

Articles

A Groundless Clash of Freedoms?: The Religious Freedom of the Religiously Affiliated University and the Freedom of Faculty to Organize Under the NLRA

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“I believe in law. At the same time I believe in freedom. And I know that each of these . . . may destroy the other. But I know too that, without both, neither can long endure.”¹

Introduction

THIS ARTICLE EXAMINES the claim by some religiously affiliated universities and colleges that their First Amendment rights will be violated by the National Labor Relations Board if professors are allowed to organize and engage in collective bargaining using the Board’s processes. The Board’s processes can require an employer to bargain with a union selected by a majority of professors and to respond to charges of unfair labor charges. Because the right to organize using the processes of the Board is a statutory extension of the constitutional right of association under the First Amendment,² this claim can

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1. WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 6 (1947).

2. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933 (1982) (“[O]ne of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.”); Bhd. of R.R. Trainmen v. Virginia, 377 U.S. 1, 5–6

be also understood as an asserted conflict between the constitutional values of free association and religious freedom. It is beyond doubt that there are serious challenges to religious freedom today by both federal and state regulations, causing great division.³ This article, however, will clarify why the National Labor Relations Act should not be one of them.

This claim that the jurisdiction of the Board trods upon the religious freedom of the institutions is based upon the 1979 opinion of the Supreme Court in *NLRB v. Catholic Bishop of Chicago*.⁴ Since that opinion did not rule on the merits of the constitutional claim, it is not dispositive.⁵ The opinion was also not dispositive because the *Catholic Bishop* case dealt with high schools directly operated by a church.⁶ The constitutional claim of the religiously affiliated or inspired institutions will sooner or later have to be considered on the merits. To be considered on the merits, it will be necessary to examine how and in what manner, if at all, the Board's supervision of the representational process and of collective bargaining may in fact raise issues under the First Amendment and the Religious Freedom Restoration Act ("RFRA"). This consideration would need to be of such a serious nature as to preclude application of the Board's processes for those professors who wish to organize and engage in collective bargaining.

Part I of this article briefly describes the claim of those institutions that object to Board jurisdiction on constitutional grounds. Because that claim is closely dependent on an extension of the *Catholic Bishop* case, this article will describe that case's holding which is intentionally limited by that Court to "church operated schools." It is based not on the merits, under the Constitution, but also upon a doctrine of "avoidance" of deciding the merits. The intention is not to urge a revisiting of *Catholic Bishop*, but to criticize the uncritical extension of "avoidance" to markedly different university settings by subsequent court decisions.

(1964) ("... this right encompasses the combination of individual workers together in order better to assert their lawful rights.").

3. Sarah Posner, *The Christian Legal Army Behind 'Masterpiece Cakeshop'*, THE NATION (Nov. 28, 2017), <https://www.thenation.com/article/the-christian-legal-army-behind-masterpiece-cakeshop/> [<https://perma.cc/TKH8-4HCA>].

4. See generally *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979) (stating "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 questions arising out of the guarantees of the First Amendment Religion Clauses.").

5. *Id.* at 500, 507.

6. *Id.* at 491.

Part II and Part III describe some of the later decisions of the Board and of the courts which try to balance the competing claims, most especially the Board's decision in *Pacific Lutheran University*.⁷

Part IV examines the First Amendment Religion Clauses and the RFRA claims on their merits as applied to the Board's supervision of elections and unfair labor practices which implicate the duty to bargain. It also inquires as to whether labor arbitration of disputes under a collective bargaining agreement threatens a prohibited entanglement of this judicially favored alternative dispute resolution mechanism with such constitutional and statutory freedom interests. To date, there has been very little accurate judicial assessment of how problematic it would be for the Board to exercise its jurisdiction.

Part I

It is first necessary to describe the nature of the Board's jurisdiction under the National Labor Relations Act of 1935 ("NLRA" or the "Act"), as amended.⁸ In the NLRA, Congress declared it to be the policy of the United States 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 or other mutual aid or protection."⁹ In 1937, the Supreme Court said that this right of employees to self-organization and to select representatives is a "fundamental right."¹⁰ The Supreme Court long ago also said that Congress intended in this Act to give the Board the fullest jurisdiction constitutionally permissible under the Commerce Clause.¹¹ Thus, Congress intended that the Board protect the right of workers to organize subject only to such exceptions as explicitly established by Congress. There is no explicit exception in the Act for employees of "religious," "church" or "religiously affiliated" employers. Thus, the Board would

7. *Pac. Lutheran Univ. & Serv. Emp.'s Int'l Union*, 361 N.L.R.B. 1404, 1431–32 (2014).

8. 29 U.S.C. § 151 (1947).

9. *Id.* § 151.

10. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) ("That is a fundamental right. Employees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents. Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority.")

11. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963).

say that an exception for such employees should be recognized by it only when absolutely required by the First Amendment. This point is explained in more detail in Part II.

The case for just such an exception is illustrated by the contentions in the recent leading case at the Board, *Pacific Lutheran University* (hereafter “*PLU*”).¹² In *PLU*, the university sought complete exemption from the Board’s jurisdiction.¹³ It argued that it was a non-profit corporation owned by the Lutheran Church; moreover, that it held itself out to the public as providing a religious educational environment wherein Lutheran theology and traditions were central to its existence; and, therefore, its religious heritage and history were communicated to students, faculty, and the community.¹⁴ The university did not undertake to show how Board jurisdiction would in fact affect its First Amendment rights. Rather, its arguments were simply intended to seek complete exemption from the Board’s jurisdiction under a three-part test set by the D.C. Circuit in *University of Great Falls v. NLRB*.¹⁵ How these arguments fared and the Board’s decision in *PLU* are described more fully in Part III.

Some Catholic universities made the same claim as *Pacific Lutheran*. Loyola University of Chicago said that Board jurisdiction over an election petition for a group of adjuncts would destroy the university’s “right to define our own mission and to govern our institution in accordance with our values and beliefs, free from government entanglement.”¹⁶ Fr. Dennis Holtschneider, the then-president of DePaul University, in a piece in *Inside Higher Ed* claimed that the Board is “a rogue governmental agency . . . attempting to extend its authority over faith-based institutions” and has “reasserted the 19th-century bias against Catholicism”.¹⁷ Furthermore, it would “require governmental functionaries to judge the manner in which we implement our faith in a university context.”¹⁸ To some this assertion may sound like a plea

12. See *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1406.

13. *Id.*

14. *Id.*

15. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1344–45 (D.C. Cir. 2002).

16. Joanna Rudenberg, *Labor Movements at Loyola: Examining a Catholic University’s Corporate Doublespeak*, LOYOLA PHOENIX (Apr. 22, 2016), <http://loyolaphoenix.com/2016/04/labor-movements-loyola-examining-catholic-universitys-corporate-doublespeak/> [https://perma.cc/2RZ8-S9BB].

17. Dennis H. Holtschneider, *Refereeing Religion?*, (Jan. 28, 2016), *INSIDE HIGHER EDUC.*, <https://www.insidehighered.com/views/2016/01/28/new-nlr-standard-could-have-major-consequences-catholic-colleges-essay> [https://perma.cc/X6WY-GCHR].

18. *Id.*

for the ancient *libertas ecclesiae* (the “freedom of the Church”)¹⁹ which is an autonomy that may still adhere at least in the penumbra of our jurisprudence, but may be depreciated in our modern culture to a plea to be left alone.²⁰

Many Catholic universities, however, do not see a challenge to their religious freedom in the exercise of the Board’s jurisdiction.²¹ This is because the official moral teaching of the Catholic Church is that workers possess a moral right to form and participate in a union. In the Second Vatican Council’s Pastoral Constitution on the Church in the Modern World (*Gaudium et Spes*), the right to organize is declared to be among the “basic rights of the human person.”²² In 1986, the American Bishops said, “The Church fully supports the right of workers to form unions . . . to secure their rights to fair wages and working conditions” and “. . . firmly oppose . . . efforts [to] prevent workers from organizing.”²³ Then, the American Bishops said that this applied not only to America generally, but also to the Church as an economic actor.²⁴ The American Bishops did *not* say that workers have this moral right except when our religious freedom requires that they not have it.²⁵ It is difficult to affirm the Catholic Church’s moral teaching and still object to the jurisdiction of the Board when that jurisdiction is the only effective avenue to realizing the Church’s teaching on unionization. Yet, that is the position of the objectors who

19. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 87 (1983).

20. See Paul Horwitz, *Freedom of the Church Without Romance*, 21 J. CONTEMP. LEGAL ISSUES 59, 127 (2013); See generally, Richard W. Garnett, *The Freedom of the Church*, 4:1 J. OF CATH. SOC. THOUGHT, 59, 79 (2007) (“[It] remains unclear and unsettled what exactly are the content and textual home in the Constitution for the church-autonomy principle—or even, indeed, if there is such a ‘principle’”); See generally, Richard W. Garnett, “*The Freedom of the Church*”: (*Towards an Explanation, Translation and Defense*), 21 J. CONTEMP. LEGAL ISSUES, 33, 44 (2013) (arguing that for “freedom of the church” to be a reality, secular institutions should “abstain” from interfering in their matters).

21. Examples include Georgetown University, the University of San Francisco, St. Mary’s College of California, Fordham University, St. Francis College (Brooklyn), College of St. Rose, St. Michael’s College (Vt.) and Le Moyne College.

22. Pope Paul VI, *Pastoral Constitution on the Church in the Modern World Gaudium Et Spes*, THE HOLY SEE, (Dec. 7, 1965), http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html [<https://perma.cc/6TQX-MD4Q>].

23. *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, UNITED STATES CATHOLIC BISHOPS, 24 (1986) http://www.usccb.org/upload/economic_justice_for_all.pdf [<https://perma.cc/EK45-WJPE>].

24. *Id.* at 85–86 (“All the moral principles that govern the just operation of any economic endeavor apply to the Church and its agencies and institutions; indeed the Church should be exemplary”).

25. *Id.*

offer no real alternatives. As a result of this “split” among Catholic institutions, the moral legitimacy of this claim of constitutional concern over the jurisdiction of the Board by some Catholic institutions has been questioned.²⁶ For the purposes of this article, however, the constitutional claim of those opposing Board jurisdiction will be taken at face value, subject to analysis on the legal merits of this claim in Part IV.

Because the opposition to Board jurisdiction is premised mainly on the *Catholic Bishop* case in the U.S. Supreme Court, it is useful to see just what the Court decided, and what it did not.

The *Catholic Bishop* case arose from the Board’s direction of an election for full-time and regular part-time lay teachers in two high schools operated by the Catholic Bishop of Chicago and five diocesan high schools owned and operated by the Catholic Diocese of Fort Wayne – South Bend in Indiana.²⁷ The two Chicago schools served as minor seminaries.²⁸ The five diocesan high schools were not minor seminaries as they each provided a traditional secular education oriented to the tenets of the Catholic faith, and religious training was mandatory.²⁹ The Board exercised its jurisdiction because under the legal standard it then used, these schools taught all the secular subjects customary for a high school and were not, therefore, “completely religious” but only religiously “associated.”³⁰ The Seventh Circuit found that the Board’s distinction between “completely religious” and “religiously associated” to be unworkable and then found the exercise of the Board’s jurisdiction to violate both the Free Exercise Clause and the Establishment Clause.³¹

The Supreme Court first said that the Board’s “completely religious” – “religiously associated” test necessarily admitted to at least some degree of “entanglement.”³² Then, while the respondent

26. See Gerald J. Breyer & Donald C. Carroll, *Battling Adjunct Unions Fails Legal and Moral Tests*, NATIONAL CATHOLIC REPORTER, (Apr. 5, 2016), <http://ncronline.org/print/news/people/battling-adjunct-unions-fails-legal-and-moral-tests> [https://perma.cc/QE2H-TGMS].

27. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. at 492–93 (1979).

28. *Id.* at 492.

29. *Id.*

30. *Id.* at 493.

31. *NLRB v. Catholic Bishop of Chi.*, 559 F.2d 1112, 1118 (7th Cir. 1977). (The Seventh Circuit’s discussion of just how the exercise of the Board’s jurisdiction, in various scenarios, proved the violation of the First Amendment is worthy of consideration and will be revisited in Part Three of this article).

32. *Catholic Bishop*, 440 U.S. at 499. Indeed, in an earlier case the Board had said that the regulation of labor relations would not violate the First Amendment if it involved only

Church bodies wanted the Supreme Court to consider their claims under the Religion Clauses and affirm the Seventh Circuit's decision on that basis, the Supreme Court refused to go that far.³³

The Supreme Court, instead, decided to ask the analytically prior question of "whether Congress intended the Board to have jurisdiction over teachers in church-operated schools."³⁴ In doing this, the Court said it was adopting the maxim of *Charming Betsy*: ". . . an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available."³⁵ The Supreme Court said there was no clear indication in the Act and its legislative history that Congress intended to cover teachers in church-operated schools.³⁶ Then, reviewing its precedents, it surveyed opinions regarding Church-operated schools wherein "[r]eligious authority necessarily pervades the school system" and where teachers worked subject to that authority: "We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict inheres in the situation."³⁷

In Part II, this article asks the question of whether college teachers are similarly under religious control and discipline such that the same danger of excessive entanglement inheres there, too.

Reflecting quite generally and imprecisely then on the labor law concepts of "mandatory bargaining" about "terms and conditions of employment,"³⁸ the Court said that excessive entanglement seemed unavoidable because these parochial schools involve "substantial religious activity and purpose" and "the raison d'être of parochial schools is the propagation of a religious faith."³⁹ The Court concluded that the Board's exercise of jurisdiction "over teachers in church-operated schools would implicate the guarantees of the Religion Clauses".⁴⁰ Such implication alone was enough, therefore, to allow the Court to decide that Congress never intended for the Board to have jurisdiction over such "church-operated" schools.⁴¹

a "minimal intrusion" on religious conduct, something the Board would evaluate. Cardinal Timothy Manning, 223 N.L.R.B. 1218, 1218 (1976).

33. *Catholic Bishop*, 440 U.S. at 499–500.

34. *Id.* at 500.

35. *Murray v. The Charming Betsy*, 6 U.S. 64, 118 (1804).

36. *Catholic Bishop*, 440 U.S. at 504.

37. *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971).

38. 29 U.S.C. § 158(d) (1947).

39. *Lemon*, 403 U.S. at 628.

40. *Catholic Bishop*, 440 U.S. at 507.

41. *Id.*

To summarize the *Catholic Bishop* case, the Court did not rule on the merits of the constitutional claim with respect to even “church-operated schools” but instead found that Board jurisdiction over such “church-operated schools” was not intended by Congress. The facts before the court in *Catholic Bishop*, implicating Catholic high schools where religious authority pervades and where the purpose of such schools is the propagation of a religious faith show that the decision is not dispositive of the issue of the Board’s jurisdiction with respect to colleges and universities with a different purpose and not operated under church authority. It is now necessary to see what the Board and the courts have done in those kinds of cases.

Part II

A. The Board and the Courts Struggle with *Catholic Bishop*

In the aftermath of *Catholic Bishop* the Board sought to apply, on a case-by-case basis, a test determining whether a school had “substantial religious character.”⁴² A divided *en banc* First Circuit, however, denied the Board jurisdiction over lay teachers in a self-identified religious university in *Universidad Central de Bayamon*.⁴³ Then- Judge Breyer said that the Board’s finding that the college was not “church operated” gave too narrow a reading to that phrase as used in *Catholic Bishop*.⁴⁴ The college in question was founded by the Dominican Order. While the college received no financial assistance from that Order and was independent of the Catholic Church, the Order maintained administrative control of the college because the president and a majority of the trustees, with the executive committee thereof being required to be Dominican priests.⁴⁵ In addition, the University held itself out to the public as a Catholic school, with faculty regulations which permitted discipline for “offenses to Christian morality” and where students were required to take theology courses taught mainly by Dominican priests.⁴⁶ “Church operated” was interpreted by the Circuit’s majority to be “Order operated.”⁴⁷ What this result would mean for the eligibility of state and federal monies was not considered.

42. See, e.g., *Trustee of St. Joseph’s Coll.*, 282 N.L.R.B. 65, 71 n.10 (1986).

43. See *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 385 (1st Cir. 1985) [hereinafter “*Bayamon*”].

44. *Id.* at 394.

45. *Id.* at 392–93.

46. *Id.* at 393, 400.

47. *Id.* at 393.

The Board's "substantial religious character" test was later more broadly rejected in the D.C. Circuit.⁴⁸ That Circuit said that the Board's test was nothing more than the agency "trolling" through the structure and the inner life of the University to see if it was "sufficiently" religious in the Board's own opinion to be constitutionally exempt from the Board's jurisdiction.⁴⁹ The Board had found that (1) the curriculum did not require emphasis on the Catholic faith, (2) the university's board of trustees was not required to set only policies consonant with the Catholic religion, (3) the university president and administrators were lay persons, not even necessarily Catholic, (4) faculty were not required to be Catholic or to teach Catholic doctrine or to support the Catholic Church, (5) the students could be of any religion or none (with only about 32% claiming to be Catholic), (6) undergraduates were required to take only one religious studies course, and (7) similar findings.⁵⁰ The Board concluded, probably quite accurately, that the propagation of the Catholic faith was not a primary purpose of the university and that the university's purpose was primarily secular.⁵¹

While the Board's conclusion may have been factually correct, it was the Board's very inquiry, or method of analysis, that the D.C. Circuit found to be in violation of *Catholic Bishop*.⁵² Relying in part on the First Circuit's reasoning in *Universidad Central de Bayamon*, the D.C. Circuit held that *Catholic Bishop* applies not just to pervasively sectarian colleges but also to those which seek to provide primarily a secular education with also a subsidiary religious mission.⁵³ This stretches further the meaning of "church operated" beyond all reasonable semantical bounds. "Church operated" became "non-Church operated but at least religiously aspirational." The analysis has moved well beyond Catholic Bishop.

Drawing upon the analysis of then-Judge Breyer in *Bayamon*, the D.C. Circuit thereupon adopted a three-part test to exempt an institution from Board jurisdiction if:

- (1) The institution holds itself out to students, faculty and community as providing a religious educational environment;
- (2) The institution is organized as a nonprofit; and,

48. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002).

49. *Id.* at 1342–43.

50. See *Great Falls Uni.*, 331 NLRB 1663, 1665–66 (2000).

51. *Id.* at 1665.

52. See *Univ. of Great Falls v. NLRB*, 278 F.3d at 1340 ("This is the exact kind of questioning into religious matters which Catholic Bishop specifically sought to avoid").

53. *Id.* at 1342.

- (3) The institution is affiliated with, or owned, operated or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.⁵⁴

The D.C. Circuit clearly sees the benefit of its test is that it affords the Board and courts “assurance that the institutions availing themselves of the *Catholic Bishop* exemption are bona fide religious institutions.”⁵⁵ In the facts before the Circuit, the university did hold itself out as having a religious environment, it was a nonprofit (which the Circuit felt has a more compelling claim to the *Catholic Bishop* exemption than a for-profit⁵⁶); and the university was religiously “affiliated” by virtue of being “sponsored by the sisters of Providence within the jurisdiction of the Catholic Bishop of Great Falls-Billings”.⁵⁷

This three-part test by the court in *Great Falls* is not without constitutional problems, especially with the requirement for affiliation. Some religious institutions would be left subject to NLRB jurisdiction simply because they are not affiliated, thereby suggesting a discriminatory effect and/or forcing such an institution to seek affiliation.⁵⁸

In 2009, the D.C. Circuit considered yet another case raising questions about the first and third parts of its test adopted in *University of Great Falls* in *Carroll College*.⁵⁹ Carroll College is a private college affiliated with the Synod of Lakes and Prairies of the United Presbyterian Church. With respect to whether the institution held itself out as “providing a religious educational environment,” the Board had held that the institution’s documents, such as a mission statement, catalogues and bulletins, contained religious statements that were merely “aspirational”, not realized in fact. The D.C. Circuit held that it was not necessary to go beyond what the documents said on their face because to do so would involve the kind of digging that the three-part “bright line” test of the Circuit was intended to prevent.⁶⁰ With respect to the third part of the test, the Board was unwilling to accept a naked affiliation when the church did not sponsor the college, own the campus, or have any right of ultimate control over the institu-

54. *Id.* at 1343.

55. *Id.* at 1344.

56. *Id.*

57. *Id.* at 1344.

58. See David B. Schwartz, *The NLRA’s Religious Exemption in a Post-Hobby Lobby World: Current Status, Future Difficulties, and a Proposed Solution*, 30 ABA J. LAB. & EMP. L. 227, 245 (2014).

59. *Carroll Coll. Inc. v. NLRB*, 558 F.3d. 569, 574 (D.C. Cir. 2009).

60. *Id.* at 573.

tion.⁶¹ Again, the Circuit disagreed and found the third element of its three-part test to be satisfied. The court noted how there was plainly an affiliation with a recognized religious organization.⁶²

In sum, *Universidad Central de Bayamon* and *University of Great Falls* extend the constitutional avoidance principle of *Catholic Bishop* from the pervasively religious, religiously authoritarian high schools operated directly by a church to non-pervasively religious, non-religiously authoritarian colleges and universities affiliated with a church or religious organization, and perhaps simply to religiously aspirational institutions.

B. Constitutional Avoidance

Again, this traverse from “church operated” to “religiously affiliated (maybe)” with its pluriform nuances is problematic. What are the limits of the constitutional avoidance doctrine involved by the Supreme Court in *Catholic Bishop*? Does the doctrine, as applied, become binding precedent requiring “avoidance” in subsequent cases on much different facts?

The most prominent criticism of the doctrine of constitutional avoidance is that it allows a court to “evade its most basic constitutional duty,” a duty going back to Alexander Hamilton’s *The Federalist No. 78*,⁶³ and to *Marbury v. Madison*⁶⁴ to say what the law is.⁶⁵ Another, related criticism is that such evasion deprives the judiciary of its role “in protecting core civil rights.”⁶⁶ As shown in Part I, the right of workers to organize is a fundamental right.

It is precisely this issue that divided the Justices in the *Catholic Bishop* case, with only four of them contending that the constitutional issue should have been reached. The four invoked Justice Cardozo’s words that “avoidance of a difficulty . . . to the point of disingenuous evasion” can be possible.⁶⁷

It is not the intent of this article to reopen the dispute in *Catholic Bishop*. It is the intent of this article, however, to ask whether the avoidance doctrine can properly be extended to evade saying what the

61. *Id.* at 574.

62. *Id.*

63. ANDREW NOLAN, CONG. RESEARCH SERV., R43706, THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE: A LEGAL OVERVIEW 21 (2014), <https://fas.org/sgp/crs/misc/R43706.pdf> [<https://perma.cc/DDU3-WQMS>].

64. *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

65. NOLAN, *supra* note 63, at 20–21.

66. *Id.*

67. *George Moore Ice Cream v. Rose*, 289 U.S. 373, 379 (1933).

law is when we have non-church operated colleges and universities. In other words, an “‘educational institution’ is not a synonym for ‘church’.”⁶⁸

In *University of Great Falls*, the D.C. Circuit justified its third test, stating that the institution “. . . is affiliated with, or owned, operated, or controlled directly or indirectly by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.”⁶⁹ This determination was compelled by “analogy” to *Catholic Bishop*.⁷⁰ It is not, however, directly analogous. The first problem with this asserted analogy is the page reference the Circuit makes to *Catholic Bishop* does not support making it. The Supreme Court was merely describing the Seventh Circuit’s problem with the NLRB’s claim of jurisdiction over “religiously affiliated schools” as a background of the case.⁷¹ However, this description of the Seventh Circuit’s opinion provides no grounds on which to find a compelling analogy for the actual holding of *Catholic Bishop* beyond church-operated primary schools and high schools.

The second, more fundamental problem with this claimed analogy is that it is precluded by *Catholic Bishop* itself. It is precluded because the Supreme Court’s majority went to great lengths to say that its inquiry was a “narrow inquiry” regarding whether the Board’s exercise of jurisdiction presented a significant risk that the First Amendment would be infringed.⁷² The formal question, which was granted *certiorari*, and the only issue decided, was “whether teachers in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act.”⁷³ Some ten times thereafter the Court’s majority carefully emphasized that it was dealing with “church operated” schools. In its ultimate conclusion the court stated, “Accordingly, 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 questions arising out of the guarantees of the First

68. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 743 (9th Cir. 2011).

69. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1343 (D.C. Cir. 2002) (citing *Bayamon*, 793 F.2d 383, 399–400 (1st Cir. 1985)).

70. *Univ. of Great Falls*, 278 F.3d at 1344–45 (“Finally, as we observed above, the third element, at least in its simplest form, is directly analogous to *Catholic Bishop*. The school, college or university must be ‘religiously affiliated’”).

71. *See Catholic Bishop*, 440 U.S. at 495.

72. *Id.* at 502.

73. *Id.* at 491 (emphasis added).

Amendment Religion Clauses.”⁷⁴ Using analogy to extend *Catholic Bishop* beyond its clearly expressed limitations to non-church operated colleges with pluriform degrees of religious affiliation only extends avoidance of difficult and sensitive questions and risks evasion of ever facing them.

In *Universidad de Bayamon*, in the initial panel opinion which enforced the Board’s order, dissenting Judge Torruella took another approach.⁷⁵ He said that the Supreme Court in *Catholic Bishop* employed the term “church operated” not in a sense restricted to the facts in that case but “as a convenient method of characterizing schools with a religious mission.”⁷⁶ This characterization is not supported either by the facts or the text in *Catholic Bishop*. Judge Breyer, writing for that one-half of the deadlocked *en banc* panel which would reverse and deny enforcement, did not want to embrace the reasoning of Judge Torruella. Rather, Judge Breyer concluded that a “church-controlled” college came within the “scope” of *Catholic Bishop* because *Catholic Bishop* did not distinguish colleges from primary and secondary schools.⁷⁷ Again, that plainly ignores the facts and the express narrow limits of the text in *Catholic Bishop*. While *Catholic Bishop* may certainly be precedent for any church-operated colleges and universities, the *Catholic Bishop* court scarcely should be held to approve the use of the constitutional avoidance doctrine for non-church operated colleges and universities simply by a subliminal channeling of a “scope” larger than the opinion’s text will allow. In some state law jurisdictions, opinions of the highest court are not dispositive of facts and/or arguments not actually considered by the opinion.⁷⁸ Admittedly, the scope of Supreme Court precedent is more uncertain, or as Professor Randy J. Kozel has said, it is more “capacious.”⁷⁹ Avoidance, however, is not guidance to lower courts seeking to apply Supreme Court precedent on the merits of an issue. Implementing avoidance of the merits from church-operated schools down through a variety of non-church operated but religiously affiliated or religiously aspirational schools evades

74. *Id.* at 507 (emphasis added).

75. See *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383, 385 (1st Cir. 1985).

76. *Id.* at 392 (quoting from *NLRB v. Bishop Ford Central High School*, 623 F.2d 818, 823 (2d Cir. 1980)).

77. *Id.* at 401 (Breyer C.J., dissenting).

78. For example, in California, “[l]anguage used in an opinion is of course to be understood in the light of the facts and the issue then before the court, and an opinion is not authority for a proposition not therein considered.” *Ginns v. Savage*, 61 Cal. 2d 520, 524 n.2 (1964).

79. Randy J. Kozel, *The Scope of Precedent*, 113 MICH. L. REV. 179, 179 (2014).

the duty of the courts to interpret the law. To his credit, Judge Breyer, writing for half of the panel in *Universidad de Bayamon*, at least recognized that the issue “calls for Supreme Court guidance.”⁸⁰ Such a sentiment is only a recognition or an admission that the limits of constitutional avoidance have been reached. Why he and others on this divided panel nonetheless extended the avoidance doctrine is unclear. Eventually, the merits of what is being avoided or evaded must be faced. This is discussed in the final part of this article.

It is true that these appeal court opinions go beyond discussing the effect of *Catholic Bishop* and discuss the “merits” of what the courts see as the possibility of Board entanglement with religion. The Board has tried to navigate through these rulings in order to fulfill its command from Congress. The final part of this article describes whether it has done so successfully and whether the “merits” observations of the appeal courts are well-taken.

Part III

A. The Board’s Latest Attempt to Assert Jurisdiction

The Board is satisfied that it can assert its jurisdiction under circumstances that will nullify the need for constitutional avoidance. Indeed, given its mandate by Congress under the Act, it should be clear that it has a duty to try. Certainly, the Board is not guilty of religious bias in trying to do so.

The Board’s latest effort at balancing its duties with *Catholic Bishop* and its progeny is the *PLU* case, mentioned in the Introduction.⁸¹ The ultimate question is how successfully the Board has been in removing the court’s willingness to invoke the constitutional avoidance doctrine and, then, if it has, can the result survive constitutional analysis on the merits.

In *PLU*, the Board adopted a new standard. An election petition filed by the Service Employees International Union (SEIU) sought to represent all non-tenure-eligible contingent faculty members, full-time and regular part-time (approximately 176 employees) in a typical liberal arts university. The Board’s new standard is:

[W]e have decided that we will not decline to exercise jurisdiction over faculty members at a college or university that claims to be a

80. *Bayamon*, 793 F.2d at 401 (“Whether this kind of institution of higher education falls within the strictures of *Catholic Bishop* is, in our view, an important, likely recurring, question that calls for Supreme Court guidance”).

81. *Pac. Lutheran Univ. & Serv. Emp.’s Int’l Union, Local 925*, 361 N.L.R.B. 1404, 1431-32 (2014).

religious institution unless the college or university first demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment. Once that threshold requirement is met, the college or university must then show that it holds out the petitioned-for faculty members as performing a religious function. This requires a showing by the college or university that it holds those faculty as performing a specific role in creating or maintaining the university's religious educational environment.⁸²

1. *PLU's* First Standard

Under the first threshold standard, the Board abandons its substantial religious character test and accepts the first element of the *Great Falls* test. For example, the Board will simply accept, quite uncritically, how the university presents itself in its corporate documents, mission statement, handbooks, course catalogs, employment contracts, job descriptions, website material and oral statements to students, faculty and the public.⁸³ The Board will not inquire into how a university implements its religious mission nor will it question the good faith of a university.⁸⁴ The Board characterizes this first test as a "minimal" showing that, if not successfully made, will justify the Board proceeding on the basis that no First Amendment concerns will be implicated.⁸⁵

More importantly, however, the Board will require that a university's evidence reflect contemporary reality at a university.⁸⁶ The Board notes that some institutions may have been religious, as shown by their founding documents and historical tradition, but have morphed over time into institutions only nominally religious.⁸⁷ The Board notes that in 1881, 80% of colleges in the U.S. were private and religious, whereas, by 2001 only 20% had a connection to a religious tradition.⁸⁸ This morphing has been well chronicled, as the Board notes.⁸⁹ Institutions wanting to meet this first *PLU* test, then, will have

82. *Id.* at 1404.

83. *Id.* at 1409, 1413 n.17.

84. *Id.* at 1409.

85. *Id.* at 1410.

86. *Id.* at 1409.

87. *Id.*

88. *Id.* (citing James A. Noseworthy, *Colleges and Universities with Religious Affiliations*, STATEUNIVERSITY.COM, <http://education.stateuniversity.com/pages/1860/Colleges-Universities-with-Religious-Affiliations.html> [<https://perma.cc/9CCZ-NN7X>]; see JAMES TUNSTEAD BURTCHAELL, *THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES* (1994).

89. Pac. Lutheran Univ. & Serv. Emp.'s Int'l Union, Local 925, 361 N.L.R.B. 1404, 1431-32 (2014).

to show that they hold themselves out as providing a contemporary religious educational environment, not a nominally religious one, the end product of a morphing towards the secular.

As to an institution's non-profit status, the Board says evidence of that will be a relevant part of how a university holds itself out.⁹⁰

The Board, however, finds unnecessary the third element of the *Great Falls* test regarding "affiliation with, or owned, operated or controlled directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion."⁹¹ The Board says the first element in its new test about how the institution holds itself out should be "sufficient to determine whether First Amendment concerns are raised."⁹² Further the Board says that the third element of *Great Falls* could exclude a university from Board jurisdiction that holds itself out as providing a religious educational environment but is itself interdenominational or nondenominational, a result that might signify an unconstitutional denominational preference.⁹³ An institution can offer such evidence but it will not be required by the Board.

2. *PLU's* Second Standard

Once a university meets the threshold standard of holding itself out as providing a religious educational environment, a university must show that it holds out its employees who are the subject of an election petition as performing a specific role in creating and maintaining that environment.⁹⁴ The Board indicates how it is this specific role or function of the teacher which *Catholic Bishop* relies upon as creating the locus of an impermissible risk of excessive entanglement.⁹⁵ By contrast, says the Board, "where faculty members are not expected to play such a role in effectuating the university's religious control or discipline, the same sensitive First Amendment concerns of excessive entanglement raised [by *Catholic Bishop*] are not implicated."⁹⁶ The Ninth Circuit has also seen the employment relationship

90. *Id.* at 1410.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 1411. (As the Board notes, it has long asserted jurisdiction over non-teaching employees at religiously affiliated institutions). *See, e.g.*, *College of Notre Dame*, 245 N.L.R.B. 386 (1979) [unit of stationary engineers and grounds keepers]; *Hanna Boys Ctr Emp. and Social Serv. Union, Local 535, SEIU, AFL-CIO Petitioner*, 284 N.L.R.B. 1080

as a pivotal factor under *Catholic Bishop*: “[b]oth the rationale and the language of the Catholic Bishop opinion . . . support the limitation of its holding to the employment relationship between church-operated schools and its [sic] teachers.”⁹⁷ Post *PLU*, the Board has reaffirmed *Hanna Boys Center* and rejected any reading of *Catholic Bishop* which would deny it jurisdiction over any and all employees of a religious college.⁹⁸ The Board’s concern is with faculty whose functions are no different from faculty at institutions which do not identify faculty as religious.⁹⁹

The Board is clear, however, that it will not troll through the functions of individual faculty because to do so could raise the same First Amendment concerns. Rather, the Board will require the university to identify those of the faculty which the university holds out as performing a specifically religious function.¹⁰⁰ The Board does warn that while it will not examine faculty members’ job functions, it will not find general statements that faculty members are expected to support the “mission” or goals of the institution sufficient to show that they are performing a specifically religious function.¹⁰¹ The evidence that the Board will consider includes job descriptions, other recruitment materials, employment contracts, faculty handbooks, and statements to accrediting bodies, students, parents, and the community.¹⁰² It is not necessary that these materials narrowly hold out faculty as responsible for proselytizing or indoctrination. The range of possibilities will run from things that integrate religious teachings into coursework, serving as religious advisors, teaching/propagating religious tenets, religious training, or anything else that demonstrates a “connection” between a religious role and a faculty member’s employment functions.¹⁰³ The Board says that by limiting evidence to an institution’s own statements, the Board need not inquire into the beliefs of particular faculty nor into how faculty may include religious beliefs into their courses.¹⁰⁴

(1987), enf’d 940 F.2d 1295 (9th Cir. 1991), cert. den. 504 U.S. 985 (1992) [unit of clerical employees, recreation assistants, cooks and child care workers].

97. NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1302 (9th Cir. 1991).

98. Saint Xavier Univ. and Serv. Emp.’s Int’l Union, Local 1, 365 N.L.R.B. No. 54 (2017).

99. *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1411 (2014).

100. *Id.*

101. *Id.*

102. *Id.* at 1412.

103. *Id.* at 1412 n.14.

104. *Id.* at 1413.

The Board points out that putting the burden on the university to produce this kind of evidence, instead of accepting a bare assertion of religious purpose sufficient to exempt all faculty, is not unlike what federal tax laws and Title VII already require.¹⁰⁵ A religious non-profit seeking exemption from federal income tax under 26 U.S.C. 501 (c)(3) must submit such items as articles of incorporation, minutes, financial records as well as publications used by it to show that its mission, activities and structure satisfy the requirements for the exemption.¹⁰⁶ To receive an exemption under Title VII, courts will use a factual inquiry into an organization's secular and religious characteristics to see if the organization's purposes are "primarily religious."¹⁰⁷ To claim the ministerial exception under Title VII, a factual examination must be made regarding the functions of a putative minister.¹⁰⁸ The Board states that this evidence is designed to test whether or not it is a bona fide assertion and the Board believes its second standard under *PLU* has the same justification.¹⁰⁹ Against these precedents, the Board's standard appears reasonable, although the "primarily religious" test for Title VII sounds very much like the Board's earlier disapproved test.

Similarly, the Board says that by limiting evidence to what the institution says its various faculty members do, the Board satisfies the Supreme Court's concern in *Catholic Bishop* with religious authority.¹¹⁰ In *Catholic Bishop*, the Court was concerned that Board jurisdiction could "impinge on the freedom of church authorities to shape and direct teaching."¹¹¹ While there is in fact no "church" authority in the institutions which are the subject of this article, the Board's deference to an institution's description of what some faculty members do respects an institution's authority over the choices of faculty to be excluded from a bargaining unit because those faculty are involved with a religious environment.

Indeed, respect for such religious authority alone may cause the Board to decline jurisdiction even if a university does not hold out a

105. *Id.* at 1413 n.18.

106. See Instructions for Form 1023, Application for Recognition of Exemption Under Section 501(c)(3), Schedule A, Churches, <http://www.irs.gov/pub/irs-pdf/i1023.pdf> [<https://perma.cc/U6CR-WLHL>].

107. See, e.g., *EEOC v. Townley Eng. & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988).

108. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012).

109. *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1412-13.

110. *Id.* at 1413.

111. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 496 (1979).

particular faculty member as having functions connected to a religious environment.¹¹² Although only set out in a footnote, the Board says it will decline jurisdiction where a university's public representations "make it clear that faculty members are subject to employment-related decisions that are based on religious considerations."¹¹³ The Board gives two examples: (1) dismissal for teaching doctrines at odds with the institution's religious faith or openly contravening some tenet of the religion of the institution, and (2) a requirement that faculty accept dispute resolutions by "ecclesiastical sources of dispute resolution."¹¹⁴ Suffice it to say, the Board appears ready to decline jurisdiction over, for example, a statistics professor who is dismissed for passing out condoms in the student union during some student health event held at certain religious universities, provided the institution's public representations clearly indicated such retained religious authority. Future cases will no doubt further develop these particular limitations.

B. *PLU* Eliminates the Elements of Concern Which Led to Constitutional Avoidance in the *Catholic Bishop* Majority and in *Great Falls*

The *PLU* tests satisfy the concerns of those courts which extended *Catholic Bishop* to non-church operated, but religiously affiliated or religiously aspirational schools.

In *Catholic Bishop*, the Supreme Court's majority said its fear of government entanglement with religion arose from the religious authority that pervaded the secondary schools at issue.¹¹⁵ In addition, in heavy reliance on *Lemon v. Kurtzman*, the Court stressed the key role played by teachers in such high schools.¹¹⁶ Whether teaching a religious subject one minute and a secular subject the next, the secondary teacher is charged with infusing religious values across the curriculum, in a virtually inseparable manner. Quoting *Lemon*, ". . . the raison d'être of parochial schools in the propagation of a religious faith."¹¹⁷ The Court's majority foresaw "entanglements" in applying collective bargaining to mandatory terms of bargaining, conflicts so significant as to justify avoidance, in its opinion.¹¹⁸

112. *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1410.

113. *Id.*

114. *Id.*

115. *Catholic Bishop*, 440 U.S. at 501.

116. *Id.*

117. *Id.* (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971)).

118. *Id.* at 502.

PLU's first "threshold" test seeks to determine whether any religious authority is present. The presence of a "religious educational environment" signals the presence of religious authority to at least some degree.¹¹⁹ As noted earlier, the Board simply accepts an institution's own representations as to the existence of this environment.¹²⁰ This first *PLU* test, then, surfaces the existence of First Amendment concerns. It does not itself, however, seem to entangle the Board in a prohibited analysis because the Board must accept uncritically what an institution says about itself to the public.

The second *PLU* test implicates both the existence of religious authority and the role of teachers who may be subject to that authority in providing the religious educational environment the institution promises. Again, the prospects for entanglement are reduced, if not eliminated, by the Board's willingness to let the institution self-identify teachers that are involved in the maintenance of that religious educational environment.¹²¹ The Board itself will not troll through what each teacher does to determine whether the teacher should be included or excluded from the bargaining unit if the Board agrees that a teacher is performing functions relevant to the institution's promised environment. Only where faculty members do not play a role in effectuating a university's religious mission and are not under religious control or discipline will the Board take jurisdiction.¹²²

The Board has now had a chance to apply these concepts recently, albeit not without disagreement, based on the scope of *Catholic Bishop* and *Great Falls*.

In *Seattle University*, the Board excluded from a bargaining unit of contingent faculty all those contingent faculty in a university's Department of Theology and Religious Studies and School of Theology and Ministry;¹²³ in *Saint Xavier University*, part-time faculty in a Department of Religious Studies.¹²⁴ Even though some of the courses taught in those Departments might have only had a tenuous connection to the university's religious mission, the Board excluded everybody because, to do otherwise, the Board would have had to engage in a process of inquiry regarding the connection of each course to the mission, a process the Board felt might impinge on rights guaranteed by the First

119. *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1409.

120. *Id.* at 1410–13.

121. *Catholic Bishop*, 440 U.S. at 495–96.

122. *Pac. Lutheran Univ.*, 361 N.L.R.B. at 1413.

123. *See Seattle Univ.*, 364 N.L.R.B. No. 84, 1 (2016).

124. *See Saint Xavier Univ.*, 364 N.L.R.B. No. 85, 1 (2016).

Amendment as explained by *Catholic Bishop*.¹²⁵ Respecting the centrality of a religious university's employees, the Board asks whether ". . . a reasonable prospective applicant for a part-time faculty position in the department would expect that the performance of her responsibilities would require furtherance of the University's religious mission."¹²⁶ If so, the individual is excluded.¹²⁷ This question is directly responsive to *Catholic Bishop* wherein, in reliance on *Lemon*, the Court described how a teacher in a church-operated secondary school well understands that religious authority controls the job and that a teacher's courses, even secular courses, are integrated into a pervasively religious curriculum.¹²⁸

Such integration is completely absent in the factual record of these cases of *Seattle*, *Saint Xavier* and *Loyola of Chicago*. As the Board said in *Saint Xavier*:

Uncontested evidence shows that the vast majority of contingent faculty are not hired to advance the religious goals of the institution. For example, calculus teachers are hired based on their ability to teach calculus. They are not required to be Catholic or to take part in any religious activities on or off campus; religion is not mentioned in their employment contracts.¹²⁹

Because of the undisputed absence of such integration across a university's curriculum, the Board's second *PLU* test excludes from a bargaining unit those teachers who must reasonably understand that their job functions further a university's self-proclaimed religious mission.¹³⁰

In sum, in the Board's two-part *PLU* test, the Board has met the Supreme Court's concerns that led to avoidance in *Catholic Bishop*.

C. Notable Opposition to Board Jurisdiction

As noted above, there is present disagreement, at the Board-level, in the form of dissents in *PLU* and its progeny by now former Board Member Miscimarra. Two of his points are worth description because

125. *St. Xavier Univ.*, 364 N.L.R.B. at 3. See also *Summary of NLRB Decisions for Week of March 13–17, 2017*, NAT'L LABOR RELATIONS BOARD (Mar. 13–17, 2017), <https://www.nlr.gov/cases-decisions/weekly-summaries-decisions/summary-nlr-decisions-week-march-13-17-2017> [<https://perma.cc/9GLB-VKGG>].

126. *St. Xavier Univ.*, 361 N.L.R.B. at 9 (2014).

127. See *id.*

128. *Id.* at 1136.

129. *Saint Xavier Univ.*, 364 N.L.R.B. at 2 (quoting *Seattle Univ.*, 364 N.L.R.B. 1, 2 (2016)).

130. *Id.*

they no doubt frame the issues that will appear as the courts of appeal review *PLU's* progeny.

First, Member Miscimarra says that even when the Board looks to exclude those faculty who contribute to the religious environment of a university, the Board is, he says, distinguishing between those who teach “secular” content and those who teach “religious” content, a process of inquiry foreclosed by *Catholic Bishop*.¹³¹ The inadequacy of his point should be apparent to a reader: what the *Catholic Bishop* majority had to say about such a distinction was in the context of the fully religious, integrated curriculum of a Catholic high school.¹³² Thus, this contention is simply an argument to extend *Catholic Bishop* to the unintegrated curriculum of most religiously affiliated universities as though *Catholic Bishop* was a ruling absolutely requiring such an extension. This article obviously contends that this point made by Member Miscimarra is not intellectually satisfying.

Second, and more substantial, is Member Miscimarra’s contention that *PLU's* exclusion of only those faculty who create and maintain a religious educational environment is under-inclusive.¹³³ He says it is under-inclusive because of “the role played by part-time faculty in supporting the Catholic identity and furthering the Catholic mission of the University, as well as in facilitating dialogue among various faith traditions and between those traditions and academic disciplines.”¹³⁴ In other words, the identity or mission covers all subjects including those taught by professors who teach only traditional secular subjects such as math, a language, physics, chemistry, etc. This would apply even if a professor was not told when hired that she needed to be of a certain religion or any at all or was deemed to be engaged in a “religious” endeavor. This contention that everything is religious, albeit some of it softly so, is made also in *University of Great Falls*.¹³⁵ Further, it is true that often faculty, including part-time faculty, no matter what they are teaching, are told in an initial interview process that they are expected to support a University’s mission and certainly not to denigrate it.¹³⁶

This point by Member Miscimarra accurately reflects the opposition to Board jurisdiction made by some. For example, on June 27,

131. See, e.g., *Saint Xavier Univ.*, 364 N.L.R.B. at 3 (Member Miscimarra, dissenting).

132. *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 500 (1979).

133. *Saint Xavier Univ.*, 364 N.L.R.B. at 4.

134. *Id.* 364 N.L.R.B. No. 85 at 6.

135. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1346 (D.C. Cir. 2002).

136. *Saint Xavier Univ.*, 364 N.L.R.B. at 6.

2017, the President of Manhattan College wrote the university community to restate his continuing opposition to Board jurisdiction because in his view the *PLU* Board is defining what it means to be a Catholic college in alleged derogation of the right of Manhattan to define its mission.

President Brennan O'Donnell states:

In applying 'Pacific Lutheran' to Manhattan College, the Board unilaterally excluded faculty in religious studies, effectively deciding for us (and by extension for all Catholic universities) that such faculty have a specific responsibility for the Catholic mission, which is not shared with other faculty.

This view stands in direct opposition to Manhattan College's position. Manhattan College has always taken the position that all faculty share the role of supporting and sustaining the Catholic mission . . . our culture of inquiry, in which faith and reason are held in complementary relationship, admits of — and even requires — the participation of everyone who strives for truth.¹³⁷

There are two answers to this under-inclusiveness argument. First, the Board does not define a university's mission nor does it redefine it; a university does. And, when a university self-identifies some faculty as having specific responsibilities for the express religious aspects of a university, the Board is simply recognizing that action by the university and excluding those faculty responsible for the direct maintenance of the mission, as arguably required by *Catholic Bishop's* concern for the religious function of teachers.

The search for truth is understandably at the heart of this mission, as President O'Donnell contends, and as the great Catholic intellectual, John Henry Cardinal Newman, made clear over a century ago.¹³⁸ The search for truth is not dependent on any religious authority. No member of a faculty, including those teaching secular subjects and who may be agnostics or atheists, would contend that they are champions of truth's opposite. Indeed, it may be this search for truth that makes them comfortable at a particular university. A complementarity of faith and reason does not mean they are the same. There is

137. Letter from Brennan O'Donnell, President, Ph.D., to Manhattan College Community 1–2 (June 27, 2017), <https://content.manhattan.edu/hr/6-27-17-statement-nlr.pdf> [<https://perma.cc/RJ55-D2H9>].

138. JOHN HENRY CARDINAL NEWMAN, *THE IDEA OF A UNIVERSITY* 7, 52 (1959) ("The view taken of a university in these Discourses is the following. . . . That it is a place of teaching universal knowledge. This implies that its object is, on the one hand, intellectual, not moral . . . Observe then, Gentlemen, I have no intention, in anything I shall say, of bringing into the argument the authority of the Church, or any authority at all; but I shall consider the question simply on the grounds of human reason and human wisdom.").

no need to baptize truth. The search alone for truth is not the exclusive domain of religion, as Cardinal Newman made clear. And such a search cannot, alone, implicate the protection of the Free Exercise Clause.

Second, while a university may define its entire mission as “religious,” that will not insulate the entire university under the rubric of the “free exercise” of religion. It will not do so because the government may regulate by a law of general applicability without violating the Free Exercise Clause, a point that will be explored more fully later in this article. Thus, Member Miscimarra’s under-inclusiveness objection is unavailing in the final analysis.

It is also hard not to wonder whether most of these universities really want to assert an entirely religious mission. If they do, then they will have effectively disqualified themselves from at least some forms of government assistance. In *Tilton v. Richardson*, for example, sectarian universities were found eligible, by a 5 to 4 vote, for funds under the Higher Education Facilities Act because “. . . the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.”¹³⁹ Thus, a claim that a university’s mission is so religious that it needs protection from the jurisdiction of the Board is too broad a claim for those institutions that want to secure eligibility for public funds by stressing, quite accurately, their secular contributions to our society. Government may, for example, decide not to grant educational support for those pursuing religious subjects in college without denying the free exercise of religion.¹⁴⁰

The argument that a university’s animating impulse is so basically religious as to oust the Board of its jurisdiction is particularly hard to make for Catholic institutions. This is because the official teaching of Popes and American bishops recognizes the right of workers to organize and to bargain, including specifically employees of the Church and Church affiliated organizations. This teaching deplores attempts by employers to deny workers their rights under the law administered by the Board, and never has this teaching sought to be exempt any employers from Board jurisdiction on the basis of a claim of religious freedom. Catholic institutions making this claim have done little besides oppose the only vehicle American law provides to realize these fundamental labor rights. The mission, rightly understood, includes

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

140. *See Locke v. Davey*, 540 U.S. 712, 719 (2004).

Board jurisdiction because the Board's processes are the only process for realizing in practice the right to organize and to bargain.

In sum, then, the Board's *PLU* standards should satisfy courts not to extend the avoidance of the *Catholic Bishop* majority beyond church operated schools. It is next necessary to see if on the merits the Constitution's Religion Clause and the RFRA are truly impediments to Board jurisdiction.

Part IV

A. NLRB Jurisdiction, Free Exercise and the Religious Freedom Restoration Act

Reaching the "merits" of the opposition to Board jurisdiction, one must first describe the applicable legal principles and then proceed to a more detailed analysis of how, if at all, the exercise of Board jurisdiction implicates the Religion Clauses of the Constitution and the RFRA. This article discusses both because, subsequent to *Catholic Bishop* in 1977, the Supreme Court significantly narrowed the protection of the Free Exercise Clause in the face of generally applicable laws that have the effect of burdening religious practice in *Employment Division v. Smith*.¹⁴¹ In reaction, Congress passed the RFRA.¹⁴² Thus, both need consideration because the RFRA presents a separate line of inquiry from the constitutional issues.¹⁴³

B. Free Exercise

The Free Exercise Clause says that "Congress shall make no law . . . prohibiting the free exercise [of religion]." ¹⁴⁴ While the guarantee of freedom of religious belief is absolute, the freedom to act based on religious belief is not absolute.¹⁴⁵ In *Smith*, Justice Scalia writing for the Court's majority, held that Oregon could deny unemployment benefits to two men discharged for "misconduct," viz. their use of peyote for sacramental purposes in a ceremony of their Native American Church.¹⁴⁶ The ingestion of peyote, held a hallucinogenic drug under Oregon's law banning controlled substances without a prescription,

141. See *Emp't Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990) [hereafter "*Smith*"].

142. 42 U.S.C. § 2000bb-1 (2012); see generally, DOUGLAS LAYCOCK, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 39 (2000).

143. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1347 (D.C. Cir. 2002).

144. U.S. CONST., amend. I.

145. *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

146. *Smith*, 494 U.S. at 890.

may have burdened a religious practice, said the Court, but it did not deny the men the free exercise of religion.¹⁴⁷ Narrowing prior precedents, Scalia concluded that absent other constitutional protections, “[t]he government’s ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy ‘cannot depend on measuring the effects of a governmental action on a religious objector’s spiritual development’.”¹⁴⁸ The Court cited cases such as *U.S. v. Lee*, where an Amish employer unsuccessfully objected to paying Social Security taxes;¹⁴⁹ *Prince v. Massachusetts*, allowing the prosecution under child labor laws of a woman using her children to distribute religious tracts;¹⁵⁰ and *Gillette v. U.S.*, sustaining the Selective Service System over persons objecting on religious grounds to a particular war.¹⁵¹

The Supreme Court just last term cited *Smith* for the proposition that sincere religious motivation alone will not be enough against neutral or generally applicable laws.¹⁵² The Court, however, dropped a footnote to suggest that not just any application of a neutral law of general applicability is necessarily constitutional.¹⁵³ In this note, the Court recalled its decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, wherein the Court held that the Religion Clauses require a ministerial exception be implied into the prohibition against employment retaliation in the Americans With Disabilities Act.¹⁵⁴ The Court then observed that in *Hosanna-Tabor* it distinguished *Smith*, which concerned government regulation of physical acts (ingesting peyote) from “government interference with an internal church decision that affects the faith and mission of the church itself.”¹⁵⁵ Clearly, then, the Court is signaling that it may find an exception to the *Smith* principle for “a church.” Because the universities that this article is concerned with are not churches, it does not appear that there is any impediment to applying *Smith* to the *PLU* situation.

Applying *Smith*, then, the NLRA is a neutral law and also one of general application.

147. *Id.* at 880.

148. *Id.* at 885 (citation omitted).

149. *U.S. v. Lee*, 455 U.S. 252, 258–262 (1982).

150. *See Prince v. Massachusetts*, 321 U.S. 158, 177–78 (1944).

151. *Gillette v. U.S.*, 401 U.S. 437, 461 (1971).

152. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2020–21 (2017).

153. *Id.* at 2021 n.2.

154. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012).

155. *Id.* at 190.

It is neutral. It is not directed at any religious practices. The formal “findings” expressing Congress’ purposes, quoted earlier, betray no root in religious bigotry, or in a trivializing of religion generally; nor is religion singled out as it was in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, where facially neutral ordinances against animal slaughter were in fact aimed at rituals of members of the Santeria religion. Being religiously motivated, they were struck down as violations of the Free Exercise Clause.¹⁵⁶

The NLRA is also a “law of general application.” There apparently is no settled definition of this term. Yet, a law like the NLRA which purports to regulate labor-management relations in the private sector in the U.S. seems unquestionably to be one. Professor Laycock, however, has properly said that it is necessary to consider the exceptions in a law purporting to be a law of general application because secular exceptions may except so much that an anti-religious motive may be exposed.¹⁵⁷ The exceptions in the NLRA are for governmental bodies, employers already covered under the Railway Labor Act and labor organizations (separately defined) when not acting themselves as employers.¹⁵⁸ These exceptions certainly do not “expose” a conclusion that the coverage of religiously affiliated or motivated universities in the NLRA is anti-religious.

Not surprisingly, the Board understands the Act to be a law of general application within *Smith*.¹⁵⁹

Thus, the NLRA is a neutral law and one of general application, and the religiously motivated and/or affiliated universities which are the subject of this article can claim no Free Exercise Clause protection against the exercise of NLRB jurisdiction. This article will further question whether the RFRA calls for a different result.

1. The Establishment Clause

The text of the Establishment Clause is: “Congress shall make no law respecting an establishment of religion.”¹⁶⁰ To escape invalidity under this Clause, a statute (1) must have a secular legislative purpose, (2) its principle or primary effect must neither advance nor in-

156. See *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993).

157. Laycock, *supra* note 142, at 33–36.

158. 29 U.S.C. § 152 (2) (1947).

159. *Ukiah Adventist Hosp. d/b/a Ukiah Valley Med. Ctr.*, 332 N.L.R.B. 602, 612 (2000) (objecting to a union by a Seventh Day Adventist was religiously sincere but rejected under *Smith*).

160. U.S. CONST., amend. I.

hibit religion, and (3) it must not foster an “excessive government entanglement with religion.”¹⁶¹

It seems beyond question that the NLRA has a secular legislative purpose, viz. the regulation of private sector labor-management relations. Similarly, the Act’s principal and primary effect does not advance or inhibit religion. As to whether the exercise of the Board’s jurisdiction fosters an excessive entanglement with religion is of course something that requires a close examination of the ways that jurisdiction gets exercised. This article concludes that there is no excessive entanglement if a reader accurately understands just what the Board does and does not do.

2. The RFRA

Unhappy with *Smith*, Congress used RFRA to return to what it felt had been constitutional law prior to *Smith*, and even to arguably expand it.¹⁶² *Smith* was often seen as a watering down of Free Exercise protection for religion and even as evincing a hostility to religion.¹⁶³ This purpose and the nature of RFRA was articulated by the Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.* The *Hobby Lobby* majority said that Congress enacted the RFRA “to provide very broad protection for religious liberty” in the wake of *Smith*.¹⁶⁴ More specifically, “Government shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability.”¹⁶⁵ And if there is such a burden, then a person is entitled to an exemption from the law unless Government “demonstrates that the application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”¹⁶⁶ As amended by the Religious Land Use and Institutionalized Persons Act, RFRA also covers “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.”¹⁶⁷

Applying these definitions, the Supreme Court in *Hobby Lobby* granted an exemption from regulations under the Affordable Care

161. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

162. Stephen L. Carter, *The Resurrection of Religious Freedom?*, 107 HARV. L. REV. 118, 119 (1993) (discussing the changing approach to religious freedoms in the Supreme Court in the decades following the *Smith* decision).

163. *Id.* at 118.

164. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

165. 42 U.S.C. § 2000bb-1(a) (2018).

166. 42 U.S.C. § 2000bb-1(b) (2018); *Hobby Lobby*, 134 S. Ct. at 2761.

167. 42 U.S.C. § 2000cc-5 (7)(A) (2012).

Act's mandate for employers to provide contraceptive benefits to a closely held corporation.¹⁶⁸ It did so by imputing to that corporate person the religiously-based opposition of the corporate owner to certain forms of contraception.¹⁶⁹ The Court found that the regulation did "substantially burden" the religious belief of the owner; and while conceding that the Government had a "compelling interest," the Court found that the regulation was not the "least restrictive means" of achieving that interest.¹⁷⁰

In describing what is meant by the "exercise of religion," the *Hobby Lobby* court tied back to *Smith*: "the 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religious reasons.'"¹⁷¹

The Court stressed that its parsing of the RFRA was rather narrow, dealing only with a contraceptive mandate that was not the least restrictive means.¹⁷² It said it was not questioning earlier precedents like *Lee* which required the Amish to pay Social Security Taxes because these other cases presumably would be seen under the RFRA as being the least restrictive means of accomplishing a compelling governmental interest.¹⁷³ Thus, the full reach of the RFRA remains to be definitively reached.

Now to turn to the issues such as whether the Board's jurisdiction under *PLU* presents "excessive entanglement" with religion, whether that jurisdiction "substantially burdens" a religious exercise, and whether the Board's actions are the "least restrictive means" for satisfying a compelling governmental interest. This article will not address whether the Board's jurisdiction to administer the NLRA is a compel-

168. *Hobby Lobby*, 134 S.Ct. at 2759.

169. *Id.* at 2775–82 (reasoning that a closely-held corporation can assume the religious beliefs of a corporate owner, and that the corporate owners' opposition to certain forms of contraception were specific religious beliefs so assumed).

170. *See id.* at 2780.

171. *Id.* at 2769–70 (citing *Emp't Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 877 (1990)) (The full definition in *Smith* is: "But the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be 'prohibiting the free exercise [of religion]' if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of 'statues that are to be used for worship purposes,' or to prohibit bowing down before a golden calf.").

172. *Id.* at 2781–82.

173. *Id.* at 2784.

ling governmental interest because plainly it is.¹⁷⁴ If the regulations mandating contraceptive coverage under the Affordable Care Act can be conceded by the *Hobby Lobby* court to be “compelling,”¹⁷⁵ so must be the basic labor law regulating labor-management relations in the private sector since 1935.

The Board has essentially two functions under the Act: conducting elections and the investigation and adjudication of unfair labor practices.¹⁷⁶

As to elections, upon the filing of an election petition, the Board determines whether there is a question concerning representation. If there is, then the Board determines whether there is “a unit [of employees]” appropriate for collective bargaining, it conducts a secret ballot election, and formally certifies whether the employees have chosen representation or declined it.¹⁷⁷ It is difficult, if not impossible, to see where the conduct of such a secret ballot election alone amongst employees entangles or burdens religion, and certainly a secret ballot is the least restrictive means possible to discern the will of employees because employees do not even have to vote if they do not want to do so.

The Board’s certification of a winner, however, was described as problematic by the Seventh Circuit in the *Catholic Bishop* case. It “necessarily alters and impinges upon the religious character of all parochial schools because no longer would the bishop be the sole repository of authority as required by church law, Canon 1381.”¹⁷⁸ The authority of a bishop under Canon Law for a religious high school owned by a bishop is of course not similarly significant where, as here, the concern is with religiously affiliated universities neither owned by a church or its bishop, nor subject to Canon Law in the same way.

The determination by the Board of what faculty should be eligible to vote in an election could include individuals whom a university holds out as being responsible for the maintenance of the religious values of the institution. The NLRB has, however, as already explained, used the progeny of *PLU* to exclude such individuals as teachers of theology and religious studies from such eligibility.¹⁷⁹

174. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

175. *Hobby Lobby*, 134 S. Ct. at 2780.

176. 29 U.S.C. §§ 159, 160 (2012).

177. § 159.

178. *NLRB v. Catholic Bishop of Chi.*, 559 F.2d 1112, 1123 (1977).

179. *Saint Xavier Univ.*, 364 N.L.R.B. No. 85 (2016).

In sum, there seems to be no observable excessive entanglement or substantial burden placed on these universities by the Board's exercise of its jurisdiction to conduct elections and certify the results.

C. Unfair Labor Practices

The Board's jurisdiction over unfair labor practices (ULPs) is another matter because it is here that the courts have been summarily uncritical in their understanding of how Board jurisdiction may violate religious freedom.

The Board's jurisdiction to investigate and adjudicate ULPs arises under Section 10 of the Act which authorizes the NLRB to: (1) receive "charges" of ULPs by any person; to investigate the same; and (2) to issue a complaint and have a trial.¹⁸⁰ The Board's authorized remedies are narrow: (i) a "cease and desist" order; and/or (ii) an order to take affirmative action such as "reinstatement of employees, with or without back pay."¹⁸¹ Of more particular interest to what follows, the Act prohibits the Board from requiring reinstatement of any individual or the payment of back pay "if such individual was suspended or discharged for cause."¹⁸²

This subject of discharging a professor has caused courts to speculate about "entanglement" in an uncritical way. In the First Circuit's opinion in *Bayamon*, the court theorized that a professor might file a ULP charge over some job action claiming that the university had an anti-union animus while the university might claim its actions were based on religious reasons.¹⁸³ A more charged example of a clash of motives might be a professor who alleges she was disciplined because she was too vocal in support of a union (which if true would be a ULP under section 8(a)(1) of the Act) while the university claims its disciplinary action came because this professor was openly urging student use of condoms in violation of some university norm which the professor promised to respect upon being hired, i.e. "cause."

The *Bayamon* court failed, however, to observe that the Supreme Court, some two years earlier, approved a methodology for resolving these dual motive cases under the NLRB's *Wright Line* test as approved by the Supreme Court in *NLRB v. Transportation Management Corp.*,

180. 29 U.S.C. § 160.

181. *Id.*

182. § 160.

183. *Bayamon*, 793 F.2d 383, 401 (1st Cir. 1985).

that protects dismissal “for cause.”¹⁸⁴ The NLRB’s General Counsel bears the burden of first proving that the professor’s union support was at least a factor motivating the university’s action.¹⁸⁵ Then the university can successfully rebut by showing that its decision rested on the professor’s unprotected conduct of hawking condoms and that the professor would have been disciplined in any event.¹⁸⁶ Presumably, such a university, especially if it has been consistent in enforcing its values, will have no problem prevailing legally. Admittedly, there may be a case with a separate problem, viz. whether the university’s claim is mere “pretext:” i.e., did religious belief actually motivate the university’s action? Would the NLRB be too accepting of a university’s proffered “cause” involving doctrine or religious mission? And would litigating that involve too much inquiry into motivation? The NLRB’s *Wright Line* test as approved in *Transportation Management* would seem to be an adequate answer. A university would not have to explain or defend its doctrine but simply show that it acted pursuant to that doctrine. This was the position of the dissent in *Bayamon*, which saw no problem with Board jurisdiction.¹⁸⁷

The Second Circuit also has stated that a state labor board may not inquire into whether a religiously-based reason given for a discharge is really a part of a church’s dogma; it can only determine whether that reason given is one part of a dual motive for discharge.¹⁸⁸

The *Bayamon* Court of Appeals also asserted an even more fundamental objection, in its view. It said that the very process by which the NLRB would investigate a claimed ULP charge is the same process of inquiry of which *Catholic Bishop* disapproved.¹⁸⁹ The court used the example of Bayamon University wanting to dismiss a teacher for “an offense to Christian morality,” e.g., counseling abortion.¹⁹⁰ Said the court: “. . . reviewing such sanctions would place the Board squarely in the position of determining what is ‘good faith’ Dominican practice in respect to such counseling. Indeed, it is difficult to imagine secondary

184. See generally *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983) (stating “we conclude that the Court of Appeals erred in refusing to enforce the Board’s orders, which rested on the Board’s *Wright Line* decision.”).

185. *Id.* at 401–04.

186. *Id.* at 403.

187. *Bayamon*, 793 F.2d at 389.

188. *Catholic High Sch. Assn. of Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1168–69 (2d Cir. 1985).

189. *Bayamon*, 793 F.2d at 401.

190. *Id.*

school examples that could not arise with equal ease in the college context.”¹⁹¹

This process of inquiry has obvious relevance in the context of a secondary school subject to the autonomous authority of a bishop. This extension of *Catholic Bishop* to a university not owned by a bishop, however, does not work. More fundamentally, the Board has no legal mandate to evaluate the “good faith” that a university may have for discipline. The legal standard is “cause.” While it is unclear what the court had in mind by its reference to “good faith,” certainly a university would not seek constitutional protection for some right to use pretext, i.e., to fire a teacher for allegedly counseling abortion when the university knew such a basis was factually false. That would not be considered cause. It would be dishonesty. As noted above, a university will have to show it had “cause.”

Thus, in discipline cases implicating deeply held religious values, moral or doctrinal in nature, the NLRA protects these sensitive and admittedly important decisions under the rubric of “cause.” The NLRB is not, and should not be, interested in weighing and evaluating with its own eyes what is “cause.” Yes, academic freedom issues, too, will no doubt be present in some of these cases. However, as important as academic freedom is to academic integrity, the NLRB has no power under the Act to enforce it as such. The concern of the *Bayamon* court majority is appealing in terms of “freedom,” but it is also needlessly hyperbolic and too uncritical for a federal court.

Much of the uncritical speculating about how Board jurisdiction might entangle with, or burden, religiously affiliated universities implicates an employer’s duty to bargain in good faith. The duty is the mutual obligation of employer and union “to meet at reasonable times and confer in good faith with respect to wages, hours and conditions of employment, or the negotiations of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached.”¹⁹² And, then there follows this clause which is of fundamental significance to much of the fear for religious freedom: “but such obligation does not compel either party to agree to a proposal or require the making of a concession.”¹⁹³

Further, not only does the Act not compel any agreement, the Act does not regulate the substantive terms governing wages, hours, and working conditions because agreement, if reached, is volun-

191. *Id.*

192. 29 U.S.C. § 158 (2012).

193. *Id.*

tary.¹⁹⁴ Nor can the Board impose on the parties any agreement or particular term of agreement by way of remedying bad faith bargaining.¹⁹⁵ Thus, the only remedy for bargaining in bad faith is an order to return to bargaining.

The First Circuit majority in *Bayamon* also opined on how bargaining over “terms and conditions of employment” would potentially entangle the Board in a constitutionally problematic way.¹⁹⁶ The Circuit majority saw problems specifically with respect to college curriculum (including religious requirements), the manner of teaching (according to Christian principles), and the obligation of faculty to counsel and advise students.¹⁹⁷ It observed that the need for academic freedom would greatly broaden the more detailed subjects for negotiation of “terms and conditions.”¹⁹⁸ The majority noted how all of this was simply too broad to avoid entanglement.

The dissenting judges in *Bayamon* have the better of the argument on this point. This dissent observed that these universities are not pervasively sectarian like a high school; that most of the subjects for bargaining are completely secular; that most of the faculty were not even hired for religious reasons; that any particular subject that might affect a truly religious facet of an institution is one the university is free simply to refuse to bargain about and test its position ultimately before the courts because these institutions do not completely lose the shield of the First Amendment in the face of NLRB jurisdiction.¹⁹⁹ As this dissent points out, the Supreme Court, in another context, has already recognized the difference between pervasively sectarian high schools, where teachers are an agent of the bishop, and universities which are primarily non-sectarian are thus able to secure public funds.²⁰⁰ The dissent is correct because the fundamental differences between high schools and universities are so fundamental as to preclude a knee-jerk extension of *Catholic Bishop*.

194. NLRB v. Am. Nat'l Ins. Co., 343 U.S. 395, 401–02, (1952).

195. See H.K. Porter Co. v. NLRB, 397 U.S. 99, 108 (1970) (“... allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract”).

196. *Bayamon*, 793 F.2d at 402.

197. *Id.*

198. *Id.*

199. *Id.* at 388–89, 404–06.

200. See *Tilton v. Richardson*, 403 U.S. 672, 688–89; see also *Hunt v. McNair*, 413 U.S. 734, 745 (1973); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 750 (1976).

The Board, too, has changed since these cases. The Board's *PLU* decision is a signal that it cannot question an assertion of religious dogma or praxis. Its new, chastened position in *PLU* is entitled to judicial respect, not continuing avoidance or evasion of the First Amendment issues.

Besides the legal power simply to say "no" across a bargaining table, however, a religiously affiliated university can also insist in bargaining on a management rights clause which reserves exclusive power over certain carefully enumerated facets of university life that the university feels it needs to protect its religious mission. The NLRB must accept an employer's right to seek an agreement reserving to itself the exclusive right to make decisions on any number of subjects in the workplace.²⁰¹ Further, that same management rights clause can be a limitation over what a university is willing to accept as a grievance and over what it will agree to arbitrate.²⁰² Thus, a university cannot be made to arbitrate issues of interpretation or application of a collective bargaining agreement, or indeed of any dispute between itself and a union, provided it has clearly set forth its non-agreement.

It is useful to observe here that there are state labor board cases which do support the proposition that NLRB jurisdiction is more than viable without any real entanglement or burden on religion. The Second Circuit, post- *Catholic Bishop*, has upheld the constitutionality of state labor boards bargaining for purely secular terms and conditions in even church operated high schools where every teacher is directly involved in the transmission of religious values to students just as in *Catholic Bishop*.²⁰³ In this case the court's majority found that the N.Y. State Labor Board had had jurisdiction for years and had never encountered a religious question or had to inquire into religious beliefs.²⁰⁴ The role of the N.Y. Board with respect to collective bargaining is not intrusive; it is, indeed, identical to the role of the NLRB with the result that the duty to bargain "does not involve excessive administrative entanglement between church and state."²⁰⁵ Unlike the state aid cases which require on-going state supervision to perceive whether state monies are used only for secular classroom

201. See *NLRB v. Am. Nat'l Ins. Co.*, 343 U.S. 395, 401 (1952).

202. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 584 (1960).

203. *Catholic High Sch. Ass'n of the Archdiocese of N.Y.*, 753 F.2d 1161 1166-67 (2d Cir. 1985).

204. *Id.* at 1165.

205. See *id.* at 1167-68.

purposes,²⁰⁶ the Second Circuit said the Board's "supervision over the collective bargaining process is neither comprehensive nor continuing."²⁰⁷ The historical reason for the existence of so few legal issues was probably because of the language the parties negotiated which recognized the need, after *Catholic Bishop* at least, to carve out and preserve the right of management to preserve its religious character.²⁰⁸ Similarly, New Jersey's state labor board can compel church operated elementary schools to recognize a union as representative of lay teachers and to engage in collective bargaining.²⁰⁹

Hiring may also be a matter of concern for these universities which want to "hire for mission."²¹⁰ Who these universities hire is not, however, a mandatory subject of bargaining.²¹¹ Thus, these universi-

206. See *Lemon v. Kurtzman*, 403 U.S. 602, 627 (1971); see generally *Meek v. Pittenger*, 421 U.S. 349 (1975) (holding certain state aid programs unconstitutional because the schools benefitting were predominately religious and supervision of personnel would be too excessive); see also *Wolman v. Walter*, 433 U.S. 229, 231 (1977) (holding that state field trip funding was impermissible direct aid to sectarian education, as neither the individual teacher's religious neutrality or the secular use of funds could be guaranteed without the type of close supervision that would create excessive entanglement).

207. *Catholic High Sch. Ass'n of Archdiocese of N.Y.*, 753 F.2d at 1167.

208. See *id.* at 1163 ("The preamble of the Collective Bargaining Agreement between the Association and the Union stated: [T]he Union and its members recognize the uniqueness of the Employer and its member schools in that it is a Roman Catholic school system committed to provide education within the framework of Catholic principles and that nothing in this Agreement shall be construed as interfering in any way with the [Association] in carrying out [its] functions and duties that are canonical, ecclesiastical, or religious in nature; and [T]he Union and its members further recognize that the functions and duties referred to hereinabove are not subject to the grievance, discharge, termination or other provisions of this Agreement. Moreover, a rider to the agreement stated 'there are certain areas of Canon Law, ecclesiastical decrees and religious obligations that cannot be the subject of negotiations.' It further provided, for example that 'if a teacher were to teach that there was no God' then 'he could be discharged . . . and the discharge would not be subject to the discharge grievance procedure.'").

209. *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 150 N.J. 575, 581 (N.J. Sup. Ct. 1997); *contra Hill-Murray Fed. of Teachers v. Hill-Murray High Sch.*, 471 N.W.2d 372, 374 (Minn. Ct. App. 1991); see generally David L. Gregory and Charles J. Russo, *The First Amendment and the Labor Relations of Religiously Affiliated Employers*, 8 B.U. PUB. INT. L. J. 449 (1999).

210. Joshua Hochschild, *The Catholic Vision: Hiring for Mission is About More Than Counting Catholics*, COMMONWEAL MAGAZINE (May 8, 2017), <https://www.commonwealmagazine.org/catholic-vision> [<https://perma.cc/8288-QRE6>] ("Personnel is policy. Hiring is of utmost importance for the health and integrity of an institution. As a Catholic institution, discerning who will occupy positions will always involve asking what characteristics candidates bring to help their areas of responsibility achieve distinctive excellence in light of Catholic mission. This doesn't mean just hiring people who can "check the Catholic box." It means hiring people able and eager to engage some dimension of the Catholic worldview and thereby enrich their work and their institution.").

211. *Star Tribune*, 295 N.L.R.B. 543, 549 n. 20 (1989).

ties may hire as they wish without having to negotiate to impasse with a union over qualifications or the very decision itself to hire a particular professor.

The mention of “impasse” of course also raises the specter of a strike by faculty after an impasse has been reached in negotiations for a collective bargaining agreement. It is this threat of strike that often is the real driver of opposition to unionization. This is because the end result may cause greater financial burden for a university that is already too tuition dependent. The strike is legally protected by section 13 of the NLRA and is part of the National Labor Policy.²¹² “[H]aving established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful means not prevail.”²¹³

The right to strike for economic reason, and the choice to strike, however, do not implicate the jurisdiction of the Board. The Board does not authorize or sanction an economic strike. The strike is the free action of the faculty, and as such it could, in theory at least, take place even if a university and a faculty union were not even covered by the NLRA. There is no basis, then, for entanglement of the Board in such a voluntary action.²¹⁴

Would labor arbitration, the nation’s preferred method of labor dispute resolution, pose its own issues of excessive entanglement? Probably not. First, as earlier suggested, a management rights clause coupled with a very clear reservation of certain issues from the arbitration process can avoid arbitration altogether for issues implicating the heart of the institution’s moral and religious values. Second, if a collective bargaining agreement does not itself represent entanglement, an interpretation or enforcement of it by an arbitrator chosen by the parties should not generally either. In labor arbitration the arbitrator is the parties’ chosen “official reader” of their agreement, interpreting language and assessing past practice, to arrive at a resolution which then becomes part of the agreement.²¹⁵ An arbitrator may find just cause for discipline, or not. An arbitrator may resolve a multitude of issues, none of which have anything to do with issues of faith. The

212. 29 U.S.C. § 163 (2012).

213. *Am. Ship Building Co. v. NLRB*, 380 U.S. 300, 317 (1965).

214. Nor is there Board entanglement with an employer’s free decision to lockout its workers, the correlative power to the right to strike, in order to pressure workers to accept the employer’s negotiating proposals. *Id.* at 300.

215. *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1205 (9th Cir. 1989) (*en banc*).

arbitrator's award is only legally good, however, as long as it "draws its essence" from the agreement itself; e.g., an arbitrator is not free to dispense her "own brand of industrial justice."²¹⁶ Finally, if an arbitrator happens to issue an award that a religiously affiliated university feels is truly violative of religious freedom, the courts are always available to vacate awards that are contrary to "public policy" being that the Religion Clauses certainly constitute just such clear, dominant public policy.²¹⁷ It is hard to see where an alternative dispute mechanism chosen by a union and a religiously affiliated university contains new seeds of entanglement.

Finally, there is evidence that collective bargaining between religiously affiliated employers and unions such as the SEIU is working without constitutional conflict.²¹⁸

A. Religious Freedom Restoration Act ("RFRA")

The Board's jurisdiction as exercised in *PLU* does not offend the RFRA. As earlier noted, the RFRA says the federal government shall not "substantially burden" a person's exercise of religion, even through a law of general applicability unless that burden is in furtherance of a "compelling government interest" and represents the "least restrictive means" of furthering that interest.²¹⁹

The question posed about substantial burden in *Hobby Lobby* was whether the contraceptive mandate imposed a substantial burden on the ability of the closely held corporation's owners to conduct business in accord with their religious beliefs.²²⁰ The Court's majority made short shrift of the issue by noting that Hobby Lobby would be indirectly supporting what it considered moral evil and that, because of its size, Hobby Lobby could be looking at a fine of about \$1.3 million per day.²²¹ By contrast, and as shown in the above discussion about entanglement, it is difficult to see any burden of any substantiality for an institution complying with *PLU*. The institution cannot credibly say it would be cooperating with evil to be subject to Board jurisdiction. A religiously affiliated university need not change its mis-

216. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

217. *See* *W.R. Grace & Co. v. Local Union*, 759, 461 U.S. 757, 766 (1983); *See also*, *United Paperworkers Int. Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987).

218. *See generally*, Maryann Parker & Saerom Park, *The Impact of Pacific Lutheran on Collective Bargaining at Catholic Colleges and Universities*, 7 J. COLLECTIVE BARGAINING ACADEMY Art. 3 (2015).

219. 42 U.S.C. § 2000bb-1 (2012).

220. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

221. *Id.* at 2775.

sion or moral values. It has the ability simply to say “no” at the bargaining table to any proposal it deems harmful to its values. The generalized speculations of the Court, to the contrary, are just that, uncritical speculation.

For Catholic-affiliated universities, any claim of a burden is also in effect self-contradictory because to be Catholic the institution should accept the social teachings of the Church which demand respect for the right to organize and bargain even for the Church’s own employees.²²²

As noted earlier, the NLRA does represent a compelling government interest. Drilling down further into the nature of that interest, however, helps to inform a discussion of the other RFRA elements, especially the “least restrictive” element.

Congress’ purposes in the NLRA included labor relations, “peace” across the nation, and also giving workers a “voice” at the workplace.²²³ These purposes go further, however, than peace and voice. They implicate “a valid labor regulatory system which serves a substantial public purpose.”²²⁴ They also implicate human rights, as Professor James A. Gross has written: “If the core values of the Wagner Act are understood for what they actually are—that is, human rights values—it changes the scheme for giving certain rights priority over other rights. If freedom of association is recognized as a human right, for example, then it gets first priority.”²²⁵

As Professor Gross points out, that does not mean other rights such as management rights are forsaken, but that those other rights do not receive the first priority that courts, administration agencies, and labor arbitrators have historically given them.²²⁶

In *Hobby Lobby*, the government could find other means of providing cost-free contraceptives, said the Supreme Court.²²⁷ How does government find some other means to provide university professors, tenured and contingent, with the human rights recognized by the NLRA? Notably in *Hobby Lobby*, the Court did not reach the question of whether an accommodation of that employer would mean employees had to lose their own benefits, and Justice Kennedy expressly sig-

222. See *supra*, notes 22–24 and accompanying text.

223. Charlotte Garden, *Religious Employers and Labor Law: Bargaining in Good Faith?*, 96 B.U.L. REV. 109, 152–55 (2016).

224. *Buckley v. AFTRA*, 496 F.2d 305, 311 (2d Cir. 1974).

225. JAMES A. GROSS, A SHAMEFUL BUSINESS: THE CASE FOR HUMAN RIGHTS IN THE AMERICAN WORKPLACE 65 (2010).

226. *Id.*

227. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

naled his reluctance to accept such a result in his concurrence.²²⁸ The prospect of a substantial majority of faculty losing entirely the benefits of the NLRA should be a sobering sign of a need for a more critical assessment of the merits of the opposition to Board jurisdiction in the name of religious freedom.

As also earlier observed, the second prong of the *PLU* test will make any teacher held out by the institution as performing a specific religious function, such as teachers of theology or religious studies, ineligible for inclusion in a bargaining unit.²²⁹ What course of action, then, could be less restrictive and still achieve Congress' substantial public purposes? Or what could be less restrictive and still recognize the human right to organize for better wages, hours, and conditions? There are a few voices for a voluntary system of bargaining outside the jurisdiction of the Board.²³⁰ Even advocates of this idea are forced to admit that its weakness is that it "necessarily concentrates power on the side of the institution."²³¹ Indeed, the faculty would be left as at-will, itself a morally dubious result.²³² It is not legally open to the NLRB, however, to defer to this alternative under the guise of "least restrictive." So far, there is nothing in the law under the RFRA that suggests professors should go without legal protection under the NLRA in order to accommodate religious freedom.

However, it cannot seriously be contended that a least restrictive means legally necessitates an abject surrender and a return to an unregulated state. These religiously affiliated universities are subject to all manner of government regulation, local, state, and federal, such as taxation, health, safety, fire zoning, and any number of other police power intrusions and limitations on their operations. Determining why these institutions should be free of NLRB regulation when workers' rights are at issue demands a more focused and critical response by those who object to that jurisdiction.

Conclusion

There is no facial conflict between the religious freedom of the university and the freedom of faculty to organize and bargain under

228. *Id.* at 2786–87 (Kennedy, J., concurring).

229. *See supra*, notes 115–19 and accompanying text.

230. Christian Vareika, *Further and Further, Amen: Expanded National Labor Relation Board Jurisdiction Over Religious Schools*, 56 B.C. L. REV. 2057, 2088 (2015).

231. *Id.* at 2089.

232. *See* Donald C. Carroll, *At-Will Employment: The Arc of Justice Bends Towards the Doctrine's Rejection*, 46 U.S.F. L. REV. 655, 655-56 (2012).

the NLRA. It is not necessary to revisit *Catholic Bishop*. It is necessary, however, to acknowledge that an extension of the result in that case simply by the “avoidance” mechanism to universities not operated by a church and not suffused with church authority is unwarranted and evades the courts’ duty to determine the law. Then-Judge Breyer was correct when he urged resolution in the Supreme Court.

The NLRB’s *PLU* case tests are worthy of consideration on the merits of the challenges both under the Religion Clauses and the RFRA, without further evasion. As this article is finalized, three universities are seeking review of NLRB decisions based on *PLU* in the U.S. Court of Appeals for the District of Columbia²³³ and Manhattan College.²³⁴ The right of often underemployed and underpaid faculty under this nation’s labor law to organize and bargain should be confronted on the merits.

233. *Duquesne University v. National Labor Relations Board*, No. 18-1063 (D.C. Cir. 2018) (appeal pending); *St. Xavier University v. National Labor Relations Board*, Nos. 18-1076 & 1086 (D.C. Cir. 2018) (appeal pending).

234. *Manhattan College v. National Labor Relations Board*, No. 18-1113 (D.C. Cir. 2018) (appeal pending).

