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The NLRB's Assault on Religious Liberty

May 2011

by Patrick J. Reilly

About the Author

Patrick Reilly is the founder and president of The Cardinal Newman Society. He has written numerous articles and is a frequent commentator on Catholic higher education for the media. He is a co-editor of *The Newman Guide to Choosing a Catholic College*, *The Enduring Nature of the Catholic University* and *Newman's Idea of a University: The American Response*. He has served as editor and researcher for the Capital Research Center, executive director of Citizens for Educational Freedom, higher education analyst for the U.S. House of Representatives education committee, program analyst for the Postsecondary Division of the U.S. Department of Education, and media consultant to the U.S. Conference of Catholic Bishops.

Executive Summary

When an acting regional director of the National Labor Relations Board (NLRB) concluded in January 2011 that Manhattan College, a Christian Brothers institution, was not sufficiently religious to claim exemption from federal labor law, there was an outcry from educators and religious liberty advocates.

But most media reports missed the point, portraying the case as a sudden turn against the First Amendment rights of religious colleges. In fact, the NLRB has claimed jurisdiction over Catholic colleges and universities for decades, forcing institutions to recognize faculty unions despite the potential interference with their ability to enforce their religious missions.

In the Manhattan College case, the NLRB has an opportunity to correct this abuse. The Board's ruling could free Catholic colleges and universities from NLRB jurisdiction, or it could pose a significant setback for the religious liberty of Catholic educators. It could determine the future of faculty unions at Catholic colleges and universities. And it could impact other college relations with the federal government if the same First Amendment concerns are applied to requests for exemption from federal law.

Because the evolution of the NLRB's reasoning is essential to understanding the impact of the Manhattan College case, this paper summarizes key NLRB and federal court decisions since the 1979 Supreme Court ruling in *NLRB v. The Catholic Bishop of Chicago, et al*.

The Center for the Advancement of Catholic Higher Education
A Division of The Cardinal Newman Society in Support of *Ex corde Ecclesiae*

9415 West Street
Manassas, Virginia 20110
703-367-0333
www.CatholicHigherEd.org

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About The Center

The Center for the Advancement of Catholic Higher Education (CACHE), a division of the nonprofit Cardinal Newman Society, advises and assists academic and religious leaders in efforts to strengthen the Catholic identity and academic quality of Catholic colleges and universities.

Note: the views expressed herein are those of the author and not necessarily those of The Center for the Advancement of Catholic Higher Education or The Cardinal Newman Society.

The NLRB's Assault on Religious Liberty

In January 2011, an acting regional director of the National Labor Relations Board (NLRB) sparked a national outcry with his ruling requiring Manhattan College, a Christian Brothers institution, to recognize a faculty union and comply with federal labor law despite the College's religious identity. The Board's pending review of that decision could have a far-reaching impact on religious liberty in the United States and the future of unionization at Catholic colleges and universities.

When the ruling was issued, it received significant media attention for the wrong reasons. The case was portrayed as a sudden turn against Catholic colleges' religious liberty. One national newspaper reported that it was "the first time an NLRB body has tried to force a religious institution to allow unions."

In fact, the NLRB has claimed jurisdiction over Catholic colleges and universities for decades, forcing institutions to recognize faculty unions despite the potential interference with their ability to enforce their religious missions—a violation of religious liberty under the First Amendment to the U.S. Constitution.

Because the evolution of the Board's reasoning is essential to understanding the impact of the Manhattan College case, this paper summarizes key NLRB and federal court decisions since the 1979 Supreme Court ruling in *NLRB v. The Catholic Bishop of Chicago, et al.* It should be noted that this paper addresses only the matter of NLRB jurisdiction over Catholic colleges and universities, but not arguments for and against unions outside the purview of federal law.

NLRB v. The Catholic Bishop of Chicago (1979)[1]

Catholic Bishop was a watershed moment in the protection of religious institutions from undue government intrusion. It has served as the primary basis upon which the NLRB evaluates requests from Catholic colleges and universities for exemptions from the Board's jurisdiction and from collective bargaining with faculty.

But in the NLRB's early years of enforcing the National Labor Relations Act of 1935, the question of Catholic schools and colleges was moot. The NLRB declined to assert jurisdiction over any nonprofit educational institution, arguing that the nonprofit status precluded substantial commercial activity. It was not until 1970 that the NLRB reversed its position in response to the growing influence of leading universities, claiming jurisdiction over Cornell University[2] as well as other schools, colleges and universities.

Still through most of the 1970s, the NLRB did not consider whether the agency might be intruding on the First Amendment rights of Catholic colleges and universities. The Board asserted jurisdiction over Catholic institutions including Fordham University in New

1. 440 U.S. 490 (1979).

2. *Cornell University and Association of Cornell Employers-Libraries*; *Cornell University, Petitioner and Staff Association of the Metropolitan District Office, School of Industrial and Labor Relations, Cornell University*; *Cornell University, Petitioner and Association of Cornell Employers-Libraries*; *Cornell University, Petitioner and Civil Service Employees Association, Inc.*; *Syracuse University, Petitioner and Service Employees International Union, Local 200, AFL-CIO*, 183 NLRB 329 (1970).

York City;[3] Manhattan College in Riverdale, New York;[4] Seton Hill College in Greensburg, Pennsylvania;[5] Saint Francis College in Loretto, Pennsylvania;[6] and even the U.S. bishops' national university, The Catholic University of America in Washington, D.C.[7] In all of these cases, the bargaining units included teaching faculty.

The question of religious liberty was raised, however, by Catholic parochial schools. In 1975, the NLRB established a "completely religious" test[8] that exempted only Catholic schools with no secular education, such as seminaries to train young men for the priesthood. Even when a school was owned and operated by the Catholic Church, the NLRB determined that:

> Regulation of labor relations does not violate the First Amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain [the National Labor Relations Act's] objective.[9]

It required the Supreme Court in the 1979 case *NLRB v. The Catholic Bishop of Chicago, et al.* to introduce the concept of religious freedom to the NLRB. Under consideration were lay faculty unions at Catholic parochial schools in the dioceses of Chicago and Fort Wayne-South Bend. The federal Court of Appeals for the Seventh Circuit had ruled that both the Free Exercise Clause and the Establishment Clause of the First Amendment prevented the NLRB from asserting jurisdiction over a Catholic school with regard to teachers, and it dismissed the NLRB's "completely religious" test for exemption:

> We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where 'completely religious' takes over or, on the other hand, ceases. In our opinion the dichotomous 'completely religious-merely religiously associated' standard provides no workable guide to the exercise of discretion. The determination that an institution is so completely a religious entity as to exclude any viable secular components obviously implicates very sensitive questions of faith and tradition.[10]

Agreeing that the NLRB's jurisdiction over Catholic schools with regard to faculty unions posed significant First Amendment concerns, and finding that Congress had not clearly expressed its intent that teachers in church-operated schools would be covered by the National Labor Relations Act, the Supreme Court upheld the Circuit Court ruling. How this might impact Catholic colleges and universities, however, was a matter left to the NLRB and lower courts.

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3. *Fordham University and American Association of University Professors, Fordham University Chapter, Petitioner; Fordham University and Law School Bargaining Committee, Petitioner*, 193 NLRB 23 (1971); *Fordham University and American Association of University Professors, Fordham University Chapter, Petitioner*, 214 NLRB 137 (1974).

4. *Manhattan College and American Association of University Professors, Manhattan College Chapter, Petitioner*, 195 NLRB 23 (1972).

5. *Seton Hill College and Seton Hill Professional Association, Pennsylvania State Education Association, Petitioner*, 201 NLRB 155 (1973).

6. *Saint Francis College and St. Francis College Education Association, Pennsylvania State Education Association/NEA*, 224 NLRB 125 (1976).

7. *The Catholic University of America and Law Faculty Bargaining Committee, Petitioner*, 201 NLRB 145 (1973), 202 NLRB 111 (1973), 205 NLRB 19 (1973), 236 NLRB 122 (1978).

8. *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Schools and Baltimore Archdiocesan Lay Teachers' Organization, Petitioner*, 216 NLRB 54 (1975).

9. *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles, a Corporation Sole; The Archdiocese of Los Angeles Education and Welfare Corporation; The Archdiocese of Los Angeles Department of Education; and the following high schools within the geographical boundaries of the Archdiocese of Los Angeles and California Federation of Teachers, affiliated with The American Federation of Teachers, AFL-CIO and its affiliated Local 3448, United Catholic Secondary Teachers Association, Petitioner,* 223 NLRB 198 (1976).

10. 559 F. 2d 1112 (1977).

College of Notre Dame (1979)[11]

In September 1979, the NLRB considered an appeal from the College of Notre Dame in Belmont, California, to a regional director's assertion of jurisdiction over the Catholic college. It was the first case before the Board in which a Catholic college claimed a right to refuse collective bargaining according to the Supreme Court ruling in *Catholic Bishop*.

The regional director had asserted that the Supreme Court's First Amendment concerns in *Catholic Bishop* were irrelevant to the College's interests, because the Court had been concerned only with lay teachers in "church-operated" elementary and secondary schools. This limited the effective reach of *Catholic Bishop* in three ways: it could be applied only to elementary and secondary schools, not colleges or other institutions; it applied only to schools deemed to be "church-operated," as distinct from schools that were church-affiliated but legally independent from an established church; and it applied only to bargaining units of teachers, not non-teaching employees.

The NLRB agreed with the regional director's first restriction, contending that a college education does not typically involve "substantial religious activity and purpose" like the Catholic schools involved in *Catholic Bishop*, even at a religious college. Therefore the government would not become entangled in religious matters if a college were subjected to NLRB oversight. The Board cited the Supreme Court ruling in *Tilton v. Richardson*:

> There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. …Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education."[12]

The NLRB also agreed that the College was not controlled by the Catholic Church:

> Because an independent board of trustees, not the diocese or the Order, controls the institution, and because there is no administrative or financial connection at all between the diocese or the Order and the school, the College of Notre Dame is not church-operated within the meaning of *Catholic Bishop*.

The NLRB acknowledged that the College of Notre Dame had clear ties to the Catholic Church. The college was established in 1851 by the Order of Sisters of Notre Dame de Namur. At the time of the NLRB's review, nine of the college's fifteen trustees were Sisters of Notre Dame, and one-third of the faculty was affiliated with religious orders. The college required that the president, an *ex officio* member of the board of trustees, belong to the founding Order.

But this was insufficient for the NLRB to regard the College as church-controlled. Legal ownership of the college had been transferred from the Sisters of Notre Dame de Namur to a board of trustees independent of the Order and the Archdiocese of San Francisco. The NLRB found no evidence of property owned or funds contributed by the Sisters or the Archdiocese.

The regional director's third limitation on *Catholic Bishop*—that it did not apply to non-

11. *College of Notre Dame and International Union of Operating Engineers, Stationary Local No. 39, AFL-CIO, Petitioner*, 245 NLRB 44 (1979).

12. 403 U.S. 672 (1971). The Supreme Court rejected concerns that the Higher Education Facilities Act of 1963 constituted "excessive entanglement with religion."

teaching employees, such as the service and maintenance employees who were the focus of this particular case—was not taken up by the NLRB, which said the issue was moot since it had determined that *Catholic Bishop* did not apply to the College for other reasons. Nevertheless, the teachers-only restriction would be cited in future cases.

Having rejected the College's standing for exemption from the National Labor Relations Act under *Catholic Bishop*, the NLRB could have ended its deliberations. Instead the Board proceeded to consider whether the College was sufficiently religious to pose a risk of government entanglement with religion by forcing collective bargaining and asserting NLRB jurisdiction over the College—the Supreme Court's primary concern in *Catholic Bishop*. The further investigation was clearly unnecessary after the Board had already determined that *Catholic Bishop* was not relevant. But the NLRB may not have been confident of its limited application of *Catholic Bishop* and may have wanted to insure that its ruling was not overturned by a federal court. The NLRB continued to devote substantial time and effort to such evaluations in future cases.

The Board's investigation turned up some positive signs of Catholicity. According to the student handbook, the college aimed "to assist the student to acquire a deeper understanding of Christianity in its Catholic interpretation, to live and experience it relevantly, and to provide knowledge of other Christian and non-Christian religions." Crucifixes hung in most classrooms.

But the NLRB also found evidence of secularization underneath the Catholic trappings. It described the undergraduate curriculum as "nonsectarian," requiring only two general religion courses in a wide variety of subjects including Judaism and Islam. And the Board reported that faculty were hired "without regard to religious preference," the school calendar listed no religious holidays, and students were never required to attend Mass.

Interestingly, the NLRB found it relevant that the College received federal grants and participated in federal and state student aid programs. The concern might reasonably have been related to the question of church control over the College, in which regard the NLRB has established a pattern of examining whether an employer is substantially funded by the Catholic bishops or a religious order. But here—and in future rulings—the Board seemed to imply that acceptance of government assistance is a sign that a college or university lacks a strongly religious purpose.

Lewis University (1982)[13]

Three years later in 1982, Lewis University in Romeville, Illinois, unsuccessfully opposed a faculty union and challenged the NLRB's application of *Catholic Bishop*. The NLRB held firmly to its position that "*Catholic Bishop* applies only to parochial elementary and secondary schools, not to institutions of higher learning such as Lewis University." The Board cited both *College of Notre Dame* and another 1979 ruling against Barber-Scotia College,[14] which was affiliated with the United Presbyterian Church.

Lewis University had clear ties to the Catholic Church. It was founded in 1930 by the Archdiocese of Chicago, which later transferred ownership to the newly formed Diocese of Joliet. The Brothers of the Christian Schools were asked to handle day-to-day manage-

13. *Lewis University and Faculty Life Committee of the College of Arts and Sciences, Petitioner*, 265 NLRB 157 (1982).

14. *Barber-Scotia College, Inc. and Barber-Scotia Professional Association/NEA, Petitioner*, 245 NLRB 48 (1979). The ruling found that *Catholic Bishop* did not apply to higher education and Barber-Scotia was not church-controlled.

ment, and their involvement with the University continued even after 1974, when control shifted to an independent board of trustees. The NLRB found that more than a third of the trustees, seven out of nineteen, were Christian Brothers at the time of its review, and the chairman was the order's provincial.

Nevertheless, the NLRB determined that Lewis University was not church-operated. Although seven trustees were Christian Brothers, the University's bylaws required that a majority (ten) of the trustees must be members of the order, and the NLRB looked unfavorably at the order's failure to exercise its right of control. The Board also noted the lack of control by the Diocese of Joliet and the University's acceptance of state and federal aid.

With regard to the University's religious identity, the NLRB found that courses available to fulfill students' required six credits of "religious studies" were "not limited to Catholicism." Faculty members were not required to be Catholic.

In addition to pleading for an exemption under *Catholic Bishop*, Lewis University tried a new argument that had been successful just months earlier for Duquesne University of the Holy Ghost in Pittsburgh, Pennsylvania.[15] Although Duquesne had initially contested a regional director's assertion that *Catholic Bishop* does not apply to colleges, the University dropped the argument on appeal before the NLRB, instead relying on a new Supreme Court ruling in *NLRB v. Yeshiva University*.[16] The Court had ruled that full-time professors at Yeshiva were "managerial" employees who had a significant role in management of the University, and therefore they could be excluded from collective bargaining. The strategy worked for Duquesne, and the NLRB ruled that the University was exempt from recognizing a union of full-time members of its law faculty.

Lewis University was not so successful. The NLRB ruled that its full-time professors were not managerial employees as in *Yeshiva University*, because at Lewis they did not have final authority over significant University operations and did not "effectively formulate and effectuate the policies of the Employer."

Universidad Central de Bayamon (1984)[17]

The 1984 case of the Universidad Central de Bayamon, a historically Dominican university in Puerto Rico, introduced a new dilemma for the NLRB: if *Catholic Bishop* exempted parochial elementary and secondary schools but not colleges from the National Labor Relations Act, how should the Board regard a Catholic university that operates a Catholic school? Also, was there a possibility of entanglement with religion if the NLRB claimed jurisdiction over a university that operated a program to prepare seminarians for the priesthood?

Although the Universidad Central de Bayamon could claim both situations—with a seminarian program and two Catholic schools—the NLRB determined that the University must recognize a union of full-time teaching personnel.

Among the University's programs was the Center for Dominican Studies in the Caribbean (CEDOC), a two-year Master of Divinity program that was open to lay students, especially those who intended to teach in Catholic schools, but was primarily intended to partially prepare seminarians for the priesthood. The NLRB found that the curriculum was "primar-

15. *Duquesne University of the Holy Ghost and Duquesne University Law School Faculty Association, Petitioner*, 261 NLRB 85 (1982).

16. 444 U.S. 672 (1980)

17. *Universidad Central de Bayamon and Union de Profesores Universitarios (UPU), Petitioner*, 273 NLRB 138 (1984).

ily religious in content," and that the Center required all courses to be taught "within the limits of the Roman Catholic tradition." To claim jurisdiction over CEDOC would unconstitutionally involve the NLRB in religious matters pertaining to CEDOC's faculty.

But rather than exempt the entire University from collective bargaining, the NLRB ruled that only CEDOC employees could be excluded from the faculty union. This was possible, the Board decided, because CEDOC had its own director and hired and paid for its own professors; it was "not wholly and structurally integrated with Respondent."

The University also owned a Catholic elementary school and a Catholic elementary/secondary school, in part to offer teacher-training to the University's students. The schools were governed by the University's board of trustees and president, and their director was vice president of the University. Despite this formal oversight, however, the NLRB concluded that the schools operated largely independent of the University and the Catholic Church, with their own principals, budgets and authority to hire teachers.

Both schools required their teachers to "keep those norms of behavior which are dictated by the School and the Catholic Church." Like CEDOC, the NLRB determined that the schools were thoroughly Catholic, and it would be "an impermissible entanglement between government and religion" to require the University to bargain with the schools' teachers. But because of the schools' operational independence, a union of full-time University faculty would not interfere with religious education at the schools. The University could exclude the schools' teachers from collective bargaining, but still had to recognize a faculty union.

As for Central de Bayamon's standing with regard to *Catholic Bishop*, the NLRB repeated its argument that the Supreme Court had focused narrowly on union organization of Catholic elementary and secondary school teachers, not colleges. Also, the Board concluded that the University was not "owned, financed or controlled by the Dominican Order or by the Roman Catholic Church, and that the University's academic mission is secular."

Central de Bayamon was founded by the Order of the Dominican Fathers in 1961 but became independent in 1970. The NLRB noted that the local Archdiocese of San Juan had no "administrative nor secular control over the institution," owned no University property and contributed no funds as of 1984. The only assistance from the Order was an interest-free mortgage on certain property. Although six of the University's ten trustees were Dominicans, the NLRB reported the president's testimony that the board of trustees "does not consult with or report to the Order."

The NLRB concluded: "There is no dispute that Respondent has been recognized as a Catholic university, but this recognition has had no effect on the manner that the University has been administered or on its curriculum offerings." But in fact there did seem to be some dispute about the University's recognition by the Church, even according to the Board's findings. The NLRB reported, presumably referring to the Archbishop of San Juan:

> Indeed, the highest ranking official in the Catholic Church in San Juan testified, without contradiction, that as the Employer does not comply with any of the requisites set forth by the Catholic Church, the Employer is not a Catholic university and that it has repeatedly refused to submit to any direction or control by the Catholic Church.

But to the contrary, the University claimed that it had been "recognized by and affiliated with the Sacred Congregation of Catholic Education in Rome as a Catholic institution." And the NLRB acknowledged a formal agreement between the University and the Church:

> The recognition agreement vests on the Bishop of San Juan only the authority to oversee those aspects

> of university life and functions dealing with pastoral or religious matters and is specific in adding: "This right to oversee is understood not to extend to matters which usually fall within the university administration competency." Although the agreement grants the Bishop the right to attend meetings of the board of trustees where pastoral matters are going to be discussed, no such meetings have been held and the Bishop has not attended any meetings, nor has he been invited to them or solicited an invitation.

As in *College of Notre Dame* and *Lewis University*, the NLRB proceeded to evaluate the Catholic identity of the Universidad Central de Bayamon. The University's education, argued the NLRB, was "entirely secular." The Articles of Incorporation defined the University's purpose as providing "a humanistic education at an academic level." The Board found that students were not required to attend Mass or study the Catholic religion; a required three-credit course offered "a comparison of various religions." The Catholic Church was not involved with student admissions or faculty hiring, neither students nor professors had to be Catholic, and professors "do not have to commit themselves in writing to support the mission of the Church."

The NLRB repeatedly noted the University's participation in federal aid programs. At the conclusion of its argument that the University is primarily secular, the Board admonished: "Respondent's posture regarding its religious affiliation is hardly consistent with its demonstrated, repeated attempts, often successful, to receive Federal grants for its programs."

As in Lewis University, the NLRB also considered whether Central de Bayamon University's full-time professors were managerial employees and therefore ineligible for unionization, according to the Supreme Court ruling in *Yeshiva University*. The NLRB ruled that the University's professors had insufficient control over operations and therefore were not managerial.

But the NLRB did not have the last word. Central de Bayamon University refused to comply with the ruling, and the Board petitioned the U.S. Court of Appeals for the District of Columbia Circuit to enforce its directives. In the Court's ruling in 1986, it split evenly on whether the NLRB correctly applied *Catholic Bishop*. The split ruling meant that the Court was unable to enforce the NLRB's jurisdiction over the University, and so the University was not forced to bargain with its employees.

In an opinion written by future Supreme Court Justice Stephen Breyer, which proved influential in future court cases, three of the Circuit Court judges argued that the very act of inquiring whether an employer was sufficiently religious was contrary to the First Amendment concerns in *Catholic Bishop*. They were satisfied that the University was not church-controlled within the meaning of *Catholic Bishop*, even though it demonstrated a secular purpose with a "subsidiary religious mission."

The judges also rejected the NLRB's position that *Catholic Bishop* did not apply to colleges and universities. They argued that *Catholic Bishop* did not clearly distinguish Catholic colleges from Catholic schools, and that the National Labor Relations Act did not explicitly contemplate jurisdiction over religious employers regardless of whether they are schools, colleges or other institutions. Moreover, they asserted that the risk of "state/religion entanglement" in a Catholic university was comparable to that of a Catholic elementary or secondary school under the jurisdiction of the NLRB.

But with a split court and no clear court precedent on these questions, the judges invited confirmation: "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."

St. Joseph's College (1986)[18]

A 1986 case concerning St. Joseph's College in Standish, Maine, brought about an important reversal by the NLRB. The Board consented to apply the Supreme Court ruling in *Catholic Bishop* to colleges and universities as well as elementary and secondary schools:

> After careful consideration, we are now of the opinion that the Supreme Court's holding in *Catholic Bishop* is not limited to parochial elementary and secondary schools, but rather applies to all schools regardless of the level of education provided. There is no language in *Catholic Bishop* limiting the Court's holding to parochial elementary and secondary schools. …we find that we can more properly accommodate first amendment concerns by considering the application of *Catholic Bishop* to all educational institutions on a case-by-case basis.

Given the timing of the D.C. Circuit Court's split ruling in the case of Central de Bayamon University, which had been issued nearly five months earlier, it seems possible that the NLRB's turnabout was influenced by Judge Breyer's opinion in that case. But nowhere in the Board's new ruling was the Circuit Court referenced.

Although the reversal meant that prior cases including those cited above were partially overruled, the NLRB stood behind its findings that the College of Notre Dame, Lewis University and the Universidad Central de Bayamon were not church-operated. But for St. Joseph's College, it was a different story. The NLRB found that the College was, in fact, "church-operated within the meaning of" *Catholic Bishop* and therefore could refuse to recognize a faculty union.

Key to this ruling was the significant involvement of the College's founding religious order, the Sisters of Mercy. The Sisters founded St. Joseph College in 1912 and maintained control over the institution with a two-tiered governance. The board of trustees, always chaired by the Mother General of the Sisters of Mercy, had final authority over the College. The Mother General selected the other six trustees; at the time of the NLRB review, all were Sisters of Mercy. The trustees controlled the corporation's investments and assets and appointed the College president.

A second body, the board of governors, managed day-to-day operations of the College. Composed of 24 to 36 members, at least one-third of the governors had to be members of the founding Order. The governors were required to ensure that College policies were consistent with the Catholic faith and the College's mission. The board included a representative of the Bishop of Portland:

> …whose responsibility is to insure that the College, in its teachings, does not contradict the teachings of the Catholic Church with respect to faith and morals. According to the chairman of the board of trustees, if the Bishop finds such a contradiction, he can take appropriate action, including asking for the discharge of the faculty member involved and/or making a determination as to which books shall be used by the College. There is no evidence, however, that the Bishop has ever exercised this power.

The NLRB found that the Sisters of Mercy held low-interest and interest-free loans to the College totaling approximately $1,765,000. Administrators told the Board that "the College could not survive without the financial support of the Order."

Selection criteria for the president, as described by the NLRB, included: "be a practicing Catholic, have a valid marriage, be pro Church, religion, and the mission of St. Joseph's College, and to accept and support the objectives of the 'sponsoring body.'"

18. *Trustee of St. Joseph's College and The Faculty Association of St. Joseph's College, Maine Teacher's Association and National Education Association, Petitioner*, 282 NLRB 9 (1986).

Sisters of Mercy held 18 teaching and administrative positions at the College, including dean and treasurer of the College. The NLRB noted that, since 1981, new professors were required to sign a statement that the professor "considers it a part of his duty to promote the objectives and goals of the College… the Sisters of Mercy of Maine."

The NLRB also found a strong Catholic identity at St. Joseph's College. Promoted as "the Catholic College of Maine," the College attracted Catholics who comprised 80 percent of the student body. Mass was voluntary, but for Catholic students, the six required credits in religious studies had to concern Catholicism. The NLRB concluded, but did not seem concerned, that the remaining subjects were taught in a manner comparable to secular colleges.

Teachers were forbidden to "inculcate ideas contrary to the official position of the Pope with the Bishops in matters of Faith and Morals."

> Although there is no evidence of any faculty discharges for any reason, the president of the College testified that faculty could and would be dismissed if their personal lives were not in harmony with the teachings of the Catholic Church or if they advocated ideas, in or out of the classroom, which were contrary to Catholic beliefs.

Based on these findings, the NLRB concluded that by asserting jurisdiction over St. Joseph's College, it would violate the warning in *Catholic Bishop* that government must avoid entanglement with religion, thereby presenting "a significant risk that the First Amendment will be infringed."

> We particularly find that the College's requirement that faculty members conform to Catholic doctrine and agree on hire "to promote the objectives and goals… of the Sisters of Mercy of Maine," not merely the objectives and goals of the College itself, would necessarily involve the Board in an "inquiry into the good faith of a position asserted by the clergy-administrators" in the resolution of common unfair labor practices involving discipline or discharge, a result clearly disapproved of by the Court in *Catholic Bishop*.

University of Great Falls (1997, 2000)[19]

The Religious Freedom Restoration Act of 1993 (RFRA)[20] introduced a new factor into NLRB rulings on the exemption of religious employers from the National Labor Relations Act. RFRA states, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the burden is necessary for the "furtherance of a compelling government interest" and is the least restrictive means of serving that interest.

In 1996, the University of Great Falls in Great Falls, Montana, argued that the Catholic university was exempt from recognizing a faculty union according to *Catholic Bishop*, and also that the NLRB's jurisdiction over the University would violate the Religious Freedom Restoration Act (RFRA). Without comment, the Board declined to reconsider a regional director's decision to reject the argument with regard to *Catholic Bishop*.

As for RFRA, the NLRB initially agreed to consider the University's arguments. But just prior to the Board's ruling, in the 1997 case *City of Bourne v. Flores*,[21] the Supreme Court

19. *University of Great Falls and Montana Federation of Teachers, AFT, AFL-CIO, Petitioner*, 325 NLRB 3 (1997), 331 NLRB 188 (2000).
20. 42 U.S. C. Sec. 2000bb.
21. 519 U.S. 1088 (1997).

invalidated a portion of RFRA as it applied to state and local governments, finding that it violated the separation of powers in the Fourteenth Amendment. Although the Court's ruling did not invalidate the law as it pertains to the federal government, the NLRB inexplicably declared moot the University's argument with regard to RFRA following the *Flores* decision.

The NLRB therefore dismissed the appeal, upholding the regional director's claim of jurisdiction over the University and rejecting the University's additional claim that its faculty members were not managerial.

But it did not end there. The University of Great Falls continued to refuse collective bargaining with its professors and was ordered to report again to the NLRB in the year 2000. This time the Board acknowledged that the Supreme Court had not rendered RFRA moot with regard to the federal government, and so the Board addressed for the first time the impact of RFRA on the National Labor Relations Act's jurisdiction over a Catholic university.

A violation of RFRA must constitute a substantial burden on religious practices. The NLRB noted that the legislative intent behind RFRA was to restore legal standards of religious liberty that existed prior to the Supreme Court's 1990 decision in *Employment Division v. Smith*.[22] The Board therefore reasoned that it could continue to rely on *Catholic Bishop* as it had done prior to RFRA, and that its standard of avoiding even a "substantial risk of infringement" on religious activity was well within RFRA's prohibition on an actual "substantial burden." So while the NLRB acknowledged the applicability of RFRA to its jurisdiction over Catholic employers, it decided that the law had no practical impact on its deliberations.

Returning, then, to *Catholic Bishop*, the NLRB ruled that the University of Great Falls was not church-controlled.

> In making this finding, the regional director examined and relied on a number of factors. The regional director found that neither the Order nor the Catholic Church is involved directly in the day-to-day administration of the University, including such matters as hiring and firing of faculty, modifying the curriculum, and purchasing educational supplies and materials. In this regard, the Respondent's board of trustees, which is overwhelmingly composed of lay persons, possesses the final approval authority on such personnel matters as faculty sabbaticals, tenure, and promotions, as well as on financial, academic, and student affairs issues. Further, the evidence shows that the Respondent is not financially dependent on the Order or the Church.

And according to form, the NLRB also considered the extent of the University's religious identity, echoing the regional director's finding that "the University's purpose and function are primarily secular." Here the regional director helpfully summarized eight tests of a "substantial religious character" (numbering added to original text):

> The Board has not relied solely on [1] the employer's affiliation with a religious organization, but rather has evaluated [2] the purpose of the employer's operations, [3] the role of the unit employees in effectuating that purpose, and [4] the potential effects if the Board exercised jurisdiction. The Board considers such factors as [5] the involvement of the religious institution in the daily operation of the school, the degree to which the school has [6] a religious mission and [7] curriculum, and [8] whether religious criteria are used for the appointment and evaluation of faculty.

Without undertaking its own review of the University of Great Falls, the NLRB concluded

22. 494 U.S. 872 (1990). The Supreme Court upheld a state law that had the effect of restricting certain religious activity, because the law was neutral on religious belief and was generally applied. Congress intended RFRA to restore a "compelling interest" restriction on laws impacting religious activity.

that the regional director had "ample grounds" for determining that the University was "primarily secular." Although the University had been associated with the Sisters of Providence since its founding in 1932:

> …the regional director relied, among other things, on the following: (1) the curriculum does not require the Catholic faith to be emphasized, nor is there in fact a particular emphasis on Catholicism; (2) the Respondent's board of trustees is not required to establish policies consistent with the Catholic religion; (3) the University's president and other administrators are lay persons who need not be members of the Catholic faith; (4) faculty members are not required to be Catholics, to teach Catholic doctrine, or to support the Church or its teachings; (5) students may come from any religious background, and no preference is given to applicants of the Catholic faith; of approximately 1,450 students, only about 32 percent are Catholic; and (6) although undergraduate students are required to take one course in religious studies, the course does not have to be one involving Catholicism.

Again, despite the finding against the University of Great Falls, the NLRB did not have the last word. The University petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review in September 2000.[23] The University argued not only that the NLRB had no jurisdiction over the University under *Catholic Bishop*, but also that the Board's investigation of the University's religious character was itself a violation of its First Amendment rights under *Catholic Bishop*. The University also repeated its argument that it was exempt from NLRB jurisdiction under RFRA.

The University was joined in its struggle by three Catholic universities which filed amicus briefs, including The Catholic University of America, the University of the Incarnate Word and Saint Leo University—but not the Association of Catholic Colleges and Universities, the National Conference of Catholic Bishops, or any individual bishop. Supporting briefs were filed by several Seventh-Day Adventist organizations and universities, the Association of Southern Baptist Colleges and Schools, the Association of Christian Schools International, Baylor University (Baptist) and Brigham Young University (Mormon).

The Circuit Court's 2002 ruling repudiated the NLRB's past 23 years of intruding on the religious freedom of Catholic colleges. The Court agreed with the University of Great Falls that the NLRB should never have investigated the University's policies and activities in an attempt to judge its religious character. "The Board reached the wrong conclusion because it applied the wrong test," the Court reasoned. It noted that while the federal courts usually defer to agencies' interpretations of "ambiguous statutory language," the courts place a higher priority on "constitutional avoidance"—meaning they will try to avoid constitutional questions when it is reasonable to do so.

According to the Circuit Court, the NLRB had improperly interpreted *Catholic Bishop* as inviting the agency's judgment as to whether an employer is religious according to certain standards. Instead, the Supreme Court in *Catholic Bishop* was primarily interested in avoiding unnecessary conflict with the First Amendment, which was possible because the National Labor Relations Act did not explicitly place religious employers under its jurisdiction or specify criteria by which a religious institution could seek an exemption to the law. It could simply be assumed that First Amendment concerns prevail when an employer sincerely claims a religious mission and identity.

In *Catholic Bishop*, the Supreme Court was concerned that NLRB jurisdiction over Catholic schools:

> …will necessarily involve inquiry into the good faith of the position asserted by the clergy administrators and its relationship to the schools' religious mission. …It is not only the conclusions that may

23. *University of Great Falls v. NLRB*, 278 F.3rd 1335 (D.C. Cir. 2002).

> be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

By evaluating whether a Catholic university was sufficiently religious, the Circuit Court ruled, the NLRB "has engaged in the sort of intrusive inquiry that *Catholic Bishop* sought to avoid." The Court cited the plurality opinion in the Supreme Court case *Mitchell v. Helms*,[24] rejecting "inquiry into... religious views" as "not only unnecessary but also offensive," and declaring that "[i]t is well established, in numerous other contexts, that courts should refrain from trolling through a person's or institution's religious beliefs."

Rejecting the NLRB's intrusive test of an employers' religiosity, the Court prescribed a three-part test for exemption from the National Labor Relations Act, drawn partly from Judge Breyer's opinion in *Universidad Central de Bayamon v. NLRB*:

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'."
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."

The Court was confident that this test "avoids the constitutional infirmities" of the NLRB investigations of religious character:

> Our approach… does not intrude upon the free exercise of religion nor subject the institution to questioning about its motives or beliefs. It does not ask about the centrality of beliefs or how important the religious mission is to the institution. Nor should it.

The Court was not concerned that exempting institutions simply because they claim a religious identity would invite fraudulent claims by secular institutions. It cited the Supreme Court ruling *Boy Scouts of America v. Dale*,[25] in which the Court found that if an institution publicly holds itself out to be religious, the Court "cannot doubt that [it] sincerely holds this view."

> While public religious identification will no doubt attract some students and faculty to the institution, it will dissuade others. In other words, it comes at a cost. Such market responses will act as a check on institutions falsely identify [sic] themselves as religious merely to obtain exemption from the NLRA. Thus, the requirement of public identification helps to ensure that only *bona fide* religious institutions are exempted.

Because the Court found that the University of Great Falls easily met its three-part test and was therefore exempt from NLRB jurisdiction, it did not consider the University's exemption under RFRA. But the Court did criticize the NLRB's reliance on *Catholic Bishop* as sufficient for meeting the standards of RFRA. An institution that is not exempt from collective bargaining under *Catholic Bishop*, the Court reasoned, might still endure a "substantial burden" on its "exercise of religion" because of collective bargaining generally or because of a particular remedy imposed by the NLRB.

24. 530 U.S. 793, 828 (2000).
25. 530 U.S. 640, 653 (2000).

Manhattan College (Pending)

Despite the D.C. Circuit Court's repudiation of the NLRB's religious character test, the Board has not yet embraced the Court's three-part test prescribed in *University of Great Falls v. NLRB*, leaving staff to follow Board precedent with the religious character test. In 2003, the NLRB's general counsel advised Barry University in Miami Shores, Florida, that it was exempt from NLRB jurisdiction under *Catholic Bishop*—but only after concluding that "the University's board of trustees and administration adhere to and seek to fulfill a stated religious mission."[26] In 2008, a NLRB regional director decided that the University of Detroit Mercy in Detroit, Michigan, is not exempt from NLRB jurisdiction because neither of the University's two sponsoring religious orders, the Society of Jesus and the Sisters of Mercy, "or the Catholic Church, is involved in its day-to-day operations."

In 2008 the D.C. Circuit Court chastised the NLRB for continuing to violate the First Amendment with its investigations into whether colleges were "religious" enough. In this case, the Board refused to exempt a Presbyterian college—Carroll College of Waukesha, Wisconsin—under RFRA. The College's attorneys had conceded NLRB jurisdiction under *Catholic Bishop*, but then changed their minds when they appealed the case to the Circuit Court. The Court ruled in favor of the College:

> After our decision in *Great Falls*, Carroll is patently beyond the NLRB's jurisdiction. *Great Falls* created a bright-line test of the Board's jurisdiction according to which we ask three questions easily answered with objective criteria.
>
> From Carroll's public representations, it is readily apparent that the college holds itself out to all as providing a religious educational environment. That it is a nonprofit affiliated with a Presbyterian synod is beyond dispute. From the Board's own review of Carroll's publicly available documents, *see Carroll Coll.*, 345 N.L.R.B. at 254–55, it should have known immediately that the college was entitled to a *Catholic Bishop* exemption from the NLRA's collective bargaining requirements.[27]

Still, NLRB staff employees continue to apply the Board's religious character test absent a clear Board ruling that embraces the D.C. Circuit Court's more lenient three-part test for exemption. In 2010, the NLRB general counsel rejected a request by Marquette University in Milwaukee, Wisconsin, for exemption from recognizing a union of security guards—not only because the unit did not include teaching faculty, but because "the Board has not adopted the D.C. Circuit's three-part test for determining whether to assert jurisdiction over religiously-operated employers."[28] Revealing a clear preference on the matter, the general counsel contrasted the Board's "thorough" religious character assessment with the Court's "superficial" test.

This year the NLRB has an opportunity to accept the Circuit Court's three-part test, if it so chooses. The Board has agreed to consider an appeal of an acting regional director's ruling against Manhattan College in Riverdale, New York, which contends that the acting director inappropriately asserted jurisdiction over the Christian Brothers institution, citing the Circuit Court ruling in *Great Falls*.

But even as Catholic educators hope for an end to more than three decades of federal intrusion under the NLRB's religious character test, the Manhattan case poses a new difficulty. Not only did the acting director find that Manhattan College failed the Board's

26. Office of the General Counsel, National Labor Relations Board, Advice Memorandum Case 12-CA-22936-1 (2003).
27. *Carroll College v. NLRB*, 558 F.3rd 556 (D.C. Cir. 2009).
28. *Marquette University and James Riccaboni, an Individual, Charging Party*, General Counsel's Opposition to Respondent's Motion for Summary Judgment, NLRB Cases 30-CA-18402, 30-CA-18487 (2010).

religious character test, but he also anticipated Circuit Court review and concluded that the College failed to meet a strict interpretation of the Court's three-part test. Catholic educators and religious liberty advocates will be watching closely to see whether the NLRB or the Circuit Court, should the case be appealed, will accept the acting director's interpretation and thereby limit exemptions from the National Labor Relations Act even if *Great Falls* becomes precedent.

With regard to *Catholic Bishop*, Manhattan College began its dispute with the NLRB more than a decade ago. In 1996 a regional director concluded that the College was "a Church-sponsored institution within the meaning of *Catholic Bishop*" and dismissed a petition from full-time and part-time faculty seeking to unionize. But the faculty appealed, and the director reversed her decision in a 1999 ruling, finding also that the College's professors were not "managerial." The victory for the union organizers was short-lived; in 2000 the faculty voted against forming a union.

In 2010 the College's adjunct faculty petitioned the NLRB to force the College to recognize its union. The acting regional director, noting the Board's 1999 decision that the College was not "church-operated," considered whether anything significant had changed at the College. In so doing, he conducted the sort of investigation of the College's religious character that the D.C. Circuit Court had found to be unconstitutional.

The acting director found much at Manhattan College that clearly distinguished it as Catholic. It was listed in the U.S. bishops' *Official Catholic Directory* as a Catholic institution in the Archdiocese of New York. The bylaws required that the Brother Provincial of the District of Eastern North America of the Christian Brothers (or his designee) and at least five Christian Brothers "to the extent one is available" serve on the Board of Trustees. The Provincial was designated vice-chairman and served on the Executive Committee.

In December 2002, the College and the Christian Brothers had agreed to a "Sponsorship Covenant" celebrating the two parties' "intertwined history" since 1853. The Covenant established the position of Vice President of Mission, asserting that the College was "[f]irst and foremost… a Catholic institution" that "has always been sponsored by the Christian Brothers." It required the College, when hiring new employees, to "discuss the mission statement, the College's Catholic identity, and its Lasallian tradition" and to favor Christian Brothers as candidates. The president had to be someone "strong in the knowledge and in the practice of the Catholic faith and who understands and values the Lasallian Tradition."

Nevertheless, the acting regional director determined that the College was "owned, operated and controlled by an independent Board of Trustees, not by the Catholic Church or any religious entity." Despite assigning six trustee positions to Christian Brothers, the College's bylaws allowed for up to 37 trustees, including no fewer than 10 lay alumni. And although Christian Brothers had traditionally served as president, the 2002 Covenant allowed for a layman—and in 2009, the first lay president was appointed.

And despite the required discussions of the College's Catholic identity with new hires, "it is also clear that it is not a requirement that candidates be Catholic or have a belief in God in order to be hired." The application for adjunct faculty required applicants to attest that they have read and will "abide by" the College's mission statement, but assured them that it placed "no obligation whatsoever on anyone as far as their personal beliefs or religious practices are concerned."

As for financial control, half the assets of the College were designated to the Christian Brothers upon dissolution of the College, and the acting regional director estimated that the Brothers contributed about $100,000 per year to the institution. But the College also

received about $350,000 per year from the State of New York toward its $84 million budget.

The acting director found that students at Manhattan College were required to complete three courses in Religious Studies, including one in Catholic Studies—"an academic course on the Catholic intellectual tradition and does not require students to learn prayers, learn Catholic rituals, or express Christian faith." Students did not have to be Catholic to be admitted.

The mission statement identified the College as an "independent Catholic institution of higher learning" but described its purposes in largely secular terms:

> Established in 1853, the College is founded upon the Lasallian tradition of excellence in teaching, respect for individual dignity, and commitment to social justice inspired by the innovator of modern pedagogy, John Baptist de la Salle. The mission of Manhattan College is to provide a contemporary, person-centered educational experience characterized by high academic standards, reflection on faith, value and ethics, and life-long career preparation. This is achieved in two ways: by offering students programs which integrate a broad liberal education with a concentration in specific disciplines in the arts and sciences or with professional preparation in business, education and engineering; and by nurturing a caring, pluralistic campus community.

Other documents reviewed by the acting regional director found repeated affirmations of the College's Catholic character—but independent of Catholic Church control, without indoctrination or any imposition on students and faculty, and recognizing professors' academic freedom. A 1999 "Trustees Report" provided to faculty applicants stated:

> There is no intention on the part of the Board, the administration, or the faculty to impose Church affiliation and religious observance as a condition for hiring or admission, to set quotas based on religious affiliation, to require loyalty oaths, attendance at religious services, or courses in Catholic theology.

The acting regional director determined that the College was not church-controlled within the meaning of *Catholic Bishop*, and the role of adjunct faculty did "not involve propagating religious faith in any way." But he went beyond the NLRB's religious character test to apply the D.C. Circuit Court's three-part test for exemption from NLRB jurisdiction, despite noting that the Board had not yet adopted the Court's test. "Even applying the D.C. Circuit test here," he concluded, "jurisdiction would still be proper."

Whether the Circuit Court would agree is doubtful. In *Great Falls* and in *Carroll College*, the Court seemed content to accept a stated religious affiliation as sufficient to meet the first prong of its test, that the college or university "'holds itself out to students, faculty and community' as providing a religious educational environment." Manhattan College clearly identifies itself as a Catholic institution, albeit without the sort of religious criteria for admission, hiring and coursework that might be found elsewhere.

Instead, the acting regional director took on the task of determining whether the College offered a genuine "religious educational environment," entering into the sort of judgment about religious character that the Circuit Court sought to avoid. In so doing, the director concluded that Manhattan College did not offer a religious environment despite claiming a Catholic identity.

The ruling cites a number of College materials in support of this conclusion. A student admissions brochure, for instance, "makes certain references to St. John Baptist de La Salle, but does not include any reference to the Catholic Church or Catholicism." It described Lasallian education in largely secular terms:

> Learning De La Salle style means that your teachers are exceptional, devoted to a personal approach that centers on you and your success. That what you learn is both practical and cutting-edge. That values and compassion lie at the heart of whatever you do. …The Lasallian education is about embracing a full, caring and meaningful life.

Likewise the Application for Admission "contains no reference whatsoever to religion, faith, or the Church" and required an essay describing career and educational goals.

An employee recruitment brochure listed the "LaSallian Core Principles: including 'Faith in the Presence of God,' as well as 'Respect for all Persons,' 'Quality Education,' 'Inclusive Community,' and 'Concern for the Poor and Social Justice.'" The acting regional director argued that the repeated references to LaSallian education did not seem to indicate a particularly religious environment that would lead to First Amendement conflicts with NLRB jurisdiction.

> While the College may well be affiliated with the Church and take pride in its historical relationship with the Church, the College's public representations clearly demonstrate that it is not providing a 'religious educational environment' and therefore, even under the D.C. Circuit test, the Board should exercise jurisdiction over the College.

In its pending appeal to the NLRB, Manhattan College argues that the acting regional director ignored numerous examples of how the College lives out its Catholic identity and professes it to prospective students and faculty. The College argues that the director improperly defined the LaSallian heritage as largely secular.

Most importantly, however, the College challenges the acting regional director's examination of its materials for evidence of a truly "religious educational environment" as itself a violation of the College's religious liberty and the D.C. Circuit Court's rulings.

> The federal appellate courts have followed *Catholic Bishop* with a consistent series of decisions which set out parameters for the NLRB's permissible inquiry and the application of the First Amendment jurisdictional bar to religious colleges. …Those proscriptions and limitations were pervasively ignored by the Region in this case.

Facing the Future

Manhattan College's prospects on appeal to the NLRB are not certain. The Board is faced with three crucial choices: 1) follow the Circuit Court's apparent direction by declining jurisdiction over Manhattan College and any institution that simply claims a religious identity, according to the Court's three-part test; 2) interpret the Court's test in such a way as to assert jurisdiction over Manhattan College and other religious institutions that are judged to offer something less than a "religious educational environment;" or 3) ignore the Circuit Court and continue to apply the Board's intrusive religious character test.

The third option is a real possibility, even though the NLRB knows that rulings appealed to the D.C. Circuit Court are likely to be overturned. That awkward situation could only be remedied by a new Supreme Court decision. As stated in 1957, it has been

> …the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise.[29]

29. *Insurance Agents' International Union, AFL-CIO and The Prudential Insurance Company of America*, 119 NLRB 103 (1957).

If the NLRB persists with its religious character test, it will at least be helpful if the Board offers some clarification of what it is looking for. As indicated in Table 1, the Board has not always been consistent in the aspects of a college's Catholic identity which it considers when evaluating the degree of church control and religious character. This paper considers only rulings by the NLRB and not its regional staff prior to the Manhattan College case; different factors may be considered or disregarded by NLRB staff in regional decisions.

So there remains much uncertainty in rulings involving Catholic colleges, although the final standard seems to be that staff cannot overrule Board precedent. Until the Board explicitly accepts the Circuit Court's *Great Falls* test, regional directors and the general counsel are bound to assess a college's religious character on a case-by-case basis.

And yet, adding to the confusion is a single exception. In a 2005 ruling concerning nonteaching employees of The Salvation Army, the NLRB determined:

> For the purposes of this case, we assume that the [D.C. Circuit] Court's test governs the exercise of the Board's jurisdiction over religiously affiliated educational institution [sic].[30]

The ruling provides no explanation for why the *Great Falls* test was applied "for the purposes of this case." Nevertheless, the Board asserted jurisdiction because The Salvation Army is not an educational institution according to *Catholic Bishop*. Subsequent decisions by regional staff—even in cases concerning educational institutions, including the University of Detroit Mercy, Manhattan College and Marquette University—have simply disregarded *Salvation Army*, even while claiming that staff must follow NLRB precedent in applying its religious character test.

The response of the D.C. Circuit Court, should a NLRB ruling in the Manhattan College case be appealed, is rather easy to predict if the Board chooses option one or three—following the Court's lead or outright rejecting it. But should the Board accept the argument of its acting regional director, limiting the ability of religious colleges and universities to meet the *Great Falls* test, it will be interesting to see how the Circuit Court responds.

The outcome of the Manhattan College case is likely to have a profound impact on Catholic higher education. It could determine the future of faculty unions. It may free Catholic colleges and universities from NLRB jurisdiction, or it may be a significant setback for the religious liberty of Catholic educators. And it could impact other college relations with the federal government if the same First Amendment concerns are applied to requests for exemption from federal law.

Meanwhile, legal experts have advised The Center for the Advancement of Catholic Higher Education that a Catholic college or university's best protection from religious liberty violations is to faithfully follow the guidelines established by the Catholic Church for Catholic higher education. The norms of *Ex corde Ecclesiae*, if followed in both letter and spirit, should be sufficient in most cases to claim a religious identity that impacts curriculum, personnel, campus life, and all activities of the institution. A new assessment guide published by The Center[31] may be helpful to college leaders in self-evaluating their religious identity and preparing for any challenge from a federal agency or court.

The Becket Fund for Religious Liberty warns that Catholic institutions must be able to demonstrate that their religious identity is "bona fide" and "sincerely held," or they may

30. *The Salvation Army and Kalaveeta Dean*, 345 NLRB 38 (2005).

31. *Assessing Catholic Identity: A Handbook for Catholic College and University Leaders* (Manassas, VA: The Center for the Advancement of Catholic Higher Education, 2011), posted at www.CatholicHigherEd.org.

be unable to claim religious exemptions to federal law.[32] Kevin Theriot, Senior Counsel for the Alliance Defense Fund, believes the Vatican and bishops have made this easier with clear standards of Catholic identity: "Catholic colleges and universities have an advantage over other religious institutions in that the Catholic Church's Canon Law and the Apostolic Constitution *Ex corde Ecclesiae* lay out the requirements for a college to be considered Catholic."[33]

Moreover, an appropriate easing of NLRB jurisdiction over Catholic institutions does not lessen the reality of the "market check" cited by the D.C. Circuit Court. There is reason to ask not only whether the NLRB *should* be evaluating a college's Catholic identity, but also why the NLRB or anyone else who conducts a reasonable evaluation *could* conclude that the Catholic identity is not strong. If the public perception is that the fact of a Catholic label is not indicative of a pervasive Catholic identity, then that is a far more important matter than whether to recognize a faculty union—and the question of protecting religious liberty is essentially moot.

32. The Becket Fund for Religious Liberty, "Implications of Mandatory Insurance Coverage of Contraceptives for Catholic Colleges and Universities" (Manassas, VA: The Center for the Advancement of Catholic Higher Education, October 2009), posted at www.CatholicHigherEd.org.

33. Kevin Theriot, "Protecting Catholic Colleges from External Threats to Their Religious Liberty" (Manassas, VA: The Center for the Advancement of Catholic Higher Education, January 2011), posted at www.CatholicHigherEd.org.

Table 1

Factors considered in NLRB ruling	CND (1979)	LU (1982)	UCB (1984)	SJC (1986)	UGB (1997, 2000)
College-level education (not elementary or secondary)	x	x	x		
Bargaining unit includes teaching or non-teaching employees	x	x	x	x	x
Establishment by diocese/religious order	x	x	x	x	
Independence of board of trustees from diocese/religious order	x	x	x	x	x
Trustee representation of founding diocese/religious order	x	x	x	x	
Number of trustees who are priests/religious	x	x	x	x	x
Financial support from diocese/religious order	x		x	x	x
Property ownership by diocese/religious order	x	x	x	x	
Disposition of assets upon dissolution of college	x		x	x	
Recognition by Church as Catholic college			x		
Compliance with Church requisites for Catholic colleges			x		
Mission statement/articles of incorporation	x		x		x
Statements in college publications	x				
Participation in government student-aid program	x		x		
Receipt of government aid	x	x	x		
Crucifixes/religious objects on campus	x			x	
Availability of religious services	x		x	x	
Requirements for attending religious services	x		x	x	
Observance of religious holidays	x				
Number of religion courses required	x	x	x	x	x
Requirements to study Catholic faith	x	x	x	x	x
Religious nature of curriculum	x		x	x	x
Student admissions based on religious preference	x	x	x		x
President selection based on religious preference		x		x	x
Faculty hiring/promotion based on religious preference	x	x	x		x
Employees held to religious/moral standards			x	x	x

CND (1979) = *College of Notre Dame and International Union of Operating Engineers, Stationary Local No. 39, AFL-CIO, Petitioner* , 245 NLRB 44 (1979)
LU (1982) = *Lewis University and Faculty Life Committee of the College of Arts and Sciences, Petitioner* , 265 NLRB 157 (1982)
UCB (1984) = *Universidad Central de Bayamon and Union de Profesores Universitarios (UPU), Petitioner* , 273 NLRB 138 (1984)
SJC (1986) = *Trustee of St. Joseph's College and The Faculty Association of St. Joseph's College, Maine Teacher's Association and National Education Association, Petitioner* , 282 NLRB 9 (1986)
UGB (1997, 2000) = *University of Great Falls and Montana Federation of Teachers, AFT, AFL-CIO, Petitioner* , 325 NLRB 3 (1997), 331 NLRB 188 (2000)


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