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Under the National Labor Relations Act Have Been
Limited:**

The Case of *Brown University*

By Ellen Dannin

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Understanding How Employees' Rights to Organize Under the National Labor Relations Act Have Been Limited: The Case of *Brown University*

Ellen Dannin *

I. Introduction

Throughout the Bush Administration's tenure, the National Labor Relations Act (NLRA) and National Labor Relations Board (NLRB or Board) have been harshly criticized, respectively, for lacking the tools necessary to protect workers and for undermining existing worker protections. Indeed, at the extreme, some critics have advocated abandoning the Board and repealing the NLRA. Although the Bush appointees to the NLRB (the Bush Board) have been criticized justifiably for their assault on worker rights, the full nature of this assault has yet to be assessed.

The case that arguably best captures the Bush Board's disregard for the rule of law, as well as the public reaction thereto, is the 2004 *Brown University*¹ decision, which held that graduate student teaching and research assistants were not employees, and therefore not protected by the NLRA. There was – and continues to be – strong reaction to the decision. New York University, for example, took the position that it need no longer recognize its graduate student union,² despite a contradictory Board decision just a few years earlier. Unions strongly denounced the Board for taking away the right to organize.³ More recently, on April 18, 2008, Senator Ted Kennedy and Representative George Miller introduced the *Teaching and Research Assistant Collective Bargaining Rights Act*, H.R. 5838 and S. 289, because they felt it necessary to restore graduate student assistants' rights to union representation.⁴

Brown is a case whose meaning and impact are not well understood by the public, yet the case has important ramifications not only for other graduate students, but for all employees who seek to exercise their NLRA rights. *Brown* foreshadowed other cases in which the Board would ignore precedent and the policies underlying the NLRA. Thus, examining *Brown's* legitimacy and legacy is not a matter of mere historical interest. It offers the opportunity to assess how best

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¹ *Brown University*, 342 N.L.R.B. 483 (2004).

² Karen W. Arenson, *N.Y.U. Moves to Disband Graduate Students Union*, N.Y. TIMES June 17, 2005, at B2, available at http://www.nytimes.com/2005/06/17/education/17NYU.html?_r=1&oref=slogin; Steven Greenhouse & Karen W. Arenson, *Labor Board Says Graduate Students at Private Universities Have No Right to Unionize*, N.Y. TIMES July 16, 2004, at A14, available at <http://query.nytimes.com/gst/fullpage.html?res=940de4df153af935a25754c0a9629c8b63>.

³ Barbara McKenna, *AFT Denounces NLRB's Grad Employee Ruling*, AFT HIGHER EDUCATION, July 16, 2004, http://www.aft.org/higher_ed/news/2004/grademps_nlr.htm.

⁴ Press Release, H. Comm. On Educ. & Labor, Miller, Kennedy Introduce Bill to Restore Collective Bargaining Rights to Thousands of Working Graduate Assistants (Apr. 18, 2008), http://www.house.gov/apps/list/speech/edlabor_dem/re1041808.html.

to strengthen workers' rights to freedom of association, self-organization, mutual aid or support, and collective bargaining – rights Congress created seventy-three years ago through the NLRA.

II. The Brown University Decision

There is no more critical issue in labor and employment law than the definition of who is an employee. Each body of law's definition of employee is tailored to ensure that its purpose is promoted.⁵ Thus, deciding whether Brown's graduate students were employees, as defined by the NLRA, meant deciding whether they had a protected right to engage in freedom of association, self-organization, collective bargaining, and acts of mutual aid or protection.⁶

To secure those protections, the NLRA consciously protects employees as a class. Section 2(3) states: "employee *shall* include any employee, and *shall not* be limited to the employees of a particular employer."⁷ Congress considered class-based protection as so necessary it reinforced it in § 2(9):⁸ "The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, *regardless of whether the disputants stand in the proximate relation of employer and employee.*"⁹

Despite the clarity with which Congress spoke as to who is an employee and, thus, protected by the NLRA, the courts and the majority of the Bush Board have progressively narrowed that definition and, as a result, limited important employee rights and protections.¹⁰

A. The Procedural Posture of the Case

The Board issued *Brown University* on July 13, 2004, as a 3-2 decision from the full five-member Board. Normally, the Board sits as a three-member panel. Sitting as a five-member

⁵ The importance of the definition of employee to the success of workplace legislation is often not well understood or appreciated. For example, among the recommendations of the 1994 Dunlop Commission was: "Adopting a single definition of employee for all workplace laws based on the economic realities of the employment relationship." COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS 12 (1994) *available at* <http://www.dol.gov/sec/media/reports/dunlop/preface.htm>. Such a uniform definition would defeat the purpose of statutes such as the NLRA and the Fair Labor Standards Act.

⁶ National Labor Relations Act (NLRA) §§ 1, 2(3), 7, 29 U.S.C. § 151, 152(3), 157 (2008); *see also Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978).

⁷ NLRA § 2(3) (emphasis added).

⁸ Ellen Dannin, *Not a Limited, Confined, or Private Matter: Who is an Employee under the National Labor Relations Act*, 59 LAB. L.J. 5 (2008).

⁹ NLRA § 2(9) (emphasis added).

¹⁰ ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW - HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* (2006); JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Anne Marie Lofaso, *September Massacre: The Latest Battle in the War on Workers' Rights Under the National Labor Relations Act*, (May 13, 2008), (American Constitution Society Issue Brief) <http://www.acslaw.org/node/6664>; Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 MINN. L. REV. 265 (1978).

panel signals an important case and one that may overturn precedent. The *Brown* majority included Chairman Robert J. Battista and Members Peter C. Schaumber and Ronald Meisburg.¹¹ The dissent included Members Wilma B. Liebman and Dennis P. Walsh. Throughout the balance of the Bush Board's term, sitting as a five-member panel and this numerical split became common as the Bush Board overturned longstanding precedent.¹²

Before discussing the majority and dissenting decisions in *Brown*, it is necessary to understand the nature of the Board's authority in the case. Today, when Labor Law is no longer regarded as a basic law school course,¹³ when Industrial Relations and Labor Studies programs have been eliminated from many colleges and universities, when the labor beat has been dropped from all but a handful of newspapers, and when an ever smaller percentage of people have firsthand experience with unions, we have a citizenry less informed about workplace, labor, and union issues and law. Without a basic understanding of Board process and law, the most serious problems connected to *Brown* cannot be understood and, indeed, have yet to be fully discussed.

Briefly, then, Board cases can be divided into two basic categories: unfair labor practice cases and election cases. Their substance and procedure are controlled by different parts of the NLRA. Unfair labor practices are set out in § 8, and their procedure is controlled by § 10. Election cases are controlled by § 9. Unfair labor practice cases are the vehicle for prosecuting violations of NLRA rights, and their procedure is more similar to a criminal than a civil case.¹⁴ As with criminal cases, the NLRA does not create a private right of action for the person who files the charge. Rather, the NLRA creates a public right which is the NLRB's responsibility to enforce.¹⁵

Brown, however, was an election case. Election case procedure is more complex than that of unfair labor practices and less well understood by the public. The case begins with filing a petition for election in a Regional Office. Petitions request that specific job classifications –

¹¹ Ronald Meisburg is the current NLRB General Counsel, a position he assumed on January 4, 2006, after his term as recess-appointment Board member ended on December 8, 2004. He was replaced on the Board by Peter N. Kirsanow, who served in a recess appointment from January 4, 2006 to December 31, 2007.

¹² It is Board policy, by tradition, not to overrule precedent unless there are three votes to do so. Thus, although a unanimous three-member panel has the authority to overrule precedent, the Board usually does so only with a full five-member panel.

¹³ A 2002 survey by the Association of American Law Schools section on Labor and Employment Law found that many law schools offered no or few courses in these subjects. The main reason for not offering them was a view that there are no important public policy issues related to the role of work in our society.

¹⁴ When a charge is filed in a Regional Office, an agent is assigned to investigate the charge. If the Region decides there is reasonable cause to believe a violation of the NLRA has occurred, a complaint is issued, and the case is scheduled for trial before an Administrative Law Judge (ALJ). The NLRB's General Counsel prosecutes the case through an attorney in the Regional Office where the charge was filed. The ALJ's decision can be appealed to the Board by the losing party. Appeals from Board decisions are similar to federal civil cases in that they may be appealed to one of the federal Courts of Appeals by the losing party – either the NLRB, the Charging Party, or the Respondent. NLRA §10(f). Appeals may also be taken for a second reason by the NLRB's General Counsel. Board orders are not self-enforcing. As a result, in order to have an enforceable order, the NLRB must appeal the Court of Appeals and then potentially to the U.S. Supreme Court. NLRA §10(e).

¹⁵ First Annual Report of the National Labor Relations Board 23 (1936).

not specific people – be included or excluded from the bargaining unit.¹⁶ In roughly 90% of cases, the parties agree to an election, including the composition of the unit, and proceed to hold a secret-ballot election.¹⁷ The decision as to employee status in both unfair labor practice and election cases is fact-specific.¹⁸ In election case hearings, the NLRB plays a neutral role as factfinder. Election case hearings are conducted before a Regional Office employee, not before an ALJ, and the written decision is issued by the Regional Director. The NLRA does not provide for appeals of election cases to the federal court system.

This election case framework can be better understood by examining the procedure in *Brown*. The petition in *Brown* was filed by the United Automobile Workers to represent a bargaining unit of approximately 450 graduate students employed as teaching assistants, research assistants, and proctors. When, as in *Brown*, the employer refuses to agree to an election, a hearing is scheduled. The university took the position that its graduate students were not employees and that their duties and working conditions were “factually distinguishable” from a recent case that had found graduate students at New York University to be employees. The issue for the hearing, then, was whether the functions of the *Brown* graduate students – and only the *Brown* graduate students – were those of employees. In *Brown*, the Regional Director found that the teaching and research assistants and proctors were employees and directed that an election be held. On December 6, 2001, while the employer’s request for the Board to review the decision was pending, the election was held and the ballots were impounded.¹⁹ Unlike most requests for review, the Board granted the university’s petition.

On appeal, the university added a new claim: that the Board should overrule *NYU*, a case decided just four years earlier.²⁰ In *NYU*, the Board majority decided that graduate students should no longer be barred, as a class, from employee status.²¹ Instead, the normal election case analysis of job duties was to be undertaken to determine whether they were employees. Based on that fact-specific analysis, the Board held that New York University’s graduate students were employees with a protected right to join a union and engage in collective bargaining.

B. The Majority Decision

The majority’s statement of the issues in *Brown* forecast the outcome:

The case presents the issue of whether graduate student assistants who are admitted into, not hired by, a university, and for whom

¹⁶ Petition, Form NLRB-502, available at http://www.nlr.gov/nlr/shared_files/forms/nlrform502.pdf. The use of job classifications means that bargaining rights continue and are not lost when employees are hired or leave.

¹⁷ Elections were held pursuant to agreement of the parties: 89.0 % of the time in FY 2004 ; 91.1% of the time in FY 2005; 88.1% of the time in FY 2006; and 91.2% of the time in FY 2007. NLRB OFFICE OF GENERAL COUNSEL, SUMMARY OF OPERATIONS (2005-2007), http://www.nlr.gov/research/memos/general_council_memos.aspx.

¹⁸ Examples of the sorts of questions asked may be found in the NLRB HEARING OFFICER’S GUIDE, http://www.nlr.gov/Publications/Manuals/hearing_officers_guide.aspx (last visited July 25, 2008).

¹⁹ This process prevents delay in holding the election that might affect the employees’ support for the union.

²⁰ New York University, 332 N.L.R.B. 1205 (2000).

²¹ *Id.*

supervised teaching or research is an integral component of their academic development, must be treated as employees for purposes of collective bargaining under Section 2(3) of the Act. The Board in *NYU* concluded that graduate student assistants are employees under Section 2(3) of the Act and therefore are to be extended the right to engage in collective bargaining. That decision reversed more than 25 years of Board precedent. That precedent was never successfully challenged in court or in Congress. In our decision today, we return to the Board's pre-*NYU* precedent that graduate student assistants are not statutory employees.²²

The *Brown* majority decision is founded on three main points. First, the majority claimed that it was overturning *NYU*, a four-year-old case, in order to reinstate the Board's prior analysis, thus merely returning to a long tradition of cases that barred graduate students, as a class, from employee status and restoring doctrinal stability. However, as the dissent pointed out, the law as to employee status of graduate students prior to *NYU* did not create a blanket exclusion for graduate students. Rather, it excluded graduate students, not because they were students *per se*, but because the activities of the graduate students in question were those of students.²³

Second, the majority concluded that the graduate students' relationship with Brown University was educational, that an educational relationship precluded the existence of an economic relationship, and that the NLRA protected only economic relationships. The Board majority concluded that, unlike the graduate students in *NYU*, Brown graduate students were required to serve as teaching fellows or research assistants as part of their degree requirements and that money they received was a student stipend – not pay – because it had no relationship to whether they worked as teaching assistants or research assistants.

Imposing collective bargaining would have a deleterious impact on overall educational decisions by the Brown faculty and administration. . . . In addition, collective bargaining would intrude upon decisions over who, what, and where to teach or research – the principal prerogatives of an educational institution like Brown. Although these issues give the appearance of being terms and conditions of employment, all involve educational concerns and

²² *Brown*, 342 N.L.R.B at 483.

²³ *Id.* at 495. *But see* Gordon Lafer, *Graduate Student Unions: Organizing in a Changed Academic Economy*, 28 LAB. STUD. J. 25 (2003) (discussing the business model of universities and the role of graduate students as workers within that model); *cf. Brown*, at 493 n.1 (experience with graduate student collective bargaining beginning in 1969) The *Brown* dissent maintained:

After the 1980's, financial resources from governments became more difficult for universities to obtain. "[A]s financial support for colleges and universities lag behind escalating costs, campus administrators increasingly turn to ill-paid, overworked part- or full-time adjunct lecturers and graduate students to meet instructional needs." By December 2000, 23.3 percent of college instructors were graduate teaching assistants. *Id.* at 497.

decisions, which are based on different, and often individualized considerations.²⁴

Third, the majority stated repeatedly that its decision was made as a matter of policy. The decision, however, speaks in generalities and never specifies any NLRA policy, such as: promoting collective bargaining; safeguarding workers' full freedom of association, self-organization, and choice of representatives; acting for mutual aid or protection; achieving equality of bargaining power; protecting the right to strike; preventing business depressions; improving wage rates; increasing the purchasing power of wage earners; or stabilizing competitive wage rates and working conditions within and between industries.²⁵ Given that, in general, the Board is charged with promoting these policies, their absence from any decision, and especially a decision said to be based on policy, is striking. Moreover, in election cases, the Board is specifically charged to make its decision so as "to assure to employees the fullest freedom in exercising the rights guaranteed by this Act".²⁶ It is clear that this mandate was one the majority not only ignored, but violated the law in so doing, as explained in more detail in Sections 2 and 3 of Part III below.

Instead of making this decision in accordance with law, the majority purported to base its decision on the needs of educational institutions to be unhampered by the obligations of collective bargaining. This analysis jettisons at least one of the NLRA's stated policies and relies on no known legislative policy. Not only does the majority never explain which policies it relies on, it never explains why bargaining rights would harm the educational institution. The harm is assumed. For example, the majority states, "our decision turns on our fundamental belief that the imposition of collective bargaining on graduate students would improperly intrude into the educational process and would be inconsistent with the purposes and policies of the Act."²⁷

The majority repeatedly substitutes tautologies for analysis. According to the majority, "The dissent gives a few examples of collective-bargaining agreements in which there is assertedly no intrusion into the educational process. However, inasmuch as graduate student assistants are not statutory employees that is the end of the inquiry."²⁸ And "The dissent also faults us for acting in the absence of 'empirical evidence,' and for allegedly engaging in policymaking reserved to Congress. Once again, inasmuch as graduate student assistants are not statutory employees, that is the end of our inquiry."²⁹ It also stated:

Moreover, even if graduate student assistants are statutory employees, a proposition with which we disagree, it simply does not effectuate the national labor policy to accord them collective bargaining rights, because they are primarily students. . . . Thus,

²⁴ *Id.* at 490.

²⁵ NLRA §§ 1, 2(3), 7, 13.

²⁶ NLRA § 9(b).

²⁷ Brown, 342 N.L.R.B at 493.

²⁸ *Id.* at 492.

²⁹ *Id.* at 493.

assuming *arguendo* that the petitioned-for individuals are employees under Section 2(3), the Board is not compelled to include them in a bargaining unit if the Board determines it would not effectuate the purposes and policies of the Act to do so.³⁰

As these examples show, the majority repeatedly claims its decision is based on policy; however, the NLRA does not permit making an election decision based on policy in a vacuum. Section 9(b) requires that election decisions be based on the facts of employment in the petitioned-for bargaining unit and that the decision be one that promotes the policy of “assur[ing] to employees the fullest freedom in exercising the rights guaranteed by this Act.”³¹ The majority fails to comply with the requirement that it make a decision on the facts of the case before it and then obscures this failure by claiming it is making a policy decision. The majority specifies no policy, but it is clear that its decision was not based on the policy it was required to use – assuring “to employees the fullest freedom in exercising the rights guaranteed by this Act.” Furthermore, as discussed below, the NLRA and its legislative history reject using an economic relationship between a single employer and a single employee as defining who is an employee. The failings of the majority decision appear so clear that it might well have been overturned on appeal. However, as previously explained, the NLRA does not provide for appeals from election cases.

B. The Dissent

The dissent, in contrast, was a serious and reasoned discussion that addressed major defects in the majority’s decision. In the interest of brevity, only a few of the dissent’s points are included here. However, the full text of the dissent more fully demonstrates the problems of the majority decision.

In rejecting the majority’s positions, the dissent noted that, while doctrinal stability was important, changes in the way universities operated and employed graduate students had been explored in detail in *NYU*. The result supported applying the normal NLRA analysis to graduate students’ employee status, rather than automatically excluding them. The dissent also observed that changes in university organization and the way graduate students were used meant that their relationship could be economic and not just educational.³²

³⁰ *Id.* at 492.

³¹ In the past, the Board has made a policy decision in election cases. However, in those cases, the policy used to guide the decision was that set out in § 9(b): “to assure to employees the fullest freedom in exercising the rights guaranteed by this Act.” The *Brown* dissent made the point that § 2(3) does not give the Board the authority to exclude employees based on a policy that essentially finds certain employees unworthy of protection in the collective-bargaining process because the Board supposes that collective bargaining will not work for them. Nor can the Board base its decision on a “policy” that collective bargaining will not promote the employer’s interest. *See Brown*, 342 N.L.R.B at 500 (Liebman, dissenting).

³² *See Lafer, supra* note 27; *Symposium: Organizing Contingent Academics*, 6 WORKINGUSA 5 (2003); Nelson Lichtenstein, *Graduate Education Is a Seamless Web of Learning and Work, Not Class Warfare*, CHRONICLE OF HIGHER EDUCATION, Aug. 6, 2004, available at

Second, the dissent noted that the NLRA definition of employee as including “any employee” was sufficiently broad that it should encompass graduate students acting as employees. The majority rejected this argument and the NLRA’s definition of employee as a mere tautology. Far from being a tautology, § 2(3) defines employee status as the default and rejects basing employee status on an economic relationship between an employer and employee when it states that “employee *shall* include any employee, and *shall* not be limited to the employees of a particular employer.”³³ (emphasis added) It is unlikely that, had the dissent quoted § 2(3) in full, it could have persuaded the majority. However, doing so might have demonstrated more clearly how far the majority’s analysis was from the commands of the statute.

Third, the dissent showed that the facts as to the Brown graduate students’ duties and the university’s right to control their work demonstrated their employee status. According to the dissent, “[The majority] errs in seeing the academic world as somehow removed from the economic realm that labor law addresses—as if there was no room in the ivory tower for a sweatshop.”³⁴ The dissent contended that the Regional Director had found “that the teaching assistants (TAs), research assistants (RAs), and proctors were statutory employees, because they performed services under the direction and control of Brown, and were compensated for those services by the university.”³⁵ Among the duties found by the Regional Director to be those of employees were that the graduate students worked under the direction and control of *Brown*. The teaching assistants taught “undergraduates, just as faculty members do.” The research assistants in social sciences and humanities performed services that were not for their own academic achievement and in exchange for compensation. Finally, the proctors worked in university offices or museums, providing services that were not integrated with their academic programs. In addition, “the Regional Director found that Brown withholds income taxes from the stipends of teaching assistants, research assistants, and proctors and requires them to prove their eligibility for employment under Federal immigration laws.”³⁶ In short, the dissent’s detailed analysis and discussion contrast sharply with the majority decision’s vague statements and other defects, including providing no basis for rejecting the Regional Director’s factual analyses.

<http://chronicle.com/weekly/v50/i48/48b01601.htm>; Kate Bronfenbrenner & Tom Juravich, *Universities Should Cease Hostilities With Unions*, CHRONICLE OF HIGHER EDUCATION, Jan. 19, 2001, available at

<http://chronicle.com/weekly/v47/i19/19b02401.htm>.

³³ In *WBAI Pacifica*, 328 NLRB 1273 (1999), the Board excluded unpaid volunteers from the § 2(3) definition of “employee”, on the grounds that there be at least a rudimentary economic relationship with some employer. However, such a relationship is not required by all laws to find employee status. For example, the Fair Labor Standards Act of 1938 does not require an economic relationship when it defines “to employ” as “to suffer or permit to work” because to do so could defeat the purpose of the FLSA by allowing an employer who paid its employees nothing to escape a minimum-wage violation. It seems unlikely that the Board would find an employer exempt from an unfair labor practice merely because it had failed to pay its employees. The FLSA, incidentally, limits employment to an employer-employee relationship when it defines “employee” as “any individual employed by an employer.”

³⁴ *Brown*, at 494.

³⁵ *Id.*, at 497.

³⁶ *Id.*

III. Analysis and Significance of *Brown*

A. The Impact of *Brown*

More than just a badly written decision, *Brown* is a decision with pernicious effects. First, it led to a widespread – but legally incorrect – view that it was illegal for graduate students to unionize. The majority holding that graduate students were not employees meant they had no legal protections for organizing. In other words, they organized at their own peril but broke no laws by doing so. People are certainly more likely to organize when that is a legally protected right, but they may organize absent that protection. Those who fear that organizing violates the law are highly unlikely to do so.

Second, the majority's decision was wrong on the law for the reasons explained above. Understanding why the majority's claims and reasoning are wrong is necessary to enforcing the NLRA as written – and in accord with Congress's intent – and, thus, strengthening worker rights.

Third, we cannot know how many – if any – graduate students or other workers failed to seek union representation as a direct result of *Brown*, but that possibility is troubling. Of equal concern, the vehemence of anti-NLRB and anti-NLRA statements by some liberals may have convinced at least some workers who seek union representation that they are not protected by law and, thus, may have affected the success of union organizing. There is a difference between a law that is not enforced and one that does not exist, but that distinction was rarely made. Some consideration needs to be made as to the wisdom of a campaign that may have promoted the goals of those who oppose unions and worker rights and whether more productive courses of action could be taken in the future.

B. The Response to *Brown*

While the Board has been castigated for the *Brown* decision, there has been insufficient public discussion as to the meaning and legitimacy of the majority decision. For example, some workers' rights organizations assumed the worst and thus overstated the possible effects of the decision. In addition, no one adequately challenged the majority's claim that it had the legal authority to issue a "policy" decision in an election case. Rather, the majority's claims to that power were largely accepted. The lack of such a discussion and targeted challenge has led to a situation in which graduate students effectively – but unnecessarily – lost rights.

The generalized liberal denunciation that took place in response to *Brown* and later in *Oakwood Healthcare*,³⁷ a 2006 decision with a 3-2 split, may have had the unintended effect of

³⁷ *Oakwood Healthcare*, 348 NLRB 37 (2006), available at http://www.nlr.gov/shared_files/Board%20Decisions/348/348-37.pdf; see, e.g., Ross Eisenbrey and Lawrence Mishel, Supervisor in Name Only: Union Rights of Eight Million Workers at Stake in Labor Board Ruling, (July 12, 2006) (EPI Issue Brief #225); Posting of James Parks to AFL-CIO Now Blog, <http://blog.aflcio.org/2006/10/03/labor-board-ruling-may-bar-millions-of-workers-from-forming-unions/> (Oct 3, 2006).

disenfranchising workers by overstating the consequences of decisions about supervisory or non-employee status. *Oakwood* addressed nuanced issues related to determining supervisory status and, thus, exclusion from the definition of employee. Both before and after the decision was issued, some liberal groups took the position that eight million workers would lose the right to unionize. One problem with such a broad approach is that many people with the title of supervisor are actually employees under the NLRA and have a protected right to organize. In fact, that has been the case in decisions applying *Oakwood*. In addition, the NLRA states: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization" ³⁸ However, most people would not know the law or understand that titles do not equate with status, so some "supervisors" might have concluded that they had no rights to union representation. ³⁹

If worker rights to unionize are to be protected, greater care must be taken in the way legal rights and cases are discussed. It means explaining that the anti-union majority on the Bush Board was perverting the law in order to destroy worker rights under the NLRA, while also not sending the message that the NLRA is opposed to worker rights and collective bargaining. This distinction is not easy in a complex area such as labor law and unionization; however, the Change to Win federation recently created a campaign that deftly recognizes this distinction:

In a massive assault on workers, the Bush-appointed majority of the National Labor Relations Board issued a sweeping set of decisions in September 2007 – the *September Massacre* – denying basic worker rights and protections with blatantly biased decision-making. Through these and prior decisions, the Bush Board has violated its statutory duty to protect workers and has instead subordinated the public interest to corporate interests.

The National Labor Relations Act (NLRA) declares that it is "the policy of the United States" to encourage "the practice and procedure of collective bargaining" and to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." The Act promotes the economic well-being of workers by counterbalancing the power of large corporate employers with worker organizations.

...We condemn the Bush Board's anti-worker decisions. It is time to return to responsible, non-partisan decision-making and to the

³⁸ NLRA § 14(a).

³⁹ While *Oakwood* was pending and after its issuance, news reporters who contacted me for comment assumed that the decision meant that it was illegal for anyone who was labeled as a supervisor to unionize. With the loss of the labor beat, most reporters who are assigned to cover such a case need basic education on the law and realities of today's workplaces.

principles embodied in the Act that many of us have spent a lifetime upholding.

We declare our support for the fundamental principle that worker rights are human rights. . . . It is time to restore the fundamental principles of our basic labor law – to protect worker rights and to give workers a free and fair opportunity to improve their lives by bargaining collectively through their unions.⁴⁰

The importance of criticizing carefully and strategically and drawing clear distinctions between rights under the law and the failures of those charged with enforcing it cannot be overemphasized. Unless care is taken in responding to decisions such as *Brown*, workers will be disenfranchised and the Board’s critics will complete the work of those who want to destroy employee rights. Furthermore, the tenor of much criticism allowed the Bush Board and its supporters to dismiss it as mere partisanship and thus escape any meaningful scrutiny.

Brown also has significance as a precursor to a series of later decisions in which the Board continued its overreaching, culminating in a series of decisions known as the “September Massacre.”⁴¹ Indeed, numerous appellate courts have been willing not just to overturn decisions by the Bush Board, but to sharply criticize its decision-making process as well.

For example, in *Washington State Nurses Ass’n v. NLRB*,⁴² the Ninth Circuit found that allowing a hospital to ban wearing union buttons violated the Supreme Court’s standards in *Beth Israel Hospital* (1978), lacked any evidence to support its conclusions, and had factual findings that were, at best, based on speculation. In addition, the decision “was contrary to . . . the basic adjudicatory principle that conjecture is no substitute for evidence.”

In *Jolliff v. NLRB*,⁴³ the Sixth Circuit castigated the Bush Board for, among other things, basing “its finding of actual malice, in part, on a bizarre reading” of testimony and “by supplementing the thin record with unwarranted inferences and misinterpretations of testimony.”

In 2004, two Bush Board decisions held that employees could legally be locked out based on their union affiliation or union support, even though the NLRA makes it an unfair labor practice to discriminate against employees based on their union membership or activities.⁴⁴ Both cases were reversed. The Seventh Circuit criticized the Board majority for assuming facts the employer never submitted, raising the employer’s defense of operational needs *sua sponte*, not placing the burden on the employer to carry its affirmative defense, and, based on those assumed facts, finding that the employer committed no violation.⁴⁵ The D.C. Circuit overturned the Board

⁴⁰ Change To Win, *Condemn the Bush Labor Board’s Assault on Workers*, http://changetowinaction.org/campaign/condemn_the_bush_board (last visited July 25, 2008).

⁴¹ Lofaso, *supra* note 10.

⁴² *Washington State Nurses Ass’n v. NLRB*, 526 F.3d 577 (9th Cir. 2008).

⁴³ *Jolliff v. NLRB*, 513 F.3d 600, 610 (6th Cir. 2008).

⁴⁴ *Midwest Generation*, 343 N.L.R.B. 501 (2004); *Bunting Bearings Corp.*, 343 N.L.R.B. 479 (2004).

⁴⁵ *Local 15, International Brotherhood of Electrical Workers v. NLRB*, 429 F.3d 651 (7th Cir. 2005)

majority's decision because it was not consistent with controlling precedent, required the union to prove facts on an issue for which the employer carries the burden, speculated about the employer's motives, and then used that speculation to conclude that the employer had a legitimate motive.⁴⁶

Finally, in *Jochims v. NLRB*,⁴⁷ the D.C. Circuit held that the Board's decision had "blatant flaws"; "the Board completely deviated from its own precedent and issued a judgment that is devoid of substantial evidence"; "the Board's judgment lacks both reasoned decision-making and substantial evidence"; and "the Board's judgment in this case rests on nothing."

C. The *Brown* Majority's Failure to Comply with Law

The majority decision in *Brown* was susceptible to criticism it never received for its gross failures on three grounds. First, it failed to apply NLRA law and policy on employee status. Second, it ignored the limits that § 9(b) places on the Board's decision-making authority in election cases. Third, it ignored statutory limits on the Board's policymaking authority.

1. NLRA Law and Policies on Employee Status

The importance of the assault on the NLRA's definition of employee and, thus, on employee rights deserves special attention. Dismissing the NLRA's definition of employee as a mere tautology allowed the *Brown* majority to substitute a definition limited to an economic relationship with an employer. It has since gone on to use this definition to limit and eliminate rights.⁴⁸ Indeed, the definition of "employee" and NLRA protections are currently at stake in a case pending before the Board – *New York New York Hotel*.⁴⁹ Bush Board limits on employee status are extreme but not unprecedented. In *Lechmere*, for example, the Supreme Court claimed that the definition of employee was limited to employees of an employer, the opposite of the NLRA's definition and even failed to acknowledge that the statute defined the term "employee".⁵⁰

It cannot be said too strongly that these constrained readings are contrary to the plain language of the NLRA and its legislative history. The *Brown* majority's claim that NLRA policies limit employee status to the economic relationship between an employer and employee is based on misreading the § 1 NLRA goal of creating equality of bargaining power "between employers and employees" as limited to the singular. In other places, the *Brown* majority could only reach its conclusion by ignoring the mandatory language and legislative history of §§ 2(3) and (9). *Brown* effectively placed the burden of proof on those who supported employee status. However, the presumption in NLRB cases – grounded in § 2(3)'s emphatic statement that

⁴⁶ *USW v. NLRB*, 179 Fed. Appx. 61 (D.C. Cir. 2006).

⁴⁷ *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir 2007).

⁴⁸ *See, e.g.*, *Toering Electric Co.*, 351 N.L.R.B. No.18 (Sept. 29, 2007).

⁴⁹ *New York New York Hotel, LLC*, No. 28-CA-14519 (N.L.R.B.). Oral argument was held November 9, 2007, and amicus briefs were filed in that case, both rare occurrences in Board cases. Documents related to the oral argument may be found at http://www.nlr.gov/research/frequently_requested_documents.aspx (scroll down).

⁵⁰ *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992).

“employee *shall* include any employee, and *shall* not be limited to the employees of a particular employer” – has long been for employee status, and the party that claims otherwise bears the burden of proof. The NLRA’s legislative history makes it clear that Congress wanted a broad definition, one that was based on class rather than an economic relationship with *an* employer,⁵¹ and the congressional intent behind § 2(3) is rooted in similar positions in the Norris LaGuardia Act and cases from the 19th century.⁵²

2. Section 9(b) Limits the Board’s Decision-making Authority in Election Cases

The *Brown* majority avoids analysis and discussion of job duties by claiming to base its decision on policy. However, no part of the NLRA gives the Board the authority to make policy decisions in election cases. Indeed, § 9(b) limits the Board to making its decision as to the bargaining unit “*in each [representation] case*”, rather than on a class basis. Thus, decisions in election cases must be focused on the facts of the case. Consider the *Yeshiva* case as evidence that employee status must be determined in each case, not on a class basis. The Supreme Court in *Yeshiva*⁵³ found that the powers exercised by the Yeshiva faculty meant that they were managers and thus not employees. However, this did not mean that college faculty as a class could not be employees. In fact, the Board and courts have found faculty that did not to act as managers to be employees.⁵⁴ If this was true of a case decided by the Supreme Court, it is certainly true of a Board decision.

3. Limits on the Board’s Policymaking Authority

The *Brown* majority repeatedly justified its decision as based on policy, yet failed to articulate any policy it relied upon. This is not the only case in which the Bush Board has attempted to substitute what it says is a policy decision for its obligation to make a factual analysis and apply precedent.⁵⁵

Congress gave the Board authority in § 6 to promulgate rules and regulations in accord with the provisions of the Administrative Procedures Act.⁵⁶ Rather than using the legal routes

⁵¹ Ellen Dannin, *Not a Limited, Confined, or Private Matter – Who is an Employee Under the National Labor Relations Act*, 59 LAB. L.J. 5 (2008). In contrast, the definition of employer in § 2(2) contains no “shall.”

⁵² See, e.g., *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 192-93 (1941); *Briggs Mfg. Co.*, 75 N.L.R.B. 569, 570-71 (1947).

⁵³ *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). However, the holding in *Yeshiva* is also popularly understood to mean that no college faculty can unionize.

⁵⁴ See, e.g., *David Wolcott Kendall Memorial School v. National Labor Relations Board*, 866 F.2d 157 (1989); *Bradford College*, 261 NLRB 565 (1982).

⁵⁵ For recent examples, see *Lofaso supra* note 10; see also *Dana Corp.*, 351 N.L.R.B. No.28, 15 (Sept. 29, 2007) (“The majority claims that its decision is based on policy considerations rather than factual probabilities, but the majority then speculates about factual scenarios and statistics that purportedly show the unreliability of [authorization] cards.”) (Liebman, dissenting)

⁵⁶ One of the only times instances was when the Board used rulemaking to establish bargaining units in hospitals, and thus set standards that brought order out of the chaos that could not be resolved through the § 9(b) process. 1974 Health Care Amendment, 29 CFR § 103.30; see also *American Hospital Association v. NLRB*, 499 U.S. 606 (1991).

available to it, the *Brown* majority avoided the requirements of § 9(b) to make a factual analysis as to conditions at Brown University and avoided rule-making requirements for a policy decision, which would have included the notice-and-comment process and the creation of a record with the breadth of facts and views necessary to create a proper and stable decision.⁵⁷ Doctrinal stability and predictability are better for both employers and employees and would better promote respect for law and legal process than rulings that change depending on the party in power.

Even if § 9(b) provides the legal authority to make policy decisions as to a class of workers, an election case record is not adequate for this type of decision. The hearing record in *Brown* is typical. It included only evidence on Brown University graduate students, not about graduate students in general, and post-hearing materials provided by amici. But more important, § 9(b)'s mandate to make decisions based on the facts in each case reflects the reality that work is carried on in so many different ways that a class-based rule as to employee status will tend to be either too broad or too narrow.

D. The Problem of Review in Election Cases

In light of its many weaknesses, *Brown University* theoretically may have been a good candidate for appeal. However, under the NLRA, it is very difficult for employees and unions to bring appeals of decisions in election cases. The NLRA does not expressly provide for appeals of election cases to the courts of appeals. Despite this, processes have been created by which employers can get circuit court review of election cases. Thus, had this decision gone against the employer, Brown University could have committed what is called a technical § 8(a)(5) violation by refusing to recognize and bargain with the union.⁵⁸ The union could then have filed an unfair labor practice charge, and the Board would have used a summary process to quickly issue a complaint and decision, which could have been appealed to the court of appeals.⁵⁹ Employees and unions, on the other hand, have no comparable review procedure.

Developing a comparable review procedure for unions that lose a representation case may not matter in most cases, because a union that loses the decision may prefer to file a new petition, rather than invest time and money in an appeal. However, in a case like *Brown*, appellate review

⁵⁷ It should be noted that doubt has been raised as to whether Congress intended § 6 to give the Board the power to promulgate the sort of class-based rule that the *Brown* majority attempted to create as to graduate students. See Thomas W. Merrill & Katherine Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002). Congress might want to consider whether it should give the Board that power, but, ultimately, it may not matter when the issue is employee status.

⁵⁸ **Error! Main Document Only.** This procedure was in place by 1937. See NATIONAL LABOR RELATIONS BOARD, SECOND ANNUAL REPORT FOR THE FISCAL YEAR ENDING JUNE 30, 1937 105 (1937); Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 981 (1938-1939). The problem created by a lack of a statutory route for review of election cases led the D.C. Circuit Court of Appeals to suggest in 1939 that the only route available was filing for an injunction in district court. Note, *The Proposed Amendments to the Wagner Act*, 52 HARV. L. REV. 970, 981 (1938-1939). The Note's author suggested that "it would seem more orderly to provide for appeal by a union to the circuit court of appeals." *Id.*

⁵⁹ Cf. *Bally's Park Place, Inc.*, 352 N.L.R.B. No.95 (June 30, 2008); BNA Lab. Rel. Week (July 10, 2008).

could have played a useful role by ruling on the decision and process.⁶⁰ The only other option to address the problems created by the decision is for some future Board to reinstate *NYU*, thus creating the perception and reality of decisions based, not on law and legal process, but on partisanship. This can further undermine workers' faith in the law and institutions designed to protect their rights.

However, that later case might never exist. A Regional Office would be bound by *Brown* and would have to dismiss any petition filed seeking to represent graduate students working for their universities. Had a union that represented graduate students at a university that withdrew recognition filed an unfair labor practice charge, the Regional Office, would be bound by *Brown* to dismiss the charge.⁶¹

IV. Conclusion: Applying the Lessons of Brown

Bad cases, such as *Brown*, can still teach important lessons. First, it is impossible to read the majority decision in *Brown* without feeling alarm at the obvious lack of commitment to enforcing the NLRA and its policies. That approach to decision-making has also been reflected in many other decisions by the same members and their replacements. This is not a trivial matter. Federal employees take an oath of office to "well and faithfully discharge the duties of the office."⁶² The NLRA states, "Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause."⁶³ This is not to take the position here that these members should have been removed, a step that should never be done lightly, given the opportunity for its abuse. Rather, it is a reminder that the

⁶⁰ Theoretically, unions could secure appellate review of an election-case decision by committing an unfair labor practice that would provide a vehicle comparable to the employer's technical § 8(a)(5) violation. The best candidate would appear to be a technical § 8(b)(7)(C) violation by picketing for more than thirty days to force an employer to recognize or bargain with a union. Even if *Brown University* had refused to file a § 8(b)(7)(C) charge, the charge could have been filed by anyone, assuming there were facts to support the charge. However, § 8(b)(7)(C) is not comparable to the simple summary process used to secure review by employers and is unlikely to be useful for dealing with a case like *Brown*. Under § 10(l), § 8(b)(7)(C) cases are required to have an expedited investigation, and when "reasonable cause to believe such charge is true and that a complaint should issue" an injunction against the picketing must be petitioned for. NLRA §10(l). That injunction is subject to appeal and thus offers an opportunity for appellate review, but of the issuance of the injunction, not review of the election case decision. The outcome of the hearing in the § 8(b)(7)(C) case may be appealed, but if the union lost the election case, no election will have been held, and the picketing will violate the law. Thus, at a minimum, the result is two cases, the injunction and the hearing on the picketing, unless the union admits the picketing violated § 8(b)(7)(C) and accepts the injunction. Neither case places the decision in the election case before the court of appeals. In addition, courts of appeals are required to defer to decisions by expert administrative agencies. Given that in the years just before and during the time *Brown* was decided, the Board won 76-95% of appeals, in whole or in part. Statistics are from the NLRB OFFICE OF GENERAL COUNSEL, SUMMARY OF OPERATIONS (2003-2005), available at http://www.nlr.gov/research/memos/general_council_memos.aspx.

⁶¹ A similar situation existed in the period leading up to the issuance of the Epilepsy Foundation case on employee rights in a non-union workplace to have a representative present during a disciplinary interview. See Charles S. Strickler, *The Weingarten Rights of Non-Union Employees: An Advocate's Perspective*, 9 J. IND. EMP. RTS. 187 (1999-2000).

⁶² 5 U.S.C. § 3331 (2008), available at http://www.opm.gov/constitution_initiative/oath.asp.

⁶³ NLRA § 3(a).

office is not a sinecure but one whose tenure requires faithful discharge of the duties of the office.

Second, if our goal is to strengthen workers' rights to freedom of association, self-organization, mutual aid or support, and collective bargaining – rights Congress created 73 years ago through the NLRA – care must be taken. Failures to enforce NLRA rights must be criticized. However, if that criticism is not targeted to the specific wrong, it can do damage; it can undermine and even destroy those important rights.

Third, in many cases, what seems necessary is appointing and confirming Board members who will ensure the NLRA is enforced as written and in accord with Congress's intent. The situation of graduate students is such a case, and there are many others where new legislation is not necessary and is not sufficient to address the problem. However, there are other situations where new legislation could be helpful in enforcing the NLRA and promoting its policies. Thus, if appellate review of election cases is desirable, new legislation may be necessary to give all aggrieved parties the same access to review that employers now have.

Finally, underlying all these observations is our country's larger problem of promoting respect for law at all levels and the process of principled legal interpretation. As Congress observed of the NLRA in 1935, "Experience has proved that neither obedience to the law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment."⁶⁴ The forms those problems take with regard to the NLRA and Board are both unique and, yet, akin to those now found at all levels of government. All laws must be observed. But we have a special obligation in the case of remedial legislation such as the NLRA. We must insist that the promise of the NLRA to actively promote freedom of association in order to create equality of bargaining power between employers and employees and thus to lift workers out of poverty and hopelessness is kept.

⁶⁴ S. REP. NO. 573, at 12 (1935).