” who sometimes need their TAs to put in more hours towards the end of the semester to help grade term papers and exams. *Weiss, supra* note 297, at A37; *see also infra* note 374.

368. *St. Clare’s*, 229 N.L.R.B. at 1003; *see also supra* note 90 and accompanying text.

369. *See supra* notes 113-15 and accompanying text.

370. *Boston Med. Ctr. Corp.*, 330 N.L.R.B. No. 30, 1999 WL 1076118, at *20 (Nov. 26, 1999) (emphasis added).

conditions of employment [so] that the critical elements of academic freedom need not be compromised.”³⁷¹

The *Boston Medical* majority sought support for its argument in state court decisions. It found such support in an extensive quote from the California Supreme Court’s *Regents* decision granting medical house staff at public hospitals collective bargaining rights. The full quote reads as follows:

The University asserts that if collective bargaining rights were given to housestaff[,] the University’s educational mission would be undermined by requiring bargaining on subjects which are intrinsically tied to the educational aspects of the residency programs. This ‘doomsday cry’ seems somewhat exaggerated in light of the fact that the University engaged in meet-and-confer sessions with employee organizations representing housestaff prior to the effective date of [the relevant statute]. Moreover, the University’s argument is premature. The argument basically concerns the appropriate scope of representation under the Act. (See § 3562, subd. (q).) Such issues will undoubtedly arise in specific factual contexts in which one side wishes to bargain over a certain subject and the other side does not. These scope-of-representation issues may be resolved by the [PERB] when they arise.³⁷²

The California PERB quoted parts of the same passage in its decisions in *UCSD* and *UCLA* to grant TAs at California’s public universities collective bargaining rights.³⁷³ The PERB reasoned there that safeguards and exclusions contained in California’s HEERA adequately addressed the university’s concerns regarding the impact of collective bargaining over terms and conditions of TA employment on academic issues.³⁷⁴

371. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-32.

372. *Boston Med.*, 1999 WL 1076118, at *21 (quoting *Regents of Univ. of Cal. v. PERB*, 41 Cal. 3d 601, 623, 715 P.2d 590, 604-05, 224 Cal. Rptr. 631, 646 (1986)).

373. See *supra* notes 247, 287 and accompanying text.

374. See *Association of Student Employees*, 22 PERC ¶ 29084, at 354 (Cal. Pub. Employment Relations Bd. 1998) [hereinafter *UCSD I*]; *Student Ass’n of Graduate Employees*, 23 PERC ¶ 30025, at 88 (Cal. Pub. Employment Relations Bd. 1998) [hereinafter *UCLA II*]. *University of California Assistant Vice*

The federal NLRA does not contain comparable safeguards and exclusions. It is significant, however, that the *Regents* court did not refer to HEERA's safeguards and exclusions, and thus apparently thought that none are needed to enable the PERB to keep academic issues out of collective bargaining over terms and conditions of medical house staff employment.

By the same token, no statutory provisions are needed to enable the NLRB to keep academic issues out of collective bargaining over terms and conditions of TA and RA employment. Long before *Regents*, *UCSD*, and *UCLA*, and *Boston Medical*, *Yale*, and *New York University*, Professor Malin made a convincing argument in this regard. Professor Malin observed that "concern that student unions will misuse the collective bargaining process to the detriment of their educational institutions . . . raises issues regarding the scope of collective bargaining rather than the applicability of the N.L.R.A. to student employees."³⁷⁵ He further observed that

[s]tate authorities have had little difficulty in delineating the permissible scope of academic collective bargaining [T]he appropriate agency or court may balance the impact of [a potential bargaining] issue on the terms and conditions of employment against the impact of the issue on matters of educational policy to determine whether it should be a subject of mandatory collective bargaining *A similar balancing process in private university negotiations is not inconsistent with national labor policy. Although the Supreme Court has upheld the NLRB's extensive interpretation of the duty to bargain, it has never considered the scope of collective bargaining for dual status employees, e.g., employee-students.*³⁷⁶

A good example of how state authorities have "delineat[ed] the permissible scope of academic collective bargaining," even without the help of statutory safeguards such as those provided by HEERA,

President Judith Boyette implicitly recognized the importance of these statutory safeguards and exclusions for limiting the scope of bargaining when she said regarding that university's dispute with its TA union, described *supra* note 367, that "[u]nder state labor law, . . . it's clear that union contracts cannot restrict how professors design their courses." Weiss, *supra* note 297, at A37.

375. Malin, *supra* note 345, at 28.

376. *Id.* at 28-29 & n.139 (emphasis added) (citation omitted).

is class size, one of the very issues about which NYU officials are “most concerned,” leading NYU Vice President Robert Berne to claim that “[i]t is almost impossible to draw the line between what we consider academic issues and what they consider work issues.”³⁷⁷ While a minority of state courts has held that in contract negotiations between public school districts and teachers’ unions, class size is a mandatory subject of bargaining,³⁷⁸ the majority of state courts has held that it is not.³⁷⁹ What is important here is not the different results reached by the different state courts, but rather the fact that they all have been able to “draw the line” somewhere with respect to class size at public schools, contrary to the claim by NYU Vice President Berne. By the same token, there is no reason to believe that the NLRB will not be equally able to “draw the line” somewhere with respect to class size at private universities. The fact that it may not be easy to draw the latter line, or that some private universities may not like where it will be drawn, is no more an argument to deny TAs and RAs collective bargaining rights than the fact that it was not easy to draw the former line—as evidenced by the split in jurisdictions—or that the minority of public school districts does not like where it was drawn is an argument to deny teachers these rights.

The NLRB recognized in *Boston Medical* that it has the power to define the scope of collective bargaining over terms and conditions of medical house staff employment in such a way that academic matters are kept out. It could exercise its power to define the scope of collective bargaining over terms and conditions of TA and RA employment in a similar way. Concern over the possible intrusion of collective bargaining upon academic matters is therefore not a valid reason to deny TAs coverage under the NLRA.

Let us finally return to Yale President Richard Levin’s worry about the “interposition” of a TA union into the “educational relationship between a student and faculty member who serves as his or

377. Arenson, *supra* note 366, at B1.

378. See *Tualatin Valley Bargaining Council v. Tigard Sch. Dist.*, 808 P.2d 101 (Or. Ct. App. 1991) (holding that class size is a mandatory subject of bargaining because it relates to work load, which is itself a mandatory subject of bargaining), *rev’d*, 840 P.2d 657 (Or. 1992).

379. See *In re West Irondequoit Teachers Ass’n v. Helsby*, 315 N.E.2d 775 (N.Y. 1974) (holding that class size is not a mandatory subject of bargaining because it initially is purely the subject of educational policy).

her teacher, research advisor, or supervisor in teaching.”³⁸⁰ The reality, however, is that the student-teacher and employee-supervisor relationships are separate, often involving different faculty members in the respective positions of teacher and supervisor. Interposition of a TA union into the economic employee-supervisor relationship therefore does not, as a rule, intrude upon the educational student-teacher relationship. As the ALJ in *UCSD I* explained, “[t]he mentor relationship . . . is limited primarily to the relationship between a graduate student and a dissertation committee chair, or sometimes a committee member.”³⁸¹ This relationship would be unaffected by collective bargaining because it is “extremely rare for the same individuals to have been in both an employee-supervisor relationship and a student-faculty mentor relationship.”³⁸² And in *UCLA I*, the ALJ added, “Even if evidence indicated that a large number of mentor relationships overlapped with employment relationships, extending coverage would not damage those relationships. There is nothing inherent in collective bargaining that precludes a supervisor from being a mentor”³⁸³ Mentor issues, therefore do not militate against NLRA coverage of TAs.

The corresponding concern by NYU officials that “collective bargaining with [RAs] will discourage mentoring relationships between graduate students and their faculty advisors”³⁸⁴ might be more valid, at least with respect to some RAs. Recall that at UCLA, RAs typically conduct dissertation-related research in the lab of their dissertation chair, who also functions as their supervisor.³⁸⁵ In this case, it will be much harder to separate the work performed as an RA from the education obtained as a student, and the relationship with the supervisor from the relationship with the dissertation chair. Consequently, interposition of a union into the employment relationship could adversely affect the mentor relationship. Concern over the possible intrusion of collective bargaining upon academic matters

380. *Yale*, 1999 WL 1076116, at *14.

381. *UCSD I*, 22 PERC ¶ 29084, at 386.

382. *Id.*

383. Regents of the Univ. of Cal., 20 PERC ¶ 27129, at 445 (Cal. Pub. Employment Relations Bd. A.L.J. 1996) [hereinafter *UCLA I*].

384. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-31.

385. See *supra* note 256 and accompanying text.

might therefore be a valid reason to deny those RAs who work in the lab of their advisor coverage under the NLRA. No such objection exists in the case of TAs like those involved in *Yale*. Neither is it clear that such an objection exists in the case of the RAs involved in *New York University*. Recall that the union did not seek to represent and the Regional Director did not include in the bargaining unit those NYU RAs who, like the UCLA RAs discussed *supra* in this paragraph, performed only dissertation-related research.³⁸⁶ Whether the other NYU RAs which assist “a professor in his or her research”³⁸⁷ perform this service for their advisor or for another professor is unclear, and to the extent that they do so for a professor other than their advisor, no mentoring relationship is implicated.

3. Coverage of TAs under the NLRA will reduce the number of TA strikes

Yale Graduate School Dean Thomas Appelquist is concerned that coverage of TAs under the NLRA will result in strikes.³⁸⁸ The NLRA, however, states, “Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption . . . ,” that is, from strikes.³⁸⁹ It is thus an axiom of federal labor law that coverage under the NLRA of employees within the meaning of the NLRA *reduces* the number of strikes in general and recognition strikes in particular.³⁹⁰

Similarly, the *UCLA II* PERB observed that:

HEERA’s expressed purpose is to foster harmonious and cooperative labor relations by providing for a system of collective bargaining between the University and its employees. It is [therefore] axiomatic that this purpose is furthered by the extension of collective bargaining rights to those employees determined by PERB to meet the

386. See *supra* notes 156, 169 and accompanying discussion.

387. *New York Univ.*, 66 Daily Lab. Rep. (BNA) at E-25 (emphasis added); see also *supra* note 155 and accompanying text.

388. See Streitz & Hunkler, *supra* note 5, at 371.

389. 29 U.S.C. § 151 (1988).

390. See *supra* note 124 and accompanying text.

[HEERA] test.³⁹¹

The California Supreme Court said in *Regents* that “it is widely recognized that collective bargaining is an alternative dispute resolution mechanism which diminishes the probability that vital services will be interrupted.”³⁹² Even the dissenter on the *UCSD I* PERB who argued against granting TAs collective bargaining rights admitted that “lessening the frequency of strikes is a positive feature of collective bargaining.”³⁹³

The facts seem to support the axiom that collective bargaining minimizes labor unrest. Then-Chairman Fanning claimed in his *St. Clare's* dissent that “the recent strikes at various New York City hospitals are the direct result of [the denial of collective bargaining rights to medical house staff in] *Cedars*.”³⁹⁴ Commentator Jennifer A. Shorb found that “[m]ost housestaff strikes are recognition strikes.”³⁹⁵ This view was echoed by the *UCLA I* ALJ: “While strikes among student employees in a recognized bargaining unit have occurred as a negotiation pressure tactic . . . they are rare. Most . . . strikes . . . occur[] as a demand for recognition.”³⁹⁶ Yale has endured three TA recognition strikes in four years,³⁹⁷ hardly evidence that denying NLRA coverage keeps TAs from striking.

Dean Appelquist, however, contends that positive experiences with collective bargaining at public universities cannot be generalized to private universities because public employees, once they are recognized as such, cannot strike.³⁹⁸ Dissenting *Boston Medical* NLRB Member Hurtgen agrees: “The majority observes that no problems have developed in the public sector where house staff are involved in collective bargaining. I would remind them that these governmental employees do not have the right to strike.”³⁹⁹

391. *UCLA II*, 23 PERC ¶ 30025, at 87.

392. *Regents of the Univ. of Cal. v. PERB*, 41 Cal. 3d 601, 623, 715 P.2d 590, 605, 224 Cal. Rptr. 631, 646 (1986).

393. *UCSD I*, 22 PERC ¶ 29084, at 361 (Johnson, Member, dissenting).

394. *St. Clare's*, 229 N.L.R.B. at 1009 (Fanning, Chairman, dissenting).

395. Shorb, *supra* note 189, at 1089.

396. *UCLA I*, 20 PERC ¶ 27129, at 446.

397. See *supra* notes 127-28, 130 and accompanying text.

398. See Streitz & Hunkler, *supra* note 5, at 371.

399. *Boston Med.*, 1999 WL 1076118, at *29 (Hurtgen, Member, dissenting).

Although this is true for public employees in most states, it is not true for public employees in California, where the supreme court has held that “strikes by public employees are not unlawful . . . unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health and safety of the public.”⁴⁰⁰ It is unlikely that a TA strike would be deemed unlawful under this demanding standard.⁴⁰¹

Since coverage under California’s HEERA, like coverage under the federal NLRA, does not prevent student employees from striking, the *Boston Medical* NLRB majority was correct to infer from the PERB’s conclusion in *Regents*, namely that coverage under HEERA of medical house staff would *reduce* rather than increase the number of house staff strikes at California’s public hospitals, that coverage under the NLRA of medical house staff would likewise *reduce* rather than increase the number of house staff strikes at the nation’s private hospitals. By the same token, the NLRB should infer from the PERB’s corresponding conclusion in *UCSD* and *UCLA* regarding TAs, based at least in part on the same reasoning as *Regents*, that coverage under the NLRA of TAs and RAs would *reduce* the number of TA and RA strikes at the nation’s private universities. As discussed at the beginning of this section, such an inference would be consistent with the explicit NLRA assumption that collective bargaining minimizes labor unrest. Concern that coverage of TAs and RAs under the NLRA would result in strikes is therefore not a

400. *County Sanitation Dist. v. Los Angeles County Employees’ Ass’n*, 38 Cal. 3d 564, 586, 699 P.2d 835, 850, 214 Cal. Rptr. 424, 439 (1985).

401. Applying the standard defined by the California Supreme Court in *County Sanitation*, the California PERB has found even a public school teacher strike to be unlawful only where it disrupts the educational process so as to cause, in the words of the concurrence, a “total breakdown of education.” *Compton Unified Sch. Dist.*, 11 PERC ¶ 18067, at 407 (Cal. Pub. Employment Relations Bd. 1987) (Hesse, concurring). Public school education represents a more essential public interest than public university education, and a strike of teachers at a public school causes a more dramatic disruption of education than a strike of TAs at a public university. In particular, since a TA strike leaves professors free to teach their own classes (whereas a teacher strike does not leave anyone to teach any classes), it does not cause a total breakdown of education and should not be held to be unlawful under *County Sanitation* as interpreted by *Compton Unified*.

valid reason to deny TAs and RAs collective bargaining rights under the act.

V. CONCLUSION

All TAs and some RAs at America's private universities should be granted collective bargaining rights. These assistants are employees within the meaning of the NLRA under both the old primary purpose test (because they seek employment for primarily economic reasons) and the new service test (because they provide compensated services). Moreover, there are no valid public policy reasons to deny these TAs and RAs coverage under the NLRA. Collective bargaining over terms and conditions of TA and RA employment will not infringe upon academic issues, and NLRA coverage will not increase the number of TA and RA strikes. Accordingly, coverage of these assistants under the NLRA is proper. Such a decision would not only give hard-working TAs and RAs their due, it would have the additional advantage of making federal labor law more consistent with state labor law and leveling the playing field for private and public universities. Whereas TAs and RAs at America's private universities, who are governed by federal law, currently do not have collective bargaining rights, similarly situated student employees at public universities in a growing number of states, who are governed by state law, *do* have such rights.⁴⁰² Removing such arbitrary and irrational distinctions between federal and state labor law and between private and public employers and employees should be a public policy priority: Such distinctions may hinder the understanding of and respect for the law and may disadvantage private employers or employees vis a vis their public counterparts or vice versa. Removing such distinctions through coverage of TAs and RAs under the NLRA therefore benefits not only those student employees, but society as a whole.

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402. *See supra* note 294.

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