The Status of Graduate Students and That of Medical Residents under the National Labor Relation Act as a Starting Point for Crafting a Statutory Definition of "Employee"

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Hundreds of graduate students [at Yale and Columbia] will not teach classes, hold review sessions or participate in research next week.

The strike will be the first by Ivy League graduate students since the National Labor Relations Board ruled last year that graduate students at private colleges are students, not workers, and cannot form unions.

As a result of that decision, graduate students can win recognition only if university administrators voluntarily grant it—something they have refused to do.

Organizers say they hope the combined pressure of simultaneous strikes on two campuses will help reverse that stance.

"By asserting this as one voice, we’re identifying what we have in common: that we should be recognized as legal workers and be respected and given bargaining rights,” said Dehilia Hannah, a graduate student in philosophy at Columbia.

University officials say their position has not changed.
“Our relationship with graduate students is educational and collaborative, not an employer-employee relationship,” said a Columbia spokeswoman, Alissa Kaplan Michaels, echoing the responses of Yale, Brown University and the University of Pennsylvania.¹

So goes the debate that originated in 1967 when University of Wisconsin graduate students formed the first graduate student union, the Teaching Assistants Association.² Since then, countless graduate students have asserted that they provide a valuable service to the university and thus are employees like all other university workers. Universities always counter that the graduate students are there to receive an education, not to work, and therefore are very different from other university workers. This debate has been replicated between medical residents and hospitals.

The primary issue discussed in this Note is whether graduate students and hospital house staff, including medical residents, are employees for purposes of the National Labor Relations Act (the “NLRA” or the “Act”) and hence entitled to engage in collective bargaining. The National Labor Relations Board (the “NLRB” or the “Board”) has recently used two different tests to determine whether the groups are appropriate units for collective bargaining. Thus, a main focus of this Note will be to develop a uniform test, or definition, to apply to all cases involving NLRA status determinations.³ In developing this test, an attempt will be made to foster more consistent results than shown in the past Board decisions, while recognizing that the Board prefers to regulate through adjudication rather than rulemaking.

Part I provides background on the NLRA and the NLRB as well as an overview of the NLRB’s inconsistent treatment of graduate students and house staff. Part II discusses why the tests the Board currently uses to make status determinations are inadequate. Part II also includes brief comment on the tests used to make the same status determination under other federal labor and employment statutes. Part III proposes a new test that incorporates the strengths of the tests the NLRB currently uses while simultaneously addressing the weaknesses of these tests. The new test also provides a greater

¹ Graduate Students at Yale and Columbia Plan One-Week Strike in Push for Union Recognition, N.Y. TIMES, Apr. 14, 2005, at B10.
² Kevin Mattson and Patrick Kavanagh, Graduate Student Radicalism, PERSP. ON HIST., Nov. 1999, at 37, 37.
³ “Status determination” as used in this Note refers to the determination as to whether a given worker is an employee under the NLRA.
likelihood of consistent results by imposing bright-line guides that the adjudicator may diverge from only if the party arguing for such divergence meets a heightened burden of proof. Part IV discusses the application of the new test to graduate students and house staff, ultimately concluding that graduate students are not employees under the Act, but house staff are. Part V considers the advantages of having one consistent status test that applies to all federal labor and employment statutes and discusses whether the proposed test is capable of such an application.

I. BACKGROUND

In 1935, Congress enacted the NLRA for the purposes of combating disruption of industry by labor-management disputes and promoting economic and social progress. In its present form, the NLRA has broad jurisdiction that is limited only by the Constitution and the definitions contained in section 2 of the Act. Section 2 includes definitions of “employers” and “employees.” For the purposes of this Note, these definitions’ relevant aspects are that: (1) the definition of “employer” explicitly excludes the government as an employer under the Act; and (2) the definition of “employee” is circular and vague.

A. Section 2(3)—Employee “Shall Include Any Employee”

Like the definitions used in many employment statutes, the definition of employee provided in Section 2(3) of the NLRA is ambiguous. The exact language of the definition is as follows:

The term “employee” shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has

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5 National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (2006) (“The term ‘employer’ [for purposes of the Act] . . . shall not include the United States or any wholly owned Government corporation . . . or any State or political subdivision thereof . . . .”). Thus, the rights of workers at public universities or hospitals are not governed by the NLRA, but rather are governed by state law.
6 See infra Part I.A for the definition.
not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act . . . .

Due to the vague definition of “employee,” courts and the NLRB have generally looked beyond the explicit language of the NLRA to determine whether any particular person is an employee for purposes of the Act. An employee under the Act is entitled to all the rights contained therein. Paramount among these rights is the right to choose union representation in negotiations with the employer—i.e., the right to collective bargaining—and the right to remedies for unfair labor practices. This Note focuses on whether graduate students performing services for universities and house staff serving hospitals are employees under the NLRA. The most important implication of such a finding would be that universities and hospitals would be required to engage in collective bargaining with graduate students and house staffs should the groups so choose.

B. Overview of the NLRB’s Treatment of Graduate Students

Originally, the NLRB did not assert jurisdiction over private universities and hence did not consider the status of graduate students under the NLRA. However, in its 1970 Cornell University decision, the Board asserted jurisdiction over private universities on the basis that universities engage in interstate commerce. In that case,

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8 29 U.S.C. § 152(3).
10 See 29 U.S.C. § 159 (providing information regarding election procedures under the NLRA). See generally 1 THE DEVELOPING LABOR LAW, supra note 4, at 537–635 (providing an overview of representation proceedings and elections).
11 “Graduate students” as used in this Note includes teaching assistants, research assistants, and proctors whose duties generally include teaching classes and leading small discussion groups, performing research under grants provided to faculty members, and administrative duties.
12 Gregory Gartland, Of Ducks and Dissertations: A Call for A Return to the National Labor Relations Board’s “Primary Purpose Test” in Determining the Status of Graduate Assistants under the National Labor Relations Act, 4 U. PA. J. LAB. & EMP. L. 623, 626 (2002) (“Historically, the Board was hesitant to bring private universities under the umbrella of the NLRA . . . .”).
the Board ultimately certified a group of non-academic employees as an appropriate bargaining unit.\textsuperscript{14} In its 1972 \textit{Adelphi University} decision,\textsuperscript{15} the Board first confronted graduate students attempting to exercise the rights provided for in the NLRA. In \textit{Adelphi University}, the proposed bargaining unit consisted of graduate students, professors, and library staff.\textsuperscript{16} In refusing to certify the unit, the Board did not reach the question of whether the students were employees for purposes of the Act, but rather held that the bargaining unit lacked the "community of interest" required by section 9(a).\textsuperscript{17}

Two years later, the Board directly confronted the status of graduate students in \textit{Leland Stanford Junior University}\textsuperscript{18} ("Stanford"). Stanford could not be disposed of on the ground that the proposed bargaining group lacked "community of interest" because the group was made up exclusively of physics research assistants.\textsuperscript{19} However, the Board still refused to certify the unit on the basis that "the research assistants in the physics department are primarily students [and thus] are not employees within the meaning of Section 2(2) [sic] of the Act."\textsuperscript{20} In applying what became known as the "primary purpose" test, the Board placed heavy emphasis on several facts: all the services the students performed were "toward the goal of obtaining the Ph.D. degree"; the payment was a form of financial aid since there was "no correlation" between work performed or hours spent and the payment received; the students did not receive the fringe benefits normally associated with employment; the payments made to students were tax exempt; the students received academic credit for their work; and the students were not subject to discharge for unsatisfactory performance.\textsuperscript{21} Thus, the Board provided factors to consider in applying the "primary purpose" test.

\textsuperscript{14} \textit{Id.} at 334.
\textsuperscript{15} \textit{195 N.L.R.B.} 639 (1972).
\textsuperscript{16} \textit{Id.} at 639.
\textsuperscript{17} \textit{Id.} at 640; \textit{see also} Kalamazoo Paper Box Corp., 136 N.L.R.B. 134, 137 (1962) (discussing the factors used in determining whether a proposed bargaining unit has a "community of interest"); 1 \textit{THE DEVELOPING LABOR LAW}, \textit{supra} note 4, at 643-44 ("Community of interest is not susceptible to precise definition . . . . The Board . . . attempt[s] to summarize the concept as follows: Whether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work . . . . are functionally integrated with the Employer's other employees; have frequent contact with other employees; . . . have distinct terms and conditions of employment; and are separately supervised." (quoting \textit{United Operations Inc.}, 338 N.L.R.B. 123, 123 (2002))).
\textsuperscript{18} 214 N.L.R.B. 621 (1974).
\textsuperscript{19} \textit{Id.} at 621.
\textsuperscript{20} \textit{Id.} at 623.
\textsuperscript{21} \textit{Id.} at 622-23.
The Board used the "primary purpose" test to determine the status of workers for almost thirty years.\textsuperscript{22} Where a worker's primary purpose was not economic, the Board consistently held that the worker was not an employee within the meaning of the NLRA.\textsuperscript{23} However, in 1999, in \textit{Boston Medical Center Corp.},\textsuperscript{24} the Board developed a different test, the "function" test.\textsuperscript{25} It focuses on whether a worker is a common-law employee. In 2000, the Board applied this less stringent test to a case involving graduate students\textsuperscript{26} and reversed twenty-six years of precedent.\textsuperscript{27} In \textit{New York University},\textsuperscript{28} the Board used the "function" test to hold that a group of graduate teaching and research assistants was an appropriate bargaining unit under section 9(a) of the Act.\textsuperscript{29} In applying the "function" test, the Board focused on a narrow analysis—"graduate assistants perform services under the control and direction of the Employer, and they are compensated for these services by the Employer."\textsuperscript{30} Thus, the Board greatly simplified the test for determining whether a person is an employee within the meaning of section 2(3)—any person who would be an employee at common law is an "employee."\textsuperscript{31}

The application of the "function" test to graduate students was short-lived. Four years after \textit{New York University}, the Board restored the "primary purpose" test. In \textit{Brown University},\textsuperscript{32} in a two-three ruling, the Board held that a group of graduate students working as teaching assistants, research assistants, and proctors was not an appropriate bargaining unit and as such did not have the right to engage in collective bargaining. While the Board used the "primary purpose" test,\textsuperscript{33} a footnote suggested that the Board would not have

\begin{footnotes}
\footnote{22}{Elizabeth Butler Baum, Casenote, \textit{NLRB Refuses to Harm "Academic Freedom" at Universities by Permitting Graduate Student Assistants to Unionize}, 56 MERCER L. REV. 793, 796–97 (2005).}
\footnote{24}{330 N.L.R.B. 152 (1999). See infra Part I.C for discussion of this case.}
\footnote{25}{\textit{Id.} at 159.}
\footnote{26}{332 N.L.R.B. 1205 (2000).}
\footnote{27}{\textit{See supra} note 22.}
\footnote{28}{332 N.L.R.B. 1205 (2000).}
\footnote{29}{National Labor Relations Act § 9, 29 U.S.C. § 159 (2006).}
\footnote{30}{The accuracy of this analysis has been questioned. See \textit{Brown Univ.}, 342 N.L.R.B. 483, 490 n.27 (2004) (suggesting that even under the "function" test, graduate students are not employees for purposes of the Act).}
\footnote{31}{\textit{New York Univ.}, 332 N.L.R.B. at 1206.}
\footnote{32}{\textit{Id.}}
\footnote{33}{342 N.L.R.B. 483 (2004).}
\footnote{34}{Use of the "primary purpose" test is evidenced by statements such as, "the relationship between Brown and its graduate student assistants is primarily academic." \textit{Id.} at 492.}
\end{footnotes}
certified the unit even under the "function" test. Though there were differences between the students seeking certification in New York University and those seeking certification in Brown University, these differences were most likely irrelevant under the "primary purpose" test. Thus, under current law, most graduate students are not employees for purposes of the NLRA.

The Brown University majority bolstered its opinion with a series of policy arguments that were not mentioned in Stanford. The Board derived the policy arguments from one central theme: "collective bargaining is not particularly well suited to educational decisionmaking and . . . any change in emphasis from quality education to economic concerns will 'prove detrimental to both labor and educational policies.'" From this premise, the Board concluded that since the students' and universities' goals were not adverse, it was unnecessary to achieve the main purpose of collective bargaining—equality of bargaining power. The Board went on to conclude that attaining equality of bargaining power was not only unnecessary, but also undesirable. Since equal bargaining power "would unduly infringe upon traditional academic freedoms," it would not be a wise policy decision to certify the unit of students. In other words, students should not be permitted to bargain (with persons far more experienced) regarding the requirements to obtain an educational degree.

The dissent responded to these policy concerns by attacking the assumption that universities are the same as they were when the

35 Id. at 490 n.27.
36 See Sheldon D. Pollack & Daniel V. Johns, Graduate Students, Unions, and Brown University, 20 LAB. LAW. 243, 254 (2004) (noting that the Brown students were receiving academic credit for their work while the majority of the New York University students were not, and the work was not a degree requirement for most New York University students whereas the work was required of Brown students).
37 See New York Univ., 332 N.L.R.B. at 1207 (stating that the Board does not contest the large educational benefits graduate students derive from working for the university, but rather thinks that such benefits are not relevant to making the status determination—"the fact that [the graduate students] 'obtain educational benefits from their employment' is not inconsistent with employee status" (quoting Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 161 (1999))).
38 In extreme situations where the duties a student performs for a university are completely unrelated to achieving a degree and hold no educational benefit, the performing student may satisfy the "primary purpose" test. But see San Francisco Art Inst., 226 N.L.R.B. 1251 (1976) (holding that bargaining unit made up exclusively of students working part-time as janitors at their university should not be certified because the students' interests in their part-time employment is tenuous and secondary to their educational interest).
40 Id.
41 Rather, the parties shared the mutual goal of the students obtaining educations.
43 Id.
Board originally addressed the status of graduate students under the Act.44 The dissent argued that in light of the nature of today's university, the underlying purposes of the Act would be served by providing graduate students with the NLRA's protections.45 However, the main thrust of the dissent's argument was not policy, but statutory—the "function" test applied because "[a]bsent compelling indications of Congressional intent, the Board simply is not free to create an exclusion from the Act's coverage for a category of workers who meet the literal statutory definition of employees."46

Despite the dissent's argument, the "primary purpose" test is the current applicable law, and, therefore, graduate students do not currently have a right based on the NLRA to engage in collective bargaining.

C. Overview of the NLRB's Treatment of House Staff

The Board's decisions regarding the status of hospital house staff47 under the NLRA has followed a course similar to its decisions regarding graduate students. Until the 1974 Health Care Institution Amendments to the NLRA, the Board asserted jurisdiction over only a limited class of health care providers.48 However, the 1974 Amendments provided the Board with wide-ranging jurisdiction, including jurisdiction over non-profit hospitals.49

The first case involving the status of house staff arose in the context of a non-profit hospital. In Cedars-Sinai Medical Center,50 a group of house staff sought certification as "employees" under the NLRA. The Board denied certification in an opinion that echoed Stanford. Though there are clear differences between graduate

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44 "American higher education was being transformed even as the Board's 'traditional' approach to graduate student unionization developed. . . . [A] big corporation has replaced the once self-centered company of scholars." Id. at 497 (Liebman & Walsh, Members, dissenting) (quoting JACQUES BARZUN, THE AMERICAN UNIVERSITY: HOW IT RUNS, WHERE IT IS GOING 3 (1968)).

45 Id. at 497–98 (noting that universities are becoming much more dependent upon graduate students to perform the functions of tenured faculty).

46 Id. at 496.

47 "House staff" as used in this Note includes medical interns, residents, and fellows who are working at a hospital in furtherance of full medical licensure, certifications in specialties, and certifications in sub-specialties, respectively.

48 See 1 THE DEVELOPING LABOR LAW, supra note 4, at 69 (stating that generally, prior to the Amendments, the Board only had jurisdiction over proprietary hospitals and nursing homes that otherwise met its jurisdictional standards).

49 29 U.S.C. § 152(14) (2006) (defining "health care institution" to include "any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm or aged person").

students and house staff that arguably bring house staff closer to "employee" status, the Board held that "the educational relationship that exists between the housestaff and Cedars-Sinai (a teaching hospital) . . . leads us to conclude . . . that the housestaff's relationship with Cedars-Sinai is an educational rather than an employment relationship."51

In reaching this conclusion regarding the house staff's primary purpose, the Board considered the following facts determinative: the purpose of members of the house staff was not to earn a living but rather to fulfill a requirement for the practice of medicine; the compensation was not related to the hours worked or type of services provided; the programs were designed to optimize the learning experience (as opposed to maximizing benefits to the hospital); there was no expectation of an ongoing employment relationship when house staff completed the program; and there were regular evaluations that were similar to grades and examinations.52 Thus, Cedars-Sinai applied the "primary purpose" test that the Board first announced in Stanford.

Another case involving house staff further clarified the "primary purpose" test.53 In St. Clare's Hospital & Health Center,54 the Board emphasized how policy considerations supplement the application of the "primary purpose" test. Similar to its underlying policy arguments in Brown University, the Board emphasized that collective bargaining was not suitable to the relationship between house staff and hospitals because equality of bargaining power is not desirable in educational settings. The Board elaborated as follows:

[T]he student-teacher relationship is an inherently inequalitarian one, it being assumed that the teacher, by virtue of superior knowledge and experience, is in a better position to determine the most appropriate course of instruction and method of proceeding. In this respect, the teacher and student have mutual interest in the advancement of the student's education. Such mutuality of goals rarely exists in the typical employment relationship, and goes far towards explaining why collective bargaining can flourish in one sphere while constituting an anathema in the other.

51 Id. at 253.
52 Id. at 253–54.
54 Id.
... [If collective bargaining were permitted] it would follow that many academic freedoms would become bargainable as wages, hours, or terms and conditions of employment. Once this occurs, Board involvement in matters of strictly academic concern is only a petition or an unfair labor practice charge away.\textsuperscript{55}

Additionally, the Board in \textit{St. Clare's Hospital} noted that the process the house staff was undergoing was a \textit{personal} one and therefore not amenable to \textit{collective} bargaining. A final notable aspect of the \textit{St. Clare's Hospital} decision is that the Board sought to create bright-line rules by dividing student workers into four categories: (1) students employed by a commercial employer for work unrelated to their studies; (2) students employed by their academic institution for work unrelated to their studies; (3) students employed by a commercial employer for work related to their studies; and (4) students employed by their academic institution for work related to their studies.\textsuperscript{56}

Students falling into the first group are employees under the Act.\textsuperscript{57} The opinion was not entirely clear on the status of students in the second group, instead focusing on whether such students would share a "community of interest" with those with whom they worked.\textsuperscript{58} However, the Board did cite examples in which such students would be employees under the Act.\textsuperscript{59} The Board held that students in the third and fourth categories were "primarily students" and, as such, were not covered by the NLRA.\textsuperscript{60} The Board concluded that house staff fall into the fourth category and therefore are not employees within the meaning of section 2(3).\textsuperscript{61}

While the clarity provided by the "four categories" analysis may seem minimal, it does provide an example of how, without actual rulemaking, the Board can make its decisions more consistent. Creating flexible categories of workers or some other type of adaptable, general rule may be extremely helpful in crafting a solution to the overarching issue of who is an employee under the NLRA.\textsuperscript{62}

\begin{footnotesize}
\begin{itemize}
\item[55] Id. at 1002–03.
\item[56] Id. at 1000–02.
\item[57] Id. at 1001.
\item[58] Id.
\item[59] E.g., id. at 1001 n.18 (citing Benzschawel, 210 N.L.R.B. 349, (1974)).
\item[60] Id. at 1001–02
\item[61] Id. at 1002–03.
\item[62] See infra Part III for how bright-line guidelines contribute to the strength of the new test proposed by this Note.
\end{itemize}
\end{footnotesize}
For twenty-three years, the Board consistently held that house staff did not fall within the ambit of the NLRA and as such did not have collective bargaining rights. However, in a dramatic reversal in 1999, the Board applied the “function” test—involving common law agency principles—to a case involving house staff. In Boston Medical Center Corp., the Board held that house staff are “employees,” and, thus, hospitals are required to engage in collective bargaining should the house staff so desire. As discussed previously, the Board applied the “function” test to graduate students one year later in New York University. In applying the “function” test in Boston Medical Center, the Board found the following facts dispositive: the house staff are compensated for their services and are not eligible for a student tax exemption; receive fringe benefits; spend 80 percent of their time engaged in direct patient care; and are unlike those in a traditional academic setting. The “function” test is still good law with regard to house staff; thus, currently, house staff are “employees” entitled to all rights afforded by the NLRA, including collective bargaining.

II. THE “PRIMARY PURPOSE” AND “FUNCTION” TESTS ARE INADEQUATE

Both tests employed by the Board have significant shortcomings—notably, on their faces, both fail to take into account policy considerations. Policy considerations are important in light of the critical effects unionization can have on both employers and employees. Congress recognized that in certain instances such effects are undesirable and explicitly excluded certain employees.

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63 Robert A. Epstein, Note, Breaking Down the Ivory Tower Sweatshops: Graduate Student Assistants and Their Elusive Search for Employee Status on the Private University Campus, 20 St. John's J. Legal Commentary 157, 164 (2005)
64 See supra Part I.B for a description of the “function” test.
66 Id. at 168; see also National Labor Relations Act § 9, 29 U.S.C. § 159 (2006) (providing information regarding election procedures); 1 The Developing Labor Law, supra note 4, at 537–635 (providing an overview of representation proceedings and elections).
68 This analysis may no longer be valid in light of Mayo Found. for Med. Educ. & Research v. United States, 503 F. Supp. 2d 1164 (D. Minn. 2007) (holding invalid an IRS regulation that barred any person working over forty hours per week from qualifying for a student tax exemption, thus implicitly recognizing that house staff are eligible for student tax exemption).
69 330 N.L.R.B. at 160–61 ("[H]ouse staff do not pay tuition or student fees. They do not take typical examinations . . . nor do they receive grades . . . ." (footnote omitted)).
70 For instance, unions often promote contractual provisions that disfavor certain groups of employees, make it impossible for employees to negotiate on an individual basis, and in non-Right to Work states, impose mandatory dues.
from the NLRA for policy reasons. Likewise, the Supreme Court has recognized that providing coverage for certain workers would have severe effects and therefore has upheld Board decisions that certain workers, though not explicitly excluded in the Act’s language, are not "employees." Finally, as a practical matter, policy is appropriate to consider in making the status determination because the definition provided in section 2(3) is so ambiguous.

Neither the "primary purpose" test nor the "function" test incorporates policy considerations. While the actual application of the "primary purpose" test often shows considerable incorporation of policy concerns, the test itself does not require this. Furthermore, both tests have weaknesses beyond failing to consider policy.

A. The Shortcomings of the "Primary Purpose" Test

The "primary purpose" test is inadequate in several other respects. First, as a practical matter, there are situations where it is difficult to determine a given worker's primary purpose. While this problem is somewhat remedied by resorting to consideration of an objective primary purpose—i.e., what a reasonable person in the worker’s situation would view as her primary purpose—the difficulty does not end here. What if two purposes are equally important? This very well may be the case with the student-athlete. The student-athlete has an arguably economic purpose—to enhance his eventual value to a professional sports team and to receive the benefits of his athletic

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71 See National Labor Relations Act, 29 U.S.C. § 152(2) (2006) (persons working for non-employers as defined in this section are not covered by the Act, for instance, workers employed by the government); id. § 152(3) (persons specifically exempted from definition of employee as defined in this section are not covered by the Act, for instance, workers who fit the statutory definition of "supervisors").


74 See, e.g., Brown Univ., 342 N.L.R.B. 483, 491 (2004) (discussing, within the application of the "primary purpose" test, the policy implications of giving graduate students the right to engage in collective bargaining).

scholarship—and an equally important educational purpose—to attend classes at his university. This analysis highlights another deficiency of the “primary purpose” test—namely, when is a purpose an economic one? Most situations are clear in that a worker is receiving money, but the student-athlete scenario is not nearly as straightforward. While the Board’s decisions understandably indicate that a scholarship is not enough to make a student’s primary purpose economic, the decisions do not indicate the result if the student’s primary purpose in attending an institution is to play sports with the goal of making himself attractive to a professional team and thus a recipient of a considerable economic benefit.\footnote{Perhaps under this analysis, most students at a university have a primary purpose that is economic—a purpose to increase their economic value in the marketplace.}

A second inadequacy of the “primary purpose” test is that it ignores the instructions the Supreme Court gave in \textit{NLRB v. Town \& Country Electric, Inc.}\footnote{516 U.S. 85 (1995).} There, the Court suggested that in instances where Congress has not explicitly provided a definition of the term employee, the common-law agency considerations embodied in the “function” test\footnote{That is, whether the worker performs services under the control or right of control of the employer in exchange for compensation.} are relevant to the status determination.\footnote{516 U.S. at 94.} The Court, nonetheless, recognized that “when reviewing [an administrative agency’s] interpretation of the term ‘employee’ . . . we have repeatedly said that, ‘[s]ince the task of defining the term “employee” is one that “has been assigned primarily to [the administrative agency]” . . . the [administrative agency’s] construction of that term is entitled to considerable deference . . . .’”\footnote{Id. (second brackets in original) (last ellipses in original) (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891 (1984)).}

Thus, though the Court recognizes that the Board is quite within its power to create a definition that is not identical to the common-law definition, it instructs that the Board’s definition should include some consideration of common-law agency principles. The “primary purpose” test does not incorporate these principles, and for this reason, as well as the practical difficulties mentioned above, it is not an ideal test for determining whether a person is an employee under the NLRA.

\textbf{B. The Shortcomings of the “Function” Test}

While the “function” test follows the Supreme Court’s suggestion in \textit{Town \& Country Electric, Inc.}, it does so blindly without...
consideration of the qualifications the Court placed on using the common-law definition of employee. Thus, the resulting test is far too narrow and formalistic.

In addition to its failure to incorporate policy considerations, the restrictive “function” test leaves no room for consideration of the legislative history of the Act. It is a fundamental rule that “a reviewing court should not confine itself to examining a particular statutory provision in isolation.” Use of legislative history is particularly appropriate where, as here, the language of the statute is ambiguous. The Board has recognized the need to ensure that its interpretations of the NLRA are consistent with Congress’s purpose in enactment: “the Board has the discretion to determine whether it would effectuate national labor policy to extend collective-bargaining rights to . . . [any given] category of employees.”

Such discretion is also recognized in the Administrative Procedure Act, which provides for judicial review of agency decisions under the deferential “arbitrary and capricious” standard. Furthermore, the Supreme Court has endorsed the view that it is appropriate for an administrative agency to analyze the underlying principles of the Act the agency is enforcing. For instance, in *NLRB v. Bell Aerospace Co.*, the Court upheld the Board’s refusal to certify managerial employees as an appropriate bargaining unit even though section 2(3) does not explicitly exclude the group from coverage under the NLRA. In so holding, the Court relied extensively on the legislative history of the Act in determining that the purpose underlying the Act would not be served by giving managerial employees the right to engage in collective bargaining.

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81 Id.
82 See *supra* notes 70–73 and accompanying text (discussing the negative consequences of not considering policy in the status determination).
88 Id. at 289.
89 Id. at 288–89 n.16 ("The rationale for this Board policy [of excluding managerial
Thus, in determining whether any given worker is an "employee," Congress’s purpose for enacting the NLRA is relevant. This purpose has been described several ways. Some commentary posits that the underlying purpose is "to strike a balance between the conflicting and often hostile interests of [the parties]." Others claim the underlying purpose is to "redress the "inequality of bargaining power" between employees and employers and permit wage earners to secure adequate compensation and [working] conditions." The Board should exercise great caution when granting "employee" status to a category of workers where such a grant does not serve these purposes.

Since the "function" test does not foster such caution, it results in an over-inclusion problem. That is, under the "function" test, groups whom the Board, often with court approval, has ruled are not "employees" would be covered by the NLRA. For instance, under a pure common-law analysis that "[an employment] relationship exists when a servant performs services for another, under the other’s control or right of control, and in return for payment," workers in management positions would be "employees." However, the Supreme Court held that managerial employees are not within the meaning of Section 2(3). Likewise, under the "function" test, so-called "confidential employees," whom Board decisions have excluded from the Act, would have a right to engage in collective bargaining.

A final shortcoming of the "function" test is that it is too formalistic, permitting employers to circumvent the underlying purpose of the Act. For instance, regardless of the actual nature of an employer’s relationship with a worker, the employer can structure the relationship to give the worker a status, i.e., that of an independent contractor, that excludes the worker from the Act’s protections.

employees from the Act . . . seems to be the reasonable belief that Congress intended to exclude . . . [managerial employees] on the theory that they were the one[s] from whom the workers needed protection." (last alteration in original)).

94 See B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956) ("[T]he Board has consistently excluded from bargaining units as confidential employees persons who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations.").
Therefore, workers who were intended to have the right to engage in collective bargaining may be denied this right by employers who take advantage of the formalism of the "function" test. For all of these reasons, the "function" test alone is not sufficient for determining who is an employee under the NLRA.

C. The Shortcomings of Tests Used in Other Employment Statutes

In addition to the "primary purpose" and "function" tests, courts and administrative agencies use two other tests with some regularity in determining whether a worker is an employee under various other federal labor and employment statutes. As with the Board's status determinations, other agencies have not consistently applied the same status test to their respective statutes.

1. The "Economic Reality" Test

The "economic reality" test requires an adjudicator to examine the totality of circumstances and determine "whether, as a matter of economic reality, the individuals "are dependent upon the business to which they render service." While this test's "totality of circumstances" language makes it broad enough to permit policy and legislative history considerations, it has several weaknesses.

There are several practical difficulties with implementing this test. As under the "primary purpose" test, whether a worker is dependent upon a business is a difficult determination to make even from an objective standpoint, and is virtually impossible to make from a subjective standpoint. Agencies and courts have embraced the following six factors for consideration in implementation of the test: (1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service

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95 See infra Part V.A for a discussion of which tests are used in making the status determination for various statutes.
96 See infra Part V.A for a discussion of which statutes are subjected to multiple tests for the status determination.
98 Application to the NLRA may be especially problematic in light of the argument that the Taft-Hartley Amendments to the NLRA rejected the application of the "economic reality" test to the NLRA. See NLRB v. United Ins. Co. of Am., 390 U.S. 254, 256 (1968); see also H.R. REP. NO. 80-245, at 18 (1947) ("[T]he Board expanded the definition of the term 'employee' beyond anything that it ever had included before . . . .").
rendered requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the service rendered is an integral part of the alleged employer’s business. However, an analysis of these factors is time-consuming and often produces conflicting results. Accordingly, the test, in its current form, is too cumbersome and unpredictable to use in defining employee for purposes of the NLRA.

2. The “Hybrid” Test

The “hybrid” test combines elements of both the “function” test and the “economic reality” test. It calls for a court to consider the economic realities of the relationship between the employer and the worker, as well as “the extent of the employer’s right to control the ‘means and manner’ of the worker’s performance.”

In practice, the application of the test suffers from the same uncertainties inherent in the “economic reality” test. Additionally, some courts have criticized the test in that there is “little discernible difference between the hybrid test and the common law agency test.” Thus, the test may suffer from all the deficiencies previously noted: the narrow analysis does not leave room for policy and legislative history considerations, and the test is highly formalistic, enabling an employer to circumvent the protections of the Act. For these reasons, the “hybrid” test is not ideal for determining who is an employee under the NLRA.

99 See Martin, 949 F.2d at 1293.

100 See, e.g., Darren M. Creasy, Note, A Union of Formalism and Flexibility: Allowing Employers to Set Their Own Liability Under Federal Employment Discrimination Laws, 44 W&M. & MARY L. REV. 1453, 1471 (2003) (“The strongest criticism of the economic realities test, however, is that it necessitates an extensive inquiry involving numerous factors, resulting in a time-consuming investigation that wastes judicial resources and produces inconsistent results.” (citing William D. Frumkin et al., Benefits Litigation: Spotting ERISA Issues in General Employment Disputes and the Impact of Recent Supreme Court Decisions, 29 ANN. INST. ON EMP. L. 881, 910 (2000))).


102 Spirides v. Reinhardt, 613 F.2d 826, 831 (D.C. Cir. 1979) (applying the “hybrid” test to a Title VII claim).

103 See supra Part II.C.1 for a discussion of the intrinsic uncertainties of the “economic realities” test.

104 Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993) (applying “function” test over “hybrid” test to a claim arising under the ADEA).

105 See supra notes 70-83 and accompanying text for a discussion of why these considerations need to be included in any NLRA status determination.
III. PROPOSAL FOR THE "TRIFECTA" TEST

An ideal status determination test will incorporate the strengths of the two tests the NLRB already utilizes while addressing the weaknesses of those tests. Thus, a test that incorporates common-law agency principles as required by *Town & Country Electric, Inc.*, while preserving a modified form of the "primary purpose" test, and considers policy and legislative history would be ideal. Unfortunately, such a complex test would likely be subject to manipulation and thus would not offer the consistency that Board decisions in this area so desperately need. However, infusing such a test with some bright-line guides would likely improve consistency without sacrificing any of the desired elements.

The result is the "trifecta" test which requires an adjudicator to undertake three separate analyses. First, it must determine whether the worker's objective primary purpose is economic. This analysis will be modified from that which was undertaken in *Brown University* so as to address the shortcomings identified.106 In its modified form, an economic purpose will exist only in situations where the most sought after benefit is money; an economic purpose will not exist, for example, where a person is primarily seeking to enhance his economic value in the marketplace. As this distinction is often difficult to make, the adjudicator will consider, when necessary, the objective "look and feel" of the relationship, including how permanent the employment situation is, the existence of fringe benefits, and any other relevant factors.107 The permanence of the relationship is relevant because this may be indicative of the worker's primary purpose.108 However, the adjudicator must bear in mind that this will not always be the case—for instance, a person who works for a temporary employment agency and therefore has no ongoing relationship with any of her "user-employers" very well may have a primarily economic purpose.109 In addition, the extent to which the worker is provided with fringe benefits will also contribute to the first prong's "look and feel" analysis.110

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106 See *supra* Part II.A for a discussion of the shortcomings of the "primary purpose" test.
107 Such factors may include the extent of the correlation between the work performed and the compensation received, and the IRS's treatment of the money earned.
108 For example, a law student working as a clerk for a law firm while he is obtaining his degree likely has a primary purpose other than his hourly compensation, i.e., experience.
109 See, e.g., *H.S. Care L.L.C.*, 343 N.L.R.B. 659 (2004) (holding that employees employed solely by a user-employer and employees employed jointly by the user-employer and a temporary agency were not an appropriate bargaining unit, but not indicating that the employees of the temporary agency were ineligible for the protections of the NLRA as a separate unit).
110 See *Brown Univ.*, 342 N.L.R.B. 483, 486 (2004) (reasoning that the fact that graduate
The second analysis will require the adjudicator to determine whether the person fits the common-law definition of employee—i.e., whether the person works subject to the control or right of control of the employer in exchange for compensation. The final analysis requires the adjudicator to consider the policy implications and the legislative history support—that is, whether or not the consequences of granting "employee" status are favorable from a policy standpoint, and whether the consequences serve the underlying purpose of the NLRA.

The "trifecta" test will be made less arbitrary by requiring an adjudicator to hold that a person is not an "employee" if none of the three prongs favors such a finding. Likewise, the adjudicator must hold that the person is an "employee" where all three prongs favor a finding of "employee" status. If two of the three prongs favor finding "employee" status, then the person challenging the status must show by clear and convincing evidence that the one prong against such status is strong enough to outweigh the other two prongs. Similarly, where two of the three prongs disfavor a finding of "employee" status, the clear and convincing evidence burden is on the person seeking such status. Thus, the "trifecta" test incorporates all the relevant considerations without sacrificing the consistency that would accompany a more straightforward test.

IV. APPLICATION OF THE "TRIFECTA" TEST

Application of the "trifecta" test to typical graduate students and house staff will result in a finding that only house staff are employees for purposes of the NLRA. A contrary outcome will only occur where the relationship between the graduate student or medical resident and the educational employer is substantially different than the typical relationship. Thus, the test enables the Board to continue to regulate through ad hoc adjudication, but fosters the consistency that is found where agencies engage in rulemaking.111

students do not receive "any benefits, such as vacation and sick leave, retirement or health insurance" is relevant to determining that the students are not "employees"); see also Boston Med. Ctr. Corp., 330 N.L.R.B. 152, 160 (1999) (reasoning that the fact that house staff "receive fringe benefits and other emoluments reflective of employee status" is relevant to determining that the house staff are "employees").

111 In general, the Board has not engaged in the rulemaking that some other administrative agencies have, but rather, like the courts, has policed through ad hoc adjudication. While the law clearly permits an agency to freely choose between rulemaking and adjudication, SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) ("[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency."), there are certain benefits of rule-making. A primary benefit of creating
A. Generally, Graduate Students Are Not "Employees"

While prongs one and two of the test could be disposed of by reference to Brown University and New York University, respectively, some further discussion is warranted. Under the "purpose" prong of the test, the typical graduate student performing work for his university while pursuing a degree is not an employee for purposes of the Act because his primary purpose is educational. This primary purpose is evidenced by the fact that graduate students receive academic credit for their work. Furthermore, neither the university nor the student expects the employment situation to be permanent—there is a clear point of termination of the relationship: the point at which the student receives his degree. Other characteristics of the relationship between a university and a typical graduate student demonstrate that the objective "look and feel" of the relationship is not that of an employer-employee relationship. For instance, students usually do not receive fringe benefits, students are eligible for student tax exemptions, and usually there is no correlation between the work performed and compensation received. Thus, the first prong disfavors a finding that graduate students are employees for purposes of the Act. However, the first prong does not show by clear and convincing evidence that the typical graduate student is not an "employee." Therefore, consideration of the other prongs is required.

The second prong, which considers whether the worker is a common-law employee, is relatively easy to satisfy and, therefore, is satisfied by the typical graduate student. Clearly there will be situations where this prong is not satisfied—for instance, if the student is working relatively independently or if the student is working purely for academic credit or tuition off-set as opposed to "compensation," as required at common law. As with the first prong, however, the showing under this prong with regard to the typical

a rule of general application is that it often results in more consistent results. See, e.g., David L. Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 929–41 (1965).

112 As stated above, under the test, one prong may be dispositive where the party shows by clear and convincing evidence that it is strong enough to outweigh the other two prongs. The first prong would constitute clear and convincing evidence of "employee" status (and thus render the other prongs irrelevant) in a situation where a person is being compensated for working in a position that holds little or no opportunity for promotion, and the person is also lacking opportunity for further training. This unusual situation may be met by tenured university faculty who do have the required training or expertise for administrative positions.

113 See New York Univ., 332 N.L.R.B. 1205, 1208 n.10 (2000) (noting that certain NYU graduate students who perform research that is entirely for their own work, as opposed to being for a faculty member, are not "employees").
graduate student is not strong enough to meet the clear and convincing evidence threshold such that the other two prongs are irrelevant.1

Thus, in the case of the typical graduate student, the third prong, which considers policy implications and legislative history support, is dispositive as to whether the student is an employee for purposes of the NLRA. In light of the consequences of giving students "employee" status, the third prong militates in favor of not providing graduate students with the protections of the NLRA.

From a policy standpoint, there are serious consequences for giving graduate students the right to engage in collective bargaining. The Board recognized such consequences in Brown University. There, the Board concluded that since the students' and the universities' goals are not adverse (in fact, there is a mutual goal of educational achievement), the main purpose of collective bargaining, attaining equal bargaining power, was not necessary.115 Furthermore, equal bargaining power would improperly infringe on academic freedom116 in that it would permit students to bargain regarding the requirements to obtain a degree. Finally, since the academic experience is a largely personal one, it is not well-suited for collective bargaining. Thus, policy considerations favor finding that graduate students are not "employees."

Additionally, granting graduate students rights under the NLRA does not serve the underlying purposes of the Act. There is no indication in the legislative history that Congress intended the definition of "employee" to encompass all workers who are not explicitly excluded by the language of the Act.117 Rather, the Act covers only those situations where affording a particular class of workers the protections of the Act will serve the Act's underlying purpose.118 The objectives of the Act, as evidenced by the legislative history, are not served by extending coverage to graduate students—

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114 The second prong would constitute clear and convincing evidence of "employee" status in a situation where the only goal of the employer is to exploit the worker's work product and the only goal of the employee is to receive compensation for his work; this situation may be met when a law student with no hospitality or management training works part-time at a restaurant as a server.


116 Id.

117 See Stephen L. Ukeiley, Graduate Assistants at the Bargaining Table, But for How Long?, 21 Hofstra Lab. & Emp. L.J. 643, 645 n.22 (2004) ("To illustrate the baselessness of [a position to the contrary] consider the following: Does Congress's omission of dog walkers on the list of excluded employees require their recognition as employees under the Act? Of course not.").

118 See supra notes 83-84 and accompanying text for importance of legislative history in statutory interpretation. See supra notes 90-91 and accompanying text (discussing commentary regarding the purposes of the NLRA, to address divergent interests and unequal bargaining).
the main interests of the university and the students are not adverse, and this is not a situation where equality of bargaining power is desirable.

Thus, both public policy and the legislative history of the NLRA favor a finding that graduate students are not "employees." As such, the third (and in this instance, decisive) prong dictates that graduate students are not "employees."

**B. Generally, House Staff Are "Employees"**

While prong one, considering the worker's primary purpose, and prong two, considering whether the worker is a common-law employee, could be disposed of by reference to Cedars-Sinai Medical Center and Boston Medical Center Corp., respectively, some further discussion is warranted. The difficulties inherent in the first prong of the test are highlighted in the circumstances of a typical member of a hospital's house staff. House staff receive considerable money as remuneration, but are also enhancing their future economic value in the marketplace. Thus, the "look and feel" analysis is vital to making a determination under the first prong.

The "look and feel" of the relationship somewhat resembles that of an employer-employee relationship. However, in general, characteristics that are atypical of an employment relationship are more prevalent. For instance, a member of the house staff rarely has an expectation of ongoing employment. Furthermore, the aspects of the relationship relating to education of the house staff do not "look and feel" like an employer-employee relationship: the house staff are all seeking some type of certification; in general, compensation is not related to the hours worked or type of services provided; the programs are generally designed to optimize the learning experience.

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121 See, e.g., Boston Med. Ctr. Corp., 330 N.L.R.B. at 160 ("[House staff] receive fringe benefits and other emoluments reflective of employment status."); see also The Ohio State University Medical Center Benefits and Stipends, http://medicine.osu.edu/gme/benefits (last visited Mar. 20, 2008) (stating that residents and fellows at Ohio State Medical Center receive many benefits including health insurance, sick leave, parental leave, vacation, liability insurance, workers' compensation, and retirement benefits).
122 See, e.g., Cedars-Sinai Med. Ctr., 223 N.L.R.B. at 253 ("[T]he average stay of [house staff] at Cedars-Sinai is less than two years. . . . Only a few interns, residents, or clinical fellows can expect to, or do, remain to establish an employment relationship with Cedars-Sinai.").
for the house staff (as opposed to maximizing benefits to the hospital), and there are regular evaluations that are similar to grades and examinations. A recent court ruling providing that house staff may be eligible for student tax exemptions is a further example of how the relationship is not a typical employment relationship. Finally, the Board’s evaluation of house staff under the “primary purpose” test in Cedars-Sinai cannot be ignored—based on the above features of the relationship between house staff and hospitals, the Board was correct when it concluded “the housestaff’s relationship with [a hospital] is an educational rather than an employment relationship.”

The analysis under prong two is much more straightforward. A worker is a common-law employee if he performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment. While, technically, house staff are admitted to a teaching hospital, they also enter into what resembles an employment contract. Such contracts, as well as descriptions of the daily routine of a house staff member, evidence the hospital’s actual control over the house staff. Thus, house staff are clearly common-law employees, and, therefore, prong two favors a finding that they are covered by the NLRA.

Since prongs one and two are not in accord and neither is so compelling as to provide clear and convincing evidence of the status of house staff, prong three is decisive as to whether house staff are entitled to the rights provided for by the Act. The policy portion of the analysis considers whether the consequences of providing house staff with the protections of the Act, particularly the right to engage in

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124 See Cedars-Sinai Med. Ctr., 223 N.L.R.B. at 253 (“The [house staff] programs themselves were designed not for the purpose of meeting the hospital’s staffing requirements, but rather to allow the student to develop . . . skills necessary to the practice of medicine . . . .”); see also Boston Med. Ctr. Corp., 330 N.L.R.B. at 176 (dissenting opinion) (“[The house staff] assignments address the resident’s educational needs, . . . and thus are quite the opposite of employer assignments, which . . . focus[ ] on an employee’s strengths to achieve maximum output.”).


127 223 N.L.R.B. at 253.


129 See, e.g., Limited Staff Agreement (2007-2008 Academic Year), http://medicine.osu.edu/sitetool/sites/pdfs/medicinegmepublic/Limited_Staff_Agreement.pdf (last visited Mar. 20, 2008) (the agreement that residents and fellows at the Ohio State University Medical Center hospital must sign).


131 See supra notes 112, 114 (discussing what would constitute clear and convincing evidence for each of the first two prongs).
collective bargaining, are desirable. Providing house staff with these protections is not nearly as problematic as making such provisions for graduate students. For instance, while teaching hospitals clearly share a goal with the members of house staff—education of the house staff—the hospitals are certainly more focused on patient care and running a successful hospital. In light of this, collective bargaining may be necessary to achieve an equality of bargaining power in the numerous instances where the educational goals of the house staff conflict with the economic goal of hospital administration to run a profitable operation.\(^\text{132}\)

Additionally, the concern that collective bargaining would improperly impose on the freedom of hospitals to run their educational programs is minimal, because typically house staff spend more time engaging in work that is performed by the “regular” medical employees of the hospital than in educational pursuits.\(^\text{133}\) Therefore, the majority of the bargaining would pertain to economic issues rather than educational issues, leaving the hospital relatively free to set the parameters for the purely educational aspects of the house staff’s training. At the very least, the need to promote equality of bargaining power due to the prevalence of economic issues outweighs the need to preserve the hospital’s right to completely control the education of persons who have already completed medical school. Thus, providing house staff with the right to engage in collective bargaining is not problematic from a policy standpoint.

From a legislative history standpoint, the other component of prong three, giving house staff the rights provided for in the Act serves Congress’s underlying purpose in enacting the NLRA. As noted above, there are significant conflicting interests between house staff and their hospitals,\(^\text{134}\) and therefore the NLRA should be used to strike a balance between these interests. Furthermore, equality of bargaining power is desirable where, as here, the primary conflicting interests are wages and working conditions—in other words, the NLRA should cover situations where it is necessary to “redress the inequality of bargaining power” between employees and employers.

\(^\text{132}\) For instance, an intern will likely receive more educational benefit if he is able to spend more time observing each patient or doing each procedure, but the hospital will be more successful if the intern observes patients and does procedures as quickly and efficiently as possible.

\(^\text{133}\) Boston Med. Ctr. Corp., 330 N.L.R.B. at 160 (“[H]ouse staff spend up to 80 percent of their time at the Hospital engaged in direct patient care [as opposed to attending didactic lectures that more resemble the academic setting of a classroom].”).

\(^\text{134}\) Particularly the interest of the house staff in receiving as much experience and education as possible and the interest of the hospital in running an efficient and profitable operation.
and permit wage earners to secure adequate compensation and [working] conditions."

Both policy and legislative history favor providing house staff with the protections of the Act—therefore, the third, and decisive, prong dictates that house staff are "employees" and therefore have a right to engage in collective bargaining.

V. OTHER EMPLOYMENT STATUTES’ DEFINITIONS OF "EMPLOYEE"

A. Tests Currently Used Under Other Employment Statutes

Many of the federal labor and employment statutes suffer from the same problem that the NLRA suffers from—that is, the definitions of "employee" contained in the statutes are circular and vague and thus provide little guidance as to who is covered by the various Acts. Furthermore, administrative decisions and case law dealing with status determinations under several of the federal employment statutes often suffer from the same inconsistencies as NLRB decisions—at times, courts and agencies are inconsistent in what test they use to determine who is an employee under any given statute. For instance, the circuits are split regarding the proper test to make the status determination under the Age Discrimination in Employment Act—the First, Second, Sixth, Seventh, and Ninth Circuits use the "function" test, while the Third, Fourth, Fifth, and Tenth Circuits use the "hybrid" test. The circuits are also split regarding the appropriate test for Title VII status determinations—the Fourth, Seventh, Eighth, Tenth, and Eleventh Circuits use the "function" test, the Sixth and Ninth Circuits use the "economic reality" test, and the Fifth Circuit uses the "hybrid" test.

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135 Brown, supra note 91, at 890 (alteration in original) (quoting Patrick M. Kuhlmann, Comment, The Enigma of NLRA Section 2(11): The Supervisory Exclusion and the Case of the Charge Nurse, 2000 Wis. L. Rev. 157, 161). "Working conditions" includes the opportunity for learning on the job.

136 See, e.g., Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 323 (1992) ("ERISA's nominal definition of 'employee' . . . is completely circular and explains nothing."); see also supra note 7 (providing other examples of the vague definitions of employee under some of the statutes).

137 See, e.g., Vakharia v. Swedish Covenant Hosp., 190 F.3d 799, 805 (7th Cir. 1999); Barnhart v. New York Life Ins. Co., 141 F.3d 1310, 1313 (9th Cir. 1998); Speen v. Crown Clothing Corp., 102 F.3d 625, 631 (1st Cir. 1996); Simpson v. Ernst & Young, 100 F.3d 436, 443 (6th Cir. 1996); Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993).


139 See, e.g., Schwieger v. Farm Bureau Ins. Co. of Nebraska, 207 F.3d 480, 484 (8th Cir. 1999).
On the other hand, some tests are applied consistently to the same statute, but there is no clear justification for why different tests are used for different statutes. For instance, cases arising under the Fair Labor Standards Act are judged under the "economic reality" test, as are cases arising under the Family Medical Leave Act. Agencies and courts making status determinations under the Employee Retirement Income Security Act and the Americans with Disabilities Act, on the other hand, use the "function" test. The inconsistencies in determining which workers are "employees" both within the same statute and among the various employment statutes raises the issue of whether, ideally, there should be one definition of "employee" that applies to all federal employment statutes. While in-depth analysis of this question is outside the scope of this Note, a brief consideration of this question and whether the "trifecta" test provides a solution is appropriate.

B. The Advantages and Disadvantages of One Common Definition of "Employee"

In 1994, the Dunlop Commission suggested that "there is no need for every federal employment and labor statute to have its own definition of employee." However, the authors failed to provide any

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2000) (holding that the common law test would prevail, although it referenced economic realities); Vakharia, 190 F.3d at 805; Zinn v. McKune, 143 F.3d 1353, 1357 (10th Cir. 1998); Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 259-60 (4th Cir. 1997); Cobb v. Sun Papers, Inc., 673 F.2d 337, 341 (11th Cir. 1982) (implementing the "common law test" despite referring to economic factors).


See Deal, 5 F.3d at 118-19.

In Nationwide Mutual Insurance Co. v. Darden, 503 U.S. 318 (1992), the Court reasoned that the FLSA "goes beyond its ERISA counterpart [in defining employee]," id. at 326, but did not provide persuasive reasoning as to why.

See, e.g., Tony and Susan Alamo Found. v. Secretary of Labor, 471 U.S. 290, 301 (1985); Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1440 (10th Cir. 1998).


Id. at 65.
support for their contention. There are certainly advantages to having one common definition of employee. For instance, a common definition would likely reduce litigation, 148 limit uncertainty among employers and employees as to whether the employees are entitled to statutory protections, and would eliminate the circuit splits that currently exist regarding what tests should be used to make the status determination within a single employment statute. 149

However, there are also significant disadvantages to having one common definition of employee. For instance, the statutes serve different purposes, and therefore different definitions may be necessary to achieve these purposes. 150 A common definition may be too inflexible and thus result in over-inclusion and under-inclusion problems. 151 Finally, to implement one common definition or test would require legislative action, as the courts seem unable to agree on this issue. Such action is often difficult to achieve; furthermore, it is particularly unlikely in light of the fact that Congress has not acted in the fifteen years since the Dunlop Commission recommended that "Congress adopt a single, coherent concept of employee and apply it across the board in employment and labor law." 152

C. Application of the "Trifecta" Test to Other Employment Statutes

Many of the identified limitations of having one common definition of "employee" would be negated by the third prong of the "trifecta" test, because this prong ensures flexibility and requires consideration of the underlying purpose of the employment statute at issue. Therefore, the "trifecta" test may be ideal for the task the

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148 As the law stands now, a worker could be an employee under one statute, but not an employee under another statute and therefore would have to bring multiple suits to determine what protections he is entitled to. See, e.g., Nationwide Mut. Ins. Co., 503 U.S. at 326 ("[The FLSA definition of employee], whose striking breadth we have previously noted, stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of agency law principles [used to determine employee status under ERISA].")

149 For instance, the split regarding what test to use for the Age Discrimination in Employment Act, supra notes 137–138, and the split regarding what test to use for Title VII, supra notes 126–28.

150 For instance, while it is not appropriate for graduate students to be considered employees for purposes of the NLRA, it may be desirable that they be considered employees for purposes of Title VII. See, e.g., Bakhtiar v. Lutz, 507 F.3d 1132 (8th Cir. 2007) (involving a Title VII claim brought by a graduate teaching assistant, in which the court did not even consider whether the student lacked standing on the basis that he was not an employee).

151 For instance, the legislature likely intended for "confidential" employees, see supra note 80 (providing definition), to have standing for purposes of most federal employment statutes, but not for purposes of the NLRA. Therefore, if "confidential" employees satisfy a common definition of "employee" there will be over-inclusion problems; whereas, if they do not satisfy the definition, there will be under-inclusion problems.

152 THE DUNLOP COMMISSION, supra note 146, at 65–66.
Dunlop Commission set forth for Congress. It could be the vehicle for realizing all the efficiency and other advantages of having a common definition while minimizing the pitfalls of applying a definition across the board to all federal labor and employment statutes.

CONCLUSION

Addressing the questionable status of graduate students and house staff under the NLRA necessitates addressing the larger issue of the definition of “employee” within the Act. Thus, the proposed solution, the “trifecta” test, solves two problems—it enables a definitive determination regarding the status of these two groups, and it provides a consistent framework for the Board to apply in making all status determinations. The proposed test incorporates the strengths of the tests the Board has used in the past, addresses the weaknesses of those tests, and is sufficiently flexible. Whether the “trifecta” test poses an additional solution by providing a single, uniform concept of “employee” for use in all federal labor and employment statutes is uncertain. In the meantime, hospitals should not expect to be free from the constraints of the Act, and universities should remain confident in their right to remain union-free.

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