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## **Adjunct Faculty Unionization and Religiously Affiliated Universities**

**Michael P. Moreland\***

The administrative state interacts with and regulates religion in many ways. Religious institutions—particularly large institutions such as universities or hospitals—employ thousands of people, triggering several mundane and unobjectionable requirements such as payroll taxes, workplace safety regulations, and wage and hour laws. Sometimes this regulation of religion in the employment setting rises to the level of national attention, as in recent contentious debates about the contraceptive mandate issued by the Department of Health and Human Services pursuant to the Affordable Care Act. But most regulation of religious institutions as employers is less prominent and contentious while still posing issues about religious freedom and state interference in the employer-employee relations of religious institutions, as seen in the question of adjunct faculty unionization at religiously-affiliated colleges and universities. The conflict over adjunct faculty unionization has waxed and waned over several decades (partly and unsurprisingly depending on the partisan composition of the National Labor Relations Board) and was the focus of one of the most prominent articles in the field of law and religion over 30 years ago.<sup>1</sup> More recently as adjunct faculty seek to unionize and raise objections to their pay levels and working conditions amid budget problems at both public and private universities, the NLRB has taken an increasingly aggressive position regarding its jurisdiction over collective bargaining efforts by faculty at religiously affiliated universities.<sup>2</sup>

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\* University Professor of Law and Religion and Director, Eleanor H. McCullen Center for Law, Religion, and Public Policy, Villanova University. Many thanks for comments received at a workshop sponsored by the C. Boyden Gray Center for the Study of the Administrative State at George Mason University Antonin Scalia Law School.

<sup>1</sup> Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373 (1981).

<sup>2</sup> The focus of this article will be on NLRB oversight of adjunct faculty unionization at private, religiously affiliated universities. Tenured and tenure-track faculty at private universities are not subject to the NLRA because they are deemed managerial employees under the Supreme Court's decision in *NLRB v. Yeshiva University*. 444

In this essay, I will first survey the current state of the law regarding NLRB jurisdiction over adjunct faculty at religiously affiliated colleges, culminating in the Board's recent decision in the *Pacific Lutheran* case that set forth a test for the exercise of NLRB jurisdiction. In *Pacific Lutheran*, the Board moved from an inquiry (on which the Board had insisted for several years, notwithstanding consistent circuit court precedent to the contrary) into the religious character of an *institution* to a focus on the religious function or role of the *faculty* seeking to unionize. In the second section of the paper, I will step back from the doctrinal dispute over NLRB jurisdiction and pose a set of broader questions about the mission of religiously affiliated universities, the role of faculty in such universities, the difficult issues posed by the possible tension between support for unionization and the religious mission of some universities (particularly Catholic institutions), and the ways in which administrative regulation is shaping—and perhaps distorting—the mission of religious institutions. In these respects, the controversy over adjunct faculty unionization serves as a useful case study for understanding the administrative state and its regulation of religion.

## **I. From *Catholic Bishop* to *Pacific Lutheran***

The NLRB was created by the National Labor Relations Act of 1935, which is the primary federal statute governing the rights and obligations of management and employees in the collective bargaining process. Decisions about what entities are covered by the NLRA's provisions are delegated to the NLRB's case-by-case adjudication. For many years following enactment of the NLRA, the NLRB did not exercise jurisdiction over nonprofit educational

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U.S. 672 (1980). Faculty at public state universities, while not governed by the NLRA, are generally subject to the public employee collective bargaining provisions in their respective states. In recent cases, the NLRB has also raised questions as to *Yeshiva*'s scope and precedential value, which raises interesting questions about faculty governance and labor relations at private universities but beyond the scope of this essay. See *Pacific Lutheran*: "Over the 30-plus years since *Yeshiva* was decided, the university model of delivering higher education has evolved considerably. . . . [C]olleges and universities are increasingly run by administrators, which has the effect of concentrating and centering authority away from the faculty."

institutions at all.<sup>3</sup> By the 1970s, however, the NLRB began to broaden its assertion of jurisdiction in new areas was routinely exercising jurisdiction over educational institutions, including religiously-affiliated institutions, with only an exemption for schools that were “completely religious” and offered instruction only in religious subjects.<sup>4</sup>

In the landmark case of *NLRB v. Catholic Bishop of Chicago* in 1979 concerning unionization efforts by parochial school teachers, the Supreme Court held that the doctrine of constitutional avoidance in statutory interpretation<sup>5</sup> required that NLRB’s jurisdiction not extend to parochial school teachers because (1) there was a significant risk of violation of the First Amendment if NLRB jurisdiction extended to “church-operated” secondary schools, and (2) there was no clear indication of congressional intent in the NLRA to give the NLRB jurisdiction over teachers in church-operated schools.<sup>6</sup> “In the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board,” the Court wrote, “we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.”<sup>7</sup> As the Court noted, a variety of issues that the NLRB is routinely called upon to resolve in labor disputes, such as charges of unfair labor practices, could raise serious First Amendment questions if applied to religious schools:

The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school’s religious mission. It is not only the conclusions that may be

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<sup>3</sup> See *Trustees of Columbia University in the City of New York*, 97 NLRB 424 (1951).

<sup>4</sup> *Roman Catholic Archdiocese of Baltimore*, 216 NLRB 249 (1975).

<sup>5</sup> See *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis in original) (internal citations omitted): The canon [of constitutional avoidance] is not a method of adjudicating constitutional questions by other means. Indeed, one of the canon’s chief justifications is that it allows courts to *avoid* the decision of constitutional questions. It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts.

<sup>6</sup> 440 U.S. 490 (1979).

<sup>7</sup> 440 U.S. at 507.

reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.<sup>8</sup>

Since *Catholic Bishop*, courts have expanded the holding of the case to cover a broad range of religiously affiliated schools, not merely those that are “church-operated” and not merely primary and secondary schools. At the core of these courts’ concerns is that the same (and similarly constitutionally problematic) line-drawing exercise would be required should the NLRA be interpreted to apply to religious schools, whether elementary and high schools or colleges and universities. Then-Judge Stephen Breyer noted in his opinion in *Universidad Central de Bayanom v. NLRB* that the Court in *Catholic Bishop* did not limit its holding to primary and secondary schools and that the same entanglement problems that the Court identified in *Catholic Bishop* are present in higher education:

[T]o fail to apply *Catholic Bishop* [to colleges and universities] is to undercut that opinion’s basic rationale and purpose. The Court there rejected the Labor Board’s pre-existing distinction between “completely religious schools” and “merely religiously associated schools.” In doing so, it sought to minimize the extent to which Labor Board inquiry (necessary to make the “completely/merely-associated” distinction) would itself entangle the Board in religious affairs. Under this rationale, therefore, we cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board “entanglement” as they are administered.... These ad hoc efforts, the application of which will themselves involve significant entanglement, are precisely what the Supreme Court in *Catholic Bishop* sought to avoid.<sup>9</sup>

Notwithstanding these appellate court decisions, the NLRB took the position for several years that *Catholic Bishop* was limited to schools with a “substantial religious character” and that

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<sup>8</sup> 440 U.S. at 502. In dissent, Justice Brennan argued that the NLRA already contained exemptions from the jurisdiction of the NLRB, primarily for public (federal and state) employees and so the majority’s interpretation of the NLRA was an unwarranted addition of non-profit and religious employers to that list of exemptions. 440 U.S. at 511. Both the majority and the dissent in *Catholic Bishop* engage in a forced reading of the legislative history of the NLRA, including trying to find significance in subsequent amendments to the NLRA in the Taft-Hartley Act of 1947.

<sup>9</sup> 793 F.2d 383, 402 (1st Cir. 1986) (en banc) (Breyer, J., for half of an equally divided court).

the Board should determine on a case-by-case basis whether a school has such a character.<sup>10</sup> In order to make this determination, the Board “considers such factors as the involvement of the religious institution in the daily operation of the schools, the degree to which the school has a religious mission and curriculum, and whether religious criteria are used for the appointment and evaluation of faculty.”<sup>11</sup> This “substantial religious character” test resulted, of course, in a much narrower range of schools being exempted from NLRB jurisdiction over faculty collective bargaining efforts, thus requiring schools that resisted such jurisdiction to appeal to the Board’s rulings in federal court.<sup>12</sup>

In a 2002 opinion that sharply rebuked the Board’s “substantial religious character” test, the D.C. Circuit held that the NLRB’s determination of a school’s overall religious character was (following *Catholic Bishop*) an inappropriate way to make jurisdictional determinations.<sup>13</sup> The D.C. Circuit instead articulated a three-pronged test to determine whether a religious institution was exempt from the jurisdiction of the NLRB that would avoid the intrusive inquiry into the good faith claims of a religious university that, the court argued, *Catholic Bishop* sought to avoid: (1) the institution “holds itself out to students, faculty and community as providing a religious educational environment,” (2) the institution “is organized as nonprofit,” and (3) the institution “is affiliated with, or owned, operated, or controlled, directly or indirectly, by a

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<sup>10</sup> The Board practices both inter- and intra-circuit non-acquiescence—that is, the Board’s policy is not to follow circuit court precedent except as to a particular case *within* a circuit and not to follow precedents from a different circuit. See *D.L. Baker, Inc.*, 351 NLRB 515, 529, fn. 42 (2007) (internal citations omitted):

The Board generally applies its “nonacquiescence policy,” and instructs its administrative law judges to follow Board precedent, not court of appeals precedent, unless overruled by the United States Supreme Court. This nonacquiescence policy serves important goals: it defines a uniform national labor policy, as distinct from a patchwork of geographically diverse rules, and it frees the Board from attempting to anticipate with precision the locus of appellate jurisdiction. For those reasons, the Board has explained, it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision, but will instead respectfully regard such a ruling as the law of that particular case.

<sup>11</sup> *In re University of Great Falls*, 331 NLRB No. 188 at 3 (2000).

<sup>12</sup> For a discussion of administrative agencies’ self-interpretation of their jurisdiction and how that question relates to the *Chevron* doctrine, see Nathan A. Sales and Jonathan H. Adler, *The Rest is Silence: Chevron Deference, Agency Jurisdiction, and Statutory Silences*, 2009 Ill. L. Rev. 1497.

<sup>13</sup> *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference to religion.”<sup>14</sup> As the D.C. Circuit explained, the *Great Falls* test “allow[s] the Board to determine whether it has jurisdiction without delving into matters of religious doctrine or motive, and without coercing an educational institution into altering its religious mission to meet regulatory demands.”<sup>15</sup> In 2008, another institution, Carroll College, successfully challenged the Board’s exercise of jurisdiction over it when the D.C. Circuit reaffirmed *Great Falls* and held again that a school met all three components of the test set forth in *Great Falls*.<sup>16</sup>

Cases addressing similar attempts by the government to distinguish which institutions are “really” religious and which institutions are not have come to broadly the same conclusion. For example, in *Colorado Christian University v. Weaver*, the Tenth Circuit held that a Colorado public scholarship program that excluded students who attended “pervasively sectarian” universities was unconstitutional.<sup>17</sup> In order to determine if a university was “pervasively sectarian,” the government was required to examine the curriculum of the school and take into consideration whether, for example, the students were required to attend religious services. But such inquiries are precisely what the First Amendment prohibits, for “[t]hese determinations threaten to embroil the government in line-drawing and second-guessing regarding matters about which it has neither competence nor legitimacy.”<sup>18</sup> And in *Presiding Bishop v. Amos* (a case that raised an Establishment Clause challenge to Title VII’s exemption of religious organizations from the prohibition on discrimination based on religion), Justice Brennan observed that “determining whether an activity is religious or secular requires a searching case-by-case

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<sup>14</sup> 278 F.3d at 1347.

<sup>15</sup> *Id.* at 1345.

<sup>16</sup> *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009).

<sup>17</sup> 534 F. 3d 1245, 1250 (10th Cir. 2008).

<sup>18</sup> 534 F.3d at 1265.

analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree.”<sup>19</sup>

Similarly, in determining whether a religious organization is sufficiently “religious” to qualify for the Title VII exemption, both EEOC guidance and cases such as *LeBoon v. Lancaster Jewish Community Center Association*<sup>20</sup> hold that the exemption is quite broad. As Judge Roth put it in the Third Circuit’s opinion in *LeBoon*:

First, religious organizations may engage in secular activities without forfeiting protection under Section 702....Second, religious organizations need not adhere absolutely to the strictest tenets of their faiths to qualify for Section 702 protection....Third, religious organizations may declare their intention not to discriminate, as the LJCC did to the United Way and in its employee handbook, without losing the protection of Section 702....Fourth, the organization need not enforce an across-the-board policy of hiring only coreligionists....We will not deprive the LJCC of the protection of Section 702 because it sought to abide by its principles of “tolerance” and “healing the world” through extending its welcome to non-Jews.<sup>21</sup>

In the most recent series of cases about NLRB jurisdiction over religiously affiliated universities, several religiously affiliated schools—St. Xavier, Manhattan College, Duquesne University, Loyola University-Chicago, DePaul University, Pacific Lutheran, and Seattle University, for example—have had claims for exemption from NLRB jurisdiction rejected by Board regional hearing officers. In each case, the schools clearly satisfy the test in *Great Falls*. For instance, the NLRB maintained that Manhattan College, while clearly holding itself out to be a religious institution, does not meet the admissions, hiring, and curriculum criteria that the NLRB thinks exempted institutions must meet in order to be “substantially religious.” In

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<sup>19</sup> *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 343 (1978) (Brennan, J., concurring in the judgment).

<sup>20</sup> 503 F.3d 217 (3d Cir. 2007).

<sup>21</sup> 503 F.3d 217 at 230.

response, the Association of Catholic Colleges and Universities and the Association of Jesuit Colleges and Universities filed amicus briefs on behalf of Catholic institutions.

This most recent round of arguments about NLRB jurisdiction over adjunct faculty unionization reached its culmination in the Board's 2014 decision in *Pacific Lutheran*. There, the Board departed from its previous and longstanding "substantial religious character" test but refused to adopt a test as deferential as the D.C. Circuit's *Great Falls* approach. Instead, for the Board to decline jurisdiction in a case it will first impose a "threshold requirement" borrowed from the first prong of *Great Falls*, *i.e.*, ask whether the university "holds itself out to students, faculty, and community as providing a religious educational environment."<sup>22</sup> In the second step of the inquiry, the Board will impose a requirement that "the university holds out its petitioned-for faculty members as performing a *specific* role in creating and maintaining that [religious educational] environment,"<sup>23</sup> a requirement that *Pacific Lutheran* could not meet in the Board's view.

One concern is the Board has a remarkably cramped account of whether faculty contribute to the religious mission of a university. The Board holds that where a school does not indicate that "faculty members are expected to incorporate religion into their teaching or research, that faculty members will have any religious requirements imposed on them, or that the religious nature of the university will have any impact at all on their employment,"<sup>24</sup> then the university is not "holding out" its faculty as performing a religious function. Most troubling is the Board's claim that "[t]his is especially true when the university also asserts a commitment to diversity and academic freedom, further putting forth the message that religion has no bearing on

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<sup>22</sup> Slip op. at 6 (quoting *Great Falls*, 278 F.3d at 1343).

<sup>23</sup> Slip op. at 7 (emphasis added).

<sup>24</sup> Slip op. at 8.

faculty members' job duties or responsibilities.”<sup>25</sup> *The Pacific Lutheran* approach—while trying to be more accommodating to the objections of religious schools by shifting from an “institutional” inquiry to a “faculty role” inquiry—still contains a good deal of judgments about what kinds of institutional settings are sufficiently religious and which are not.

Indeed, the problem with the “holding out faculty as performing a specific religious function” test from *Pacific Lutheran* is that it throws the Board right back into the intrusive religious inquiry that courts from *Catholic Bishop* to *Great Falls* have said runs a high risk of unconstitutional interference with religion. On the Board’s view, only when faculty engage in “religious indoctrination or religious training” or where a school imposes a narrow religious test for hiring would the Board find no jurisdiction. But this is the Board’s own view of what counts as factors sufficient for faculty at a school to be part of its religious mission, a view not shared by *Pacific Lutheran* (or most Catholic universities). In its opinion, the Board begs the question by asserting its own (indeed, highly contestable) view of what constitutes the religious mission of a university, including a rejection of academic freedom and curricular and hiring practices in which very few schools engage. As Member Johnson put it in his dissent in *Pacific Lutheran*:

[T]he majority appears to require that, to meet its burden, there must be evidence establishing that the university’s mission centers on blatant religious indoctrination or proselytization, that the institution fails to grant religious freedom or freedom of inquiry, and that the institution denies nonbelievers from participating on campus as students and faculty members. Because PLU, in its literature, does not correspond to this crabbed view of how a religion should express itself in a university environment, the majority finds that the faculty are, ipso facto, not held out as performing a specific religious function.<sup>26</sup>

In the wake of *Pacific Lutheran*, regional hearing officers have decided a series of cases<sup>27</sup> applying its “holding out” faculty test to find that the NLRB has jurisdiction over unionizing

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<sup>25</sup> *Id.*

<sup>26</sup> Slip op. at 37.

<sup>27</sup> Loyola-Chicago.

adjunct faculty other than those who hold positions teaching theology or religion.<sup>28</sup> In one case involving Carroll College (affirmed by the full Board), the regional hearing officer held that NLRB could not assert jurisdiction because the faculty handbook had a provision for discharge of faculty for “continued serious disrespect or disregard for the Catholic character or mission” of the college, though there was no evidence that the college had actually dismissed faculty for that reason.<sup>29</sup>

## **Part Two: Adjunct Faculty Unionization, Religion, and the Modern Administrative State**

The fight between the NLRB and religiously affiliated colleges and universities over adjunct faculty unionization raises a host of interesting issues about administrative law and religious freedom, such as the scope of the NLRB’s power to make determinations about religion, the employer-employee relationship in religious institutions, the religious identity of institutions of higher education, and views about unionization held by churches. The rest of this essay will explore these issues, as they—more than the narrow doctrinal dispute over the interpretation of the NLRA in these cases—pose questions at the center of the interaction of the modern administrative state and religious institutions.

At the origin of the debate is the NLRB’s own aggressive approach to adjudicating these cases and its expansive interpretation for several decades of the NLRA’s reach to include religious institutions. Perhaps this is merely a familiar instance of an administrative agency engaging in self-aggrandizing statutory interpretation and regulation, but such a tendency is exacerbated here by the serious constitutional limits posed by the First Amendment (as every court to weigh in on the NLRA’s applicability to religious institutions has so held) and the

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<sup>28</sup> Boston College, Duquesne, and Seattle U. decisions. Note that an assertion of jurisdiction by the NLRB entails oversight and certification of the results of an election by faculty whether to unionize. In the case of Pacific Lutheran itself, the faculty voted not to unionize after the university lost the challenge to NLRB jurisdiction.

<sup>29</sup> Carroll College. The hearing officer noted that NLRB precedent holds that the Board will not “look behind” documents to determine actual practice.

NLRB's stated practice of non-acquiescence to judicial precedents. Alongside the HHS contraceptive mandate, the adjunct faculty unionization dispute comes to be seen as a marker of how administrative agencies take (or fail to take) claims of religious freedom into account in issuing regulations and adjudicating disputes between the agency's power and religious objections to it. In the following discussion, I wish to signal some of the broader contested questions raised by the NLRB dispute.

Employer-Employee Relations: With regard to the relationship between employers and employees in religious institutions, recent scholarship has emphasized the concerns of objecting employees, particularly where religious employers have been accorded an exemption from anti-discrimination law.<sup>30</sup> These critics argue that cases such as *Hosanna-Tabor* and *Hobby Lobby* (interestingly, both were cases in which administrative agencies unsuccessfully opposed the religious exemption claims of employers) illustrate how employees are unwittingly subject to the religious view of their employers and lose the protections otherwise afforded to employees in non-religious settings. By contrast, defenders of religious exemptions in these cases have a stronger view of the religious institutions' claims to determine the structure of the employer-employee relationship and to impose requirements on employees consistent with the mission of the institution. Without dismissing the issues raised by those solicitous of the concerns of dissenting employees, Justice Brennan's argument in his *Amos* concurrence raises the concern that insufficient attention is paid to the ways in which regulatory reach into religious institutions poses a threat to constitutional protections for such institutions to be self-defining, within limits, as to their religious character.

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<sup>30</sup> See, e.g., B. Jessie Hill, *Change, Dissent, and the Problem of Consent*, in *The Rise of Corporate Religious Liberty* (Chad Flanders, Zoë Robinson, and Micah Schwartzman eds.) (2016); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 *Columbia L. Rev.* 1453 (2015).

The Mission of Religiously Affiliated Colleges and Universities: Alongside the NLRB dispute is a longstanding discussion among religious institutions of higher education about the history and purposes of their mission. Books such as George Marsden's *The Soul of the American University* and a series of books about Catholic higher education such as James Burtchaell's *The Dying of the Light* have set forth arguments about the religious identity (and loss of religious identity) of American colleges and universities. In the accounts of Marsden and Burtchaell, part of the blame for the loss of religious identity among formerly and strongly Christian institutions lies with internal pressure from administrators and faculty to water down a school's attachment to its mission. But there is also an account of the place of external social, political, and legal considerations, and one could argue that the NLRB's own (and shifting) approach to what constitutes a sufficiently religious university both reflects and shapes the mission of religious higher education. Conservative critics of Catholic universities argue that the schools have surrendered their mission and that NLRB jurisdiction over adjunct faculty unionization is condign punishment, though the schools have argued for a broader and more deferential view of what constitutes a religious mission—so that, for example, academic freedom and religious diversity in hiring can be seen as consistent with religious identity at a university, notwithstanding the NLRB's view that such commitments are dispositive evidence that an institution is subject to the Board's jurisdiction.

NLRB Jurisdiction and Interference with Religious Mission: One recurring question raised by the opposition of some religiously affiliated universities to NLRB jurisdiction over adjunct faculty unionization is how, precisely, such NLRB oversight would interfere with the mission of a religious school, particularly as to faculty in areas that seem remote from the religious mission of a school. Critics of the schools' position point out that many religious

schools are often circumspect about their commitments to a religious mission, with few imposing a requirement that faculty (adjunct or otherwise) be adherents of a particular religious faith. “Morality” clauses in faculty contracts—including for tenured faculty—are often not tied to particular religious requirements but are instead common to both religious and non-religious institutions. For example, a faculty member who is convicted of a felony can be dismissed under a faculty contract’s morality clause, but there is often not anything peculiar to a school’s *religious* mission in such proceedings.<sup>31</sup> Nonetheless, I wish to suggest there are some areas of potential conflict between religiously affiliated universities and NLRB oversight of employees unionization efforts that have received insufficient attention in the discussion.

One example is posed by the growing practice in the collective bargaining arena of the attempted creation of so-called micro units. In *In re Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), the NLRB modified its test for what unit of an employer’s workforce should be considered the appropriate unit voting on forming a union. Generally, the test employed by the NLRB for determining whether the employees petitioning to unionize are the appropriate unit had been whether all of the employees sharing a “community of interest” are included in the proposed bargaining unit. For obvious reasons, employees seeking to unionize often try to narrow the scope of the unit to those who might have the strongest interest in forming a union, while management usually tries to broaden the number of employees covered by a petition in the hope that those skeptical of forming a union or whose interests are perhaps more aligned with management will be included (and vote against unionization). The Board’s decision in *Specialty Healthcare* made it easier to form micro units by assuming that the

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<sup>31</sup> See Marka B. Fleming, Amanda Harmon-Cooley, and Gwendolyn Mcfadden-Wade, *Morals Clauses for Educators in Secondary and Post-Secondary Schools: Legal Applications and Constitutional Concerns*, 2009 B.Y.U. Education and Law J. 67,

petitioning employees were the appropriate unit unless an employer could show that a broader set of employees share an “overwhelming community of interest test” with the petitioning employees.<sup>32</sup> In 2017, the Board revisited its decision in *Specialty Healthcare* and restored the mere “community of interest” standard, without the presumptions in favor of the already existing micro unit in collective bargaining.<sup>33</sup>

Whatever standard the Board uses in determining the validity of a micro unit, one can readily see how this might play out in the university setting. Faculty in disciplines that arguably fall outside *Pacific Lutheran’s* “holding out as performing a religious function” test (engineers, for example) could form a micro unit and exclude faculty (in, say, certain fields in the humanities that cover the core curriculum of a religiously affiliated school) who might be more closely implicated in the university’s mission. But, once again, this would require the Board or a court reviewing the NLRB’s recognition of a micro unit to decide which disciplines are germane to the religious mission of a university. Math and science?—arguably not. Theology?—definitely. Philosophy?—maybe, maybe not. Business?—probably not. The indeterminate and piecemeal nature of such an inquiry shows how the prior concerns about line drawing between different types of institutions and different types of faculty are present in the micro unit disputes in many collective bargaining efforts.

So also concerns could be raised about means of disciplining faculty. Some religiously affiliated universities have codes of conduct for faculty (though, of course, the more elaborate

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<sup>32</sup> 357 NLRB at 945–46:

We therefore take this opportunity to make clear that, when employees or a labor organization petition for an election in a unit of employees who are readily identifiable as a group (based on job classifications, departments, functions, work locations, skills, or similar factors), and the Board finds that the employees in the group share a community of interest after considering the traditional criteria, the Board will find the petitioned-for unit to be an appropriate unit, despite a contention that employees in the unit could be placed in a larger unit which would also be appropriate or even more appropriate, unless the party so contending demonstrates<sup>28</sup> that employees in the larger unit share an overwhelming community of interest with those in the petitioned-for unit.

<sup>33</sup> See *PCC Structural, Inc.*, 365 NLRB No. 160 (2017),

such a code of conduct, the more the faculty will fall within the *Pacific Lutheran* test of being held out as performing a religious function), which can include guidelines for faculty sanctions. But in some cases, the NLRB has adjudicated disputes about employee discipline that could affect faculty at a religiously affiliated school. For example, in *United States Postal Serv. & Am. Postal Workers Union*, the Board held that an employer is prohibited from disciplining an employee for using “profane” language during a grievance hearing.<sup>34</sup> So also in cases involving threatening co-workers,<sup>35</sup> harassing comments on Facebook,<sup>36</sup> “sexually inappropriate gestures,”<sup>37</sup> and racist signs,<sup>38</sup> the Board has curtailed the ability of employers to discipline employees in ways that could implicate concerns of religiously affiliated institutions.

Catholic Universities and Catholic Social Teaching on Unions: A good deal of the rhetorical heat in the debate over NLRB jurisdiction is focused on the supposed hypocrisy of institutions—primarily Catholic schools—resisting adjunct faculty unionization efforts. The social teaching of the Catholic Church since Pope Leo XIII’s encyclical *Rerum Novarum* in 1891 has consistently argued for the right of workers to organize to improve their working conditions, and labor activists have made much of the difficult position of Catholic university administrators who argue against adjunct faculty unionization. The truth of the matter is more complicated, however, and provides an interesting lesson in the interaction of contemporary labor law and the commitments of religious institutions.

While *Rerum Novarum* does discuss trade unions (the English translation speaks of “workingmen’s unions”), it is important to place that argument into context. The encyclical was addressed to the then-new problem of wage labor as a consequence of widespread

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<sup>34</sup> 364 NLRB No. 62 (2016).

<sup>35</sup> Plaza Auto Center (2014).

<sup>36</sup> Pier Sixty (2015).

<sup>37</sup> Consolidated Communications (2014).

<sup>38</sup> Cooper Tire & Rubber (2017).

industrialization. The emphasis on associations of all forms in the key paragraphs on unions is part of a larger argument about commutative justice and the forms of social life that are produced through such associations.<sup>39</sup> Though *Rerum Novarum* is often said to be an encyclical about “economics,” it is really a document about social order and what Russell Hittinger has called the three necessary “societies” (family or domestic life, polity, and the Church).<sup>40</sup> An important aspect of this social order is that each form of sociality, including political society, is limited in its authority by the claims of the other two.

In this dispute over the resistance of Catholic institutions to adjunct faculty unionization in light of the Church’s own teaching, one way to reframe the question is as one about competing claims over liberalism and the administrative state. Critics of Catholic institutions’ reluctance to acquiesce to NLRB jurisdiction assume that the baseline of legal entitlements is set by the NLRA’s recognition of collective bargaining efforts and that religious exemptions from NLRB oversight are at best special pleading and at worst rank hypocrisy.

But as Kathleen Brady has argued, the Catholic Church’s own view of labor relations is more cooperative than the NLRA’s, and Catholic institutions could appropriately insist on their own internal set of labor relations consistent with Catholic social teaching rather than one imposed by the NLRB.<sup>41</sup> On this view, the NLRB’s aggressive interpretation of its own authority

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<sup>39</sup> See, e.g., Para. 49:

The most important of all [associations] are workingmen's unions, for these virtually include all the rest. History attests what excellent results were brought about by the artificers' guilds of olden times. They were the means of affording not only many advantages to the workmen, but in no small degree of promoting the advancement of art, as numerous monuments remain to bear witness. Such unions should be suited to the requirements of this our age - an age of wider education, of different habits, and of far more numerous requirements in daily life. It is gratifying to know that there are actually in existence not a few associations of this nature, consisting either of workmen alone, or of workmen and employers together, but it were greatly to be desired that they should become more numerous and more efficient.

<sup>40</sup> Russell Hittinger, “The Three Necessary Societies,” *First Things*, June 2017.

<sup>41</sup> Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining under Federal and State Labor Laws: Freedom from and Freedom For*, 49 Vill. L. Rev. 77, 121-22 (2004):

[B]ehind the bargaining process and a key factor in motivating the parties to reach agreement is the availability of economic weapons and the threat that they will be used. The presence of these weapons

is consistent with certain views about the administrative state and the place of subsidiary institutions—most especially religious institutions—subject to that administrative state’s power. Rather than a departure from the social order (and rights of association) articulated in *Rerum Novarum*, then, the argument mounted by Catholic institutions in the debate over faculty unionization is perhaps better seen as consistent with the Catholic social tradition’s arguments about the sharply delimited authority of the state over the Church and other institutions of civil society.<sup>42</sup>

This dispute about Catholic social teaching and unions has also been raised in the wake of the U.S. Supreme Court’s holding in *Janus v. AFSCME* that compulsory public sector agency fees are unconstitutional, which ushered in a host commentary about the relationship between *Janus* and the long tradition in Catholic social thought of supporting unionization. The U.S. Conference of Catholic Bishops filed an amicus brief in the case supporting the union side, Bishop Frank Dewane (Bishop of Venice, Florida and Chairman of the USCCB Committee on

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and a corresponding ““area of labor combat”” is, as the Supreme Court has said, part and parcel of the structure of the Act. Labor peace is achieved under the Act by balancing the power of employers and employees, directing both parties to bargain in good faith, and giving each party wide discretion in the use of weapons should less adversarial tactics fail.

This vision of the collective bargaining process is deeply inconsistent with the Church’s vision. For the Church, the animating spirit in labor-management relations must be one of brotherhood and cooperation. . . . Thus, for the Church, the collective bargaining process is not one where the parties necessarily proceed from antagonistic viewpoints and concepts of self-interest. To the contrary, each party must try to understand the other’s position, even put themselves in the other’s position, and genuinely seek reasoned interchange and a harmonious outcome. The common good, not merely common ground, should be the object of the negotiating process, and the primary motivation for reaching agreement should be love, not fear.

<sup>42</sup> In an article that is generally skeptical of the risk posed by NLRB jurisdiction, Susan Stabile notes that religiously affiliated schools already willingly subject themselves to accreditation agencies and other external influences—though it is not clear whether and to what extent such accreditation requirements might be in conflict with the religious mission of Catholic colleges and universities. See *Blame It on Catholic Bishop*, 39 *Pepperdine L. Rev.* 1317, 1333 (2013):

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

Domestic Justice and Human Development) issued a statement<sup>43</sup> expressing disappointment with the decision in *Janus*, and Catholic journalist Michael Sean Winters condemned the decision.<sup>44</sup> On the other side, Bishop Thomas Paprocki of Springfield, Illinois tweeted approval for the outcome in *Janus* because of concerns that public sector unions were strongly in favor of abortion.

There are at least a couple of lingering issues that warrant clarification in this dispute over *Janus* and Catholic social teaching on unionization, which also goes to the question of whether Catholic institutions can resist NLRB jurisdiction over adjunct faculty unionization consistent with their own Church's views. One of the consistent themes in the arguments for the outcome in *Janus* is that agency shop arrangements in the public sector are meaningfully different than such arrangements in the private sector. The “management” on the other side of the bargaining table in public employment is the state whose leaders are the subject of lobbying and political support from the public employee union. *Rerum Novarum* and the ensuing line of Catholic teaching on unionization were primarily addressed to the urgent necessity of unions for trade workers in the *private* sector. In light of the rise of wage labor amid industrialization, Leo XIII focused on the problem of commutative justice and how the formation of workers' associations would be ordered to the common good.

That does not entail, of course, that Catholic social teaching is irrelevant to public sector unions—but the more fruitful conversation might be somewhere in between the view that Catholic social thought on unions applies simply and conterminously between public and private sector unions and the view that Catholic social thought has nothing to do at all with public employee unions. Do the principles of Catholic social thought supporting the rights of workers to

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<sup>43</sup> <http://www.usccb.org/news/2018/18-111.cfm>

<sup>44</sup> <https://www.ncronline.org/news/opinion/distinctly-catholic/janus-decision-was-blow-workers-point-way-forward>

organize apply with full or modified force in the public sector union context? There is a long scholarly literature (with which Catholic social teaching has not engaged) about public sector bargaining that highlights the inelastic demand for services and bargaining power of public employee unions, with important policy and economic consequences.<sup>45</sup> And while this dispute is tangential to the argument about adjunct faculty unionization, it does point out the complexity of Catholic social teaching on unions and the need for elaboration of that teaching in different unionization contexts.

Similarly, the fit between First Amendment speech and associational arguments (including religious freedom associational arguments) and Catholic social teaching on unions has been neglected. As presented in litigation, *Janus* was foremost a case about the scope of *First Amendment rights* and not about whether unionization is valuable in the abstract. Specifically, the case was about the claim by plaintiffs such as Mark Janus that the payment of an agency fee amounted to compulsory subsidization of political activity (and more precisely, that *Abood*'s distinction between chargeable expenses for collective bargaining activities and expenses for political activities was not sustainable). Both the majority opinion by Justice Alito and the dissent by Justice Kagan in *Janus* assumed agency fees pose *some* plausible First Amendment burden on employees such as Janus. Their disagreement was over whether that burden runs headlong into a "no compelled speech" principle (majority) or whether that burden is justified by a deferential, lower level of scrutiny derived from the government employee speech line of cases coming out of *Pickering v. Board of Education* (dissent).

Catholic social teaching probably underdetermines the answer to this First Amendment problem, in large part because Catholic social teaching on rights of workers' associations begins

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<sup>45</sup> Harry H. Wellington and Ralph K. Winter, *The Limits of Collective Bargaining in Public Employment*, 78 Yale L.J. 1107 (1969).

with a thick understanding of the common good and civil society (which is served by maintenance of a living wage for laborers to support the family) and gets around belatedly to rights of freedom of expression. Catholic social thought has not developed much by way of an account of why and when freedom of speech and association should be legally protected, and Millian liberal or “marketplace of ideas” accounts presumably sit uneasily with the Catholic understanding of law and politics. Apart from a passing mention of freedom of speech in Pope John XXIII’s *Pacem in Terris* in 1963 or perhaps by derivation from religious freedom in the 1965 declaration *Dignitatis Humanae* at Vatican II, there just is not much in the Catholic tradition about freedom of speech and association, at least in the way those freedoms are understood by the First Amendment. Even John Courtney Murray—usually associated with an irenic assimilation of Catholic political thought and American constitutional law—struggled to square the Catholic commitment to the “moral basis of government” and “ordered liberty” with the then-nascent U.S. Supreme Court caselaw on free speech in the 1940s and 1950s.<sup>46</sup> All of which is not to say that Catholic social teaching does not speak to the question at all (and perhaps says all the worse for the individualism of American constitutional rights discourse), only that Catholic social teaching does not straightforwardly resolve the constitutional questions posed by unionization.

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<sup>46</sup> John Courtney Murray, S.J., *The Problem of Free Speech*, 1 *Philippine Studies* 107 (September 1953).