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Blame It on *Catholic Bishop*: The Question of NLRB Jurisdiction over Religious Colleges and Universities

Susan J. Stabile*

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“Labor unions are an indispensable element of social life in Catholic teaching. No one may deny the right to organize without attacking human dignity itself.”¹

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1. Paul Moses, *Which Side Are They On?*, COMMONWEAL, May 20, 2011, at 18 (quoting Joseph Fahey's testimony for the New York State United Teachers Union in the Manhattan College Case).

I. INTRODUCTION

When should laws of general application apply to religiously affiliated entities? Although there is little question that churches themselves are exempt from most precepts of the law, more difficult questions arise with respect to whether other religious institutions should benefit from an exemption. Many of those questions have arisen with respect to the application of laws addressing the employer-employee relationship.

In some cases resolving the question requires an analysis of the character of the institution itself. This is the approach, for example, taken by some states with respect to statutes requiring prescription contraception coverage—the statute applies unless an entity is a “religious employer” (or some similar term) within the meaning of the statute.

In other cases, the determination is whether a particular employee or group of employees is exempt from the protection of certain laws that would otherwise apply to a religious institution. That is the case with the ministerial exemption of Title VII,² which exempts from its protections ministerial employees of a religious employer.³

My focus in this Article is on how the National Labor Relations Board (the NLRB or the Board) determines whether to exercise jurisdiction over religious colleges and universities, subjecting them to the collective bargaining requirements of the National Labor Relations Act (the NLRA).⁴ The NLRB’s current approach is to examine whether the educational institution has a “substantial religious character,”⁵ in the absence of which it will exercise jurisdiction. As evidenced by two recent decisions by NLRB regional directors in cases involving efforts by adjunct faculty to form unions—one involving Saint Xavier College and one involving Manhattan College⁶ and both of which are currently on appeal to the full Board⁷—the

2. 42 U.S.C. §§ 2000a to 2000e-17 (2006).

3. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

4. National Labor Relations Act, 29 U.S.C. §§ 151–160 (2006).

5. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 503 (1979) (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971)).

6. *Saint Xavier Univ.*, No. 13-RC-22025, 2011 NLRB Reg. Dir. Dec. LEXIS 33 (N.L.R.B. May 26, 2011); *Manhattan Coll.*, No. 2-RC-23543, 2011 NLRB Reg. Dir. Dec. LEXIS 94 (N.L.R.B. Jan. 10, 2011).

7. *Manhattan College’s Employer’s Request for Review of the Regional Director’s Decision and Direction of Election* was filed with the NLRB on Jan. 24, 2011. *Empl’r’s Request for Review of a Decision of the Reg’l Dir., Manhattan Coll.*, No. 2-RC-24543, 2011 NLRB Reg. Dir. Dec. LEXIS 94 (N.L.R.B. Jan. 10, 2011) (filed on Jan. 24, 2011). The Board issued an order on Feb. 16, 2011 granting review, but denying the request to delay proceeding with the election until the process of review is completed. *Order Granting Empl’r’s Request for Review of the Acting Reg’l Dir.’s Decision and Direction of Election*, No. 2-RC-24543, 2011 NLRB LEXIS 45 (N.L.R.B. Feb. 16, 2011). *Saint Xavier University’s Employer’s Request for Review of the Regional Director’s Decision and Direction of Election* was filed with the NLRB on June 9, 2011. *Saint Xavier Univ.’s*

substantial religious character test is an unnecessarily intrusive one that substitutes the government's views about what it means to be religious for the views of the institution and the religious community with which it is affiliated.

The intrusiveness of the substantial religious character test led the D.C. Circuit to establish an alternate test for determining whether religious colleges and universities should be exempt from the requirements of the

Emp'r's Request for Review of the Reg'l Dir.'s Decision and Direction of Election, Saint Xavier Univ. Emp'r, No. 13-RC-22025, 2011 NLRB Reg. Dir. Dec. LEXIS 33 (N.R.L.B. May 26, 2011) (filed on June 9, 2011). The Board issued an order on July 13, 2011 granting the request. Order Granting Emp'r's Request for Review of the Reg'l Dir.'s Decision and Direction of Election, Saint Xavier Univ. Emp'r, No. 13-RC-22025, 2011 NLRB LEXIS 350 (N.R.L.B. July 13, 2011). Several amicus briefs have been filed in both cases. For amicus briefs filed for Manhattan College, see, e.g., Amicus Brief of Gen. Conference of Seventh-Day Adventists & the Ass'n of Christian Sch. Int'l in Support of Emp'r on Review of a Decision of the Reg'l Dir., Manhattan Coll., No. 2-RC-23543, 2011 NLRB LEXIS 45 (N.L.R.B. Feb. 16, 2011) (filed on Apr. 20, 2011); Brief for Amici Curiae Ass'n of Catholic Colls. & Univs. et al. in Support of Emp'r, *id.* (No. 2-RC-23543) [hereinafter Catholic Colleges Amicus Brief] (filed on Apr. 25, 2011); Brief of the Am. Fed'n Labor & Cong. of Indus. Org. & the Am. Fed'n of Teachers, AFL-CIO, *id.* (No. 2-RC-23543) [hereinafter AFL-CIO Amicus Brief] (filed on Sept. 23, 2011). For amicus briefs filed for Saint Xavier, see, e.g., Amicus Brief of Gen. Conference of Seventh-Day Adventists, et al. in Support of Emp'r on Review of a Decision of the Reg'l Dir., Saint Xavier Univ., No. 13-RC-22025, 2011 NLRB LEXIS 350 (N.L.R.B. July 13, 2011) (filed on Aug. 4, 2011); Brief for Amici Curiae Ass'n of Catholic Colls. & Univs. et al. in Support of Emp'r, *id.* (No. 13-RC-22025) (filed on Aug. 29, 2011); Amicus Brief of the AFL-CIO & the Am. Fed'n of Teachers, *id.* (No. 13-RC-22025) (filed on Sept. 14, 2011). All of the aforementioned orders, amicus briefs, and other filings mentioned in this footnote are available online. For materials related to Saint Xavier University, see Case 13-RC-022025, NATIONAL LABOR RELATIONS BOARD, <http://nlrb.gov/case/13-RC-022025> (last visited Apr. 11, 2012). For materials related to Manhattan College, see Case 02-RC-023543, NATIONAL LABOR RELATIONS BOARD, <http://nlrb.gov/case/02-RC-023543> (last visited Apr. 11, 2012).

How soon the Board will issue a decision on the appeals is unclear. The NLRB must have at least three members to take any actions, including issuing decisions. See *New Process Steel v. NLRB*, 130 S. Ct. 2635 (2010). The combination of the departure of NLRB Chair Wilma Liebman on August 28, 2011, and the expiration of Craig Becker's term at the end of 2011, left the Board with only two members. On January 4, 2012, President Obama made recess appointments to fill the three vacancies. See *White House Office of the Press Secretary: President Obama Announces Recess Appointments to Key Administration Posts*, THE WHITE HOUSE (Jan. 4, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/01/04/president-obama-announces-recess-appointments-key-administration-posts>. That action is being challenged, although the Department of Justice has already expressed the view that the President's action was lawful. See Memorandum Opinion from the Department of Justice Office of Legal Counsel & Virginia A. Seitz, Assistant Attorney, for the Counsel to the President on Lawfulness of Recess Appointments During a Recess of the Senate Notwithstanding Periodic Pro Forma Sessions (Jan. 6, 2012), available at <http://www.justice.gov/olc/2012/pro-forma-sessions-opinion.pdf>. The NLRB has already issued a decision explicitly rejecting the claim that it lacked a quorum, relying on the presumption of regularity of official acts of public officials. *Ctr. for Soc. Change, Inc.*, 358 N.L.R.B. No. 24 (Mar. 29, 2012).

NLRA. This test, established in *University of Great Falls v. NLRB*,⁸ has the virtue of being simple and nonintrusive, asking only whether an institution holds itself out to the public as a religious institution, is non-profit, and is religiously affiliated.⁹ As a practical matter, the *Great Falls* test says that religiously-affiliated institutions of higher education are always exempt from the NLRA's collective bargaining requirements.

The clash between the NLRB's substantial religious character test and the *Great Falls* test arises from the only Supreme Court decision addressing the question of NLRB jurisdiction over religious schools: the Court's 1979 decision in *NLRB v. Catholic Bishop of Chicago*,¹⁰ which held that Congress did not intend "to bring teachers in church-operated schools within the jurisdiction of the Board."¹¹ As a result of the Court's construction of the NLRA, which the dissent termed "plainly wrong in light of the Act's language, its legislative history, and this Court's precedent,"¹² the sole focus of inquiry has been on whether an institution is a "church-operated school."¹³

The dispute over the respective merits and faults of the current NLRB and the *Great Falls* approaches fails to address in a direct way the central question of whether the assertion of jurisdiction by the NLRB over religious colleges and universities, and the resulting duty on the part of such institutions to collectively bargain with their employees pursuant to the dictates of the NLRA, would present a substantial risk of excessive government entanglement with religion.¹⁴ Because *Catholic Bishop* dealt with the question of NLRB jurisdiction in the context of parochial high schools, it did not directly address this question and, for reasons I will argue, *Catholic Bishop* should not be read to preclude, in all cases, the exercise of jurisdiction by the NLRB over religious colleges and universities.

Directly examining whether and under what circumstances a risk of entanglement is present to determine whether the NLRB should exercise jurisdiction over religious colleges and universities has two advantages over

8. 278 F.3d 1335 (D.C. Cir. 2002).

9. *Id.* at 1347.

10. 440 U.S. 490 (1979).

11. *Id.* at 507.

12. *Id.* at 508 (Brennan, J., dissenting). For Justice Brennan, the fact that none of the Act's eight express exceptions covered church-operated schools was dispositive. *Id.* at 512.

13. *Id.* at 507 (majority opinion).

14. As my framing of the question suggests, I reject a broad theory of church autonomy such as that argued by Professor Laycock, who would grant religious organizations much broader exemptions from protective labor and employment laws than I believe is justified. *See, e.g.,* Douglas Laycock, *Towards a General Theory of The Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 82 COLUM. L. REV. 1373 (1981). More persuasive is the view that "the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 303 (1985).

focusing on the institution's character. First, it does not require the NLRB or the courts to determine whether an institution is sufficiently religious and, indeed, what it means for an institution to be religious, thus avoiding the pitfalls of the current NLRB test. Second, it allows a more focused analysis than does *Great Falls*, thus better promoting the interests of federal labor laws in favor of collective bargaining while avoiding undue interference with the protected activity of religious colleges and universities. The strong federal policy in favor of collective bargaining argues for depriving the NLRB of jurisdiction only where application of the NLRA and resulting oversight by the NLRB would create a First Amendment violation.

Section II of this Article gives a brief history of the NLRB's approach to the exercise of jurisdiction over religious colleges and universities. Section III addresses the weakness of the NLRB's substantial religious character test. Section IV addresses the central question of whether and under what circumstances the exercise of jurisdiction by NLRB over religious colleges and universities would create a risk of substantial entanglement. Finally, drawing from the conclusions of Section IV, Section V lays out some considerations to guide the NLRB in determining when it should exercise jurisdiction when employees of religious colleges and universities seek to unionize. Because both the Supreme Court guidance on this issue and the recent NLRB decisions have involved Catholic colleges and universities, they are the primary focus of this analysis. The analysis and conclusions, however, are intended to guide the NLRB's approach to the exercise of jurisdiction over other religious colleges and universities as well.

II. THE ROAD TO THE CURRENT NLRB TEST

A. *The Requirements of the NLRA*

Congress's intent in passing the NLRA was to "encourag[e] 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, for the purpose of negotiating the terms and conditions of their employment."¹⁵ To accomplish that aim, the statute gives employees the right to organize, form, or join a labor organization to bargain collectively, and to participate in concerted activity for the purpose of collective bargaining.¹⁶

15. National Labor Relations Act, 29 U.S.C. § 151 (2006).

16. 29 U.S.C. § 157.

Once a union is certified to collectively bargain on behalf of employees, employers are required to engage in good-faith collective bargaining with representatives of the union with respect to issues of “wages, hours, and other terms and conditions of employment.”¹⁷ Failure to do so is an unfair labor practice under the NLRA, which also identifies a number of other unfair labor practices, including interference with the rights of workers to bargain collectively or engage in concerted activity as to the terms and conditions of employment.¹⁸

The NLRA gives employees and their representatives the ability to file an unfair labor practices charge with the NLRB, which the agency then investigates.¹⁹ If the Regional Director finds merit in the charge, it will file a formal complaint against the employer, often first referring the case to arbitration.²⁰ If the case is not settled, it goes before an Administrative Law Judge of the NLRB whose decision can be appealed.²¹

B. The NLRB's Position Before and After Catholic Bishop

The NLRA gives broad jurisdiction to the NLRB, although it does specify several categories of exclusion from the definitions of “employer” and “employee” for purposes of the statute.²² There is no express exemption from the statute covering educational or other charitable institutions or their employees.²³ It, thus, would not be outlandish to assert, as Justice Brennan did in his dissenting opinion in *NLRB v. Catholic Bishop of Chicago*,²⁴ that Congress intended to subject all employers and employees, other than those specifically excepted by the statute, to the NLRA and, hence, the jurisdiction of the NLRB.²⁵

17. 29 U.S.C. § 158(d). These are “mandatory” subjects of collective bargaining. *Id.* With respect to other subjects (“permissive” subjects of collective bargaining), parties are “free to bargain or not to bargain.” *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958).

18. 29 U.S.C. § 158.

19. See 29 U.S.C. §§ 159(c), 160(b), 161; 29 C.F.R. § 102.9 (2011); *The NLRB Process*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/nlr-process> (last visited Apr. 11, 2012).

20. 29 C.F.R. § 102.15 (2011); 29 USC § 160(c). See *Investigate Charges*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/what-we-do/investigate-charges> (“When the NLRB investigation finds sufficient evidence to support the charge, every effort is made to facilitate a settlement between the parties. In recent years, the Agency’s settlement rate has been above 85 percent of meritorious cases.”) (last visited Apr. 11, 2012); *Facilitate Settlements*, NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/what-we-do/facilitate-settlements> (last visited Apr. 11, 2012).

21. 29 U.S.C. § 160(f); 29 C.F.R. §§ 102.34, 102.45 (2011).

22. See 29 U.S.C. § 152.

23. *Id.*

24. 440 U.S. 490, 511 (1979) (Brennan, J., dissenting).

25. The dissent in *Catholic Bishop* also believed that legislative (including subsequent) history of the NLRA also supported its argument. *Id.* at 511–17. For an argument that “the legislative

It took some time for this question to arise. Acting on its own discretion, the NLRB for many years declined to exercise jurisdiction over all nonprofit educational institutions, secular as well as religious.²⁶ However, in 1970, it changed its policy, holding that nonprofit educational institutions whose operations had a substantial effect on interstate commerce were within the scope of the NLRA.²⁷ The Board justified its altered policy on the change in the level of engagement of educational institutions with commercial operations, the expanded federal governmental role in higher education, and the “expand[ed] congressional recognition that employees in the nonprofit sector are entitled to the same benefits which federal statutes provide to employees in the profitmaking sphere.”²⁸

With respect to religious schools, the NLRB initially declined to exercise jurisdiction only when a school was “completely religious, not just religiously associated.”²⁹ Despite First Amendment challenges to its broad assertion of jurisdiction over religious schools, the NLRB was consistent in its view that “[r]egulation of labor relations does not violate the First Amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain [the Act’s] objective.”³⁰

In *Catholic Bishop of Chicago v. NLRB*,³¹ the Seventh Circuit firmly rejected the NLRB’s method of determining whether to exercise jurisdiction over religious schools.³² In the view of the court, the board’s “dichotomous ‘completely religious—merely religiously associated’ standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular

history of the NLRA is more complex and more inconclusive than either the majority or the dissent in *Catholic Bishop* acknowledged” and thus “cannot be relied upon either to support or refute the existence of NLRB jurisdiction over religiously-affiliated schools,” see Debra L. Willen, *NLRB Regulation of Religiously-Affiliated Schools: The Board’s Current Jurisdictional Test*, 13 INDUS. REL. L.J. 38, 50–51 (1991).

26. The Board announced this policy in *Trustees of Columbia Univ.*, 97 N.L.R.B. 424 (1951). Quoting the 1974 Conference Report to the statute, it said that the report indicates “approval of and reliance upon the Board’s asserting jurisdiction over nonprofit organizations ‘only in exceptional circumstances and in connection with purely commercial activities of such organizations.’ Whether or not this language provides a mandate, it certainly provides a guide.” *Id.* at 427 (quoting H.R. REP. No. 80-510, at 32 (1947)).

27. *Cornell Univ.*, 183 N.L.R.B. 329 (1970). Following its decision in *Cornell University*, the NLRB began to assert jurisdiction over non-profit, private secondary schools as well as universities.

28. *Id.* at 332.

29. *Roman Catholic Archdiocese of Balt.*, 216 N.L.R.B. 249, 250 (1975).

30. *Manning*, 223 N.L.R.B. 1218, 1218 (1976).

31. 559 F.2d 1112 (7th Cir. 1977), *aff’d*, 440 U.S. 490 (1979).

32. *Id.* at 1118.

components obviously implicates very sensitive questions of faith and tradition.”³³ Recognizing that the effect of rejecting the “completely religious” test would mean that the NLRB would exercise jurisdiction over all church-operated schools, the court next considered whether the exercise of such jurisdiction was consistent with the First Amendment.³⁴ Its answer to that question was no.³⁵ The court believed that being forced to engage in collective bargaining would impose a chilling effect “on the exercise of the bishops’ control of the religious mission of the schools” and that, therefore, the First Amendment precluded the NLRB’s exercise of jurisdiction.³⁶

The Supreme Court affirmed the Seventh Circuit’s opinion without addressing the constitutional question.³⁷ In a 5–4 decision, it held that teachers in high schools operated by a church are not within the coverage of the NLRA because Congress did not clearly express an affirmative intention that teachers in church-operated schools fell within the coverage of the Act.³⁸ Because it believed that the exercise of jurisdiction by the NLRB over religious high schools presents a significant risk that the First Amendment would be infringed, the Court concluded that “Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.”³⁹ That construction of the statute allowed the Court to avoid resolving “difficult and sensitive questions arising out of the guarantees of the *First Amendment* Religion Clauses.”⁴⁰

The NLRB initially took the position that *Catholic Bishop* applied only to religious elementary and secondary schools (parochial schools) and did not require it to refrain from exercising jurisdiction over religious colleges and universities.⁴¹ Over time, it developed a new policy. Concluding that the reasoning of *Catholic Bishop* applied to colleges and universities that shared characteristics with the schools at issue in that case, the NLRB determined that it should refrain from exercising jurisdiction over religious colleges and universities that had a “substantial religious character.”⁴² The

33. *Id.*

34. *Id.*

35. *Id.* at 1131.

36. *Id.* at 1124.

37. *Catholic Bishop of Chi. v. NLRB*, 440 U.S. 490, 507 (1979).

38. *Id.*

39. *Id.* at 506.

40. *Id.* at 507 (emphasis added). The Court observed that “in the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive” First Amendment questions. *Id.*

41. See *Coll. of Notre Dame*, 245 N.L.R.B. 386 (1979). The NLRB took the same position in *Lewis University*, 265 N.L.R.B. 1239 (1982).

42. *Catholic Bishop*, 440 U.S. at 503 (quoting *Lemon v. Kurtzman*, 403 U.S. 616 (1971)).

Board determined that, henceforth, it would evaluate on a case-by-case basis whether or not to exercise jurisdiction based on a consideration of “all aspects of a religious school’s organization and function that may be relevant to the ‘inquiry whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed.’”⁴³

The NLRB’s determination that it lacks jurisdiction over a religious school based on its application of its “substantial religious character” test does not mean teachers at that school are completely barred from unionization, but it does mean that they may not avail themselves of the protection afforded by federal labor law.⁴⁴ They can only request a school’s administration to recognize their union and engage in collective bargaining with the union, with no recourse if the employer refuses.⁴⁵ Thus, in 2004 when the Archdiocese of Boston determined to cease bargaining with the union that had been representing teachers at eight regional Catholic high schools at the expiration of the teachers’ prior contract, the teachers lost all rights of the prior contract regarding class load, preparation time, job security, health insurance, and other conditions.⁴⁶ In 2008 the diocese of Scranton decided it would no longer bargain with the union that had been representing teachers in that diocese, and in 2009, the Archdiocese of New York did the same.⁴⁷ In each case, teachers had no legal recourse.⁴⁸

III. THE SHORTCOMINGS OF THE CURRENT NLRB APPROACH

The question of when laws of general application apply to religiously affiliated institutions arises in a number of different contexts. Entities

43. The Faculty Ass’n of St. Joseph’s Coll., 282 N.L.R.B. 65, 68 (1986). In coming to its conclusion, the Board observed that some colleges “exhibit[] many characteristics of a school which is truly church-operated within the meaning of Catholic Bishop.” *Id.* Considering the school in question, the Board determined that assertion of jurisdiction would be inappropriate because of the “College’s requirement that faculty members conform to Catholic doctrine and agree on hire ‘to promote the objectives and goals . . . of the Sisters of Mercy of Maine.’” *Id.* (quoting a letter that all new faculty of St. Joseph must sign); see also *Livingstone Coll.*, 286 N.L.R.B. 1308 (1987) (determining that the exercise of jurisdiction by the NLRB would not create a significant risk of entanglement).

44. See Charles S. Chesnavage, *Catholic Social Justice Teaching and Catholic School Teacher’s Unions: Failing to Practice What You Preach*, in *Interfaith Theological Symposium on Economic Justice* 36, 37 (2011), available at <http://www.catholiclabor.org/gen-art/Theological%20Symposium%202011.pdf>.

45. *Id.*

46. *Id.*

47. *Id.* at 7–8.

48. *Id.*

meeting the Internal Revenue Code's definition of a religious organization are exempt from taxation.⁴⁹ State statutes requiring that prescription plans cover prescription contraceptives often exclude "religious employers," requiring a determination of whether the state definition of a religious employer has been met.⁵⁰ The Civil Rights Act exempts religious organizations from prohibitions on discrimination on the grounds of religion.⁵¹

In the context of the NLRA, the NLRB's test for determining whether to exercise jurisdiction over religious colleges and universities is a cure worse than the disease. The Board's "substantial religious character" test involves an improper inquiry into matters of religion and belief, and essentially allows the agency to substitute its view of what it means to be a religious school and provide a religious education for that of the religious institution.⁵²

In determining whether a religious school has a substantial religious character, the Board "has not relied solely on the employer's affiliation with a religious organization, but rather has evaluated the purpose of the employer's operations, the role of the unit employees in effectuating that purpose, and the potential effects if the Board exercised jurisdiction."⁵³ In making its evaluation, the NLRB also considers factors such as the "involvement of the religious institution in the daily operation of the school" and the "degree to which the school has a religious mission and curriculum."⁵⁴

As the D.C. Circuit recognized in *Great Falls*, the Board's inquiry essentially boils down to whether the school is "sufficiently religious."⁵⁵ Consider the recent decisions by NLRB regional directors in *Saint Xavier University*⁵⁶ and *Manhattan College*.⁵⁷ Both involved efforts by adjunct faculty to form unions and in both cases, the regional directors rejected the

49. See I.R.C. § 501(c)(3) (2006) (explaining the requirements for tax-exempt status).

50. See, e.g., CAL. HEALTH & SAFETY CODE § 1367.25(b) (West 2003). The same is true of the Affordable Care Act.

51. See 42 U.S.C. § 2000e-1 (2006) (noting that the Civil Rights Act does not apply to religious organizations).

52. See, e.g., *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1339 (D.C. Cir. 2002) (summarizing and rejecting the NLRB's "substantial religious character" test).

53. *Id.* at 1664–65 (2000), *vacated*, 278 F.3d 1335 (D.C. Cir. 2002).

54. *Id.*

55. *Great Falls*, 278 F.3d at 1343.

56. *Saint Xavier Univ. Emp'r*, No. 13-RC-22025, 2011 NLRB Reg. Dir. Dec. LEXIS 33 (N.L.R.B. May 26, 2011).

57. *Manhattan Coll.*, No. 2-RC-23543, 2011 NLRB Reg. Dir. Dec. LEXIS 94 (N.L.R.B. Jan. 10, 2011).

university's claim that the Board lacked jurisdiction because it was a religiously operated institution, and ordered that a union election be held.⁵⁸

The decisions in both cases contain extensive discussion and analysis of the schools' Catholic identity and history, mission and purpose, hiring practices and governance.⁵⁹ In *Manhattan College*, the NLRB Regional Director determined that the fact that Manhattan College did not impose "Church affiliation and religious observance as a condition for hiring or admission, . . . set quotas based on religious affiliation, . . . require loyalty oaths, attendance at religious services, or courses in Catholic theology," meant it lacked a substantial religious character.⁶⁰ In *Saint Xavier*, among the factors considered important by the Regional Director was the fact that faculty are not required to indoctrinate students or imbue curriculum with Church doctrine or religion.⁶¹

The current NLRB approach has "the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University."⁶² Underlying the NLRB approach are assumptions about what it means to be a religious entity and what it means to provide a religious university education, assumptions that "misunderst[an]d the nature of Catholic higher education in the United States"⁶³ When one reads the NLRB decisions, it is clear that for the agency, a university is not religious if propagation of a religious faith is not its primary purpose, if students and faculty are not required to engage in worship, or if the school welcomes people of other faiths.

The NLRB's current approach is particularly problematic when applied to Catholic colleges and universities.

[T]he organizational independence and broad educational mission of many CCUs does not mean those institutions are not "Catholic" or "religious." Inter-faith dialogue is an essential aspect[] of the Catholic Church's mission to engage the world. Church institutions do not lose their religious identity by carrying out that mission; to

58. See *Saint Xavier Univ.*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *1-3; *Manhattan Coll.*, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *1, 40-42.

59. See *Saint Xavier Univ. Emp'r*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *3-16; *Manhattan Coll.*, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *3-25.

60. *Manhattan Coll.*, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *20.

61. *Saint Xavier Univ.*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *13-14.

62. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002).

63. Catholic Colleges Amicus Brief, *supra* note 7, at 3.

the contrary, they fulfill one of their core religious functions by serving as “a primary and privileged place for a fruitful dialogue between the Gospel and culture.”⁶⁴

To put the best light on the NLRB’s approach, its test is clearly intended to address the concerns of *Catholic Bishop* that the exercise of jurisdiction could risk entanglement.⁶⁵ Focusing on the character of the institution as a proxy for focusing directly on the issue of entanglement, however, requires the Board to make judgments about what it means for an institution to possess a religious character.⁶⁶ The NLRB’s application of its current test involves an exercise not very different from the process criticized in *Catholic Bishop*.

Based on these concerns, the D.C. Circuit adopted a different approach in *Great Falls*. Under its bright-line test, a university is exempt from NLRB jurisdiction if it (a) holds itself out to students, faculty, and the community as providing a religious educational environment; (b) is organized as a non-profit entity; and (c) is in some way affiliated with or owned by a recognized religious organization.⁶⁷

IV. AN ALTERNATIVE TO THE CURRENT NLRB APPROACH

A. What Does Catholic Bishop Allow?

In the context of lay teachers at Catholic high schools, the Supreme Court held in *Catholic Bishop* that there would be a significant risk of infringement of the Religion Clauses of the First Amendment if the NLRA conferred jurisdiction over church-operated schools.⁶⁸ The first question is the extent to which *Catholic Bishop* should be read to apply to religious colleges and universities. There are two possible readings of the Supreme

64. *Id.* at 14 (quoting JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE ¶ 43 (1990)).

65. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501 (1979) (noting the danger of “an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools”).

66. *Id.*

67. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002). The D.C. Circuit reiterated its test in *Carroll Coll., Inc. v. NLRB*, 558 F.3d 568, 572 (D.C. Cir. 2009), holding that the college was exempt from NLRB jurisdiction. Because federal agencies generally follow a policy of intracircuit nonacquiescence, *Great Falls* is not binding on the agency outside of the D.C. Circuit. See *Ins. Agents’ Int’l Union*, 119 N.L.R.B. 768, 773 (1957) (stating the Board’s “consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals”). The *Great Falls* reasoning, however, has been applied in other contexts. See, e.g., *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1258 (10th Cir. 2008) (holding that criteria for state scholarships involved unconstitutionally intrusive scrutiny of an institution’s religious belief and practice).

68. *Catholic Bishop*, 440 U.S. 490, 501–03 (1979).

Court's decision, and which reading one adopts affects how one thinks about this question.

One possible reading is that, by its terms, *Catholic Bishop* applies to all educational institutions, meaning that all church-operated educational institutions at every level are exempt from the jurisdiction of the NLRB.⁶⁹ If that is the correct reading of *Catholic Bishop*, the only question that can be asked is what it means for an organization to be "church-operated." This appears to be how the D.C. Circuit court reads the decision, based on its holding in *Great Falls*.⁷⁰ It is also how then-Judge Breyer read *Catholic Bishop* in his decision in *Universidad Central de Bayamon v. NLRB*.⁷¹

The alternative reading is that *Catholic Bishop* held only that parochial grade and high schools are exempt from NLRB jurisdiction and, by its terms, does not preclude NLRB jurisdiction over colleges and universities in all circumstances. If that is the case, one might conclude that the current NLRB test for exercising jurisdiction is unduly intrusive, but still support the NLRB's approach of considering on a case-by-case basis whether to exercise jurisdiction over religious colleges and universities, based on the guidance provided by *Catholic Bishop*.

In considering which of the two readings is superior, it is relevant that there is an enormous difference between parochial grade and high schools and Catholic colleges and universities. As the Supreme Court observed in *Tilton v. Richardson*:

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. . . . Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than

69. This is the conclusion articulated in Saint Xavier University's response brief. See Saint Xavier Univ. Response to Petitioner's Brief & to the AFL-CIO's & the Am. Fed'n of Teachers' Amici Curiae Brief in Support of the Reg'l Dir.'s Decision at 2 n.1, Saint Xavier Univ., No. 13-RC-22025, 2011 NLRB Reg. Dir. Dec. LEXIS 33 (N.L.R.B. May 26, 2011), available at mynlrb.nlr.gov/link/document.aspx/09031d45806e75e5 (filed on Oct. 28, 2011) (arguing that *Catholic Bishop* means that "church-operated schools, as a whole, are exempt from jurisdiction under the Act and that the Board may not perform further inquiry beyond the three-prong approach set forth in *Carroll College* and *Great Falls*").

70. *Great Falls*, 278 F.3d at 1341.

71. *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 398–99 (1st Cir. 1986).

in primary and secondary schools that religion will permeate the area of secular education.⁷²

The Court's language in *Catholic Bishop* reflects that difference. Although *Catholic Bishop* uses the phrase "church-operated" school rather than parochial school,⁷³ the language the Court uses to talk about the risk of entanglement is descriptive of parochial schools but not typically of colleges and universities that are not seminary schools. The "entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith,"⁷⁴ which is not present at the university level.⁷⁵ As the dissenting opinion in *Bayamon* recognized, the "basic rationale" of *Catholic Bishop* rested "on the unique role that teachers in elementary and secondary schools play as servants of the Church in fulfilling the religious mission of the school," a role that is very different from the role of university professors.⁷⁶ The dissent observed:

Because the Court saw teachers in parochial schools as essentially servants of the Church in carrying out the religious missions of elementary and secondary schools, the Court could hold that the very *existence* of a union and mandatory bargaining in such schools would impermissibly violate this essential relationship between church and teacher. Teachers in the lower grades play such an integral role in inculcating their students with the school's religious doctrine, and play such an important role as religious models for their students, that the Supreme Court could well conclude that any state labor regulation would inevitably result in the entanglement of religion and government.⁷⁷

In addition, *Catholic Bishop*'s holding addressed only the question of the Board's jurisdiction over *teachers* at parochial schools. The Court's holding "does *not* 'exclude church-operated schools, as entire units, from the coverage of the NLRA.'"⁷⁸

72. *Tilton v. Richardson*, 403 U.S. 672, 685, 687 (1971).

73. This was a point of significance for then-Judge Breyer in *Bayamon*. See *Bayamon*, 793 F.2d at 392, 399–406 (Breyer, J., dissenting).

74. *NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 822 (2d Cir. 1980).

75. For example, in *Manhattan College*, even the college's required course in Catholic Studies "is a process to study Catholic ethics or rituals or teaching, but not to make people Catholic. It is not designed to indoctrinate in any way." *Moses*, *supra* note 1, at 19. It is notable that *Catholic Bishop* was decided during the *Lemon/Tilton* era, during which the Court was concerned with making the distinction between pervasively sectarian schools and other religiously-affiliated schools.

76. *Bayamon*, 793 F.2d at 403–04 (Breyer, J., dissenting).

77. *Id.* at 404.

78. AFL-CIO Amicus Brief, *supra* note 7, at 4 (quoting *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1301 (9th Cir. 1991)).

Thus, the better view is that *Catholic Bishop* is not binding on the application of the NLRA to religious colleges and universities. Rather, the NLRB's determination to decide on a case-by-case basis whether to exercise jurisdiction over religious colleges and universities, is an effort to apply the spirit of *Catholic Bishop* so as to avoid excessive entanglement. The relevant question thus becomes whether the exercise by the NLRB of regulatory oversight over the collective bargaining process presents a significant risk of infringement of religious freedom.

I frame the question in terms of NLRB regulatory oversight because collective bargaining itself presents no problem for Catholic institutions. Catholic social thought strongly favors the rights of workers to engage in collective bargaining, calling labor unions a "positive influence for social order and solidarity" and "therefore an *indispensible element of social life*."⁷⁹ Thus, the disagreement of those who oppose the NLRB's jurisdiction over Catholic colleges and universities is not with the effort by faculty to seek a representative to bargain collectively on their behalf.⁸⁰ Rather, it is opposition either to the NLRB's effort to determine whether an institution is religious or with its exercise of oversight of the bargaining process. The following two sections explore two potential risks to NLRB oversight.

B. Concerns about First Amendment Implications of NLRB Oversight

In *Catholic Bishop*, the Supreme Court expressed the concern that NLRB oversight of the collective bargaining process in parochial schools could "implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions."⁸¹ It also feared that resolution by the NLRB of unfair labor practice charges against such schools could require it to inquire "into the good faith

79. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH, ¶ 305 (2004). For a fuller discussion of Catholic social thought and unions, see Ken Matheny, *Catholic Social Teaching on Labor and Capital: Some Implications for Labor Law*, 24 ST. JOHN'S J. C.R. & ECON. DEV. 1 (2009).

80. Indeed, the full-time faculty of Saint Xavier University are represented by a union. Saint Xavier Univ., No. 13-RC-22025, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *15 n.13 (N.L.R.B. May 26, 2011). In contrast to an issue much in the news in recent times, the issue here is very different from the claim that mandating that Catholic institutions provide contraceptive coverage to their employees violates religious freedom, a mandate that would force such institutions to participate in something as to which they have deep religiously-based opposition.

81. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 503 (1979).

of the position asserted by the clergy-administrators and its relationship to the school's religious mission.”⁸²

Even as to parochial schools, there is no unanimity on whether subjecting religious educational institutions to laws regulating collective bargaining creates a constitutional problem. The view of the Seventh Circuit in *Catholic Bishop* that it does create a constitutional problem has been rejected by several courts that have addressed the application of state collective bargaining laws to religious educational institutions.⁸³

In evaluating the risks of NLRB oversight of the collective bargaining process in Catholic colleges and universities, the first thing to consider is that Catholic colleges and universities already voluntarily subject themselves to secular oversight and regulation of a number of matters having to do with terms and conditions of employment by virtue of seeking accreditation from a regional accrediting agency.

Accreditation by a recognized accrediting organization is required in order for an institution to receive federal funds such as student aid and other federal programs.⁸⁴ In addition, some states have accreditation requirements for institutions operating in their states.⁸⁵ Apart from legal requirements, accreditation is thought desirable from a marketing standpoint because it gives some assurance of quality of the institution.

Although there are a number of faith-related accreditors, virtually all Catholic colleges and universities seek and obtain accreditation by regional accreditors.⁸⁶ Among the 231 institutions that seek accreditation only by a

82. *Id.* at 502.

83. See, e.g., *Christ the King Reg'l High Sch. v. Culvert*, 815 F.2d 219 (2d Cir. 1987); *In re Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992); *In re N.Y. State Emp't Relations Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960 (N.Y. 1997). But see *Mich. Educ. Ass'n v. Christian Bros. Inst. of Mich.*, 706 N.W.2d 423 (Mich. Ct. App. 2005) (because religion permeated the educational experience at Brother Rice, there would be substantial First Amendment concerns involved if the Michigan Education Association could unionize teachers).

84. Michael W. Prairie & Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 J.C. & U.L. 61, 62 (1994).

85. For example, Virginia requires all private colleges and universities to be accredited. PETER EWELL, MARIANNE BOEKE & STACEY ZIS, COUNCIL FOR HIGHER EDUCATION ACCREDITATION, STATE USES OF ACCREDITATION: RESULTS OF A FIFTY-STATE INVENTORY 67 app., available at http://www.chea.org/pdf/State_Uses_of_Accreditation.pdf.

86. Three-hundred sixty-nine religiously-affiliated universities are accredited by faith-based agencies. Of those, one-hundred thirty-eight are also accredited by regional accrediting agencies. *The Database of Accredited Postsecondary Institutions and Programs*, DEP'T OF EDUC., <http://ope.ed.gov/accreditation/Search.aspx> (last visited Apr. 12, 2012). The database was searched by accrediting agency and included only the faith-based or religious accrediting agencies to determine the number of schools accredited by only faith-based accrediting agencies.

religious agency,⁸⁷ eschewing oversight by regional accreditors, only four are Catholic institutions, and those four are seminary schools accredited by the Association of Theological Schools.⁸⁸ Thus, almost all Catholic institutions choose to seek regional accreditation, either in addition to or in lieu of accreditation by religious agencies.

This means that Catholic colleges and universities already voluntarily subject themselves to the oversight of regional agencies regarding terms and conditions of the employment of their faculty and of faculty/university relations. That they do so suggests that being subject to NLRB oversight would not impose a unique burden on their institutions. Accreditors already impose requirements on them as to faculty governance, academic freedom and other matters that relate to terms and conditions of employment.

Although there are special provisions in the accreditation standards for religious institutions and accrediting agencies tend to honor a school's stated religious mission, there have been cases of conflict resulting from the accrediting agencies' oversight of religious institutions. In 2011, Patrick Henry College was denied accreditation because it required six-day creationism to be taught in biology class, causing the American Academy for Liberal Education (the AALE) to determine that the biology course did not satisfy the AALE's basic knowledge requirement.⁸⁹ The president of the AALE made clear that it had no objection to the teaching of creationism in theology classes—and has accredited colleges that do so—but that such teaching was inappropriate for a biology course.⁹⁰ Also in 2011, La Sierra University, a Seventh-day Adventist institution, was put on warning by its regional accreditor that its church had too much influence on the school's academic standards.⁹¹ The university's response to a lawsuit filed by several terminated administrators and faculty suggests that the position of the Seventh-Day Adventist Church is that "Church leaders should be making

87. The 231 is largely composed of Rabbinical schools, Baptist schools and miscellaneous Bible and Christian schools. *The Database of Accredited Postsecondary Institutes and Programs*, *supra* note 86.

88. The four are Byzantine Catholic Seminary of Saints Cyril and Methodius, Saint Bernard's School of Theology and Ministry, Saint Vincent Seminary, and University of Saint Mary of the Lake Mundelein Seminary. *Id.* See also *Colleges & Universities*, ASS'N OF CATHOLIC COLLS. & UNIVS., <http://www.accunet.org/i4a/pages/index.cfm?pageid=3489> (last visited Apr. 12, 2012).

89. LaTonya Taylor, *Christian College Denied Accreditation*, CHRISTIANITY TODAY (July 8, 2002, 12:00 AM), <http://www.christianitytoday.com/ct/2002/july8/15.16.html?start=1>.

90. *Id.*

91. *La Sierra U. Is Warned by Accrator over Church Influence*, THE CHRON. OF HIGHER EDUC. (Aug. 4, 2011, 1:21 PM), <http://chronicle.com/blogs/ticker/la-sierra-u-warned-by-accrator-over-church-influence/35107>.

academic and curriculum decisions,”⁹² a position that is likely to jeopardize its accreditation. At the law school level, some have charged that “the ABA and AALS improperly single out religiously affiliated law schools for special scrutiny and curtail the ability of these law schools to provide legal education in a manner that is faithful to their mission.”⁹³

The question, then, is whether NLRB oversight over the collective bargaining process would add any additional intrusion that Catholic colleges and universities do not already voluntarily subject themselves to by virtue of accreditation requirements. Focusing on the religious character of the institution does not even consider that question.

There are several reasons to think subjecting religious colleges and universities to the jurisdiction of the NLRB would not involve additional intrusion of the type that would create a constitutional concern.

First, the imposition of NLRA collective bargaining requirements is not likely to create entanglement with the religious mission of the school. It is true that the NLRB can order collective bargaining over “wages, hours, and other terms and conditions of employment”⁹⁴ (“mandatory subjects” of collective bargaining), and that the term “conditions of employment”⁹⁵ is capable of a broad reading that theoretically could encompass academic policy.⁹⁶ However, even in the secular context, the Supreme Court has made clear that “employers cannot be required to bargain over all decisions that directly affect the employment relationship,”⁹⁷ and decisions involving the application of state labor laws to religious schools (generally high schools, where one would expect more likelihood of conflict than in a university) suggest that courts have managed to exclude religious matters from the scope of mandatory subjects of bargaining.⁹⁸ More importantly, even with

92. Press Release, McCune Wright LLP, Terminated La Sierra University Employees’ Counsel Responds to Defendants’ Initial Court Filings (Sept. 14, 2011), *available at* http://www.mccunewright.com/assets/news/LSU_Press_Release_9-14-11.pdf.

93. Steven M. Barkan, *Symposium on Religiously Affiliated Law Schools: The First Conference of Religiously Affiliated Law Schools: An Overview*, 78 MARQ. L. REV. 247, 249 (1995).

94. National Labor Relations Act, 29 U.S.C. § 158(d) (2006).

95. Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 VILL. L. REV. 77, 92 (2004).

96. In *Catholic Bishop*, the Court quoted *Springfield Education Ass’n v. Springfield School District No. 19*, 547 P.2d 647, 650 (Or. Ct. App. 1976), observing that “nearly everything that goes on in the schools affects teachers and is therefore arguably a ‘condition of employment.’” NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 503 (1979).

97. Brady, *supra* note 95, at 92 (discussing the application of the Supreme Court’s reasoning in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), to the question of NLRB oversight over religious colleges and universities).

98. See *id.* at 91; *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709 (N.J. 1997) (holding that lay elementary school teachers had a state constitutional right to unionize and bargain collectively and limiting the scope of that right to secular terms and conditions of employment).

respect to mandatory subjects, the Board can require only that parties negotiate in good faith; it cannot “compel either party to agree to a proposal or require the making of a concession.”⁹⁹ As one commentator observed, “It is difficult to understand how any NLRB bargaining order would interfere with the church’s right to autonomy . . . when the schools retain ultimate authority to decide whether to agree to any particular bargaining proposal or to make any concessions.”¹⁰⁰

Second, the dispute concerning NLRB jurisdiction over religious colleges and universities has generally involved adjunct faculty,¹⁰¹ with respect to whom there is less likely to be an entanglement issue. *Saint Xavier College* is instructive. Neither the offer nor the contract of adjunct faculty, nor the student evaluations which formed the primary basis of evaluating the adjuncts, made any mention of “the Sisters of Mercy, Catholicism, God, or religion.”¹⁰² Indeed, nothing related to religion ever formed any part of the evaluation of the adjuncts; the Regional Director found that “[a]djunct faculty cannot be dismissed for conduct contrary to the Church, nor can they be dismissed by the Sisters of Mercy or Church officials.”¹⁰³

Similarly, in *Manhattan College*, the Regional Director found that the role of adjunct faculty in effectuating the secular purpose of the college “does not involve propagating religious faith in any way.”¹⁰⁴ Adjunct faculty were hired based on academic qualifications to fulfill academic obligations.¹⁰⁵ As the Regional Director observed, “Because adjunct faculty are not required to advance a religious mission in any way, exercising jurisdiction over the College will not have any ‘potential effects’ leading to unconstitutional entanglement.”¹⁰⁶ Given these facts, it is difficult to imagine how either the bargaining over the terms and conditions of adjunct employment—the traditional adjunct issues are better pay and benefits and job security—or the resolution of any unfair labor charge advanced by such faculty could involve wading into impermissible waters.

99. 29 U.S.C. § 158(d).

100. Willen, *supra* note 25, at 73.

101. Both *Saint Xavier University*, No. 13-RC-22025, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *1 (N.L.R.B. May 26, 2011), and *Manhattan College*, Manhattan Coll., No. 2-RC-23543, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *2–3 (N.L.R.B. Jan. 10, 2011), involve adjunct faculty.

102. *Saint Xavier Univ.*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *15.

103. *Id.* at *16.

104. *Manhattan Coll.*, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *33.

105. *Id.* at *25.

106. *Id.* at *33.

Third, the Supreme Court in *Catholic Bishop* expressed concern about the inquiry that would be required where the NLRB was investigating an unfair labor practice charge.¹⁰⁷ The Court feared that where a school's defense to the charge was that their religious creed mandated their action in question, "the very process of inquiry" into the good faith of church administrators could lead to excessive entanglement.¹⁰⁸ The Court's concern is misplaced.

Investigating unfair labor practices could require the Board to make a factual determination whether the complained of practice, for example, the discharge of a faculty member, was motivated by an illegal purpose, rather than a protected purpose. But courts and agencies engage in such factual determinations of motive all of the time and doing so does not require adjudicating question of religious doctrine. It is true that the Board might have to evaluate the sincerity of an asserted religious belief. "This is no different, though, from the inquiry the courts regularly have made into the sincerity of asserted religious beliefs in First Amendment cases to insure that the free exercise claim is not fraudulent."¹⁰⁹

It is clear that there are some situations where entanglement is more likely than others. First, just as there is a difference between parochial elementary and high schools and religious colleges and universities, there is

107. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504 (1979).

108. *Id.* at 502.

109. Willen, *supra* note 25, at 71. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 621–22 (1986), the Supreme Court addressed a challenge to the exercise of jurisdiction by the Ohio Civil Rights Commission over a claim that a Christian school terminated a teacher due to her pregnancy. The school defended the termination on the ground that the reason for termination was the employee's failure to follow the "Biblical chain of command" in seeking relief. *Id.* at 622–23. In the view of the Court, "the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's discharge in this case, if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge." *Id.* at 628.

This issue was addressed in the context of the ministerial exemption to Title VII in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church & School*, 597 F.3d 769 (6th Cir. 2010), *rev'd*, 132 S. Ct. 694 (2012). The Sixth Circuit rejected the fear that evaluating an employee's claim under the Americans with Disabilities Act would require it to second guess a religious employer's religious judgment; the employee's claim

would not require the court to analyze any church doctrine; rather a trial would focus on issues such as whether Perich was disabled within the meaning of the ADA, whether Perich opposed a practice that was unlawful under the ADA, and whether Hosanna-Tabor violated the ADA in its treatment of Perich.

Id. at 781–82. Although the Supreme Court ruled in favor of the existence of the ministerial exemption, the majority did not address this issue. *Hosanna-Tabor*, 132 S. Ct. at 707. Justice Alito's concurrence, however, rejected the Sixth Circuit view. *Id.* at 713 (Alito, J., concurring).

Hosanna-Tabor presents a perhaps more difficult issue than the one with which I am concerned because, by definition, ministerial exemption claims involve employees with spiritual duties, making it more difficult to avoid theological or religious issues. That difficulty was discussed in an amicus brief filed on behalf of the National Council of Churches of Christ. Brief Amici Curiae of Professor Eugene Volokh et al. in Support of Petitioner, *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012) (No. 10-553).

a difference between an ordinary religiously-affiliated college and university and a seminary, the latter of which is designed to educate and prepare students for ordination to the priesthood or other ministerial position. Faculty in a seminary are much closer to parochial elementary and secondary schools in terms of their role in inculcating students with religious doctrine and serving as religious models for their students, meaning there is far greater potential for entanglement than in the case of other religious colleges and universities.

Second, one can imagine greater possibility for entanglement in the case of full-time rather than adjunct faculty. The question of NLRB jurisdiction over Catholic colleges has generally arisen with respect to adjunct faculty. This is perhaps explained by the Supreme Court's 1980 decision in *NLRB v. Yeshiva University*,¹¹⁰ which held that most private university tenure-track faculty are managerial employees and therefore excluded from the protection of the NLRA.¹¹¹ While many have criticized the Court's analysis and conclusion,¹¹² it remains the law.

Nonetheless, there have been instances where the NLRB has found that university professors lack the degree of autonomy necessary to exclude them from the protection of the NLRA.¹¹³ In situations where full-time faculty are

110. 444 U.S. 672 (1980). In *Yeshiva*, the Court declined to address the question of the extension of Catholic Bishop to religious colleges and universities because it determined the faculty were not "employees" under the NLRA. *Id.* at 679.

111. *Id.* at 686. In the view of the Court, faculty "exercise authority which in any other context unquestionably would be managerial." *Id.*

112. See, e.g., Risa L. Lieberwitz, *Faculty in the Corporate University: Professional Identity, Law and Collective Action*, 16 CORNELL J. L. & PUB. POL'Y 263, 266, 280–301 (2007) (critiquing *Yeshiva* "as a misreading of the NLRA and an inaccurate assessment of class relations between faculty and the university administration").

113. See, e.g., Carroll Coll., Inc., 350 N.L.R.B. No. 30, at 2 (July 20, 2007) (upholding determination that faculty were not managerial employees); Lewis Univ., 265 N.L.R.B. 1239, 1250 (1982) (ruling that Lewis' full-time professors were not managerial employees because they lacked final authority over significant University operations and were not involved in formulating and effectuating policies).

It is also entirely possible, given the nature of the governance of religious colleges and universities, that their faculty would be less likely than faculty of a secular university to be treated as management under *Yeshiva*, although in at least one instance that Board concluded that full-time faculty of a religious university were managerial and thus excluded. See *Duquesne Univ. of the Holy Ghost*, 261 N.L.R.B. 587 (1982). It has been argued that, as to Catholic colleges and universities, the *Yeshiva* distinction is a distortion of Catholic teaching. David Gregory and Charles Russo write:

From the integrated perspective of Catholic social teaching, workers cannot be artificially trifurcated into "supervisors" and "managers" and "employees" for the purposes of denigrating their core rights as workers qua workers to unionize and bargain collectively.

determined to be non-managerial employees, there is a greater likelihood of entanglement.¹¹⁴ I say “greater likelihood,” but even there, there is no guarantee of a constitutional problem. Despite St. Xavier’s opposition to its adjunct faculty organizing, “the University’s full time faculty were organized under an NLRB election 20 years ago, and the University has continued to recognize and bargain with that union without experiencing any ‘entanglement’ issues through to the current date.”¹¹⁵

Finally, there is also arguably a greater potential for entanglement where graduate student assistants seek to unionize. The NLRB’s position on the question of whether graduate student assistants are employees within the meaning of the NLRA is a moving target. It traditionally held that teaching and research assistants are primarily students, not employees.¹¹⁶ However, in 2000, in a decision involving New York University, the NLRB overturned its prior precedent, holding that university graduate assistants are employees within the meaning of the NLRA and thus could form a collective bargaining unit.¹¹⁷ In 2004, it reversed itself yet again, holding in *Brown University*¹¹⁸ that graduate student assistants were not employees within the meaning of the NLRA in that the relationship between the university and the students was fundamentally educational, not economic.¹¹⁹ In a 2010

From the perspective of Catholic labor theory, all who work are workers, without regard to secular labor law’s artificial class-based trifurcation of the world of work.

David L. Gregory & Charles J. Russo, *Overcoming NLRB v. Yeshiva University by the Implementation of Catholic Labor Theory*, 41 LAB. L.J. 55, 62 (1990).

114. Where the employer is a church itself, the NLRB has determined it is inappropriate to examine the role that specific employees play in effectuating the employer’s religious purpose and will not exercise jurisdiction even over secular employees of religious institutions. *See, e.g.*, St. Edmund’s Roman Catholic Church, 337 N.L.R.B. 189 (2002). However, where the employer is not the religious institution itself, nothing precludes the NLRB from engaging in such an inquiry.

115. Petitioner’s Brief in Support of Reg’l Dir.’s Decision at 3, Saint Xavier Univ., No. 13-RC-22025, 2011 NLRB LEXIS 350 (N.L.R.B. July 13, 2011), *available at* <http://mynlrb.nlr.gov/link/document.aspx/09031d458065d347> (filed on Sept. 15, 2011).

116. In several cases in the 1970s and 1980s, the Board held that graduate assistants could not be included in regular faculty bargaining units. *See, e.g.*, Leland Stanford Junior Univ. 214 N.L.R.B. 621 (1974); Adelphi Univ., 195 N.L.R.B. 639 (1972).

117. N.Y. Univ., 332 N.L.R.B. 1205 (2000), *overruled by* Brown Univ., 342 N.L.R.B. 483 (2004). The NLRB reasoned nothing precluded a determination that the assistants had dual status as students and employees; the fact that graduate students were not required to serve as assistants in order to obtain their degrees and that the university obtained substantial benefits from their serving in that capacity meant that their positions were not primarily educational. *Id.* at 1220.

118. 342 N.L.R.B. 483.

119. *Id.* at 483. In the view of the NLRB, the interests of the university and the student, which primarily were aimed at the students’ educational advancement, could not be appropriately dealt with through the collective bargaining process. *Id.* at 489–90. For a discussion of the evolution of the Board’s view on this issue, see Ryan Patrick Dunn, Comment, *Get a Real Job! The National Labor Relations Board Decides Graduate Student Workers at Private Universities Are Not “Employees” Under the National Labor Relations Act*, 40 NEW ENG. L. REV. 851 (2006).

decision,¹²⁰ the NLRB suggested there are “compelling reasons” to reconsider *Brown University*, and in June 2011, the Acting Director of the NLRB’s regional office in Manhattan said that graduate assistants have a “dual relationship” with the university that “does not necessarily preclude a finding of employee status.”¹²¹

Although none of the cases involving efforts by graduate student assistants to organize have involved Catholic universities, such an effort could easily be forthcoming if the NLRB, in fact, overturns the *Brown University* decision.¹²² Should such a case arise, because of the dual role of employee and student, the possibility of entanglement appears greater than for adjunct professors.

C. Foreclosure of an Alternative Vision for Employer-Employee Relations

In its amicus brief in *Manhattan College*, the Association of Catholic Colleges and Universities acknowledged that “[t]he Catholic Church has long supported the moral rights of workers to organize and bargain collectively,” and that “Catholic colleges and universities respect and support those teachings.”¹²³ Nevertheless, it argued, such institutions “must have the freedom to pursue those goals without excessive government entanglement.”¹²⁴

The amicus’ concern was more fully articulated by Kathleen Brady.¹²⁵ Brady does not believe entanglement or interference with religious matters is threatened by application of labor laws to religious organizations, convinced that such problems “can be solved by limiting and adjusting applicable laws in religious contexts.”¹²⁶ Her concern is with imposing the NLRA’s

120. N.Y. Univ., 356 N.L.R.B. No. 7 (Oct. 25, 2010).

121. Decision & Order Dismissing Petition at 26, New York Univ., No. 2-RC-23481, 356 N.L.R.B. No. 7 (Oct. 25, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d4580509ccd> (decision issued June 16, 2011).

122. The question of whether graduate student assistants should be considered employees under the NLRA is beyond the scope of this Article. For commentary on the question see, e.g., Sarah J. Bannister, *Low Wages, Long Hours, Bad Working Conditions: Science and Engineering Graduate Students Should Be Considered Employees Under the National Labor Relations Act*, 74 GEO. WASH. L. REV. 123 (2005); Robert A. Epstein, *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. L. COMM. 157 (2005); Neal H. Hutchens & Melissa B. Hutchens, *Catching the Union Bug: Graduate Student Employees and Unionization*, 39 GONZ. L. REV. 105 (2003).

123. Catholic Colleges Amicus Brief, *supra* note 7, at 3.

124. *Id.*

125. Brady, *supra* note 95.

126. *Id.* at 80.

statutory scheme on Catholic institutions. Because the NLRA “presumes and perpetuates an adversarial relationship between workers and management, [whereas] Catholic teaching encourages relations that are more cooperative and collaborative,” requiring Catholic colleges to comply with the NLRA regime of collective bargaining would require Catholic institutions “to channel their employment relations into patterns of behavior that are deeply at odds with the Church’s basic vision for social life.”¹²⁷

For Brady, the ability of the Church to advance an alternative vision for social life—a vision built on love and mutual concern rather than on self-interest—is crucial. Religious organizations, in her view, offer a prophetic voice that “can push the larger community to reevaluate social and legal norms in light of new visions” that “can transform existing national values in progressive directions unimagined by prevailing orthodoxies.”¹²⁸ In the area of labor relations, that means a more cooperative model of collective bargaining rather than the adversarial model of the NLRA. She writes:

When the Catholic Church teaches that labor relations, like other social relations, should be based upon mutual concern, cooperation and willingness to forgive and seek reconciliation, the Church challenges the assumptions and expectations underlying federal and state labor laws. Rather than assuming distrust and conflicts of interest, the Church builds her approach to labor relations upon hope and the expectation that employers and employees can work together to see each others’ concerns and pursue the common good. Indeed, human fulfillment and social renewal require such self-giving. Thus, the Church rejects an essentially adversarial understanding of labor-management relations and a model for labor peace that is built upon the balance of power rather than a spirit of unity.¹²⁹

Theoretically, this sounds wonderful. The problem is that Catholic colleges and universities have not modeled the vision Brady offers. The employee groups seeking unionization have done so because Catholic colleges and universities have not offered a cooperative model of collective bargaining and appear to treat their employees no more lovingly than secular institutions of higher learning do. Six years after the Supreme Court’s decision in *Catholic Bishop*, the United States Bishops issued their pastoral

127. *Id.*

128. *Id.* at 81.

129. *Id.* at 156.

letter, *Economic Justice for All*.¹³⁰ In it, the bishops recognized the rights of workers of church institutions to organize and bargain collectively.¹³¹ Twenty-eight years later, in their actual labor relations, Catholic universities look no different than do secular universities. “Unfortunately, despite the promise of *Economic Justice for All*, the Church has yet to provide an adequate response to its labor relations lacunae created by *Catholic Bishop*.”¹³²

That it has not done so is troubling. How effective can Catholic Social Teaching be as a guide to the behavior of others if the Catholic entities themselves do not practice what the Church teaches about the rights of workers?¹³³ Brady acknowledges that Catholic institutions have not lived up to the ideal she advances. Nonetheless she believes it is “important to preserve their opportunity to try.”¹³⁴

Brady’s argument counsels in favor of giving wide berth to religious institutions so as to afford them a chance to live up to their ideals. To forego the aims of the NLRA, however, where an institution shows no signs of

130. UNITED STATES CATHOLIC BISHOPS, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY* (1986), available at http://www.usccb.org/upload/economic_justice_for_all.pdf.

131. *Id.* at 86 (“All church institutions must also fully recognize the rights of employees to organize and bargain collectively with the institution through whatever association or organization they freely choose.”); see also United States Conference of Catholic Bishops Office of Social Development & World Peace, *A Fair and Just Workplace: Principles and Practices for Catholic Health Care* (Aug. 26, 1999) (unpublished manuscript), <http://www.catholiclabor.org/hospital/workplace.htm> [hereinafter *A Fair and Just Workplace*] (stating that the “core of Catholic teaching in this area is that it is up to workers—not bishops, managers, union business agents, or management consultants—to exercise the right to decide through a fair and free process how they wish to be represented in the workplace. Workers may decide to be represented by a union or not to be represented. Catholic teaching respects their decision”).

132. David L. Gregory & Charles J. Russo, *The First Amendment and the Labor Relations of Religiously-Affiliated Employers*, 8 B.U. PUB. INT. L.J. 449, 456–57 (1999). Gregory and Russo find the failure of the Church to respond to be “theologically scandalous.” *Id.* at 466. They lament:

How is it that despite more than a century of unequivocal social teaching recognizing the dignity of all workers, including those in Church-affiliated institutions to organize and bargain collectively, some persons in Church leadership positions seek recourse to secular civil law to trump Church teaching? If the Church, as a major employer in the United States, is going to give effective witness to the social and moral teachings that it eloquently professes, then it must do more than provide pro-forma lip-service to the rights of its employees who wish to organize and bargain collectively.

Id.

133. Talking about the Manhattan College case, an organizer for the New York State United Teachers observed, “This is a college that talks about being committed to social justice. Well, its adjuncts need some social justice.” Scott Jaschik, *Church vs. Adjunct Union*, INSIDE HIGHER ED (Nov. 12, 2010, 3:00 AM), <http://www.insidehighered.com/news/2010/11/12/manhattan>.

134. See Brady, *supra* note 95, at 81.

implementing a richer vision of employer-employee relations and its treatment of its employees is such that employees seek the protection of federal labor laws seems to ask too much. At best, Brady has a good argument for the NLRB to refrain from stepping into a situation where a Catholic college or university has already taken steps to set up an alternative collective bargaining regime.

At a more basic level, however, I am not convinced Brady is correct that the application of federal labor laws would impede the ability of Catholic colleges and universities to model a more collaborative approach to collective bargaining.¹³⁵ The example of Catholic hospitals is instructive.

Although not-for-profit hospitals were originally covered by the NLRA, they were excluded from coverage by the Taft-Hartley amendments. When the issue of the removal of that exemption was being considered, the Catholic Hospital Association did not lobby for exclusion of Catholic hospitals from NLRA coverage. Instead, it supported the application of the NLRA to all employees in the health care industry, including employees of Catholic hospitals, subject only to provisions that would protect against the effects of strikes and work stoppages.¹³⁶ When Congress ultimately amended the NLRA in 1974 to cover the health care industry,¹³⁷ it contained no special provisions relating to religious hospitals, protecting only those who had conscientious objection to union membership.¹³⁸

Catholic hospitals are thus subject to the NLRA and to NLRB jurisdiction just as other hospitals. This does not prevent Catholic hospitals from approaching labor relations in the way Brady suggest and modeling a more collaborative and cooperative approach. At the time the 1974 amendments were put in place, the Catholic Hospital Association indicated that Catholic hospitals would “fairly recognize the rights of employees to organize, but at the same time [would] exercise appropriate management mechanisms to educate and motivate employees to the problems of health care administration, of public service, and of the financial realities of the industry.”¹³⁹ A statement of its board of trustees indicated a recognition of the obligation to furnish equitable terms and conditions of employment and

135. They may even help. In the real world, one might question whether it is possible to have a truly collaborative model without the threat of legal sanctions as a back-up.

136. Eugene J. Schulte, *Union Organization in Catholic Hospitals*, 21 CATH. LAW. 332, 332–34 (1975). Indeed, it appears that the Catholic Hospital Association was in favor of NLRA coverage of hospitals before other hospital representatives came on board. *See id.* at 334.

137. Health Care Amendments of 1974, Pub. L. 93-360, 88 Stat. 395 (current version at 29 U.S.C. §§ 151–169 (1974)).

138. Cathy Schatz Glazer, Comment, *Labor Relations in the Health Care Industry—The Impact of the 1974 Health Care Amendments to the National Labor Relations Act*, 54 TUL. L. REV. 416, 433–34 (1980).

139. Schulte, *supra* note 136, at 336.

to observe standards of enlightened personnel practices.¹⁴⁰ In 1999, the United States Conference of Catholic Bishops (USCCB) affirmed the rights of employees in Catholic hospitals to unionize.¹⁴¹

More recently, the Committee on Domestic Justice and Human Development of the USCCB published a document of options and guidance on the subject of Catholic health care and unions.¹⁴² The document explores how the social teachings of the Catholic Church “should shape the actions of unions, management and others in assuring workers a free and fair choice on questions of representation in the workplace.”¹⁴³ It aims at encouraging dialogue between unions and employers and replacing conflict and contention with more cooperative attitudes. The document sets forth the principles for a fair and just organizing model “based on mutual respect, equal access to truthful communications, and freedom from coercion.”¹⁴⁴

The USCCB’s document is no guarantee that there will not be difficulties between employers and unions; clearly there have been disputes over the years.¹⁴⁵ However, it does suggest that the NLRB’s assertion of jurisdiction over Catholic employers does not prevent the institution from developing and modeling a non-adversarial approach to labor relations.

V. SUGGESTED GUIDELINES FOR THE NLRB

If one accepts, as I argued earlier, that *Catholic Bishop* does not divest the NLRB of jurisdiction over religious colleges and universities, the NLRB is free to continue with a flexible approach in determining whether to exercise jurisdiction over such institutions. That approach should seek to protect both the religious freedom of the institutions and the policy in favor of unionization embodied in federal labor law. At one extreme, it would not be sufficiently protective of the interest of religious colleges and universities to say that the NLRB should always exercise jurisdiction over faculty efforts to unionize. At the other, the D.C. Circuit’s *Great Falls* test is insufficiently

140. Statement by the Catholic Hospital Ass’n Board of Trustees Concerning Employer-Employee Relations, *reprinted in* Schulte, *supra* note 136, at 337.

141. A Fair and Just Workplace, *supra* note 131.

142. See generally United States Conference of Catholic Bishops Committee on Domestic Justice and Human Development, *Respecting the Just Rights of Workers: Guidance and Options for Catholic Healthcare and Unions* (June 22, 2009), available at http://old.usccb.org/sdwp/national/respecting_the_just_rights_of_workers.pdf.

143. *Id.* at 1.

144. *Id.* at 8.

145. Gregory & Russo, *supra* note 132, at 456–57.

protective of federal labor policy and insulates religious colleges and universities more than necessary, never allowing faculty at religious colleges and universities to avail themselves of the protection of federal labor laws.

A better approach would be for the NLRB to determine whether to exercise jurisdiction over Catholic colleges and universities based on an analysis of factors counseling in favor of or against its doing so. That is, instead of putting the focus of the analysis on the religiosity of the institution, the focus ought to be more directly on the competing interests.¹⁴⁶

The discussion in Part IV of this Article suggests several relevant factors to consider as a means of ensuring that the NLRB does not exercise jurisdiction in a situation where there is a significant risk of entanglement or of infringement on a religious college or university's ability to offer an alternative means of achieving the goals sought to be achieved by federal law.

First, the fact that the unit seeking representation is composed of full-time faculty is a factor counseling against the NLRB's exercise of jurisdiction. In contrast, the fact that the unit seeking representation is composed of adjunct faculty is a factor counseling in favor of the NLRB's exercise of jurisdiction.

Second, the fact that faculty seeking representation are faculty in a seminary, with a primary task of preparing students to enter the priesthood or other ordained ministry, should be a dispositive factor counseling against the NLRB's exercise of jurisdiction.

Third, the fact that a religious college or university has chosen to be accredited by a regional accreditation agency, thereby voluntarily subjecting itself to the regulation created by such accreditation is a factor counseling in favor of the exercise of jurisdiction by the NLRB.

Fourth, the fact that a religious college or university is voluntarily engaging in collective bargaining with a faculty unit should counsel against the NLRB exercising jurisdiction. Where a religious university is endeavoring to implement a vision of employer-employee relations consistent with its religious principles, the NLRB should not attempt to supplant those principles by application of federal law.

146. In its amicus brief in *Manhattan College*, the American Federation of Labor & Congress of Industrial Organizations proposes a different alternative test, suggesting that the determinative question is "whether the faculty members in the petitioned-for unit perform a religious function." AFL-CIO Amicus Brief, *supra* note 7, at 3. Manhattan College argued in its reply brief that that inquiry would also be constitutionally infirm. Manhattan Coll.'s Response to Amicus Curiae Brief of the Am. Fed. of Labor & Congress of Indus. Orgs. & the Am. Fed. of Teachers, AFL-CIO at 11, Manhattan Coll., No. 2-RC-23543, 2011 NLRB Reg. Dir. Dec. LEXIS 94 (N.L.R.B. Jan. 10, 2011), available at <http://mynlrb.nlr.gov/link/document.aspx/09031d45807146c9> (filed on Nov. 14, 2011).

One can perhaps conceive of other factors that would be relevant. My aim here is not to present an exhaustive list, but rather, to find an alternative means of determining when the protection of federal labor laws is both necessary for the protection of employees and consistent with First Amendment protections. That aim suggests a flexible approach that would also include allowing either party to offer evidence to support its view that jurisdiction would or would not create excessive risks to an institution's religious freedom.

I acknowledge there is no guarantee that tensions will never arise in situations where the NLRB exercises jurisdiction over collective bargaining at religious colleges and universities. There may be reasons over time to impose some limits on the scope of collective bargaining with such institutions, as some states have done in the past. But the fact that tensions may arise that may need to be resolved is not a reason, in all circumstances, to deprive employees of such institutions of the protection of federal labor laws.

VI. CONCLUSION

There are some who view the NLRB's recent decisions involving Manhattan College and St. Xavier to be part of an attack on religious liberty. Others view it as a consequence of religious colleges and universities having become too secular over time, using the decisions as a means for pushing such institutions to be more sectarian.

The point here is not to disfavor religious colleges and universities who have adopted a more acculturated model of education.¹⁴⁷ It is to find a reasonable way to respect the freedom of a religious institution to carry out its religious mission without interference by the government and without exempting such institutions from laws that do no violence to that religious mission. Catholic colleges and universities should not have the freedom to treat employees in a way that would not be tolerated of a secular college and university unless application of the labor laws of the United States would cause a serious infringement of their religious freedom. Religious freedom should not provide a shield that allows religious colleges and universities to

147. Tom Berg has argued that law should not skew a church-affiliated organization's choice between different models of mission. Thomas C. Berg, *Christianity and the Secular in Modern Public Life*, 2 U. ST. THOMAS L.J. 425, 425-34 (2005). Moving away from a focus on the religiosity of the institution and toward the factors I have suggested may have the added benefit of reducing that danger.

deny their employees the benefits of collective bargaining so they can freely behave in an economically self-interested manner.