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Missing God in Some Things: The NLRB’s Jurisdictional Test Fails to Grasp the Religious Nature of Catholic Colleges and Universities

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MISSING GOD IN SOME THINGS: THE NLRB’S JURISDICTIONAL TEST FAILS TO GRASP THE RELIGIOUS NATURE OF CATHOLIC COLLEGES AND UNIVERSITIES

Abstract: The National Labor Relations Board (NLRB) uses a substantial religious character test to determine whether it is authorized to exercise jurisdiction over faculty labor relations at religiously affiliated colleges and universities. Under the NLRB’s test, a school is not considered religious unless it makes religious indoctrination one of its primary purposes, denies faculty members academic freedom, and discriminates based on religion when hiring faculty and admitting students. Such an approach fails to recognize the religious nature of Catholic institutions of higher learning, which carry out their religious missions precisely by avoiding religious indoctrination, granting faculty academic freedom, and welcoming faculty and students of all faiths. Underlying the NLRB’s test is the understanding that church-state entanglement concerns are not present when faculty members do not play a role in carrying out their school’s religious mission. Thus, this Note proposes a new jurisdictional test that evaluates whether faculty play such a role. Under this proposed test, the NLRB would not be authorized to exercise jurisdiction only if the college holds itself out as religious and requires its faculty to carry out its religious mission.

INTRODUCTION

Saint Xavier University and Manhattan College are fairly typical American Catholic institutions of higher learning.¹ In their mission statements, they affirm their Catholic identity and how their ways of educating their students are inspired by the traditions of the Catholic religious order upon which they

were founded. Both colleges offer courses in Catholic theology, and Saint Xavier explicitly educates its students in light of the Catholic Church’s vision for its universities. In addition, their local archdioceses recognize them as Catholic colleges.

In the eyes of the National Labor Relations Board (NLRB), however, neither of these Catholic schools is “sufficiently religious.” The NLRB’s conclusions as to the religious nature of these institutions came about in hearings to determine whether the NLRB, pursuant to the National Labor Relations Act (NLRA), was authorized to exercise jurisdiction over the labor relations between the colleges and their adjunct faculty unions. At separate administrative hearings before NLRB Regional Directors, the schools argued that they were exempt from NLRB jurisdiction under the reasoning of the 1979 U.S. Supreme Court case NLRB v. Catholic Bishop of Chicago. In that case, the Court— noting the substantial religious character of parochial schools and the role that
teachers play in fulfilling their religious missions—held that given the church-state entanglement concerns raised by NLRB jurisdiction over “church-operated schools,” Congress did not intend the NLRB to oversee the labor relations of teachers at religious high schools.\(^8\)

Despite arguments from the colleges that they should be exempt from NLRB jurisdiction, the NLRB Regional Directors determined in separate administrative hearings that jurisdiction over these religiously affiliated colleges was appropriate.\(^9\) Using the jurisdictional test the NLRB has developed since Catholic Bishop, the Regional Directors in both cases made these determinations after concluding that the schools were not substantially religious in nature.\(^10\) The Regional Directors reached these conclusions by considering several factors about the colleges.\(^11\) First, in both cases they determined that the colleges’ primary purposes—to educate—were secular, not religious.\(^12\) Second, both colleges did not require students or faculty to be practicing Catholics, uphold loyalty oaths, or take courses in Catholic theology.\(^13\) Third, faculty members were granted academic freedom, were not hired or fired based on their religious beliefs, and were not hired to inculcate faith in their students.\(^14\) Finally, each school was governed by a board of trustees whose membership was comprised mostly of individuals who were not priests or members of a religious order.\(^15\) For these reasons, the Regional Directors determined that the schools were not so substantially religious in nature that invoking jurisdiction over them would raise the types of Establishment Clause infringement concerns that the Supreme Court sought to avoid in Catholic Bishop.\(^16\) Today, the

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\(^16\) See St. Xavier Univ., 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *2; Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *1–2; see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .”).
determinations by the NLRB Regional Directors in both cases are under appeal.\textsuperscript{17}

As evidenced by the cases regarding Saint Xavier and Manhattan College, the NLRB’s use of the substantial religious character test presents unique challenges for Catholic colleges and universities.\textsuperscript{18} The NLRB’s test assumes that a college does not have a religious mission unless it engages in “hard-nosed proselytizing,” denies faculty academic freedom, and discriminates on the basis of religion when admitting students and hiring faculty.\textsuperscript{19} Such an approach, however, fails to recognize the religious nature of Catholic colleges and universities, which carry out their religious missions precisely by “eschewing a narrow focus on religious indoctrination,” granting faculty academic freedom, and opening their doors to non-Catholic students and faculty.\textsuperscript{20}

Underlying the NLRB’s jurisdictional test is the understanding that the indoctrination of faith is not a primary purpose of many religiously affiliated colleges and universities and that, as a result, the faculty members at these colleges are not necessarily tasked with carrying out the religious missions of their schools.\textsuperscript{21} As the NLRB’s test correctly assumes, when faculty play no

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\item \textsuperscript{18} See \textit{St. Xavier Univ.}, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *20–24 (discussing factors that indicated that Saint Xavier was not substantially religious); \textit{Manhattan Coll.}, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *33–35 (discussing Manhattan College’s objections to the NLRB’s understanding of what makes a college substantially religious); Catholic Colleges Brief, \textit{supra} note 1, at 12 (stating that the NLRB Regional Director hearing Manhattan College’s case “misunderstood the nature of Catholic higher education in the United States); Stabile, \textit{supra} note 1, at 1327 (“The NLRB’s current approach is particularly problematic when applied to Catholic colleges and universities.”).
\item \textsuperscript{19} See \textit{Univ. of Great Falls}, 278 F.3d at 1346–47 (“[I]t is hard to see what school or university that does not require attendance at religious services, or require students and faculty to be of a particular faith, would qualify for \textit{Catholic Bishop} exemption.”); see also Stabile, \textit{supra} note 1, at 1327 (stating that the NLRB’s approach makes “assumptions about what it means to be a religious entity and what it means to provide a religious education” and noting that, according to the Board, “a university is not religious if propagation of a religious faith is not its primary purpose, if students and faculty are not required to engage in worship, or if the school welcomes people of other faiths”).
\item \textsuperscript{20} See Catholic Colleges Brief, \textit{supra} note 1, at 4; Stabile, \textit{supra} note 1, at 1327. See \textit{generally} \textit{Ex CORDE}, \textit{supra} note 3 (outlining the Catholic Church’s vision for how its colleges and universities should carry out their religious missions); Eugenio Scalfari, \textit{The Pope: How the Church Will Change}, LA REPUBLICA (Oct. 1, 2013), http://www.repubblica.it/cultura/2013/10/01/news/pope_s_conversation_with_scalfari_english-67643118/, archived at http://perma.cc/9JML-VSS7 (quoting Pope Francis as saying “[p]roselytism is solemn nonsense”).
\item \textsuperscript{21} See \textit{St. Xavier Univ.}, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *20 (stating that the risk of impermissible infringement is minimized when faculty members are “not required to . . . promote church teachings”); \textit{Manhattan Coll.}, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *35 (stating that the risk of impermissible church-state entanglement is “obviated” at a college in which “teachers are not required to adhere to or promote religious tenets”); Brief for the National Labor Relations Board at
role in carrying out their school’s religious mission, NLRB jurisdiction does not raise the types of church-state entanglement concerns that the Supreme Court warned of in Catholic Bishop. Nevertheless, the NLRB’s jurisdictional test does not necessarily measure whether faculty members actually play a role in carrying out their college’s religious mission. Instead, the NLRB’s current test merely measures the extent to which a college comports with the Board’s understanding of how a religiously affiliated institution should carry out its religious mission.

This Note proposes an alternative two-part test to the NLRB’s current jurisdictional test that seeks to evaluate whether faculty members actually play a role in carrying out their college’s religious mission. Under the first part of

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30–31, *Univ. of Great Falls*, 278 F.3d 1335 (No. 00-1415) [hereinafter NLRB Brief] (citing Tilton v. Richardson, 403 U.S 672, 687 (1971)) (stating that unlike the case at parochial schools, religious indoctrination is usually not the purpose of a religiously affiliated college or university); Stabile, *supra* note 1, at 1328 (stating that the NLRB’s substantial religious character test is used as a “proxy” to determine whether the exercise of jurisdiction over a religiously affiliated college or university would risk impermissible church-state entanglement); see also Debra L. Willen, *NLRB Regulation of Religiously-Affiliated Schools: The Board’s Current Jurisdictional Test*, 13 INDUS. REL. L.J. 38, 41 (1991) (arguing that the risk of impermissible church-state entanglement arises only in the context of NLRB jurisdiction over schools in which religious indoctrination is part of their mission).

22 See *St. Xavier Univ.*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *20 (stating that the risk of impermissible infringement is minimized when faculty members are “not required to . . . promote church teachings”); *Manhattan Coll.*, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *35 (stating that the risk of impermissible church-state entanglement is “obviated” at a college in which “teachers are not required to adhere to or promote religious tenets”); Stabile, *supra* note 1, at 1320–21, 1343–45 (arguing that *Catholic Bishop* does not preclude NLRB jurisdiction over all religiously affiliated colleges, and proposing a new approach to jurisdictional determinations that evaluates the extent to which NLRB oversight would create excessive church-state entanglement); Anne Marie Cook et al., *Comment, Constitutional Law—Universidad Central de Bayamon v. National Labor Relations Board: Jurisdiction over Religious Colleges and Universities—The Need for Substantive Constitutional Analysis*, 62 NOTRE DAME L. REV. 255, 273 (1987) (arguing that NLRB jurisdiction over religiously affiliated colleges would not create impermissible church-state entanglement because faculty do not play the same role in carrying out their school’s religious mission as teachers at parochial schools do).

23 See Stabile, *supra* note 1, at 1320–21; *infra* notes 158–162 (discussing, in part, how the NLRB’s test fails to evaluate the extent to which faculty play a role in carrying out their school’s religious mission); see also Elizabeth Tucker Bradley, *Comment, A New Approach to NLRB Jurisdiction over the Employment Practices of Religious Institutions*, 54 U. CHI. L. REV. 243, 244 (1987) (arguing that jurisdictional tests should be based on the nature of the employees’ work and not the religious nature of the organization).

24 See *Catholic Colleges Brief, supra* note 1, at 4 (stating that the substantial religious character test “invites government officials to substitute their views about an institution’s ‘religious character’ for the judgment of the institution and its religious community”); Stabile, *supra* note 1, at 1328 (“Focusing on the character of the institution as a proxy for focusing directly on the issue of entanglement, however, requires the Board to make judgments about what it means for an institution to possess a religious character.”).

25 See *infra* notes 137–141 and accompanying text (laying out the proposed test). This Note assumes that impermissible church-state entanglement would not be present with NLRB jurisdiction over the labor relations of faculty members who are not tasked with carrying out their school’s religious mission. See Stabile, *supra* note 1, at 1329, 1343–45 (arguing that *Catholic Bishop* does not preclude NLRB jurisdiction over all religiously affiliated colleges, and advocating for an alternative
this test, the NLRB would evaluate whether the college or university qualifies as religious under the approach adopted in 2002 by the U.S. Court of Appeals for the D.C. Circuit in *University of Great Falls v. NLRB.* A college would satisfy the first part of this test so long as it: (1) holds itself out as religious; (2) is organized as a nonprofit; and (3) is affiliated with a religious institution.

Under the second part of this test, the NLRB would simply ask whether the college or university requires its faculty members to play a role in carrying out the school’s religious mission. If a religiously affiliated college satisfies both parts of this test, the NLRB would be unable to exercise jurisdiction over the school’s labor relations with its faculty members. This approach would improve the NLRB’s test because it merely evaluates whether faculty play a role in carrying out their school’s religious mission rather than evaluating how a school carries out that mission—and therefore avoids an improper inquiry into the school’s religious nature.

Part I of this Note discusses the evolution of the NLRB’s substantial religious character test and how two circuit courts have rejected the NLRB’s approach. Part II then explains how the assumptions behind the NLRB’s substantial religious character test fail to recognize the ways in which Catholic colleges and universities carry out their religious missions. Finally, Part III proposes a new two-part test to evaluate the circumstances under which NLRB jurisdiction over religiously affiliated colleges and universities is appropriate.

I. THE NLRB’S SUBSTANTIAL RELIGIOUS CHARACTER TEST: ITS EVOLUTION AND SUBSEQUENT REJECTION BY THE COURTS

The NLRB uses the substantial religious character test to determine, on a case-by-case basis, whether it is authorized to exercise jurisdiction over the
labor relations of faculty members at a religiously affiliated college or university.\(^\text{34}\) When the Board determines that it is authorized to exercise jurisdiction, the employer—in this case, a religiously affiliated college or university—is required to recognize the employee union and enter into collective bargaining with the union’s representatives in accordance with the NLRA’s rules.\(^\text{35}\) Among these rules is the requirement that the college and its faculty union engage in good faith collective bargaining over working conditions such as wages, hours, and work rules.\(^\text{36}\) The failure of the employee union or employer to comply with these rules constitutes an unfair labor practice under the NLRA.\(^\text{37}\)

The Board’s use of the substantial religious character test reflects the understanding that there are circumstances in which exercising its jurisdiction would implicate First Amendment Establishment Clause concerns.\(^\text{38}\) Under the Establishment Clause, the government is prohibited from becoming excessively entangled with religion.\(^\text{39}\) In the context of religiously affiliated colleges and universities, entanglement concerns can arise when religious considerations are part of a faculty member’s terms of employment or when a school reserves the right to discipline faculty members based on religious grounds.\(^\text{40}\)

\(^{34}\) See St. Xavier Univ., 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *18 (citing St. Joseph’s Coll., 282 N.L.R.B. 65, 68 (1986)). Although the NLRB’s jurisdiction over private sector employers is broad and covers most nonunion employers, the Board is not authorized to exercise jurisdiction over employees of religious organizations who carry out their employer’s religious mission—such as teachers at parochial schools. See 29 U.S.C. §§ 151–152 (2012) (granting the NLRB broad jurisdiction); Jurisdictional Standards, NAT’L LABOR REL. BOARD, https://www.nlrb.gov/rights-we-protect/jurisdictional-standards, archived at http://perma.cc/7F8D-TR29 (last visited Mar. 22, 2014) (stating the limits of NLRB jurisdiction over employees who carry out their employer’s religious mission); see also Catholic Bishop, 440 U.S. at 507 (holding that the NLRB is not authorized to exercise jurisdiction over the labor relations of faculty members at parochial schools). The Board, however, does assert jurisdiction over employees who work in “the operations of a religious organization that [does] not have a religious character, such as a health care institution.” See Jurisdictional Standards, supra.


\(^{37}\) See St. Xavier Univ., 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *18 (quoting St. Joseph’s Coll., 282 N.L.R.B. at 68 n.10) (discussing the Board’s recognition that there are circumstances in which jurisdiction would implicate First Amendment concerns).

\(^{38}\) See U.S. CONST. amend. I.; Lemon, 403 U.S. at 613–15 (establishing an entanglement test that evaluates, in part, the “character and purposes” of the religious institutions and the “resulting relationship between the government and the religious authority”).

\(^{39}\) See Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383, 401–02 (1st Cir. 1986) (en banc) (citing Catholic Bishop, 440 U.S. at 502) (concluding that church-state entanglement concerns can arise in these two contexts); Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *35 (citing
This Part explores the evolution of the NLRB’s jurisdictional test over faculty members at religiously affiliated colleges and universities.41 Section A discusses the Supreme Court’s decision in Catholic Bishop, which curtailed NLRB jurisdiction over parochial schools.42 Next, Section B discusses how the NLRB has applied the Court’s reasoning in Catholic Bishop to cases involving religiously affiliated colleges and universities.43 Finally, Section C explains how subsequent lower courts have interpreted the scope of the NLRB’s jurisdiction over religiously affiliated colleges and universities in light of Catholic Bishop.44

A. Catholic Bishop Restricts the NLRB’s Ability to Assert Jurisdiction over Parochial Schools

In Catholic Bishop, the Supreme Court held that the NLRB was not authorized to exercise jurisdiction over the labor relations of teachers at parochial high schools.45 Noting the “substantial religious character” and purpose of parochial schools, along with the “critical and unique role” that teachers play in “fulfilling the mission” of these schools, the Court voiced its concerns that First Amendment church-state entanglement disputes would be unavoidable if the Board exercised jurisdiction over teachers at these church-operated schools.46

Catholic Bishop, 440 U.S. at 501–02) (stating that “rules requiring faculty to propagate faith would require bargaining over such rules and their disciplinary consequences, and further, would require the Board to scrutinize an employer’s defense to unfair labor practice charges based on asserted enforcement of faith-based rules”); infra notes 68–70 and accompanying text (discussing entanglement concerns with NLRB inquiries into the religious principles of a college); see also Brothers, supra note 25, at 592 (arguing that the imposition of collective bargaining rules over religiously affiliated universities would impinge their ability to operate their schools in accordance with their religious missions). But see Stabile, supra note 1, at 1334, 1336 (arguing that the Supreme Court in Catholic Bishop overstated the risk of impermissible church-state entanglement caused by NLRB jurisdiction over parochial schools, stating that NLRB oversight does not: (1) force schools to negotiate over religious considerations, or (2) require the Board to wade through a school’s religious principles); Cook et al., supra note 22, at 270–73 (arguing that NLRB jurisdiction over religiously affiliated colleges would not create impermissible church-state entanglement). One commentator has noted how requiring Catholic institutions to engage in collective bargaining also implicates First Amendment concerns because the adversarial nature of collective bargaining runs counter to the Church’s understanding of the proper relationship between labor and management. See Brady, supra note 25, at 80–81 (stating that the NLRA’s adversarial approach to collective bargaining is “deeply at odds with the Church’s basic vision for social life,” and arguing that adherence to NLRA rules would prevent the Church from carrying out its vision for the proper relationship between management and workers). But see Stabile, supra note 1, at 1342 (noting that NLRA rules do not prevent Catholic institutions from bargaining with their workers in a way that is consistent with the Church’s vision for labor relations).

41 See infra notes 45–95 and accompanying text.
42 See infra notes 45–51 and accompanying text.
43 See infra notes 52–62 and accompanying text.
44 See infra notes 63–95 and accompanying text.
45 See 440 U.S. at 507. The Court rejected the NLRB’s test at the time, which authorized jurisdiction over “merely religiously associated” schools, but not “completely religious” schools. Id. at 495, 507.
schools. Specifically, the Court noted that future NLRB inquiries into unfair labor complaints could implicate a school’s religious beliefs because they would require the Board to evaluate the “good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission.” In addition, the Court expressed fear that the conclusions reached by the Board, along with the way in which the Board examined the religious practices of the school, could infringe upon the First Amendment rights of the school.

Moreover, the Court could not find any congressional authority intending NLRB jurisdiction to apply to parochial schools. Because of this lack of intent, along with the First Amendment concerns raised, the Court concluded that the NLRA should not be read to confer the Board with such jurisdiction.

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46 Id. at 501, 503–04 (quoting Lemon, 403 U.S. at 616; id. at 628 (Douglas, J. concurring)). The Court in Catholic Bishop also stated that the “raison d’être” of these schools is the propagation of the faith. 440 U.S. at 503 (quoting Lemon, 403 U.S. at 628 (Douglas, J. concurring)).

47 Id. at 502. The Court reasoned that the NLRB would be required to examine a school’s religious beliefs to determine if disciplinary actions against a teacher were genuinely based on religious grounds. Id.

48 Id. at 502–03 (“Inevitably the Board’s inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions.”). The Court cautioned that investigations into how a parochial school carries out its religious mission—by asking, for example, whether religious services must be conducted at parochial schools—implicate First Amendment concerns. See id. at 502, 507–08 (providing an example of this type of suspect inquiry).

49 See id. at 504–07. After reviewing the legislative history of the NLRA, including its subsequent revisions, the Court concluded that the legislation did not grant the Board jurisdiction because Congress did not affirmatively intend for the Board to have jurisdiction over the employment conditions of parochial school teachers. Id. The Court concluded that without such intent, Congress did not envision the Board requiring church-operated schools to collectively bargain with their faculty representatives. Id. at 506. The Court pointed to several factors to reach this conclusion. Id. at 504–07. First, Congress’s intent in passing the NLRA was to regulate labor in private industry. Id. at 504 (citing 79 CONG. REC. 7573 (1935) (statement of Sen. Robert Wagner), reprinted in 2 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2341–43 (1949)). Second, the Court cited the legislative history of the NLRA in which the Senate Committee on Education and Labor explained that a college professor is an example of someone whose employment is not covered by the NLRA. Id. at 504–05 (citing S. REP. NO. 573, at 7 (1935), reprinted in 2 NATIONAL LABOR RELATIONS BOARD, supra, at 2307). Third, the majority discussed the legislative history preceding a 1974 amendment to the NLRA, which removed an NLRB exemption for nonprofit religious hospitals. Id. at 505–06 (citing 120 CONG. REC. 12,946, 16,914 (1974) (statements of Sen. Sam Ervin and Rep. John Erlenborn)). Because Congress, in this amendment, did not address parochial schools, the Court concluded that Congress did not affirmatively intend for the Board to authorize jurisdiction over these schools. Id.

50 Id. at 507. Justice William J. Brennan, Jr., who was joined by three other justices, argued in a dissenting opinion that the NLRA granted the Board jurisdiction over lay teachers at parochial schools. Id. at 508 (Brennan, J., dissenting). The dissent maintained that the majority’s interpretation of the NLRA was not “fairly possible.” Id. at 511. Justice Brennan pointed to several factors in reaching his conclusion, including that: (1) a 1947 amendment to the NLRA which would have exempted religious employers was not passed; (2) the NLRA covers all employers not expressly exempted in the legislation; and (3) Supreme Court precedent holds that the NLRA should be viewed as broadly as
Based on this reasoning, the majority concluded that the NLRA did not grant the NLRB jurisdiction over parochial schools.\textsuperscript{51}

**B. Following Catholic Bishop, the NLRB Develops the Substantial Religious Character Test**

The NLRB at first concluded that the Supreme Court’s determination in *Catholic Bishop* regarding parochial schools did not apply to religiously affiliated colleges and universities.\textsuperscript{52} Since 1986, however, the NLRB has applied the reasoning from *Catholic Bishop* to institutions of higher learning on a case-by-case basis.\textsuperscript{53} To determine whether the NLRB may exercise jurisdiction, the Board—based on the language in *Catholic Bishop*—evaluates whether the school has a “substantial religious character.”\textsuperscript{54} This inquiry, still in use today, evaluates all facets of the school to determine if NLRB jurisdiction would raise serious First Amendment concerns of church-state entanglement.\textsuperscript{55}

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\textsuperscript{51} *Catholic Bishop*, 440 U.S. at 507. The Court’s decision in *Catholic Bishop* has faced criticism for using a “clear statement approach” to infer a lack of congressional intent for the NLRB to exercise jurisdiction over faculty at religious high schools. *See*, e.g., David L. Gregory & Charles J. Russo, *The First Amendment and the Labor Relations ofReligiously Affiliated Employers*, 8 B.U. PUB. INT. L.J. 449, 467 (1999) (arguing that the Supreme Court’s decision in *Catholic Bishop* denied the First Amendment rights of employees to organize); Marisela Pena, Comment, *The “Catholic Union” Dichotomy: Are the Catholic Church’s First Amendment Rights and the Collective Bargaining Rights of Catholic Church Employees Mutually Exclusive?*, 42 HOUS. L. REV. 165, 193–95 (2005) (arguing that the “NLRA does not violate the Church’s First Amendment rights . . . simply by giving workers the right to bargain collectively” and proposing that the NLRB be revised to overturn *Catholic Bishop*); Robert J. Pushaw, Jr., Note, *Labor Relations Board Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, 97 YALE L.J. 135, 150 (1987) (criticizing the Court’s conclusion as to the “unique role” teachers play and arguing that this approach ignores the teacher’s role as “a substitute for a public school instructor” and as “an employee”); Ellyn S. Rosen, Comment, *Keeping the Camel’s Nose out of the Tent: The Constitutionality of N.L.R.B. Jurisdiction over Employees of Religious Institutions*, 64 IND. L.J. 1015, 1024 (1989) (arguing that the Supreme Court’s entanglement analysis was inappropriate and asserting that Board jurisdiction is constitutional). The way in which the Court reached its decision—striking down jurisdiction based on the absence of an affirmative intent from Congress—has also been criticized. *See* Christopher M. Gaul, Note, *Catholic Bishop Revisited: Resolving the Problem of Labor Board Jurisdiction over Religious Schools*, 2007 U. ILL. L. REV. 1505, 1524–27.

\textsuperscript{52} *See* Barber-Scotia Coll., Inc., 245 N.L.R.B. 406, 406 (1979) (concluding that the Supreme Court recognized differences between the religious aspects of parochial schools—at which the focus is to indoctrinate students with religious beliefs—and religiously affiliated institutions of higher education—where religious indoctrination is not a primary focus); Stabile, *supra* note 1, at 1324; Willen, *supra* note 21, at 45–46.

\textsuperscript{53} *See*, e.g., *St. Xavier Univ.*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *6; St. Joseph’s Coll.*, 282 N.L.R.B. at 68.

\textsuperscript{54} *See* Univ. of Great Falls, 278 F.3d at 1339; *St. Xavier Univ.*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *18.

In conducting this substantial religious character test, the NLRB analyzes the purpose of the school, the role of the employees in bringing about that mission, and the potential consequences of Board jurisdiction over the institution. When evaluating a school’s purpose, the Board analyzes factors such as: (1) the school’s mission; (2) the emphasis of the school’s religious faith as part of its curriculum; (3) requirements that the faculty teach or support the school’s faith; (4) requirements that students take classes teaching the school’s faith; (5) the church’s or a religious group’s financial support of the school; (6) whether the school is governed by the church or a religious group, or must be governed according to the religion associated with the school; and (7) whether the school requires or prefers that administrators, faculty, and students belong to the school’s faith tradition.

The NLRB’s approach to religiously affiliated colleges and universities recognizes that these colleges have a different type of mission than those of parochial schools. The NLRB has noted that unlike in the case of parochial high schools, religious indoctrination is often not the primary purpose of a religiously affiliated college. Under the NLRB’s reasoning, there is less likelihood that “religion will permeate the area of secular education.” Accordingly, faculty members at religiously affiliated colleges tend to play a much less significant role in carrying out their schools’ religious missions. With this understanding in mind, the Board considers the extent to which a religiously affiliated college or university has a religious mission or curriculum to determine whether jurisdiction over the school and its faculty members would implicate the First Amendment church-state entanglement concerns the Supreme Court warned of in Catholic Bishop.

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58 See NLRB Brief, supra note 21, at 31 (citing Tilton, 403 U.S. at 687) (stating that unlike the case at parochial schools, religious indoctrination is usually not the purpose of a religiously affiliated college or university); supra note 21 and accompanying text (discussing how the NLRB’s jurisdictional test recognizes that religious indoctrination is not a primary purpose of many religiously affiliated colleges and universities).
59 See NLRB Brief, supra note 21, at 31 (citing Tilton, 403 U.S. at 687); supra note 21 and accompanying text.
60 See NLRB Brief, supra note 21, at 31 (citing Tilton, 403 U.S. at 687); supra note 21 and accompanying text.
61 See NLRB Brief, supra note 21, at 31 (quoting Tilton, 403 U.S. at 687); supra note 21 and accompanying text.
62 See NLRB Brief, supra note 21, at 31; see also Catholic Bishop, 440 U.S. at 504 (stating that NLRB jurisdiction over the faculty at parochial schools creates impermissible church-state entanglement); Stabile, supra note 1, at 1328 (stating that, in the “best light,” the NLRB’s test seeks to evaluate whether jurisdiction over the school would implicate church-state entanglement concerns, and
C. Following Catholic Bishop, Two U.S. Courts of Appeals Have Rejected the NLRB’s Substantial Religious Character Test

Following Catholic Bishop, two U.S. Courts of Appeals have refused to enforce the NLRB’s exercise of jurisdiction over Catholic universities, reasoning that to do so would violate the principles of Catholic Bishop. In 1986, in Universidad Central de Bayamon v. NLRB, the U.S. Court of Appeals for the First Circuit became the first court to address whether Catholic Bishop applied to religiously affiliated universities. Writing the controlling opinion of the en banc court, then-Judge Stephen Breyer concluded that the reasoning in Catholic Bishop also applied to religiously affiliated colleges and universities, even those that are not “pervasively sectarian.”

Judge Breyer reached this conclusion based on four reasons. First, he noted that Catholic Bishop made no distinction between colleges and elementary or secondary schools. Second, he reasoned that concerns relating to church-state entanglement—which Catholic Bishop sought to avoid—would be no less prevalent in the case of a university. Judge Breyer envisioned Board inquiries into unfair labor practices that could result in investigations

arguing that the factors the NLRB considers serve as “prox[ies] for focusing directly on the issue of entanglement”;

supra note 22 and accompanying text (discussing the NLRB’s position that church-state entanglement concerns are not present when faculty play no role in carrying out their college’s religious mission).

See Univ. of Great Falls, 278 F.3d at 1337; Bayamon, 793 F.2d at 398–99.

See 793 F.2d at 398–99.

Id. In an initial hearing before a First Circuit panel in 1985, the court concluded that the NLRB was permitted to exercise jurisdiction over the Catholic university in the case. Id. at 384. In a 2–1 decision, the First Circuit panel declined to extend the reasoning of Catholic Bishop to the university because, from the panel’s perspective, the university’s religious character was less central to its identity than was the case with the type of religious elementary and secondary schools that Catholic Bishop governed. Id. at 386. To justify this conclusion, the panel cited the lack of a religious mission statement, how religion played no role in the hiring process, how students from all faiths were welcomed, and how students were not required to take classes that inculcated religion. Id.

Following the panel’s review, the First Circuit, sitting en banc, vacated the panel’s decision and reheard the case. Id. at 398–99. Upon rehearing, the six First Circuit judges split evenly on the question of whether Board jurisdiction over the university’s lay faculty was appropriate. Id. Because the NLRB brought the matter before the First Circuit seeking to compel the university to comply with the Board’s determination, the court’s deadlock meant that the NLRB’s exercise of jurisdiction would not be enforced. Id.

Judge Breyer’s opinion for three judges of the en banc court cited several factors explaining why the reasoning in Catholic Bishop applied to the university at issue in the case, including: the role that a Catholic religious order—the Dominican Order—played in operating and financially supporting the school; the importance of the school’s religious orientation to its overall mission; and how the school promoted its Catholic identity. Id. at 399–400.

See infra notes 67–76 and accompanying text (laying out these reasons).

See Bayamon, 793 F.2d at 401 (citing Catholic Bishop, 440 U.S. at 506–07).
into the motives of the school’s religious leaders. Because *Catholic Bishop* warned that Board inquiries into the motives of religious employers could impinge upon First Amendment rights, Judge Breyer saw no reason why this concern did not exist in the context of a religiously affiliated university.70

Third, Judge Breyer concluded that the rationale of *Catholic Bishop* would be eviscerated if it were not applied to the university in question.71 He noted that the Supreme Court in *Catholic Bishop* rejected the NLRB’s earlier “completely religious” versus “merely religious” dichotomy because it required the Board to inquire as to the religious nature of the institution, thereby creating church-state entanglement.72 Judge Breyer stated that the Board’s new “finely spun” standard of evaluating the religious character of the university created the same entanglement concerns that arose in *Catholic Bishop*.73

Fourth, Judge Breyer maintained that cases involving aid to religiously affiliated schools were not determinative in this case.74 Whereas those cases dealt with public funding for religious schools, *Bayamon* involved government regulation of religious schools.75 Because NLRB jurisdiction would amount to government regulation of a religiously affiliated school, as was the case in *Catholic Bishop*, Judge Breyer saw no reason why the outcome of the university’s case should differ from the Supreme Court decision.76

Sixteen years after *Bayamon*, the federal courts addressed for a second time whether *Catholic Bishop* applied to religiously affiliated colleges and

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69 Id. (quoting *Catholic Bishop*, 440 U.S. at 502) (stating that issues relating to entanglement arise not only through the conclusions made by the Board, but also in their inquiries into whether an unfair labor practice occurred).

70 Id. Judge Breyer found potential issues involving religion almost completely unavoidable in the context of faculty labor disputes because—citing to *Catholic Bishop*—he reasoned that nearly all aspects of a school represent conditions of employment. Id. at 401–02 (quoting *Catholic Bishop*, 440 U.S. at 502–03) (envisioning these concerns as playing out over disputes regarding the school’s curriculum and the ways in which the faculty are instructed to teach, which could involve religious elements).

71 Id. at 402.

72 Id.

73 Id. Judge Breyer also rejected the idea that the Board could avoid First Amendment entanglement concerns by excluding—ad hoc—certain terms of employment from its review. Id. at 402–03.

74 Id. at 403. The cases Judge Breyer cited involved circumstances in which the government provided aid to religious schools, which led the Supreme Court to address whether this aid constituted state promotion of a particular religion in violation of the Establishment Clause. See id. (citing generally *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973); *Tilton*, 403 U.S. 672).

75 Id.

76 Id. In a separate opinion authored by Judge Frank Coffin, three other judges opined that NLRB jurisdiction over the university would not constitute a violation of *Catholic Bishop*. Id. at 403–04 (Coffin, J., dissenting). Judge Coffin’s opinion understood *Catholic Bishop* as addressing the particular situation of lay faculty at religious primary and secondary schools where the faculty “play as servants of the Church in fulfilling the religious mission of the school.” Id. Thus, under Judge Coffin’s framework, *Catholic Bishop* would apply to colleges and universities only when their objective is the same as those of religious secondary schools: to inculcate faith in their students. Id.
universities.\textsuperscript{77} In \textit{University of Great Falls}, the D.C. Circuit struck down the Board’s exercise of jurisdiction over the Catholic university in the case, holding that the Board’s “substantial religious character” test violated the principles of \textit{Catholic Bishop}.\textsuperscript{78} The court rejected the all-encompassing test used by the Board, asserting that it constituted the sort of intrusive inquiry into the religious mission of the school that \textit{Catholic Bishop} sought to avoid in the first place.\textsuperscript{79} In addition—citing to \textit{Catholic Bishop} and other Supreme Court cases that addressed similar examinations of the religious nature of other institutions—the D.C. Circuit maintained that it was inappropriate for the NLRB and the courts to troll through the beliefs of the university and evaluate the centrality of its religious beliefs to the university’s overall mission.\textsuperscript{80}

The D.C. Circuit characterized the NLRB’s impermissible inquiry as asking whether the university is “sufficiently religious.”\textsuperscript{81} The court rejected how the Board determined whether a school was a primarily secular institution, noting that the NLRB’s test improperly minimized the beliefs espoused by the religiously affiliated school in the case.\textsuperscript{82} Specifically, the court rejected the Board’s contention that the university in the case was primarily secular simply because it had an admissions policy of nondiscrimination, tolerated and respected diverse religious viewpoints, and did not require students to attend religious services.\textsuperscript{83} The court reasoned that under the Board’s standard, no religiously affiliated university would be considered sufficiently religious unless it discriminated based on religion or required attendance at religious services.\textsuperscript{84} The D.C. Circuit rejected the Board’s notion that one religious institution should be entitled to \textit{Catholic Bishop} protection over another simply because one engaged in “hard-nosed” indoctrination, is intolerant of other points of view, and denies academic freedom, while another is denied \textit{Catholic Bishop}

\textsuperscript{77} See \textit{Univ. of Great Falls}, 278 F.3d at 1337.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 1341 (“The NLRB’s ‘substantial religious character’ test . . . not only creates the same constitutional concerns that led to the Supreme Court’s decision in \textit{Catholic Bishop}, it is so similar in principle to the approach rejected in \textit{Catholic Bishop} that it is inevitable that we must reject this ‘new’ approach.”).
\textsuperscript{81} \textit{Id.} at 1343; see Stabile, supra note 1, at 1326. At a hearing before the NLRB’s hearing officer, the university’s president was asked a number of questions about how the school implements its religious mission. \textit{Univ. of Great Falls}, 278 F.3d at 1343. Among other questions, the president was asked how the school can have a stated mission to implement the Gospel values and teachings of Jesus while also being tolerant of others’ beliefs. \textit{Id.} The court held that this was precisely the type of inquiry that \textit{Catholic Bishop} intended to avoid. \textit{Id.} (citing \textit{Catholic Bishop}, 440 U.S. at 502 n.10, 507–08).
\textsuperscript{82} \textit{Univ. of Great Falls}, 278 F.3d at 1342, 1345.
\textsuperscript{83} \textit{Id.} at 1345.
\textsuperscript{84} \textit{Id.} at 1347.
protection because it is “ecumenical and open-minded.” The court reasoned that religiously affiliated universities that exercise their religious missions in more subtle ways are no less religious or entitled to Catholic Bishop protection, and any view to the contrary runs the risk of the Board impermissibly preferring one type of religious inculcation over another.

Given the NLRB’s impermissible inquiry, the D.C. Circuit articulated its own standard to determine whether a religiously affiliated college should be exempt from NLRB jurisdiction under Catholic Bishop. Under the D.C. Circuit’s approach, a religiously affiliated college would be exempt from NLRB jurisdiction so long as it: (1) holds itself out to the public as a religious institution; (2) is operated as a nonprofit; and (3) is affiliated with a church or religious organization. The D.C. Circuit reasoned that its three-part test faithfully applied the rationale of Catholic Bishop to institutions of higher learning. This test, the court observed, avoids the major pitfall of the Board’s substantial religious character test—namely the Board’s investigation into the nature of the school’s religious beliefs and how they relate to the school’s educational mission. The court also maintained that this test would stop the Board’s practice of evaluating how the school carries out its religious mission and how effective it is in doing so—inquiries the court deemed irrelevant for reaching jurisdictional determinations.

The court also reasoned that its three-part test ensured that only colleges and universities that were bona fide religious institutions would qualify for the

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85 Id. at 1346 (citing Laurence H. Tribe, Disentangling Symmetries: Speech, Association, Parenthood, 28 PEPP. L. REV. 641, 650 (2001)). According to Professor Tribe, freedom of association should include the right “to prefer inculcating one’s beliefs with a velvet glove rather than an iron fist.” See Tribe, supra.

86 Univ. of Great Falls, 278 F.3d at 1346 (citing Larson v. Valente, 456 U.S. 228, 244 (1982)).

87 See id. at 1343 (citing Catholic Bishop, 440 U.S. at 494, 497; Bayamon, 793 F.2d at 399–400, 403).

88 Id. at 1343 (citing Catholic Bishop, 440 U.S. at 494, 497; Bayamon, 793 F.2d at 399–400, 403); see Stabile, supra note 1, at 1320 (asserting that, under the D.C. Circuit’s test, all religiously affiliated colleges and universities would qualify for Catholic Bishop exemption).

89 Univ. of Great Falls, 278 F.3d at 1343.

90 Id. at 1344. But see Stabile, supra note 1, at 1320 (noting that the D.C. Circuit’s test has “the virtues of being simple and nonintrusive,” but criticizing it for its failure to address whether NLRB jurisdiction over a particular college or university would create impermissible church-state entanglement).

91 Univ. of Great Falls, 278 F.3d at 1344. Applying its three-part test, the D.C. Circuit concluded that the university in the case easily warranted exemption from Board jurisdiction. Id. at 1345. The court determined that the university satisfied the first part of the test because it held itself out as a Catholic institution through its mission statement, course catalog, and other documents. Id. The D.C. Circuit also noted that the university’s mission statement called for the school to be a place for students to live according to the Gospel and the teachings of Jesus. Id. The school satisfied the second part because it was organized as a nonprofit. Id. The court also found that the university satisfied the third part of the test because the Sisters of Providence—a religious order—sponsored the university, owned its land, and exercised control over the school’s governance. Id.
Catholic Bishop exemption. Specifically, the court concluded that the first part of the test—which asks whether the college holds itself out as religious—would guarantee that entirely secular institutions would not qualify for the exemption. In addition, the court reasoned that such a requirement would also serve as a market check against secular colleges from falsely professing a religious affiliation just to qualify for the exemption, as such a designation could dissuade some students and faculty members from coming to the school.

Despite the ruling in University of Great Falls, however, the NLRB has continued to use its substantial religious character test to determine whether it is authorized to exercise jurisdiction over a religiously affiliated college or university, as evidenced by the rulings involving Saint Xavier and Manhattan College.

II. THE NLRB’S SUBSTANTIAL RELIGIOUS CHARACTER TEST FAILS TO GRASP THE RELIGIOUS NATURE OF CATHOLIC COLLEGES AND UNIVERSITIES

It comes as no surprise that American Catholic colleges and universities strongly disagree with the NLRB’s determination that two of their institutions, Saint Xavier University and Manhattan College, are not substantially religious. The problem with the NLRB’s test is that it fails to fully grasp the re-

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92 Id. at 1344.
93 Id.
94 Id. In addition, the D.C. Circuit reasoned that the second part of the test—which requires the college to be organized as a nonprofit—also corresponds with Board policy that the exemption should apply to nonprofit educational institutions only. Id. (citing Bayamon, 793 F.2d at 403). The court further stated that the third part of the test—which requires the school to be religiously affiliated—is consistent with Catholic Bishop, Univ. of Great Falls, 278 F.3d at 1343–44 (citing Catholic Bishop, 440 U.S. at 495). The D.C. Circuit reaffirmed this approach in its 2009 case Carroll College, Inc. v. NLRB, 558 F.3d at 568, 572 (D.C. Cir. 2009); see Stabile, supra note 1, at 1328 n.67 (stating that the D.C. Circuit reaffirmed its three-part jurisdictional test in Carroll College).
95 See St. Xavier Univ., 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *2 n.5 (stating that the NLRB has not adopted the D.C. Circuit’s approach); Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *35–36 (stating that the NLRB has refused to adopt the D.C. Circuit’s test). The NLRB is able to continue to apply its substantial religious character test because the University of Great Falls decision is binding on the NLRB only in the D.C. Circuit. See Stabile, supra note 1, at 1328 n.67 (citing Ins. Agents’ Int’l Union, 119 N.L.R.B. 768, 773 (1957)) (stating that “[b]ecause federal agencies generally follow a policy of intracircuit nonacquiescence, Great Falls is not binding on the agency outside of the D.C. Circuit”).
96 See Catholic Colleges Brief, supra note 1, at 4; see also Robin Fretwell Wilson, The Calculus of Accommodation: Contraception, Abortion, Same-Sex Marriage, and Other Clashes Between Religion and the State, 53 B.C. L. REV. 1417, 1418–19 (2012) (discussing how a number of regulations related to the Patient Protection and Affordable Care Act of 2010 fail to classify “religiously affiliated universities, hospitals, and social services agencies like Catholic Charities” as religious employers). It is important to distinguish between the issue of whether the NLRB should be able to oversee the faculty labor relations at Catholics colleges and the issue of whether Catholic colleges have a religious mission, as not all Catholic colleges have resisted unionization efforts and NLRB jurisdiction. See Beth Griffin, Adjunct Faculty
ligious nature of Catholic colleges and universities. This is the result of the NLRB’s narrow understanding of what it means to have a religious mission and how a religiously affiliated college can carry out that mission. Under the NLRB’s test, a college is considered to be religious only if the institution makes religious indoctrination part of its mission, fails to grant academic freedom, and denies nonbelievers from participating on campus as students and faculty members. In contrast, American Catholic colleges and universities fulfill their religious missions precisely by “eschewing a narrow focus on religious indoctrination,” opening their doors to non-Catholic students and faculty, and engaging in research, no matter where such research may lead.

As is evident by the Saint Xavier and Manhattan College cases, Catholic colleges are considered not to be religious simply because of the ways in which they carry out their religious missions. Some have noted that the efforts of Catholic colleges and universities to resist unionization by their employees are inconsistent with the Church’s general position in favor of workers’ rights. See, e.g., BENEDICT XVI, ENCYCLICAL LETTER, CARITAS IN VERITATE ¶ 64 (June 29, 2009), available at http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html, archived at http://perma.cc/B9V-B88G (expressing the Church’s support for labor unions); Stabile, supra note 1, at 1331, 1340–41 (discussing the Church’s position in favor of unionization and the protection of workers but noting how Catholic colleges and universities have failed to bring about the type of labor relations the Church envisions); Pena, supra note 51, at 166–67 (noting the Church’s strong support for labor unions and the efforts by Catholic institutions to resist unionization of their employees). But see Brady, supra note 25, at 80–81 (stating that the NLRA’s adversarial approach to collective bargaining is “deeply at odds with the Church’s basic vision for social life,” and arguing that adherence to NLRA rules would prevent the Church from carrying out its vision for the proper relationship between management and workers).


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97 See Catholic Colleges Brief, supra note 1, at 3; Stabile, supra note 1, at 1327.
98 See Catholic Colleges Brief, supra note 1, at 3–4; Stabile, supra note 1, at 1327; see also Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1346 (D.C. Cir. 2002) (stating that a religiously affiliated college or university’s choice to be “ecumenical and open-minded” makes it no less religious).
99 See Univ. of Great Falls, 278 F.3d at 1346; see also Stabile, supra note 1, at 1327 (stating that a college would not satisfy the NLRB’s test unless it engages in religious indoctrination, requires students to attend religious services, and discriminates against students and faculty on the basis of their faith); MacDonald, supra note 5 (quoting Manhattan College’s president as arguing that the NLRB’s test assumes that “the primary hallmarks of an authentic Catholic college or university are exclusionary hiring, a proselytizing atmosphere, and dogmatic inflexibility in the curriculum”).
100 See Catholic Colleges Brief, supra note 1, at 3–4; Stabile, supra note 1, at 1327–28.
College, which carry out their religious missions in ways more subtle than the NLRB’s test requires, are not outliers among American Catholic colleges.\textsuperscript{102} In fact, for the most part, they are merely following the Catholic Church’s vision for how they should carry out their religious missions.\textsuperscript{103}

\textsuperscript{*31–35 (N.L.R.B. Jan. 10, 2011); Catholic Colleges Brief, supra note 1, at 3–4; Stabile, supra note 1, at 1327. Although Catholic colleges like Saint Xavier and Manhattan College assert that their choice to carry out their religious missions in more subtle ways makes them no less Catholic or religious, this point is contested. \textit{Compare St. Xavier Univ.,} 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *16 (concluding that Saint Xavier “operates strictly as a secular educational institution”), and \textit{Manhattan Coll.,} 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *31 (concluding that the purpose of Manhattan College is “secular”), with Catholic Colleges Brief, supra note 1, at 4 (stating that a Catholic college’s choice to have a “broad educational mission” does not make it less Catholic or religious). \textit{See also} Ian Lovett, \textit{Abortion Vote Exposes Rift on Catholic Campus,} N.Y. TIMES, Oct. 7, 2013, at A17, \url{http://www.nytimes.com/2013/10/07/us/abortion-vote-exposes-rift-at-catholic-university.html?_r=0}, archived at \url{http://perma.cc/K2BM-4LYJ} (discussing concerns among some religiously conservative Catholics that many Catholic colleges and universities, in broadening their educational missions, are losing some of their Catholic identity); Mark Oppenheimer, \textit{For Duquesne Professors, a Union Fight That Transcends Religion,} N.Y. TIMES, June 23, 2012, at A17, \url{http://www.nytimes.com/2012/06/23/education/for-professors-at-duquesne-university-union-fight-transcends-religion.html?_r=0}, archived at \url{http://perma.cc/Q3N3-24GS} (stating that Duquesne University is “barely religious” because it “does not require its faculty members to be Catholic and does not require students to study Catholicism”).

\textsuperscript{102} See Catholic Colleges Brief, supra note 1, at 15 (asserting that many Catholic colleges and universities “prefer to promote their religious beliefs” in more subtle ways); Stabile, supra note 1, at 1327 (discussing the difficulties the NLRB’s test poses to Catholic colleges and universities).

\textsuperscript{103} See Catholic Colleges Brief, supra note 1, at 12–16 (discussing the ways in which American Catholic colleges and universities carry out their religious missions in accord with the Catholic Church’s vision for its institutions of higher learning); Stabile, supra note 1, at 1327–28 (discussing how Catholic colleges and universities carry out their religious missions in accord with the Church’s vision for them). \textit{See generally} \textit{EX CORDE,} supra note 3 (outlining the Catholic Church’s vision for its colleges and universities); U.S. CONFERENCE OF CATHOLIC BISHOPS, \textit{THE APPLICATION OF EX CORDE ECCLESIAE FOR THE UNITED STATES} (2000) [hereinafter \textit{THE APPLICATION}], available at \url{http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/higher-education/the-application-for-ex-corde-ecclesiae-for-the-united-states.cfm}, archived at \url{http://perma.cc/73DS-HLHW} (last visited Mar. 25, 2014) (outlining the United States Conference of Catholic Bishops’ vision for American Catholic colleges and universities in light of \textit{EX Corde}).

Although \textit{EX Corde} and \textit{THE Application} lay out a vision for Catholic higher education, some Catholic colleges and universities have been criticized for not faithfully adhering to the documents’ guidelines. \textit{See, e.g.}, Patrick J. Reilly, \textit{Catholic Colleges with “Heart,”} \textit{NAT’L CATH. REG.} (Aug. 15, 2010), \url{http://www.ncregister.com/daily-news/catholic-colleges-with-heart}, archived at \url{http://perma.cc/P2UK-KBC3} (stating that some of \textit{EX Corde’s} guidelines are “often ignored”); Claire Zeng, \textit{The Case for Catholicism,} \textit{GEORGETOWN VOICE} (Oct. 30, 2013), \url{http://georgetownvoice.com/2013/10/31/case-catholicism/}, archived at \url{http://perma.cc/LD3S-WBUR} (discussing the allegations by some Georgetown alumni that the university is in violation of \textit{EX Corde} because a majority of professors are not Catholic and because professors do not uphold the Church’s moral principles through their scholarship); \textit{see also} Michael J. Mazza, \textit{May a Catholic University Have a Catholic Faculty?}, 78 NOTRE DAME L. REV. 1329, 1334–36 (2003) (quoting the presidents of a number of Catholic colleges who worry that \textit{EX Corde’s} guidelines regarding the religious backgrounds of faculty members may leave their schools vulnerable to civil liability); Lovett, supra note 101 (discussing the tensions faced by Loyola Marymount University, a Catholic and Jesuit university, in adhering to \textit{EX Corde}). Despite these criticisms, Catholic colleges and universities that carry out their religious missions in more subtle ways nonetheless maintain their religious and Catholic identities. \textit{See, e.g.}, MacDonald, supra note 5 (quoting Manhattan College’s president as saying that his school upholds the Church’s goals of
This Part analyzes the assumptions behind the NLRB’s substantial religious character test and explains how they fail to recognize the ways in which Catholic colleges and universities carry out their religious missions.104 Section A of this Part discusses the NLRB’s assumption that a college is religious only if it engages in religious indoctrination.105 Next, Section B discusses the NLRB’s assumption that a college is religious only if it denies faculty academic freedom.106 Finally, Section C discusses the NLRB’s assumption that a college is religious only if it discriminates on the basis of religion when admitting students and hiring faculty.107 Moreover, each Section explains how the NLRB’s assumptions fail to account for the ways in which Catholic colleges and universities carry out their religious missions.108

A. The NLRB’s Test Assumes That a College Is Religious Only If It Engages in Religious Indoctrination

One assumption underlying the NLRB’s test is that a college is religious only if it engages in religious indoctrination.109 When a religiously affiliated college does not carry out its religious mission through indoctrination or proselytization, the NLRB’s test concludes that the college has an exclusively secular mission.110 Such a narrow view of how religious colleges should carry out their religious missions fails to account for the religious nature of Catholic col-

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104 See infra notes 109–132 and accompanying text.
105 See infra notes 109–117 and accompanying text.
106 See infra notes 118–127 and accompanying text.
107 See infra notes 128–132 and accompanying text.
108 See infra notes 109–132 and accompanying text.
109 See Univ. of Great Falls, 278 F.3d at 1346 (reasoning that only colleges that engage in “hard-nosed proselytizing” would qualify as religious under the NLRB’s test); Catholic Colleges Brief, supra note 1, at 4 (same); Stabile, supra note 1, at 1327 (stating that, under the NLRB’s test, a college does not qualify as religious “if propagation of a religious faith is not its primary purpose”).
110 See Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *31 (finding that Manhattan College was secular because the “propagation of a religious faith” was not part of its mission); Univ. of Great Falls, 331 N.L.R.B. 1663, 1665 (2000), vacated, 278 F.3d 1335 (D.C. Cir. 2002) (finding that the University of Great Falls was secular because the “propagation of a religious faith” was not one of the school’s primary purposes); Catholic Colleges Brief, supra note 1, at 4 (stating that the NLRB assumes that college has a secular mission “unless it aggressively indoctrinates students”).
leges and universities. In fact, Catholic institutions of higher learning carry out their religious missions precisely by avoiding religious indoctrination.

The Catholic Church sees its colleges and universities as playing a central role in fulfilling the Church’s overall religious mission of evangelization. According to the Church, Catholic colleges and universities fulfill their role in spreading the Church’s message not by engaging in religious indoctrination, but instead by being places of “fruitful dialogue between the Gospel and culture.” They do this by creating—at an institutional level—a Christian presence in the academic setting that confronts the challenges of the modern world. They live out this Catholic identity by exemplifying four characteristics: promoting a Christian-inspired university community; calling for reflection on knowledge attained in light of the Catholic faith; maintaining fidelity to the Christian message; and being dedicated to the service of others. What gives a Catholic college its religious identity, according to the Church, is that it pursues its endeavors in light of the Christian message.

111 See Catholic Colleges Brief, supra note 1, at 3–4; Stabile, supra note 1, at 1327–28; see also Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *33–34 (discussing Manhattan College’s contention that the basis of the NLRB’s determination as to the religious nature of the school—whether it engages in religious indoctrination—results in the NLRB “imposing its own definition of ‘approved’ faith”); MacDonald, supra note 5 (quoting Manhattan College’s president as stating that the NLRB’s test assumes that a “primary hallmark” of a Catholic education is “a proselytizing atmosphere”).

112 See Catholic Colleges Brief, supra note 1, at 3–4; see also Stabile, supra note 1, at 1327 (stating that the NLRB’s test is “particularly problematic” for Catholic colleges and universities because of the ways in which they carry out their religious mission); Scalfari, supra note 20 (quoting Pope Francis as saying “[p]roselytism is solemn nonsense” and “[w]e need to get to know each other, listen to each other and improve our knowledge of the world around us”).

113 See EX CORDE, supra note 3, ¶ 49 (“By its very nature, each Catholic University makes an important contribution to the Church’s work of evangelization.”).

114 See Catholic Colleges Brief, supra note 1, at 3–4 (quoting EX CORDE, supra note 3, ¶ 43); Stabile, supra note 1, at 1327–28 (quoting EX CORDE, supra note 3, ¶ 43); see also THE APPLICATION, supra note 103, pt. 2, art. 4, § 4(b) n.37 (stating that The Application’s requirement that faculty members at Catholic colleges respect Church teachings “should not be . . . construed to imply that a Catholic university’s task is to indoctrinate or proselytize its students”); John J. DeGioia, President, Georgetown Univ., Where the Church Meets the World and the World Meets the Church (June 1, 2012), available at http://www.georgetown.edu/World-Meets-The-Church.html, archived at http://perma.cc/UUV5-HDRP (quoting Jesuit Erich Przywara as saying that Jesuit colleges are “where the Church meets the world and the world meets the Church”); Malloy, supra note 103 (stating that a truly Catholic university seeks to engage young people in dialogue—and does not seek to indoctrinate them).

115 See EX CORDE, supra note 3, ¶ 13.


117 See EX CORDE, supra note 3, ¶ 13; Malloy, supra note 103 (“Theological reflection permeates all really Catholic classes, courses, service learning opportunities and service projects overtly, or more subtly, in ways the mysterious Holy Spirit uses.”). In addition to the NLRB’s lack of recognition for the ways in which Catholic colleges and universities carry out their religious missions, the NLRB’s test also appears to fail to grasp how the spiritual identity of a Catholic college, which is inspired by
B. The NLRB’s Test Assumes a College Is Religious Only If It Denies Faculty Academic Freedom

A second assumption underlying the NLRB’s test is that a college is not religious unless it denies faculty members academic freedom. As the NLRB’s inquiries into the religious nature of religiously affiliated colleges and universities indicate, the NLRB’s test presupposes that there is a tension between the knowledge obtained through secular studies and a college’s religious beliefs. In the Catholic tradition, however, this tension does not exist. At Catholic colleges, the grant of academic freedom does not diminish their religious nature; rather, it enhances their ability to live out their Catholic identities.

Academic freedom plays a critical role in helping Catholic colleges and universities carry out their religious missions. It contributes to a Catholic the charism of its founding religious order—such as the Jesuits, Franciscans, or Dominicans—contributes to its religious character. Catholic Colleges Brief, supra note 1, at 17 (stating that a charism is the “distinctive spirituality, ministry, and set of traditions that informs the affiliated college’s implementation of [its] Catholic mission and identity”); see Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *37–38 (finding that Manhattan College carried out its Lasallian method of educating students—based on the approach developed by St. John Baptist de la Salle—in a secular way).

See Univ. of Great Falls, 278 F.3d at 1346 (discussing how a college does not qualify as religious under the NLRB’s test if it does not deny faculty academic freedom); St. Xavier Univ., 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *21–22 (finding that Saint Xavier has a secular mission, in part, because its faculty are not denied academic freedom); Catholic Colleges Brief, supra note 1, at 12 (discussing the NLRB’s determination that Manhattan College has a secular purpose, in part, because the school grants faculty academic freedom); Stable, supra note 1, at 1327 (discussing the assumptions underlying the NLRB’s test).

See Univ. of Great Falls, 278 F.3d at 1343. As part of the NLRB’s inquiry into the religious nature of the Catholic university under review, the Board asked the university’s president to “‘jibe’ the acceptance of other beliefs at the University with its teaching mission.” Id. (citation omitted). The Board asked, specifically, “If we are teaching a course, we have a class here in witchcraft, and how do we meld that into the teaching of beliefs that Jesus and the strong Catholic tradition? They are contrary, aren’t they?” Id. (citations omitted) (internal quotations marks omitted).

See EX CORDE, supra note 3, ¶ 17 (“While each academic discipline retains its own integrity and has its own methods, this dialogue [between faith and reason] demonstrates that methodical research within every branch of learning, when carried out in a truly scientific manner and in accord with moral norms, can never truly conflict with faith.”); see, e.g., Mission Statement, UNIV. OF NOTRE DAME, https://www.nd.edu/about/mission-statement/, archived at http://perma.cc/SC4E-DYS3 (last visited Mar. 22, 2014) [hereinafter Notre Dame Mission Statement] (stating that the University of Notre Dame’s “character as a Catholic academic community presupposes that no genuine search for the truth in the human or the cosmic order is alien to the life of faith”).

See Catholic Colleges Brief, supra note 1, at 13; see also Univ. of Great Falls, 278 F.3d at 1346 (stating that a Catholic university’s decision to be “open-minded” makes it no less religious); MacDonald, supra note 5 (quoting Manhattan College’s president as stating that the school is considered less religious according to the NLRB because it embraces the Church’s call to promote “intellectual openness”).

See Catholic Colleges Brief, supra note 1, at 13 (quoting THE APPLICATION, supra note 103, pt. 2, art. 2, § 2) (stating that academic freedom is an “essential component” of a Catholic school’s religious identity).
college’s religious mission in two ways. First, through the study and research of secular subjects, students and faculty are able to realize the connections between faith and reason, and how the two are derived from the same reality. Second, academic freedom contributes to the religious mission of Catholic colleges because it allows professors and students to seek answers to some of the most difficult challenges facing humanity. Thus, the Church asserts that scholars at Catholic colleges and universities should be given the freedom to “scrutinize reality” and “express their minds humbly and courageously” so that they are able to “contribute to the treasury of human knowledge.” In so doing, professors at Catholic colleges and universities contribute to the religious mission of their schools.

C. The NLRB’s Test Assumes That a College Is Religious Only If It Discriminates on the Basis of Religion When Admitting Students and Hiring Faculty

A third assumption underlying the NLRB’s test is that a college is not religious unless it discriminates on the basis of religion when admitting students and hiring faculty. Such a view fails to account for Catholic colleges and universities, which recognize that their religious identities are strengthened through the inclusion of non-Catholics on their campuses as students and faculty.
The welcoming of non-Catholics to Catholic colleges and universities enhances the schools’ ability to carry out their religious missions. Not only does it allow the colleges and universities to welcome scholars—regardless of their faith—who are willing to participate in the scholarly endeavors of the school, it also allows them to bring together people of different faiths to engage in interreligious dialogue. Interreligious dialogue is a key component of a Catholic college’s religious mission because, through this dialogue, the Church and others can learn and grow from each other.

III. SHIFTING THE FOCUS TO WHETHER FACULTY MEMBERS CARRY OUT THE COLLEGE OR UNIVERSITY’S RELIGIOUS MISSION

Because of the assumptions underlying the NLRB’s substantial religious character test, it fails to recognize the religious nature of Catholic colleges and universities. Underlying the NLRB’s jurisdictional test is the understanding that the indoctrination of faith is not a primary purpose of many religiously affiliated colleges and universities and that, as a result, the faculty members at these colleges are not necessarily tasked with carrying out the religious mission of their schools. The NLRB’s test correctly assumes that its jurisdiction

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130 See infra notes 131–132 and accompanying text (laying out how the inclusion of non-Catholics contributes to a Catholic college’s religious mission).

131 See EX CORDE, supra note 3, ¶ 26 (recognizing that Catholic colleges are comprised of individuals from different faith backgrounds but noting that they work toward fulfilling the school’s academic mission); id. ¶¶ 43–44 (discussing the roles that interreligious dialogue and the ability to interact with a local culture play in a Catholic college’s ability to live out its religious mission); Stabile, supra note 1, at 1327–28 (quoting Catholic Colleges Brief, supra note 20, at 14) (discussing the role that interreligious dialogue plays in a Catholic college living out its religious mission); see, e.g., Notre Dame Mission Statement, supra note 120 (“What the University asks of all its scholars and students . . . is not a particular creedal affiliation, but a respect for the objectives of Notre Dame and a willingness to enter into the conversation that gives it life and character.”); University Mission Statement, GEORGETOWN UNIV., http://www.georgetown.edu/about/governance/mission-statement/index.html, archived at http://perma.cc/UZ2C-TZMH (last visited Mar. 22, 2014) (“Established in 1789 in the spirit of the new republic, the university was founded on the principle that serious and sustained discourse among people of different faiths, cultures, and beliefs promotes intellectual, ethical and spiritual understanding.”).

132 See EX CORDE, supra note 3, at ¶¶ 43–44; see also Scalfari, supra note 20 (quoting Pope Francis as saying “[w]e need to get to know each other, listen to each other and improve our knowledge of the world around us”).

133 See Catholic Colleges Brief, supra note 1, at 12–17 (discussing the ways in which Catholic colleges carry out their religious missions); Stabile, supra note 1, at 1327 (stating that “[t]he NLRB’s current approach is particularly problematic when applied to Catholic colleges and universities” because of the ways in which they carry out their religious missions); see, e.g., St. Xavier Univ., No. 13-RC-22025, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *20–24 (N.L.R.B. May 26, 2011) (discussing factors that indicated that Saint Xavier was not substantially religious); Manhattan Coll., No. 2-RC-23543, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *31–35 (N.L.R.B. Jan. 10, 2011) (discussing factors that indicated that Manhattan College did not qualify as substantially religious).

134 See St. Xavier Univ., 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *20 (stating that the risk of impermissible infringement is minimized when faculty members are “not required to . . . promote
does not raise the types of church-state entanglement concerns that the Supreme Court warned of in the 1979 case *NLRB v. Catholic Bishop of Chicago* when faculty play no role in carrying out their school’s religious mission.\(^{135}\) Despite this, the NLRB’s test merely evaluates the extent to which a college’s approach comports with the Board’s understanding of how a religiously affiliated college should carry out its religious mission.\(^{136}\)

This Part proposes an alternative two-part jurisdictional test that seeks to evaluate whether the faculty members actually play a role in carrying out their college or university’s religious mission.\(^{137}\) Under the first part of this test, the NLRB would determine whether the college or university qualifies as religious by utilizing the approach adopted in 2002 by the U.S. Court of Appeals for the D.C. Circuit in *University of Great Falls v. NLRB*.\(^{138}\) A college would satisfy this part of the test if it: (1) holds itself out as religious; (2) is organized as a nonprofit; and (3) is affiliated with a religious institution.\(^{139}\) Under the second part of the test, the NLRB would simply ask whether the college or university

\(^{135}\) See *440 U.S. 490, 501–04 (1979)* (discussing the entanglement concerns associated with NLRB jurisdiction over the faculty at parochial schools); *St. Xavier Univ.*, 2011 NLRB Reg. Dir. Dec. LEXIS 33, at *20 (stating that the risk of impermissible infringement is minimized when faculty members are “not required to . . . promote church teachings”); *Manhattan Coll.*, 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *35 (stating that the risk of impermissible of church-state entanglement is “obviated” at a college in which “teachers are not required to adhere to or promote religious tenets”); NLRB Brief, *supra* note 21, at 30–31 (citing *Tilton v. Richardson*, 403 U.S. 672, 687 (1971)) (stating that unlike the case at parochial schools, religious indoctrination is usually not the purpose of a religiously affiliated college or university); Stabile, *supra* note 1, at 1328 (stating that the NLRB’s substantial religious character test is used as a “proxy” to determine whether the exercise of jurisdiction over a religiously affiliated college or university would risk impermissible church-state entanglement); see also *Willen*, *supra* note 21, at 41 (arguing that the risk of impermissible church-state entanglement arises only in the context of NLRB jurisdiction over schools in which religious indoctrination is part of their mission).

\(^{136}\) See Catholic Colleges Brief, *supra* note 1, at 4 (stating that the substantial religious character test “invites government officials to substitute their views about an institution’s ‘religious character’ for the judgment of the institution and its religious community”); Stabile, *supra* note 1, at 1328 (“Focusing on the character of the institution as a proxy for focusing directly on the issue of entanglement, however, requires the Board to make judgments about what it means for an institution to possess a religious character.”).

\(^{137}\) See *infra* notes 138–141 and accompanying text (laying out the proposed test).

\(^{138}\) See 278 F.3d 1335, 1343 (D.C. Cir. 2002); *infra* notes 147–162 and accompanying text (discussing this part of the proposed test).

\(^{139}\) See *Univ. of Great Falls*, 278 F.3d at 1343.
requires its faculty members to carry out its religious mission. If a religiously affiliated college satisfies both parts of this test, the NLRB would not be able to exercise jurisdiction over the labor relations of its faculty members.

This approach would improve the NLRB’s current test in two ways. First, it would actually measure whether church-state entanglement concerns exist by asking whether faculty members play a role carrying out their college’s religious mission—just as teachers at parochial schools do—without asking how the college carries out its religious mission. Second, in replacing the substantial religious character test, the NLRB would no longer conduct an intrusive inquiry into the religious nature of the school, something the Supreme Court in Catholic Bishop warned could also violate the school’s First Amendment rights.

Section A of this Part discusses the first part of the proposed test, which analyzes whether a college qualifies as religious. Section B discusses the second part of this test, which analyzes whether faculty members are required to carry out their college’s religious mission.

A. Keeping It Simple: Using the University of Great Falls Approach to Evaluate Whether a College Is Religious

Under the first part of this proposed jurisdictional test, the NLRB would evaluate whether a college qualifies as religious using the approach adopted by the D.C. Circuit in University of Great Falls. A college would qualify as

140 See infra notes 163–176 and accompanying text (discussing this part of the proposed test).
141 See infra notes 147–176 and accompanying text (discussing the proposed test).
142 See infra notes 143–144 and accompanying text.
143 See Univ. of Great Falls, 278 F.3d at 1342–45 (rejecting the NLRB’s current test because it evaluates how religiously affiliated colleges carry out their religious missions and adopting a new test that avoids such an inquiry); Stabile, supra note 1, at 1328, 1334, 1344 (stating that the NLRB uses the religious character of a school as a “proxy” for determining whether exercising jurisdiction would create impermissible church-state entanglement and proposing an alternative jurisdictional test that, instead of measuring the “religiosity” of the school, seeks to measure the extent of church-state entanglement that NLRB jurisdiction would create); Bradley, supra note 23, at 244 (arguing that jurisdictional tests should be based on the nature of the employees’ work rather than the religious nature of the organization); see also Catholic Bishop, 440 U.S. at 501 (discussing the role that parochial school teachers play in carrying out their school’s religious mission).
144 See 440 U.S. at 502–03 (stating that the “very process of inquiry” into the religious nature of a school “may impinge on rights guaranteed by the Religious Clauses”); Univ. of Great Falls, 278 F.3d at 1341–42 (holding that Catholic Bishop forbids the use of an intensive inquiry into the religious nature of a religiously affiliated college or university); Stabile, supra note 1, at 1328 (stating that the approach taken by the NLRB is similar to one rejected by the Supreme Court in Catholic Bishop).
145 See infra notes 147–162 and accompanying text.
146 See infra notes 163–176 and accompanying text.
147 See 278 F.3d at 1343.
religious so long as it: (1) holds itself out as religious; (2) is organized as a nonprofit; and (3) is affiliated with a religious institution. 148

There are a number of advantages to using this test over the NLRB’s current approach to determine whether a college qualifies as religious. 149 First, this test avoids the probing and intrusive analysis of the religious nature of the schools that the Supreme Court in *Catholic Bishop* found troubling. 150 By simply asking whether an institution of higher learning holds itself out as religious, the NLRB heeds the Court’s warning and avoids the potential of conducting an impermissible analysis. 151

Second, this standard avoids the NLRB’s current approach of measuring the extent to which a college comports with the Board’s understanding as to how a religiously affiliated college should carry out its religious mission. 152 The D.C. Circuit’s test does not evaluate how a religiously affiliated college chooses to carry out its mission—as the NLRB’s test does; it simply asks whether a college holds itself as religious. 153 This approach would recognize that a religiously affiliated college is no less religious if it chooses to carry out its religion by spreading its message in subtle ways, granting faculty academic freedom, or welcoming faculty and students from different faiths. 154

Third, this bright line test provides clarity to the NLRB, religious colleges and universities, and faculty members as to whether a school qualifies as religious. 155 By simply asking whether an institution holds itself as religious, is

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148 See id.

149 See id. at 1344 (discussing the positive aspects of this test); infra notes 150–157 and accompanying text.

150 See 440 U.S. at 502–03; Univ. of Great Falls, 278 F.3d at 1341, 1344. At a hearing before the NLRB, the president of the University of Great Falls was “required to justify the method in which the University teaches gospel values, and to respond to doubts that it was legitimately ‘Catholic.’” *Univ. of Great Falls*, 278 F.3d at 1343. The D.C. Circuit reasoned that “[t]his is the exact kind of question- ing into religious matters which *Catholic Bishop* specifically sought to avoid.” *Id.* (citing *Catholic Bishop*, 440 U.S. at 502 n.10, 507–08).

151 See *Catholic Bishop*, 440 U.S. at 502–03; Univ. of Great Falls, 278 F.3d at 1344; Stabile, *supra* note 1, at 1320 (discussing how the *University of Great Falls* approach avoids an intrusive inquiry).

152 See Univ. of Great Falls, 278 F.3d at 1345–46; Catholic Colleges Brief, *supra* note 1, at 4; Stabile, *supra* note 1, at 1326 (stating that the NLRB’s test impermissibly analyzes the religious nature of colleges and universities and “allows the agency to substitute its view of what it means to be a religious school and provide a religious education for that of the religious institution”).

153 See Univ. of Great Falls, 278 F.3d at 1344–46; Catholic Colleges Brief, *supra* note 1, at 18; Stabile, *supra* note 1, at 1320.

154 See Univ. of Great Falls, 278 F.3d at 1344–46 (stating that a college’s choice to be “ecumenical and open-minded” makes it no less religious); Catholic Colleges Brief, *supra* note 1, at 18 (stating that this test “properly leaves matters of religious identity in the hands of the institution”); Stabile, *supra* note 1, at 1327 (discussing the NLRB’s narrow understanding of how colleges can carry out their religious missions).

155 See Univ. of Great Falls, 278 F.3d at 1345 (stating that this test allows the NLRB to make jurisdictional determinations “without delving into matters of religious doctrine or motive”); Catholic Colleges Brief, *supra* note 1, at 9 (stating that this approach allows the NLRB to avoid inquiries into
organized as a nonprofit, and is affiliated with a religious organization, the NLRB should be able to decide whether a college qualifies as religious without engaging in a probing inquiry.\footnote{Stabile, supra note 1, at 1320 (stating that the University of Great Falls approach “has the virtue of being simple and nonintrusive”).} All the NLRB would have to do is verify the college’s nonprofit status and relationship with a religious organization, and look to the college’s public pronouncements—such as its mission statement—to confirm that the school makes known its religious identity.\footnote{See Univ. of Great Falls, 278 F.3d at 1345 (stating that the NLRB can determine whether a college hold itself out as religious by looking to its “course catalogue, mission statement, student bulletin, and other public documents”). Despite the straightforwardness of the University of Great Falls approach, the Regional Director in Manhattan College’s hearing determined that the school would not satisfy even this standard. See Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *35–36. The Regional Director concluded that the school did not hold itself out as religious because “the College’s public representations signal that [its connection to the Church] is limited in such a way that the College’s educational environment is not religious.” Id. at *37. But see Stabile, supra note 1, at 1320 (stating that the University of Great Falls approach would state that all religiously affiliated colleges would qualify for the Catholic Bishop exception). Under this Note’s proposed test, any public pronouncements of a school’s religious identity—even if minimal or oblique—would be sufficient to conclude that the school holds itself out as religious. See Univ. of Great Falls, 278 F.3d at 1345.}

Although this approach—standing alone—avoids the major pitfalls of the NLRB’s jurisdictional test, it shares one flaw with the test that it seeks to replace: it does not necessarily measure the extent to which faculty members are tasked with carrying out their school’s religious mission.\footnote{Stabile, supra note 1, at 1320–21 (stating that the University of Great Falls approach both fail to directly measure the risk of excessive church-state entanglement and calling for a new approach that seeks to more directly measure the risk of such entanglement).} One can easily imagine that faculty members who teach a secular subject—such as mathematics or economics—at one religiously affiliated college might be tasked with carrying out their school’s religious mission, while corresponding faculty members at another religiously affiliated school might not have such a mandate.\footnote{See id. at 1319–21 (discussing how the NLRB’s test and the University of Great Falls approach focus on the religious nature of a college or university).} Yet, despite the different roles that religious considerations play in the work of these two sets of faculty members, the jurisdictional decisions reached by the D.C. Circuit’s test and the NLRB’s test would not turn on this distinction.\footnote{See id. at 1320–21 (discussing how neither the NLRB’s test nor the University of Great Falls approach directly measure the risk of church-state entanglement).} The D.C. Circuit’s test would conclude that the NLRB is not authorized to ex-
exercise jurisdiction over the faculty members at either school—assuming that each holds itself out as religious—while the NLRB’s determination for each college would be based on how the schools choose to carry out their religious missions. Because neither test evaluates whether faculty members are tasked with carrying out their school’s religious mission, neither directly measures the extent to which NLRB jurisdiction would create impermissible church-state entanglement.

B. Determining If Faculty at Religiously Affiliated Colleges and Universities Are Tasked with Carrying Out Their School’s Religious Mission

To remedy the deficiency of the University of Great Falls’ approach, the second part of this Note’s proposed test would ask whether the religiously affiliated college tasks its faculty with carrying out its religious mission. This inquiry would address the issue that was at the heart of Catholic Bishop because it would determine if part of the faculty’s work includes carrying out their school’s religious mission. If faculty members are in fact tasked with carrying out their school’s religious mission, just as teachers at parochial schools are, the same church-state entanglement concerns that worried the Court in Catholic Bishop could also apply in this context.

161 Compare Univ. of Great Falls, 278 F.3d at 1343 (stating that a college would be exempt from NLRB jurisdiction if it: (1) holds itself out as religious; (2) is organized as a nonprofit; and (3) is affiliated with a religious organization), with id. at 1346 (stating that the NLRB’s recognizes colleges as religious only if they engage in “hard-nosed proselytizing,” discriminate on the basis of religion when admitting students, and deny faculty academic freedom).

162 See Stabile, supra note 1, at 1327 (stating that the NLRB’s test and the University of Great Falls approach both fail to directly measure the risk of excessive church-state entanglement and calling for a new approach that remedies this flaw).

163 See supra notes 158–162 and accompanying text (describing the deficiencies of the D.C. Circuit’s approach); infra notes 164–176 and accompanying text (laying out this part of the proposed test); see also Bradley, supra note 23, at 244 (arguing that the jurisdictional test should be based on the nature of the employees’ work and not the religious nature of the organization).

164 See Catholic Bishop, 440 U.S. at 501 (noting the “critical and unique role of the teacher in fulfilling the mission of a church-operated school”); Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383, 401–02 (1st Cir. 1986) (en banc) (quoting Catholic Bishop, 440 U.S. at 502–03) (concluding that issues involving religion could arise in disputes regarding a school’s curriculum and the ways in which the faculty are instructed to teach when they involve religious considerations). But see Stabile, supra note 1, at 1330 (stating that “the ‘entire focus of Catholic Bishop was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith,’ which is not present at the university level” (quoting NLRB v. Bishop Ford Cent. Catholic High Sch., 623 F.2d 818, 822 (2nd Cir. 1980))); id. at 1330 (stating that “the ‘basic rationale’ of Catholic Bishop rested ‘on the unique role that teachers in elementary and secondary schools play as servants of the Church in fulfilling the religious mission of the school,’ a role that is very different from the role of university professors” (quoting Bayamon, 793 F.2d at 403–04 (Coffin, J., dissenting))).

165 See Bayamon, 793 F.2d at 401–02 (citing Catholic Bishop, 440 U.S. at 502) (stating that Catholic Bishop concerns can apply in the context of higher education when religious considerations
Much like the D.C. Circuit’s test, this part of the proposed test is beneficial in a number of ways. First, this inquiry into whether faculty are tasked with carrying out their school’s religious mission should be straightforward, thereby avoiding Catholic Bishop’s concerns regarding an overly intrusive inquiry. The NLRB could determine whether faculty are tasked with carrying out their school’s religious mission by simply looking to the faculty handbook, the terms of the faculty’s employment, or the information provided to faculty at the time of their appointment. If part of the faculty’s employment includes carrying out the school’s religious mission, the religiously affiliated college would satisfy this component of the test.

Second, much like the D.C. Circuit’s test, this part of the inquiry recognizes that religiously affiliated colleges carry out their missions in different ways, and that the different ways in which they carry out their missions do not necessarily make them more or less religious. Under this part of the test, all that matters is whether the faculty is tasked with carrying out their school’s mission; it does not matter what that mission is or how the school seeks to accomplish it.

Third, just as the D.C. Circuit reasoned that its requirement that a college hold itself out as religious served as a market check—insuring that only colleges with a legitimate religious mission would promote the fact that they have one—this test’s requirement that the school inform faculty about their role in

__are part of a faculty member’s terms of employment or the school reserves the right to discipline faculty members based on religious grounds; Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *35 (citing Catholic Bishop, 440 U.S. at 501–02) (stating that “rules requiring faculty to propagate faith would require bargaining over such rules and their disciplinary consequences, and further, would require the Board to scrutinize an employer’s defense to unfair labor practice charges based on asserted enforcement of faith-based rules”). But see Stabile, supra note 1, at 1334, 1336 (arguing that the Supreme Court in Catholic Bishop overstated the risk of impermissible church-state entanglement caused by NLRB jurisdiction over parochial schools, noting that NLRB oversight neither forces schools to negotiate over religious considerations nor requires the Board to wade through a school’s religious principles); Cook et al., supra note 22, at 270–73 (arguing that NLRB jurisdiction over religiously affiliated colleges would not create impermissible church-state entanglement).__

166 See infra notes 167–176 and accompanying text (discussing the benefits of this part of the proposed test).

167 See Univ. of Great Falls, 278 F.3d at 1341 (stating that the NLRB’s test “engage[s] in the sort of intrusive inquiry that Catholic Bishop sought to avoid”).

168 See Manhattan Coll., 2011 NLRB Reg. Dir. Dec. LEXIS 94, at *22–25 (discussing the Regional Director’s findings as to the role that faculty play in carrying out Manhattan College’s religious mission in information the college distributed to prospective faculty members).

169 See supra note 165 and accompanying text (discussing this part of the proposed test).

170 See Univ. of Great Falls, 278 F.3d at 1346 (stating that a religiously affiliated college’s choice to carry out its mission in an “ecumenical and open-minded” way does not make it less religious).

171 See id. (rejecting the NLRB’s test because it evaluated whether a college qualified as religious based on the ways in which it carries out its religious mission); Stabile, supra note 1, at 1328 (stating that the NLRB’s test “requires the Board to make judgments about what it means for an institution to possess a religious character”).
carrying out their school’s religious mission would also serve as a market check.172 As the D.C. Circuit noted, some students and faculty might be persuaded or dissuaded from choosing a particular school because of its religious mission.173 The same logic holds true for faculty who are hired to, in part, carry out a school’s religious mission.174 Some prospective faculty members might seek to work at a college where part of their duties include carrying out their school’s religious mission, while others might be dissuaded from accepting a position for the very same reason.175 In both cases, notifying prospective faculty members of their expected role in carrying out their school’s religious mission—whatever it is—will serve as a market check, as only schools that actually require their faculty to play such a role would market such a requirement.176

CONCLUSION

The substantial religious character test that the NLRB uses to determine whether it is authorized to exercise jurisdiction over religiously affiliated colleges and universities is deeply flawed. A school is not considered religious under the NLRB’s test unless it makes religious indoctrination one of its primary purposes, denies faculty members academic freedom, and discriminates based on religion when hiring faculty and admitting students. Such an approach fails to recognize the religious nature of Catholic institutions of higher learning, which carry out their religious missions precisely by avoiding religious indoctrination, granting faculty academic freedom, and welcoming faculty and students of all faiths.

To remedy the deficiencies of the NLRB’s test, this Note proposes an alternative jurisdictional test that seeks to evaluate whether a college’s faculty play a role in carrying out their school’s religious mission. Under the proposed

172 See Univ. of Great Falls, 278 F.3d at 1344 (stating that such a requirement would serve as a market check against secular colleges from falsely professing a religious affiliation just to qualify for the exemption); supra note 94 and accompanying text (discussing the D.C. Circuit’s reasoning that the requirement that a school hold itself out as religious serves as a market check).

173 See Univ. of Great Falls, 278 F.3d at 1344.

174 See id.; infra notes 175–176 and accompanying text (discussing the logic of this approach).

175 See Univ. of Great Falls, 278 F.3d at 1344.

176 See id. One commentator has proposed an alternative test for the NLRB to determine when it should exercise jurisdiction over religiously affiliated colleges. See Stabile, supra note 1, at 1344. This test would make jurisdiction determinations based on the evaluation of a number of factors, including: (1) whether the faculty members seeking to unionize are full-time faculty or adjunct faculty; (2) whether the faculty members seeking to unionize teach in a seminary; (3) whether the school subjects itself to regional accreditation; and (4) whether the school currently engages in collective bargaining with its faculty members. Id. Although this approach is flexible and seeks to balance the rights of workers to unionize with the First Amendment rights of religiously affiliated colleges, this approach does not directly measure the extent to which faculty members at a religiously affiliated college actually play a role in carrying out their school’s religious mission. See id.
test, the NLRB would not be authorized to exercise jurisdiction over colleges that hold themselves out as religious and require their faculty to play a role in carrying out their school’s religious mission. This approach would be an improvement over the NLRB’s current test because it evaluates whether faculty play a role in carrying out their school’s religious mission without evaluating how a school lives out its mission. In adopting this approach, the NLRB would no longer throw stones at the ways in which religiously affiliated colleges carry out their religious missions.

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