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Introduction

Graduate students across the country are often required to complete a set amount of hours working as a graduate assistant in order to earn their degree. These graduate assistant hours are typically earned by working as either a research assistant or a teaching assistant, depending on which type of program the student is enrolled in.[2] The relationship between the students and their institutions presents some interesting legal questions, particularly for teaching assistants. The most intriguing question that arises is whether these students should be considered employees as defined under the National Labor and Relations Act. The distinction is an important one; classifying graduate students as employees would grant them rights and privileges that other types of employees are entitled to, most notably the right to enter collective bargaining agreements to negotiate for less required hours and university health insurance.[3]

The National Labor and Relations Act (NLRA) governs this type of issue, and the National Labor Relations Board (NLRB) hears and settles claims brought under the Act working as a quasi-judicial entity.[4] The NLRB was first presented with the question of university-employed graduate students in 1972,[5] and the issue has never fully been resolved. In 2004, the Board seemed to end the dispute once and for all when it ruled affirmatively that students were not employees under the NLRA.[6] However, the issue was not settled for long; the Board overruled itself in August 2016, holding that "student assistants who have a common-law employment relationship with their university are statutory employees under the [National Labor Relations] Act." [7] This ruling only applies to private institutions, as state statutes govern public university employment,[8] but the implications are still far-reaching.

Unfortunately, the *Columbia University* ruling was just the latest example of inconsistency in NLRB decisions.[9] Perhaps the best explanation for why the Board is consistently overruling itself is the political nature of the board itself; board members are appointed by the President of the United States, and every member has a fixed term of five years.[10] Presidents appoint candidates who will bring a conservative or liberal approach to the Board, depending on what views the President at the time of appointment holds. A conservative board would likely have no problem overruling a liberal board, and vice versa. This, coupled with the fact that NLRB decisions are only somewhat binding precedent even if affirmed by a federal circuit court,[11] means that there is no clear indication that the court will stop overruling itself at any time in the near future.

The NLRB is simply not fit to create a final, lasting precedent from a procedural standpoint [12] Therefore, the only way this issue can truly be resolved is for Congress to amend the National Labor Relations Act and end the dispute once and for all. The original Act was passed in 1935,[13] and has not been significantly altered by Congress since the passing of the Landrum-Griffin Act in 1959.[14] Almost all areas of the law have changed drastically in the last sixty years, and labor law is no different. The unique relationship between universities and their graduate students as they operate today was very likely not foreseen or contemplated when the NLRA was drafted or last amended.

Aside from being the only legitimate avenue for endorsing a specific reading of the National Labor Relations Act, Congress is the entity best equipped to decide such a complex and far-reaching issue. In 2015, there were over 130,000 students employed by their universities in a teaching assistant role.[15] Despite the competency of NLRB members, this issue is simply too large to be decided by a panel of five appointed officials. Students and universities both make compelling arguments advancing their positions. Students point to the fact that teaching assistants often fill roles that would otherwise have to be filled by adjunct faculty which are considered employees.[16] Universities, on the other hand, feel that classifying graduate students as employees would hamper their freedom to create a rigorous and challenging curriculum.[17]

This Note seeks to further explain the complex issue of graduate students as university employees and advocate Congressional action. Part One briefly explains the procedural structure of the National Labor Relations Board and how it operates. Part Two summarizes the history of Board rulings in regard to graduate students as employees, including the two most recent rulings on the matter, *Brown University* and *Columbia University*. It further identifies how the two opinions differ beyond their ultimate result. Part Three advocates for Congress to amend the National Labor Relations Act by adding students to the list of groups which are not covered by the Act, effectively denying them the classification of employee. In making this argument, the Note will point out the flaws of the *Columbia University* decision, discuss the practical effects of the decision, and explain why the rights of the universities must prevail from a policy standpoint.

I. The National Labor Relations Act Overview



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A. Passing of the Act and Mechanics of the Board

In passing the National Labor Relations Act in 1935, Congress made it a point to explain why it believed the legislation was needed.^[18] Upon reading the "[D]eclaration of [P]olicy" section, it becomes clear that the key objective of the Act was to help make up for the inequality of bargaining power between employers and employees.^[19] Enacted under the authority of the Commerce Clause,^[20] the drafters seemed to believe that the right to collective bargaining was the most powerful tool employees could harness against their employers in their plight for competitive wages and improved working conditions.^[21]

If protected by the NLRA, the students' argument is a strong one. There is a clear lack of bargaining power, and the remedy they seek is expressly endorsed by the Act.^[22] The key question at issue, however, is whether the students are "employees" under the statute.^[23] The Act has some peculiar jurisdictional limitations in defining what types of employees and employers are covered. Generally, almost all private sector employers are regulated by the Act, so long as their activity in interstate commerce exceeds a minimal level.^[24] Notably, all forms of government employment are excluded from NLRA jurisdiction.^[25] This includes federal, state, and local governments, and it extends to their entities such as libraries and parks, wholly-owned government corporations, and most relevant for our purposes, public schools.^[26] Governmental bodies aren't the only types of employers excluded from the Act, however; agricultural-based employers, as well as employees subject to the Railway Labor Act, also do not fall within its jurisdiction.^[27]

If a labor issue arises out of a provision of the Act and the employer is not excluded from the jurisdiction of the Act, then disputes are settled by the National Labor Relations Board, in a sense acting as the judicial component of the agency.^[28] The Board is comprised of five members, who are appointed by the President with advice and consent of the United States Senate.^[29] Each board member serves a regular five-year term, unless appointed mid-term to fill a vacancy.^[30] Disputes are generally heard by three-member panels unless the case at hand is significant enough to warrant consideration of all five board members.^[31] This practice was called into question in *New Process Steel, L.P. v. NLRB*, where the Supreme Court held hundreds of NLRB rulings invalid, reasoning that at least three members of the Board must sit on the deciding panel for a decision to be legally enforceable.^[32]

It is unsurprising that NLRB appointments today are highly politicized decisions.^[33] What is surprising, however, is that the partisan nature of appointments is a relatively new phenomenon. Commentators have pointed to the Eisenhower administration as the first to appoint a NLRB member whose background clearly indicated a possible bias towards the president's personal viewpoints.^[34] The trend continued until eventually Presidents Reagan and Clinton became the first presidents to appoint nominees who possessed clear Republican and Democratic partisanship, respectively.^[35]

Today, nominating a partisan NLRB member is business as usual,^[36] but what are the impacts of partisan nominations? These partisan nominations have shaped the determination of "sharply contested issues of law and policy" before the Board.^[37] There is substantial anecdotal evidence of the partisan nature of the NLRB, and the few scholarly studies on the issue generally find that "the party of the appointing president influences the NLRB's output."^[38] Scholars disagree to what extent background affects member ideology,^[39] but most would likely agree that to some extent, "a presidential administration can make or change labor policy without legislative action through appointments to the NLRB."^[40] Given the importance of labor issues covered under the NLRA, and the predictability of how members will vote,^[41] appointing NLRB members is one of the most quietly influential appointment decisions a sitting president will make.

Perhaps the best restraint on the President's authority is not a law, or even the Senate confirmation requirement, but the custom that of the five appointed Board members no more than three should come from the President's political party.^[42] Still, even with this custom in place, it is plainly obvious that a "change in presidential administration from Republican to Democrat gives rise to a pro-labor shift in NLRB performance, and a change from Democrat to Republican produces a pro-business shift."^[43]

B. The Non-Binding Nature of Decisions Demands that Congress Must Act for Meaningful NLRA Clarification

Though the NLRB assuredly acts as a judicial body in the way that it adjudicates claims and disputes, its decisions are more accurately described as an agency order.^[44] The Board may issue a ruling, but the order is not self-enforcing.^[45] If a charged party refuses to comply, the Board must seek enforcement from the appropriate appellate court.^[46] Likewise, if a party wishes to dispute an order, it can go to the courts to have the Board decision remanded or voided.^[47] Even if a federal appellate court upholds or strikes down a decision of the Board, the decision is only binding on the case at issue, and it does not set precedent for future Board rulings.^[48]

The practical effect of all of this is that newly appointed Boards are free to overrule previous rulings in adjudicating new disputes, and they do so often.^[49] Given that Boards' ideologies differ greatly depending on the president which appointed the members,^[50] and the fact that Boards are not constrained by *stare decisis* when deciding their cases,^[51] it is unsurprising that a new Board would be all too eager to overturn previous Board rulings the first time they have the opportunity to do so. The process of overturning prior Board rulings is problematic, but constitutional nonetheless.^[52] In 1975, the Supreme Court of the United States not only condoned this sort of flip-flopping, but encouraged it by holding that "[t]he responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board,"^[53] and that past decisions can be reconsidered to reflect that.^[54]

The lack of uniformity and predictability is a major concern for practicing attorneys and parties alike. A former Board Member, frustrated with the current system, notes "[a]s a matter of policy, these flip-flops reduce public and judicial confidence in the Board. In practice, this oscillation also reduces both management and labor's reliance on Board law because neither side is sure what the future will hold."^[55]

Because of its partisan nature and the lack of binding precedent, the NLRB is simply not equipped to create a true resolution of the classification of a graduate student under the Act. Any ruling on the classification of graduate students as an employee under the Act can and likely will be overturned as soon as a new Board is appointed.^[56] Further, both academic institutions and graduate students will be hesitant to act, even if a ruling is made in their favor, knowing that the current status quo can be usurped at any time.^[57] The issue of graduate students under the NLRA *must* be addressed by Congress to finally put the debate to rest.

Though ineffective at creating lasting policy because of the Board's nonobservance of *stare decisis*,^[58] the NLRB is not useless by any stretch. In fact, it may have been a goal of Congress to create the Board in such a way that it could not create rigid, binding precedent.^[59] Board members generally have valuable experience or expertise in labor or employment law,^[60] and their insights and reasoning in solving disputes should be taken seriously. Though only Congress can permanently answer the question of how to treat student-employees, in

making its decision Congress would be wise to consider how the Board has handled the issue for the last 45 years.^[61] The following section will examine a timeline of such cases, and demonstrate how both a Republican-appointed Board and a Democrat-appointed Board acted when most recently presented with the issue.^[62]

II. Where the Issue Arises and How the NLRB Has Handled It

A. Defining "Employee" Under Section 2(3) and Interpreting the Definition

The heart of the issue in all of the student-employee labor disputes is whether or not the students are considered employees under the NLRA.^[63] The Act provides a definition of "employee," which is the source of the litigation. In pertinent part, the Act defines employee in the following manner:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise ... but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act ... or by any other person who is not an employer as herein defined.^[64]

Generally, interpretation of this definition comes down to competing theories of statutory construction; specifically, the competing theories of textualism and other intentionalist theories.^[65] When used by judicial bodies, textualism—which focuses on the text of the statute at issue—is usually employed by conservative judges, whereas intentionalist theories—which focus on Congressional intent or the purpose of the statute—are often employed by liberal judges.^[66] The Board, however, is not a true judicial body but rather a branch of an administrative agency.^[67] Because of its unique nature, some interesting questions arise; most notably, what interpretation the Board should apply, or whether or not it should even apply a statutory interpretation theory at all.^[68]

A textualist approach makes the analysis somewhat easy in regarding the determination of employment status under the NLRA. Under the "*expressio unius*" statutory interpretation maxim, which provides that "[w]hen a provision sets forth a general rule followed by specific exceptions to that rule, one must assume—absent other evidence—that no further exceptions are intended,"^[69] a strong argument could be made that students are employees because they are not listed alongside the other exceptions.^[70] In other words, the argument under the doctrine of *expressio unius* is the drafters of the Act made a conscious effort to name specific exceptions to the general rule but did not include students; a Court interpreting the Act should not include students where the drafters deliberately excluded them. The *expressio unius* maxim is a subset of the larger interpretation doctrine of textualism.^[71]

Intentionalist theories, on the other hand, involve a somewhat murkier analysis, though they could arguably lead to more "fair" results.^[72] Intentionalism itself has multiple sub-categories; some judges ask themselves what the enacting legislature would have done with the issue at hand, while others query what interpretation would best serve the true purpose of the law.^[73] These methods are called intentionalism and purposivism, respectively.^[74] To employ either of these methods requires a judge to make his or her subjective decision as to what Congress would have wanted or what the purpose of the law was.^[75] To put one's self in the shoes of a 1935 legislator is a difficult thought experiment which could produce any number of results.

Both textualist and intentionalist approaches are widely used by judicial bodies,^[76] but the overarching question remains: should the NLRB act as a judicial body, or the administrative agency that it truly is? Unlike Courts, administrative agencies are well equipped to legitimately make policy choices.^[77] Courts are generally tasked with merely interpreting a statute before them, whereas an administrative agency's "are expected to make policy choices much more so than the courts, a role that has been upheld by the Supreme Court."^[78] Though the agency's role of promoting policy is often relegated to interpreting its own authority,^[79] it can abandon this role in the interest of promoting policy related to the statute it administers.^[80] This practice may cause some to raise an eyebrow, but it has been condoned by the Supreme Court so long as the policy the agency is promoting is reasonable.^[81]

The differences in how Courts and the NLRB operate tends to give credence to the idea that an intentionalist approach, specifically purposivism, is better suited to resolve disputes at issue. Accepting that an administrative agency may legitimately promote its policy,^[82] textualism seems like an odd vehicle to fulfill that duty. Policy, unlike a statute or the Constitution, is ever-changing, and continually reading statutes under a textualist lens fails to give agencies the opportunity to reflect those changes.^[83] Additionally, ruling that an argument fundamentally promotes an agency's policy, rather than merely finding an argument is valid under a textualist reading of the statute, seems much more effective at establishing and continually endorsing said policy.

B. A Brief History of Pre-*Brown* Graduate Assistant Decisions

The issue of teaching assistants and other graduate students is not a new one; in the early 1970's, the Board ruled on two cases that set an early precedent on the matter. The first, *Adelphi University*, held that graduate students were not employees of their university; therefore they were not fit to join the rest of the faculty when collectively bargaining.^[84] The Board placed a great deal of emphasis on the differences between the regular faculty and the graduate assistants. The functions the students performed, they reasoned, were primarily academic with only some faculty-related tasks.^[85] Additionally, because the student's employment relationship could not exist without the established academic relationship, the court held that the two groups were too distinct to be included in the bargaining unit.^[86]

Two years later, the Board solidified its position in *Adelphi University* and expanded upon it. In *The Leland Stanford Junior University* case, the Board held explicitly that because graduate assistants were "primarily" students, they were not statutory employees under the NLRA.^[87] The Board also considered the nature of their employment standing alone and how it compared to a traditional University employee. Unlike non-student employees, the University had little control over the students' research projects and students were not paid in accordance with the value of their work.^[88] The Board found that the true employment relationship was "a situation of students within certain academic guidelines having chosen particular projects on which to spend the necessary time, as determined by the project's needs."^[89]

The *Leland* and *Adelphi* decisions lasted for over 25 years before being overturned by *New York University* in 2000.^[90] The *New York University* Board did not act completely on its own. Instead, the reasoning for overturning *Leland* was borrowed from another decision, *Boston Medical Center*, which created a new standard of determining employment on the basis of the common law master-servant doctrine.^[91] Applying the

standard, the Board determined that the students were statutory employees under Section 2(3);^[92] this was the first time students ever received such classification.^[93] In determining whether or not a master-servant relationship existed, the Board reasoned that it exists when “a servant performs services for another, under the other’s control or right of control, and in return for payment.”^[94] Aside from examining the common law employment relationships, the Board also took a textualist approach, noting that Congress had made specific exceptions to the general rule and student-employees were not one of them.^[95]

C. *Brown Versus Columbia* – Under the Microscope

The two most recent disputes on the matter illustrate where the Board stands now, and what reasoning it used to arrive there. The cases are factually indistinguishable for all relevant purposes, and the issue is identical.^[96] So how did the two cases, decided merely 12 years apart, arrive at opposite conclusions? This section attempts to answer that question by identifying the underlying causes.

i. *Brown* Analysis

Brown overturned *NYU* and held that graduate students were not employees as defined by the NLRA.^[97] The ruling in *Brown* can be condensed down to three major conclusions, the first of which is that the relationship is primarily and unequivocally an academic one.^[98] The justification for this claim is similar to that of pre-*NYU* cases; namely, that the students’ employment relationship exists only to the extent that it is part of the academic relationship.^[99] Still, the Board realized that under a textualist reading it doesn’t matter if the relationship was primarily an academic one, so long as an employment relationship existed.^[100] To preemptively combat such a counter-argument, the Board unabashedly explained that their “interpretation of Section 2(3) followed the fundamental rule that ‘a reviewing court should not confine itself to examining a particular statutory provision in isolation.’”^[101] The Board then concluded this argument by deciding under a purposivism approach that an employee was covered under the Act only if the relationship was a “fundamentally economic relationship.”^[102]

A second conclusion the Board made is that allowing students to collectively bargain based on their employment relationship would undoubtedly cause adverse effects to their academic relationship.^[103] More specifically, by limiting an institution’s right to require some number of hours spent in a graduate assistant role, students would in effect be hampering that institution’s ability to set their own curriculum.^[104] The Board even went so far as to say that “[i]mposing collective bargaining would have a deleterious impact on overall educational decisions by the *Brown* faculty and administration.”^[105] Here, one can see the Board fully embracing its role as policymaker,^[106] by focusing on what policy it wishes to promote and the practical effects of a ruling, rather than merely interpreting the statute it administers. The Board in this instance clearly saw academic sovereignty as a legitimate policy concern.

The final argument that the Board endorsed in *Brown* is quite distinct from the previous two, and it was not contemplated by the Board in any of the pre-*NYU* decisions. The thrust of the argument is that payments made to teaching assistants shouldn’t be considered compensation, rather that they were merely part of a student’s financial aid package.^[107] This claim demands attention. The Board considered evidence presented by the University; incoming graduate students often received letters which stated if they “maintain satisfactory progress toward the Ph.D., [they] will continue to receive some form of financial aid in [their] second through fourth years of graduate study at *Brown*, most probably as a teaching assistant or research assistant.”^[108] Additionally, the Board pointed out that funding for the programs was provided by third-party donors,^[109] and “the amount of stipend received is the same regardless of the number of hours spent performing services. The awards do not include any benefits, such as vacation and sick leave, retirement, or health insurance.”^[110] All of this evidence would lead one to believe that the relationship between the University and the students were not so similar to a common-law employment relationship under a *New York University* analysis.^[111]

ii. *Columbia* Analysis

Brown lasted for 12 years, until being overturned by *Columbia*.^[112] The *Columbia* Board was very critical of the *Brown* decision, and a considerable amount of the opinion is refuting arguments the Board had accepted in *Brown*.^[113] The Board specifically took exception to the fact that *Brown*’s reasoning seemingly ignored a textualist approach altogether.^[114] Though *Columbia* did not advocate a strictly textualist approach, the Board believed that the “fundamental error of the *Brown University* Board was to frame the issue of statutory coverage not in terms of the existence of an employment relationship, but rather on whether some other relationship between the employee and the employer is the primary one.”^[115] That standard was “neither derived from the statutory text of Section 2(3) nor from the fundamental policy of the Act.”^[116]

Columbia’s disapproval of *Brown* did not stop with statutory interpretation theories. When the *Columbia* Board embraced its role as policymaker,^[117] it questioned the legitimacy of *Brown*’s conclusions. Claiming that the reasoning relied on by the *Brown* Board was “almost entirely theoretical,” they concluded that “[t]he *Brown University* Board failed to demonstrate that collective bargaining between a university and its employed graduate students cannot coexist successfully with student-teacher relationships, with the educational process, and with the traditional goals of higher education.”^[118] Instead of speculating on what might happen if students were ruled to be employees, the Board examined public universities where students were already allowed to unionize and concluded that collective bargaining had a positive effect on the student-employees, without nearly as many detriments as *Brown* predicted.^{[119][120]}

[1] University of Kentucky College of Law, J.D. expected May 2018.

[2] *Graduate Student Assistantship*, Stan. U. (Sept. 4, 2015), <https://adminguide.stanford.edu/chapter-10/subchapter-2/policy-10-2-1>.

[3] See generally *Columbia University*, 364 N.L.R.B. No. 90 (2016) (explaining the historical debate as to whether or not graduate students should qualify as employees under the Act); National Labor Relations Act, 29 U.S.C. § 157 (2012).

[4] National Labor Relations Act, 29 U.S.C. § 153 (2012); *What We Do*, National Labor Relations Board, <https://www.nlr.gov/what-we-do> (last visited March 24, 2018).

[5] See generally *Adelphi University*, 195 N.L.R.B. 639 (1972) (ruling that graduate assistants should be excluded from a bargaining unit of university faculty members because they did not share a community interest with the faculty).

[6] *Brown University*, 342 N.L.R.B. 483, 493 (2004).

[7] Columbia University, 364 N.L.R.B. No. 90, at 2 (2016).

[8] *Id.* at 2, 9.

[9] See discussion *infra* Part II.B.

[10] National Labor Relations Act, 29 U.S.C. § 153(a) (2012).

[11] See *Enforce Orders*, Nat'l Lab. Rel. Board, <https://www.nlr.gov/what-we-do/enforce-orders> (last visited March 26, 2018) ("In reviewing cases, the Circuit Courts evaluate the factual and legal basis for the Board's Order and decide, after briefing or oral argument, whether to enter a judicial decree commanding obedience to the Order.").

[12] See *id.*

[13] National Labor Relations Act, 29 U.S.C. § 151 (2012).

[14] See *Wagner Act United States [1935]*, April 2018, Encyclopedia Britannica, <https://www.britannica.com/topic/Wagner-Act>.

[15] *Occupational Employment and Wages, May 2016*, Bureau of Lab. Stat., <http://www.bls.gov/oes/current/oes251191.htm#nat> (last visited March 26, 2018).

[16] See C.W. Post Center, 198 N.L.R.B. 453, at 454 (1972).

[17] Columbia University, 364 N.L.R.B. No. 90at 7-9 (2016).

[18] See *generally* National Labor Relations Act, 29 U.S.C. § 151 (2012).

[19] *Id.* "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries."

[20] See *id.* "[C]ertain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce." See also *Precision Castings Co. v. Boland*, 13 F. Supp. 877, 882 (W.D.N.Y.) ("The enactment of the act by Congress was not beyond its powers under the commerce clause of the Constitution."), *aff'd*, 85 F.2d 15 (2d Cir. 1936).

[21] National Labor Relations Act, 29 U.S.C. § 151 (2012). "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred 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."

[22] *Id.* "It is hereby declared to be the policy of 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"

[23] See discussion *infra* Part II.A.

[24] *Jurisdictional Standards*, Nat'l Lab. Rel. Board, <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (last visited Mar. 31, 2018).

[25] *Id.* See also National Labor Relations Act, 29 U.S.C. § 152 (2012) (explaining that employers, as defined under the Act, will not include members of the various levels of government).

[26] See National Labor Relations Act, 29 U.S.C. § 152 (2012). See also *Balmes v. Bd. of Educ. of Cleveland City Sch. Dist.*, 436 F. Supp. 129, 132 (N.D. Ohio 1977) (ruling that "plaintiff cannot pursue a cause of action [against school district] based upon the National Labor Relations Act, because a board of education is not an 'employer' as that term is defined in the Act . . .").

[27] 29 U.S.C. § 152 (2012).

[28] *What We Do*, National Labor Relations Board, <https://www.nlr.gov/what-we-do> (last visited March 24, 2018).

[29] 29 U.S.C. § 153(a) (2012).

[30] *Id.*

[31] NLRB Office of the Executive Secretary, *Guide to Board Procedures* 12 (April 2017), https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1727/Guide%20to%20Board%20Procedures%202017_0.pdf.

[32] See *generally* *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010).

[33] Joan Flynn, *A Quiet Revolution at the Labor Board: The Transformation of the NLRB, 1935-2000*, 61 Ohio St. L.J. 1361, 1438 (2000) (noting that "[l]abor Board appointments are only 'a small part of the grand political game'").

[34] *Id.* at 1368-69.

[35] *Id.* at 1383-84, 1396-98.

[36] *Id.* at 1394 (noting that “appointment of both management and union-side lawyers has now become routine”).

[37] See generally Ronald Turner, *Ideological Voting on the National Labor Relations Board*, 8 U. Pa. J. Lab. & Emp. L. 707, 761–62 (2006) (concluding that “ideology has mattered in a number of cases presenting controversial and sharply contested issues of law and policy”).

[38] Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board’s Unfair Labor Practice Decisions through the Clinton and Bush II Years*, 37:2 Berkeley J. of Employment & Labor Law 223, 233 (2016).

[39] Compare Flynn, *supra* note 33, at 1403 (arguing “there seems little doubt that management and union representatives appointed to the Board are likely to be highly predisposed to the management or union-side point of view”), with Paul M. Secunda, *Politics Not as Usual: Inherently Destructive Conduct, Institutional Collegiality, and the National Labor Relations Board*, 32 Fla. St. U. L. Rev. 51, 103 (2004) (arguing that “the Members of the NLRB are able to separate their political and institutional roles and do what is best for national labor policy”).

[40] See e.g., James A. Gross, *Broken Promise: The Subversion of U.S. Labor Relations Policy, 1947-1994* 275 (1995); Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board’s Unfair Labor Practice Decisions through the Clinton and Bush II Years*, 37:2 Berkeley J. of Employment & Labor Law 223, 233 (2016) (“there have only been a few scholarly studies of the NLRB’s adjudicatory decisions, with scholars generally finding that the party of the appointing president influences the NLRB’s output.”); NBC, *Politics Stymie National Labor Relations Board*, Sept. 2009, http://www.nbcnews.com/id/32715894/ns/politics-more_politics/t/politics-stymie-national-labor-relations-board/#.W3WlrHMygQ (discussing the effect that the politicized nature of appointments has had on the appointment process).

[41] See Turner, *supra* note 35, at 711 (finding “ideology has been a persistent and, in many instances, a vote-predictive factor when the Board decides certain legal issues”).

[42] William B. Gould IV, *Labor Relations: Law, Politics, and the NLRB—A Memoir* 15 (2000).

[43] Terry M. Moe, *Control and Feedback in Economic Regulation: The Case of the NLRB*, 79 Am. Pol. Sci. Rev. 1094, 1102 (1985).

[44] 29 U.S.C. § 153(a) (2018) (“The National Labor Relations Board created by this subchapter prior to its amendment by the Labor Management Relations Act, 1947, is continued as an agency of the United States.”).

[45] *NLRB v. Mayco Plastics, Inc.*, 472 F. Supp. 1161, 1163 (E.D. Mich. 1979) (“In support of its petition, the NLRB argues that . . . orders of the NLRB are not self-enforcing”).

[46] *Id.*

[47] Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679, 706 (1989); 29 U.S.C. § 160(f) (2018).

[48] See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990) (“[A] Board rule is entitled to deference even if it represents a departure from the Board’s prior policy.”).

[49] Claire Tuck, *Policy Formulation at the NLRB: A Viable Alternative to Notice and Comment Rulemaking*, 27 Cardozo L. Rev. 1117, 1122–23 (2005) (observing that generally, “[f]our years after a change in presidential administration and a corresponding change in membership at the Board, the Board is again abruptly overruling past decisions”).

[50] See discussion *supra* Section I.A.

[51] See Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 Sup. Ct. Rev. 53, 63 (noting that NLRB is not constrained by *stare decisis* like actual judicial courts).

[52] See *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 266 (1975).

[53] *Id.*

[54] See *id.* at 265–66.

[55] R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB*, 5 FIU L. Rev. 347, 349 (2010).

[56] See Tuck, *supra* note 49, at 1122–23.

[57] See Acosta, *supra* note 55, at 349.

[58] See Daniel P. O’Gorman, *Construing the National Labor Relations Act: The NLRB and Methods of Statutory Construction*, 81 Temp. L. Rev. 177, 218 (2008) (arguing “the Board, as a policymaker and quasi legislature, should not feel bound by the doctrine of *stare decisis* to the same extent as a court and should be able to reverse precedent even when circumstances have not changed”).

[59] See Winter, *supra* note 51, at 58–59 (arguing that Congress wanted the NLRA administered by a body that was distinct from judicial courts and the doctrines they followed).

[60] See *The Board*, Nat’l Lab. Rel. Board, <https://www.nlr.gov/who-we-are/board> (last visited Aug. 16, 2018) (follow links to each Board member for information about experience and expertise).

[61] The first major ruling regarding graduate students as employees was handed down in 1972. See *Adelphi University*, 195 N.L.R.B. No. 107 (1972) (ruling that graduate assistants should be excluded from a bargaining unit of university faculty members because they did not share a community interest with the faculty).

[62] See discussion *infra* Part II C.

[63] See, e.g., *Columbia U.*, 364 N.L.R.B. No. 90 (2016); *Brown U.*, 342 N.L.R.B. No. 42 (2004).

- [64] National Labor Relations Act of 1935, 29 U.S.C. § 152 (2016).
- [65] O’Gorman, *supra* note 58, at 178–79.
- [66] O’Gorman, *supra* note 58, at 178-79.
- [67] See O’Gorman, *supra* note 58, at 182–84.
- [68] See generally O’Gorman, *supra* note 58.
- [69] Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 719 (1991).
- [70] National Labor Relations Act of 1935, 29 U.S.C. § 152 (2016).
- [71] See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. Rev. 74, 85–86 (2000) (explaining that the *expressio unius* canon is a textual or “linguistic” canon).
- [72] See generally Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* 85-101 (2005) (advocating intentionalist approach to statutory interpretation and asserting that intentionalist theories “help ... statutes match their means to their overall public policy objectives, a match that helps translate the popular will into sound policy”).
- [73] See O’Gorman, *supra* note 58, at 194.
- [74] See O’Gorman, *supra* note 58, at 194.
- [75] Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347, 348 (2005) (noting that “intentionalists try to identify and enforce the ‘subjective’ intent of the enacting legislature”).
- [76] See O’Gorman, *supra* note 58, at 191 (finding that textualism and intentionalism are the two primary methods of judicial statutory construction).
- [77] See O’Gorman, *supra* note 58, at 197.
- [78] O’Gorman, *supra* note 58, at 199.
- [79] Nat’l Cable & Telecommun. Ass’n v. Brand X Internet Servs., 545 U.S. 967, 983 (2005) (noting that “the agency remains the authoritative interpreter (within the limits of reason) of
- [its]
- statutes”).
- [80] See O’Gorman, *supra* note 58, at 197–98.
- [81] Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc., 467 U.S. 837, 842–45 (1984).
- [82] *Id.* at 864–66 (affirming that administrative agencies are free to create and promote policy, and are not bound by traditional statutory interpretation doctrines).
- [83] *Id.* at 838 (noting that the EPA permissibly changed interpretation of its own definitions because an administrative agency must reconsider its policy on a continuing basis).
- [84] See *Adelphi U.*, 195 N.L.R.B. No. 107 (1972).
- [85] *Id.*
- [86] *Id.*
- [87] *The Leland Stanford Junior U.*, 214 N.L.R.B. No. 82 (1974).
- [88] *Id.*
- [89] *Id.*
- [90] See *N.Y. Univ.*, 332 N.L.R.B. 1205, 1221 (2000); *The Leland Stanford Junior U.*, 214 N.L.R.B., No. 82 (1974); *Adelphi U.*, 195 N.L.R.B. No. 107 (1972).
- [91] *Boston Med. Ctr. Corp.*, 330 N.L.R.B. 152, 160 (1999).
- [92] *N.Y. Univ.*, 332 N.L.R.B. 1205, 1221 (2000).
- [93] *Columbia Univ.*, 364 N.L.R.B. No. 90, at 10 (Aug. 23, 2016) (stating “the Board first held that certain university graduate assistants were statutory employees in its 2000 decision in NYU”).
- [94] *N.Y. Univ.*, 332 N.L.R.B. 1205, 1206 (2000).
- [95] *Id.* at 1220.
- [96] Compare *Brown Univ.*, 342 N.L.R.B. 483 (2004), with *Columbia Univ.*, 364 N.L.R.B. No. 90 (Aug. 23, 2016).
- [97] *Brown Univ.*, 342 N.L.R.B. 483, 493 (2004).
- [98] *Id.* at 487..
- [99] *Id.* at 487-88.
- [100] *Id.* at 492.
- [101] *Id.* at 488 (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)).
- [102] *Id.* at 488.

[103] *Id.* at 490.

[104] *Id.*

[105] *Id.*

[106] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 864–66 (1984) (affirming that administrative agencies are designed to create and promote policy, and are not bound by traditional statutory interpretation doctrines).

[107] *Brown Univ.*, 342 N.L.R.B. 483, 485–86, 488 (2004).

[108] *Id.* at 485.

[109] *Id.* at 489.

[110] *Id.* at 486.

[111] See discussion *supra* Part II.B.

[112] *Columbia Univ.*, 364 N.L.R.B. No. 90, at 3 (Aug. 23, 2016).

[113] See *id.* at 3–7.

[114] *Id.* at 5–7.

[115] *Id.* at 25.

[116] *Id.*

[117] See discussion *supra* p.12.

[118] *Columbia Univ.*, 364 N.L.R.B. No. 90, at 31 (Aug. 23, 2016).

[119] *Id.* at 10–12, 14.

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