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# TO SOLVE IT ARIGHT: *RERUM NOVARUM* AND NEW JERSEY'S ANSWER TO *CATHOLIC BISHOP OF CHICAGO*

Daniel T. Paxton\*

## I. INTRODUCTION

Pope Leo XIII's landmark *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor* ("*Rerum Novarum*") for the first time in the history of the Catholic Church explicitly conveyed support for organized labor.<sup>1</sup> In *Rerum Novarum*, the pope identified the income inequality of the period, and decried the deplorable circumstances endured by most of the world's working class people.<sup>2</sup> The pope described what he considered

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\* Law Clerk to the Honorable Menelaos W. Toskos, J.S.C., Superior Court of New Jersey, Chancery Division, General Equity Part. J.D., Seton Hall University School of Law; B.A. Rutgers College. I would like to thank Professor Angela Carmella for her teaching, and my father for his example.

<sup>1</sup> Pope Leo XIII, Encyclical Letter, *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor* 49 (1892) [hereinafter *Rerum Novarum*] ("[T]he most important of all [aid organizations] are workmen's unions . . . . 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."). The Catholic Church acknowledges the innovation of *Rerum Novarum* while noting its connection to its doctrinal forebears:

The Church's concern for social matters certainly did not begin with that document, for the Church has never failed to show interest in society. Nonetheless, the Encyclical Letter *Rerum Novarum* marks the beginning of a new path. Grafting itself onto a tradition hundreds of years old, it signals a new beginning and a singular development of the Church's teaching in the area of social matters. *In her continuous attention to men and women living in society, the Church has accumulated a rich doctrinal heritage.* This has its roots in Sacred Scripture, especially the Gospels and the apostolic writings, and takes on shape and body beginning from the Fathers of the Church and the great Doctors of the Middle Ages, constituting a doctrine which, even without explicit and direct Magisterial pronouncements, the Church gradually came to recognize her competence.

PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH 39 (2004) [hereinafter PONTIFICAL COUNCIL] (emphasis in original).

<sup>2</sup> *Rerum Novarum supra* note 1, at 1 (noting "the enormous fortunes of some few individuals, and the utter poverty of the masses"); *id.* at 47 ("For, the result of civil change and revolution has been to divide cities into two classes separated by a wide chasm. On the one side there is the party which holds power because it holds wealth;

the unacceptable situations that befell these people: endless hours that sapped health and inhibited religious observance, rock-bottom wages resulting from coercion, dangerous and sometimes life-threatening working conditions, and no collective voice to seek change and redress.<sup>3</sup> In cases where these ills existed, the pope made clear that the aid and the authority of the state should be invoked on behalf of wage-earners.<sup>4</sup>

*Rerum Novarum* praised Catholics who supported labor unions and their focus on the improvement of working conditions, wages, and collective action.<sup>5</sup> While calling on the

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which has in its grasp the whole of labor and trade; which manipulates for its own benefit and its own purposes all the sources of supply, and which is not without influence even in the administration of the commonwealth. On the other side there is the needy and powerless multitude, sick and sore in spirit and ever ready for disturbance.”); *id.* at 2 (“[S]ome opportune remedy must be found quickly for the misery and wretchedness pressing so unjustly on the majority of the working class.”). Msgr. William Murphy explains that Pope Leo XIII acted on behalf of people’s economic welfare long before he wrote *Rerum Novarum*. William Murphy, *Rerum Novarum, in A CENTURY OF CATHOLIC SOCIAL THOUGHT: ESSAYS ON ‘RERUM NOVARUM’ AND NINE OTHER KEY DOCUMENTS* 1, 5 (George Weigel & Robert Royal eds., 1991). In his time as Bishop of Perugia, Pope Leo XIII (then Bishop Pecci) “took an active interest in the social and economic conditions of the people of his diocese and helped organize cooperatives that offered people not only the money they needed for agricultural development but also food in times of scarcity.” *Id.*

<sup>3</sup> *Rerum Novarum supra* note 1, at 42 (“[T]he first thing of all to secure is to save unfortunate working people from the cruelty of men of greed, who use human beings as mere instruments for money-making. It is neither just nor human so to grind men down with excessive labor as to stupefy their minds and wear out their bodies.”); *id.* at 40–41 (“The working man, too, has interests in which he should be protected by the State . . . . From this follows the obligation of the cessation from work and labor on Sundays and certain holy days.”); *id.* at 45 (“[N]evertheless, there underlies a dictate of natural justice more imperious and ancient than any bargain between man and man, namely, that wages ought not to be insufficient to support a frugal and well-behaved wage-earner. If through necessity or fear of a worse evil the workman accept harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice.”).

<sup>4</sup> *Id.* at 36, 37 (“The richer class have many ways of shielding themselves, and stand less in need of help from the State; whereas the mass of the poor have no resources of their own to fall back upon, and must chiefly depend upon the assistance of the State. And it is for this reason that wage-earners, since they mostly belong in the mass of the needy, should be specially cared for and protected by the government.”).

<sup>5</sup> *Id.* at 55 (“Those Catholics are worthy of all praise—and they are not a few—who, understanding what the times require, have striven, by various undertakings and endeavors, to better the condition of the working class by rightful means. They have taken up the cause of the working man, and have spared no efforts to better the condition both of families and individuals; to infuse a spirit of equity into the mutual relations of employers and employed . . . . It is with such ends in view that we see men of eminence, meeting together for discussion, for the promotion of concerted action, and for practical work. Others, again, strive to unite working men of various grades into associations, help them with their advice and means, and enable them to obtain fitting

faithful to eschew oppressive policies in their own businesses, Pope Leo XIII also noted the integral role labor unions played in righting these wrongs.<sup>6</sup> The encyclical called on all people to work towards the goals championed by the unions.<sup>7</sup> With *Rerum Novarum*, Pope Leo XIII launched a tradition in the Catholic Church of recognizing the centrality of these organizations in defending working people.<sup>8</sup>

Despite the clarity of Pope Leo XIII's message and the doctrine it initiated, Catholic schools and universities in the

and profitable employment . . . We find therein grounds for most cheering hope in the future, provided always that the associations We have described continue to grow and spread, and are well and wisely administered.”)

<sup>6</sup> *Id.* at 20 (“The following duties bind the wealthy owner and the employer: not to look upon their work people as their bondsmen, but to respect in every man his dignity as a person ennobled by Christian character. They are reminded that, according to natural reason and Christian philosophy, working for gain is creditable . . . but to misuse men as though they were things in the pursuit of gain, or to value them solely for their physical powers—that is truly shameful and inhuman.”); *id.* at 60 (“At the time being, the condition of the working classes is the pressing question of the hour, and nothing can be of higher interest to all classes of the State than that it should be rightly and reasonably settled. But it will be easy for Christian working men to solve it aright if they will form associations, choose wise guides, and follow on the path which with so much advantage to themselves and the common weal was trodden by their fathers before them.”).

<sup>7</sup> *Rerum Novarum supra* note 1, at 61. (“Every one should put his hand to the work which falls to his share, and that at once and straightway, lest the evil which is already so great become through delay absolutely beyond remedy.”).

<sup>8</sup> See Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* 140 (1931) (“No less praise must be accorded the leaders of workers’ organizations who, disregarding their own personal advantage and concerned solely about the good of their fellow members, are striving prudently to harmonize the just demands of their members with the prosperity of their whole occupation and also to promote these demands, and who do not let themselves be deterred from so noble a service by any obstacle or suspicion.”); Pope John Paul II, Encyclical Letter, *Laborem Exercens* 20 (1981) [hereinafter *Laborem Exercens*] (“All these rights . . . give rise to yet another right: *the right of association*, that is to form associations for the purpose of defending the vital interests of those employed in the various professions. These associations are called *labour or trade unions*. . . . Catholic social teaching does not hold that unions are no more than a reflection of the “class” structure of society and that they are a mouthpiece for class struggle which inevitably governs social life. They are indeed a *mouthpiece for the struggle for social justice*, for the just rights of working people in accordance with their individual professions.”) (emphasis in original); PONTIFICAL COUNCIL, *supra* note 1, at 301–07 (“*The Magisterium recognizes the fundamental role played by labor unions, whose existence is connected with the right to form associations or unions to defend the vital interests of workers employed in the various professions.*”) (emphasis in original); Pope Benedict XVI, Encyclical Letter, *Caritas in Veritate* 25 (2009) (“The repeated calls issued within the Church’s social doctrine, beginning with *Rerum Novarum*, for the promotion of workers’ associations that can defend their rights must therefore be honoured today even more than in the past, as a prompt and far-sighted response to the urgent need for new forms of cooperation at the international level, as well as the local level.”).

United States have mostly rejected its call in their own labor relations.<sup>9</sup> The extent to which this rejection has occurred is shocking. At the primary and secondary level, approximately 1.9 million children attend 6,568 Catholic schools.<sup>10</sup> If the percentage of organized Catholic school teachers tracks the national percentage of organized private labor, only six percent of the teachers at those schools have unions.<sup>11</sup> In higher education, the conflict between church doctrine and church practice is even greater. The Council of Catholic Bishops lists over two hundred degree-granting institutions affiliated with the Catholic Church.<sup>12</sup> Only a small number of these schools recognize unions representing their employees.<sup>13</sup>

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<sup>9</sup> UNITED STATES CATHOLIC BISHOPS, Pastoral Letter, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* 353 (1986) (“All church institutions must also fully recognize the rights of employees to organize and bargain collectively with the institution through whatever association or organization they freely choose.”); Beth Griffin, *Adjunct faculty want to form union at Catholic university, two colleges*, CATHOLIC NEWS SERVICE (Aug. 12, 2013, 12:00 AM), <http://www.catholicnews.com/services/englishnews/2013/adjunct-faculty-want-to-form-union-at-catholic-university-two-colleges.cfm> (“As adjunct faculty members have become a larger percentage of the academic staff at colleges and universities, many have sought to unionize. Their efforts have been more successful at nonreligious private institutions than at Catholic ones.”); Michael Sean Winters, *Catholic Universities & Unions*, NATIONAL CATHOLIC REPORTER (Dec. 15, 2015), <https://www.ncronline.org/blogs/distinctly-catholic/catholic-universities-unions> (“Several Catholic universities are engaged in labor disputes, trying to deny their adjunct professors, or other employees, the right to organize a union.”); Nicholas G. Hahn III, *Unions Take On Catholic Schools*, THE WALL STREET JOURNAL (Mar. 10, 2016, 6:45 PM), <http://www.wsj.com/articles/unions-take-on-catholic-schools-1457653526> (“Religious institutions of higher education have long opposed attempts by the National Labor Relations Board to assert authority over their faculty and staff.”). See also John Gehring, *Pope Francis, the labor movement’s best friend?*, CNN (Sept. 6, 2015), <http://www.cnn.com/2015/09/06/opinions/gehring-pope-francis-labor/> (“In 2011, when a coalition of more than 200 faith leaders in Ohio united to oppose a law that significantly weakened collective bargaining for public workers, the state’s Catholic bishops took a neutral position and stayed quiet.”).

<sup>10</sup> Dale McDonald and Margaret M. Schultz, *Synopsis: United States Catholic Elementary and Secondary Schools 2014-2015*, NAT’L CATHOLIC EDUC. ASSOC., <https://www.ncea.org/data-information/catholic-school-data> (last visited Oct. 15, 2015).

<sup>11</sup> *Economic News Release: Union Members Summary*, BUREAU OF LABOR STATISTICS (Jan. 23, 2015), <http://www.bls.gov/news.release/union2.nr0.htm> (“Public-sector workers had a union membership rate (35.7 percent) more than five times higher than that of private-sector workers (6.6 percent).”). However, the same report states, “Workers in education, training, and library occupations and in protective service occupations had the highest unionization rate, at 35.3 percent for each occupation group.” *Id.*

<sup>12</sup> UNITED STATES COUNCIL OF CATHOLIC BISHOPS, *Catholic Colleges and Universities in the United States*, <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/higher-education/catholic-colleges-and-universities-in-the-united-states.cfm>.

<sup>13</sup> Daniel Petri, *Catholic Universities Should Be Pro-Union*, MILLENNIAL (Apr. 7,

The few workers who have managed to gain the labor rights that Pope Leo XIII and more than one hundred years of Catholic doctrine proclaimed they deserved had to fight for them.<sup>14</sup> Catholic schools have opposed unionization at almost every turn.<sup>15</sup> Their efforts to do so have been bolstered by the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago* ("Catholic Bishop").<sup>16</sup>

In that case, the Court avoided addressing the claims of teachers at Catholic schools seeking to organize by interpreting federal law to deny the National Labor Relations Board ("NLRB" or "the Board") jurisdiction over the dispute.<sup>17</sup> To buttress its creation of a novel employer exclusion to the National Labor Relations Act ("NLRA" or "the Act"), the Court noted that this decision allowed it to sidestep a constitutional ruling regarding the Religion Clauses of the First Amendment.<sup>18</sup> Subsequent conflicting decisions by the NLRB

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2015), <http://millennialjournal.com/2015/04/07/catholic-universities-should-be-union/> ("What's even more alarming, however, is the mere 23% of college/university level educators who are represented by unions.").

<sup>14</sup> See e.g. Winters, *supra* note 9; Anne Hendershott, *NLRB Makes Inroads at Catholic Colleges*, CATHOLIC WORLD REPORT (Feb. 12, 2015), [http://www.catholicworldreport.com/Item/3690/nlr\\_b\\_makes\\_inroads\\_at\\_catholic\\_college\\_s.aspx](http://www.catholicworldreport.com/Item/3690/nlr_b_makes_inroads_at_catholic_college_s.aspx) ("Adjunct faculty members at [Manhattan College in Riverdale, St. Xavier University in Chicago, and Seattle University] had been denied the ability to unionize because the schools are 'religious institutions.' School leaders had attempted to block unionization, claiming such efforts posed a threat to their schools' religious character."); Tom Suhrbur, *Not In My Backyard: St. Xavier University Fights Union Organizing*, NATIONAL EDUCATION ASSOCIATION (Nov. 15, 2011), <http://www.nea.org/home/47699.htm> (discussing St. Xavier University's opposition to unionization of its adjunct faculty even though the university has never objected to its full-time faculty union, and suggesting the reason for the difference is the national affiliation of the proposed adjunct union). *But see* Griffin, *supra* note 9 ("Adjunct faculty at Georgetown University in Washington won union representation quickly and without resistance from the administration . . .").

<sup>15</sup> See Winters, *supra* note 9; Hendershott, *supra* note 14; *Local NLRB: Manhattan Adjuncts May Tally Union Vote*, INSIDE HIGHER ED (Aug. 27, 2015), <https://www.insidehighered.com/quicktakes/2015/08/27/local-nlr-b-manhattan-adjuncts-may-tally-union-vote> ("A regional National Labor Relations Board office said Wednesday that adjuncts at Manhattan College may count their union election votes. The ballots have been impounded since 2011, when the Roman Catholic college objected to NLRB jurisdiction over its campus, citing its religious affiliation.").

<sup>16</sup> *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 504 (1979).

<sup>17</sup> *Id.*

<sup>18</sup> National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (2012) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act . . . or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor

and lower courts regarding jurisdiction over teachers and the religious schools at which they work have made the organizing ability of teachers at Catholic schools ambiguous.<sup>19</sup>

This Article will argue that the Board's newly announced *Pacific Lutheran* test, while an improvement over the D.C. Circuit's gossamer *Great Falls* test, will ultimately be rejected by the Supreme Court, despite its similarity to the ministerial exception the Court recognized in *Hosanna-Tabor*.<sup>20</sup> To remedy this problem and to ensure the NLRA provides robust protection for employees of religious schools, the Board should adopt the New Jersey Supreme Court's *St. Teresa* test: when secular contract terms are in controversy, state jurisdiction is appropriate because it does not offend the Religion Clauses of

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organization."); *Catholic Bishop of Chicago*, 440 U.S. at 497; U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .").

<sup>19</sup> See generally *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1985) (denying the Board's asserted jurisdiction since the school held itself out as a Catholic institution, faculty could be punished for behavior violating religious rules, and the administration of the school was dominated by the founding religious order); *Jewish Day School*, 283 NLRB 757 (1987) (finding a lack of jurisdiction due to the prevalence of Judaic studies and practice in the school); *Livingstone College*, 286 NLRB 1308 (1987) (finding jurisdiction where the teachers were not required to support the church, the school's main goals were secular, and the church was absent from daily administrative activities); *University of Great Falls v. NLRB*, 278 F.3d 1335, 1347 (D.C. Cir. 2002) (denying the Board's asserted jurisdiction and establishing a three-prong test to determine jurisdiction over religious schools that asks whether (1) the school holds itself out to the community, faculty, and students as a religious institution, (2) the school is organized as a nonprofit, and (3) the school is controlled, owned, operated by, or affiliated with, directly or indirectly, a recognized religious organization or an entity that determines membership partly by reference to religion); *Pacific Lutheran University*, 361 NLRB 157 (2014) (finding jurisdiction and creating a new test combining the *Great Falls* test with an element of the Supreme Court's newly recognized ministerial exception).

<sup>20</sup> *Pacific Lutheran*, 361 NLRB at 161. The Board set the following requirements for a religious school to escape its jurisdiction over labor disputes: (1) the school must hold itself out "as providing a religious educational environment," and (2) the school must hold out the petitioning faculty as "performing a specific role in creating or maintaining the school's religious educational environment."; *Great Falls*, 278 F.3d at 1347; *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S. 171 (2012) ("We agree [with the Courts of Appeals] that there is such a ministerial exception. The members of a religious group put their faith in the hands of their ministers. Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. . . . By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According to the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.").

the First Amendment.<sup>21</sup> The Board should clarify that this jurisdiction includes the NLRA's traditional protections for recognition rights, bargaining rights, and grievance procedures.<sup>22</sup>

Part II of this Article will discuss the seminal cases and the various tests they have applied bearing on the issue of union organization at religious schools. Part III will show that the New Jersey Supreme Court's reasoning in *St. Teresa*, implementing the New Jersey State Constitution's right to organize, protects workers' rights while avoiding the shortcomings and pitfalls associated with *Great Falls* and *Pacific Lutheran*. Part IV will argue that Catholic schools in particular should welcome strong labor protections for employees because those protections are consonant with more than a century of Catholic social doctrine regarding labor.<sup>23</sup>

## II. CATHOLIC SCHOOLS AND LABOR: FROM *CATHOLIC BISHOP TO PACIFIC LUTHERAN*

### A. Catholic Bishop *and the Constitutional Floor*

In 1979, a closely divided Supreme Court decided *NLRB v. Catholic Bishop of Chicago*, holding that Congress failed to clearly express an affirmative intention to protect teachers in

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<sup>21</sup> *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elem. Sch.*, 696 A.2d 709, 718 (N.J. 1997) (“By limiting the scope of collective bargaining to secular issues such as wages and benefit plans, neutral criteria are used to insure that religion is neither advanced nor inhibited. . . . In the present case, the State would require only that the Diocese recognize the lay teachers’ right to bargain collectively over wages, benefits, and any other terms and conditions required by the agreement with the lay high-school teachers. The State would not force the Diocese to negotiate terms that would affect religious matters.”).

<sup>22</sup> National Labor Relations Act § 8(a), 29 U.S.C. § 168 (2012).

<sup>23</sup> See *Rerum Novarum*, *supra* note 1; *Laborum Exercens*, *supra* note 8; U.S. Catholic Bishops, *Forming Consciences for Faithful Citizenship*, (2007). It is possible that an improvement in labor protections at Catholic schools may also lead to an improvement in education at those schools. This change may in turn help to address declining enrollments at Catholic high schools and elementary schools. See generally DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS (2013); Adam Clark, *By the numbers: N.J. Catholic school education*, NJ ADVANCE MEDIA FOR NJ.COM (Sep. 21, 2015), [http://www.nj.com/education//2015/09/the\\_decline\\_in\\_catholic\\_education\\_by\\_the\\_nu.html](http://www.nj.com/education//2015/09/the_decline_in_catholic_education_by_the_nu.html) (“Since its peak in the 1960s, Catholic school education has experienced a decline in enrollment over the past half century in New Jersey and throughout America. As the number of students has dropped—there are fewer than half as many students enrolled in Catholic school in New Jersey now (82,978) as there were in 1980 (190,800)—schools across the state have been shuttered.”).



church-operated schools in the NLRA.<sup>24</sup> As a result, the Court concluded, the Board had no jurisdiction in a labor dispute between the teachers who were attempting to organize and the two dioceses.<sup>25</sup> The Court based its decision on the prudential doctrine of constitutional avoidance.<sup>26</sup> By finding the NLRB lacked jurisdiction, the Court dodged a construction of the NLRA that would require it to address difficult issues about the relationship between labor and the Religion Clauses of the First Amendment.<sup>27</sup>

This decision prevented two groups of lay teachers (approximately 226 people) from receiving NLRB certification of their representation by two local unions.<sup>28</sup> Teachers in the Quigley North and the Quigley South minor seminary schools operated by the Catholic Bishop of Chicago had joined the Quigley Educational Alliance, an affiliate of the Illinois Education Association.<sup>29</sup> Teachers in five high schools operated by the Diocese of Fort Wayne-South Bend, Inc. had selected the Community Alliance for Teachers of Catholic High Schools to represent them.<sup>30</sup>

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<sup>24</sup> NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 504 (1979). The 5–4 majority opinion was delivered by Chief Justice Burger and joined by Justices Stewart, Powell, Rehnquist, and Stevens. *But see id.* at 516 (“In construing the Board’s jurisdiction to exclude church-operated schools, therefore, the Court today is faithful to neither the statute’s language nor its history. Moreover, it is also untrue to its own precedents.”) (Brennan, J. dissenting); *cf.* KENNETH G. DAU, ET AL., LABOR LAW IN THE CONTEMPORARY WORKPLACE 167 (2009) (quoting 29 U.S.C. § 164(e)) (suggesting that the NLRB could decline to exercise jurisdiction over the employment of teachers in religious elementary and secondary schools under the discretionary power reserved in § 14(c)(1) of the NLRA because labor disputes involving such schools have an effect on commerce that is “not sufficiently substantial.”).

<sup>25</sup> *Catholic Bishop*, 440 U.S. at 506 (“The absence of an ‘affirmative intention of the Congress clearly expressed’ fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.”).

<sup>26</sup> *Id.* at 500 (stating that “an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available”) (internal citations omitted). For historical background on the doctrine of constitutional avoidance, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 76–80 (6th ed. 2009). For criticism of the doctrine, see Frederick Schauer, *Ashwander Revisited*, 1995 Sup. Ct. Rev. 71, 74 (arguing that “in interpreting statutes so as to avoid ‘unnecessary’ constitutional decisions, the Court frequently interprets a statute in ways that its drafters did not anticipate, and . . . may not have preferred . . . [This practice] involves paying a price for the benefits thought to come from judicial reticence”).

<sup>27</sup> *Catholic Bishop*, 440 U.S. at 507.

<sup>28</sup> *Id.* at 494.

<sup>29</sup> *Id.* at 492, 494.

<sup>30</sup> *Id.* at 494. Professor Susan Stabile argues that the Court’s decision applies

Despite prevailing in elections supervised by the NLRB, both unions were denied recognition by management.<sup>31</sup> Additionally, the management of the church-operated schools refused to bargain with the unions.<sup>32</sup> These actions contravened the rights of the teachers to form labor unions and to bargain collectively with their employers under section 8(a)(1) and (5) of the NLRA, respectively.<sup>33</sup> Consequently, the unions filed unfair labor practice complaints with the Board pursuant to those provisions.<sup>34</sup>

Justice Brennan's withering dissent (in which he was joined by Justices White, Marshall, and Blackmun) called for NLRB jurisdiction.<sup>35</sup> According to Justice Brennan, the Court's decision ignored the NLRA's language, its legislative history, and the Court's own precedents.<sup>36</sup> Moreover, the Court's newly minted requirement of affirmative expression on the part of Congress would allow "wholesale judicial dismemberment of congressional enactments."<sup>37</sup>

Regarding the Act's language, Justice Brennan noted that the NLRA listed specific exclusions that did not include religious institutions.<sup>38</sup> On the issue of the NLRA's legislative history, Congress's rejection of exemptions similar to those

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only to parochial grade and high schools and therefore does not bar NLRB jurisdiction over colleges and universities in every situation. Susan Stabile, *Blame It on Catholic Bishop: The Question of NLRB Jurisdiction Over Religious Colleges and Universities*, 39 Pepp. L. Rev. 1317, 1329 (2013) ("Although *Catholic Bishop* uses the phrase "church-operated" school rather than parochial school, the language the court uses to talk about the risk of entanglement is descriptive of parochial schools but not typical of colleges and universities that are not seminary schools. The 'entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of religious faith,' which is not present at the university level."); *id.* at 1330 (quoting *NLRB v. Bishop Ford Cent. Catholic High Sch.*, 623 F.2d 818, 822 (2d Cir. 1980)). However, Prof. Stabile admits that then-Judge Breyer in *Bayamon*, as well as the D.C. Circuit in *Great Falls*, read *Catholic Bishop* as applying to both parochial schools and colleges and universities. *Id.* at 1329.

<sup>31</sup> *Catholic Bishop*, 440 U.S. at 494.

<sup>32</sup> *Id.*

<sup>33</sup> National Labor Relations Act § 8, 29 U.S.C. § 158(a)(1), (5) (2012).

<sup>34</sup> *Catholic Bishop*, 440 U.S. at 494.

<sup>35</sup> *Id.* at 508 (Brennan, J. dissenting).

<sup>36</sup> *Id.* at 511 (Brennan, J. dissenting).

<sup>37</sup> *Id.* (Brennan, J. dissenting).

<sup>38</sup> *Id.* (Brennan, J. dissenting). Section 2(2) of the Act excludes from its definition of employer (1) the United States, (2) any wholly owned Government corporation, (3) any Federal Reserve Bank, (4) any State, (5) political subdivisions of a State, (6) any person subject to the Railway Labor Act, (7) any labor organization, and (8) anyone acting in the capacity of officer or agent of such labor organization. National Labor Relations Act § 2(2), 29 U.S.C. § 152(2) (2012).

created by the Court was cited by Justice Brennan to demonstrate legislative intent contrary to the Court's holding.<sup>39</sup> Finally, the Court failed to distinguish its numerous prior decisions affirming the Board's jurisdictional coverage of any employer within Congress's reach under the Commerce Clause.<sup>40</sup>

Since the Court did not reach the constitutional issues, neither did Justice Brennan.<sup>41</sup> But the audacity of the majority's decision was clear: in the face of contrary language, legislative intent, and precedent, the Court denied teachers their chosen representatives by creating an exemption cut from whole cloth.

### 1. *The NLRB's response to Catholic Bishop*

Over the next twenty years, the NLRB responded to this ruling by developing a jurisprudence around determining the religiosity of an institution case by case.<sup>42</sup> Based on the outcome of this inquiry, the Board would then decide if exercising its jurisdiction would pose a considerable risk of violating that employer's First Amendment rights.<sup>43</sup> The substantial religious character test, as it became known, looked beyond an employer's mere association with a religious organization.<sup>44</sup> The Board assessed the employer's purpose, the involvement of the employees in achieving that purpose, and

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<sup>39</sup> *Catholic Bishop*, 440 U.S. at 512–15. (Brennan, J. dissenting) (“The Hartley bill, which passed the House of representatives in 1947, would have provided the exception the Court today writes into the statute. . . . But the proposed exception was not enacted. . . . Instead, the Senate proposed an exception limited to nonprofit hospitals, and passed the bill in that form. The Senate version was accepted by the House in conference, thus limiting the exception for nonprofit employers to nonprofit hospitals. Even that limited exemption was ultimately repealed in 1974. In doing so, Congress confirmed the view of the Act expressed here: that it was intended to cover all employers—including nonprofit employers—unless expressly excluded, and that the 1947 amendment excluded only nonprofit hospitals.”) (internal citations and footnotes omitted).

<sup>40</sup> *Id.* at 516–17 (Brennan, J. dissenting) (citing *Guss v. Utah Labor Board*, 353 U.S. 1, 3 (1957); *Polish Nat'l Alliance v. NLRB*, 322 U.S. 643, 647–48 (1944); *NLRB v. Fainblatt*, 306 U.S. 601, 607 (1939); *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963)) (internal quotations omitted).

<sup>41</sup> *Id.* at 518.

<sup>42</sup> *Univ. of Great Falls*, 331 NLRB 1663, 1664 (2000); *see also* *Livingstone College*, 286 NLRB 1301, 1309–10 (1987); *Jewish Day School*, 283 NLRB 757, 760–61 (1983); *Trustee of St. Joseph's Coll.*, 282 NLRB 65, 68 (1986).

<sup>43</sup> *Univ. of Great Falls*, 331 NLRB 1663, 1664 (2000).

<sup>44</sup> *Id.*

the likely effects should the Board find jurisdiction.<sup>45</sup>

Phrased in this manner, the substantial religious character test does not seem facially problematic as it pertains to the First Amendment. However, the factors the Board considered in its evaluation of religiously affiliated employers reveals its ultimately fatal shortcomings. As part of its substantial religious character analysis, the NLRB asked whether the school used religious requirements as part of its hiring and evaluation of faculty, to what extent the school had a religious curriculum and mission, and how involved the religious group was in the daily operation of the school.<sup>46</sup>

Perhaps unsurprisingly, given its weighing of the religiousness of a school's activities and purpose, the substantial religious character test and the NLRB's forays into jurisdiction over church-operated institutions by means of it were eventually rejected. In *Great Falls*, the D.C. Circuit Court characterized this test as the kind of trolling and intrusive examination that *Catholic Bishop* and the Religion Clauses expressly prohibited.<sup>47</sup>

## 2. *The Great Falls test*

In 2002, the D.C. Circuit expressly rejected the Board's substantial religious character test for jurisdiction in *Great Falls*. The court adopted a new test based on then-Judge Breyer's plurality opinion for the evenly divided First Circuit in *Universidad Central de Bayamon v. NLRB* ("the *Great Falls* test").<sup>48</sup> This test asks only whether the school (1) holds itself out as a religious school, (2) is nonprofit, and (3) is religiously affiliated.<sup>49</sup>

Teachers at the University of Great Falls ("the university" or "the school") organized with the Montana Federation of Teachers, only to be denied recognition by the university.<sup>50</sup> After successfully petitioning the Board for recognition, the

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1664–65.

<sup>47</sup> *University of Great Falls v. NLRB*, 278 F.3d 1335, 1342 (D.C. Cir. 2002) ("Here too we have the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University.")

<sup>48</sup> *Id.* at 1343.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 1337.

teachers asked the university to bargain collectively and were again denied.<sup>51</sup> The Board's Acting General Counsel then issued an unfair labor practice claim against the university, and the case was subsequently brought before the Board.<sup>52</sup>

The Board ruled in favor of the teachers, finding it proper to exercise jurisdiction under *Catholic Bishop* and the substantial religious character test. The Board held that the teachers continued to be represented by the Montana Federation of Teachers under section 9(a) of the NLRA and the teachers' bargaining rights under section 8(a)(5) and (1) of the NLRA had been violated by the university.<sup>53</sup>

But the teachers' success with the Board was rebuffed by the D.C. Circuit. The circuit court characterized the Board's proceedings as "trolling through the beliefs of the University" in the very manner the Supreme Court proscribed in *Catholic Bishop*.<sup>54</sup> Citing *Employment Division v. Smith* for the proposition that the Free Exercise Clause forbids judges from appraising the centrality of religious beliefs, the D.C. Circuit called the Board's behavior nothing less than a "dissection of life and beliefs at the University."<sup>55</sup> The court attributed this

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<sup>51</sup> *Id.* at 1338.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1339. The university's challenge to the Board's ruling also involved a claim that the Board's order to bargain collectively with the teachers would violate the Religious Freedom Restoration Act ("RFRA"). *Id.* at 1338. Since the D.C. Circuit Court denied the teachers recognition based on *Catholic Bishop*, it did not reach the university's RFRA objection. *Id.* at 1347. However, the Court did mention that the two questions are separate, and that schools not exempt under *Catholic Bishop* are not therefore barred from making a successful argument under RFRA. *Id.* Whether courts would permit the Board to protect employees' rights under the NLRA against a RFRA challenge falls outside the scope of this Article.

<sup>54</sup> *Id.* at 1342.

<sup>55</sup> *Employment Div. v. Smith*, 494 U.S. 872, 886–87 (1990); *Great Falls*, 278 F.3d at 1342–43. In its application of its view of *Smith* to administrative proceedings, the D.C. Circuit suggested that if judges must not determine the centrality of religious beliefs, that prohibition must apply to Regional Directors and the full Board, *a fortiori*: "It cannot be any more appropriate for a Regional Director or the full Board to engage in such a determination." *Id.* Notably absent from the court's opinion was any mention of *Smith's* more commonly cited holding, i.e., that the Free Exercise Clause does not exempt people from valid and neutral laws of general applicability. *Smith*, 494 U.S. at 879 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in the judgment)). At the federal level, Congress replaced *Smith's* standard with strict scrutiny by means of RFRA, though this enactment has been neither wholly successful nor without critics. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997) (finding RFRA unconstitutional as applied to states because it exceeds Congress's power under § 5 of the Fourteenth Amendment); Angela C. Carmella & Eugene Gressman, *The RFRA Revision of the Free Exercise Clause*, 57 *Ohio State L. J.* 65, 117 (1996) ("RFRA sets a dangerous prototype for future congressional fits of displeasure with Supreme

impermissible inquiry on the part of the Board to the substantial religious character test.<sup>56</sup> Adopting the criteria from *Bayamon*, the court found that the university satisfied all three parts easily.<sup>57</sup> As a result, the court refused to recognize the teachers seeking to organize and allowed the university to avoid collective bargaining.<sup>58</sup>

### 3. *The shortcomings of the Great Falls test*

The *Great Falls* test, which remains the D.C. Circuit's preference, is no test at all.<sup>59</sup> It fails to establish any meaningful check on institutions wishing to escape the reach of the NLRA by means of the *Catholic Bishop* exemption. Rather, it offers three simple prescriptions for schools to frustrate organizing among their faculty. The lack of adequate reasons for choosing these requirements and the ease with which each prong is met expose the D.C. Circuit's willingness to frustrate teachers' attempts to organize.

The D.C. Circuit provided scant substantiation for the usefulness of the *Great Falls* test. The first part of the test, that an institution holds itself out as religious, deserves particular attention here. The court provided a curious rationale for this prong, and it survives in the *Pacific Lutheran* test (where the Board adopted not only the prong but also one of the D.C. Circuit's reasons for supporting it).<sup>60</sup>

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Court rulings by giving impetus to future enactments of RFRA-type super-statutes.”).

<sup>56</sup> *Great Falls*, 278 F.3d at 1347.

<sup>57</sup> *Id.* at 1345.

<sup>58</sup> *Id.* at 1348.

<sup>59</sup> Whether the D.C. Circuit's decision in *Great Falls* is binding on the Board, even in that circuit, is unclear. Intracircuit nonacquiescence, as it is called, occurs when an agency refuses “to follow a circuit court's precedents even when acting subject to that circuit's, and no other circuit's, power of judicial review.” Dan T. Coenen, *The Constitutional Case Against Intracircuit Nonacquiescence*, 75 MINN. L. REV. 1339, 1341 (1991). Prof. Stabile states that *Great Falls* is not binding on the Board outside of the D.C. Circuit, implying that *Great Falls* is binding within the circuit. Stabile, *supra* note 30, at n.67. Oddly, Prof. Stabile then cites to a case where the Board holds that it alone decides whether to adhere to the rulings of circuit courts and that proceedings below must only consider the Board's precedents when issuing orders. *Id.* See *Ins. Agents' Int'l Union*, 119 NLRB 768, 773 (1957). This policy means that even in the D.C. Circuit, the Board may deviate from that court's precedents “until the Supreme Court of the United States has ruled otherwise.” *Id.*

<sup>60</sup> *Pacific Lutheran University*, 361 NLRB 157, 162–63 (2014) (“This threshold requirement will, however, allow the Board to dismiss claims from universities that assert they are religious organizations solely in an attempt to avoid the Board's jurisdiction.”). The Board also imports the D.C. Circuit's market-check reasoning to the employment context to support the second component of its *Pacific Lutheran* test, i.e.,

The court explained the need for the first part of the test by saying “it will help to ensure that the [*Catholic Bishop*] exemption is not given to wholly secular institutions that attempt to invoke it solely to avoid Board jurisdiction.”<sup>61</sup> Imposing this requirement for this reason suggests two difficult-to-support implications: (1) completely secular schools exist that, in response to their employees’ attempt to organize, claim that they in fact provide a religious educational environment, even though they have never stated this position before, to foil their employees’ plans, and (2) courts are unable to identify that chicanery without an explicit command to do so.

Regarding the first possibility, the court gave no examples at all of institutions that have attempted this particular course of action.<sup>62</sup> Similarly, the court offers no support for the need to tell courts to be wary of such behavior. So, what work is this prong actually doing?

The D.C. Circuit revealed that the effect of this requirement

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that a university must hold out faculty wishing to unionize as performing religious functions to further the school’s religious mission. *Id.* at 165. Regarding the D.C. Circuit’s support for the other two prongs of the *Great Falls* test, the court offered very little. The D.C. Circuit justified the nonprofit requirement by noting the simplicity of evaluating it: “[I]t is hard to draw a line between the secular and religious activities of a religious organization. However, it is relatively straightforward to distinguish between a non-profit and a for-profit entity.” *Great Falls*, 278 F.3d at 1344 (internal citations omitted). For the third part of the test, that the school must be religiously affiliated, the court mustered only one sentence: “Finally, as we observed above, the third element, at least in its simplest form, is directly analogous to *Catholic Bishop*.” *Id.* at 1344–45.

<sup>61</sup> *Great Falls*, 278 F.3d at 1344.

<sup>62</sup> For information regarding the tactics schools and businesses in fact use to prevent teachers and other employees from organizing, see e.g., ALLIANCE EDUCATORS UNITED, *Alliance Refuses to Settle; Educators File New Charges*, (Aug. 24, 2015), <http://www.allianceeducators.com/alliance-refuses-to-settle-violations-educators-file-new-charges/> (“Management has attempted to block the teachers’ drive to organize a union by threatening individual teachers with poor evaluations if they engage in union activity. In addition, teacher emails have been blocked; principals told teachers that they couldn’t hand out union information fliers on their off-time; and union members and organizers have been denied their right to have access to speak with other educators during break time on school property.”); Kate Bronfenbrenner, Briefing Paper, *No Holds Barred: The Intensification of Employer Opposition to Organizing*, ECONOMIC POLICY INSTITUTE (May 20, 2009), [http://epi.3cdn.net/edc3b3dc172dd1094f\\_0ym6ii96d.pdf](http://epi.3cdn.net/edc3b3dc172dd1094f_0ym6ii96d.pdf) (“[E]mployers use supervisor one-on-ones to threaten workers for union activity in 54% of campaigns and to interrogate workers about their union activities and that of coworkers in at least 63% of campaigns. In addition to interrogation, 14% of employers use surveillance, primarily electronic (11%), and 28% of employers attempt to infiltrate the organizing committee in order to learn more about union supporters and activity.”).

is not to prevent charlatans from gaining the exemption. Instead, the first prong blocks any policing of the exemption, thus clearing the way for more schools to exploit it. If schools publicly display their religiousness, the court said, they are inoculated against judicial scrutiny because “[w]here a school, college, or university holds itself out publicly as a religious institution, ‘we cannot doubt that [it] sincerely holds this view.’”<sup>63</sup> Here, the court makes clear, the public display of religiousness *ipso facto* forbids further review. The D.C. Circuit shuns any sort of analysis regarding a significant immunity from federal law in favor of a policy that boils down to “if you say it, you get it.”

The D.C. Circuit’s own relaxed inquiry into the university’s satisfaction of this prong demonstrates the ease with which any institution can pass it. The court refers specifically to the university’s course catalogue, mission statement, and student bulletin.<sup>64</sup> These representations were enough to convince the court that the university fulfilled the first requirement.<sup>65</sup> While considering those documents does avoid entanglement with religious issues, it also fails to support the court’s stated goal of “provid[ing] reasonable assurance that the *Catholic Bishop* exemption will not be abused.”<sup>66</sup>

The superficiality of the court’s analysis is evident. Any novice web-designer would be able to create a website that included those dispositive materials. This is not to say that institutions engage in such deceptive behavior to gain the exemption (as the court implies they do). The point is that the court’s stated need for the public display of religiousness—protecting the exemption from abuse—is not in any way addressed by the first prong. As the University of Great Falls’s own website shows, nothing more is needed to meet this aspect of the *Great Falls* test.<sup>67</sup> The simplicity of passing the first

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<sup>63</sup> *Great Falls*, 278 F.3d at 1344 (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000)).

<sup>64</sup> *Id.* at 1345 (mentioning “other documents” as well). In support of its finding that the university holds itself out as a religious institution, the court also says that the university’s campus, classrooms, and offices contain Catholic icons. Since the claim that the school’s classroom and office placements of Catholic icons constitutes a public display is difficult to square with the meaning of the word “public,” it is unclear why this comment appears in the court’s reasoning.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> See UNIVERSITY OF GREAT FALLS, *Mission*, <http://www.ugf.edu/AboutUGF/Mission/tabid/83/Default.aspx>; UNIVERSITY OF GREAT



third of the test belies the court's purported goal. The requirement is not there to keep schools out, it is there to let schools in.

The second reason the D.C. Circuit offers to justify the holding out requirement is that it functions as a market check.<sup>68</sup> Schools that display their religious affiliation openly will suffer, the court claims, as a result of that representation.<sup>69</sup> As the court sees it, though the religious affiliation of the school will entice some prospective students and faculty, it will also deter others.<sup>70</sup> The court stops short of saying that the open religiousness of an institution discourages more people than it attracts, preferring the ambiguous characterization, "it comes at a cost."<sup>71</sup> This kind of response is desirable, the D.C. Circuit avers, because it too will aid in stanching the flood of schools representing themselves as religious merely to gain the *Catholic Bishop* exemption.<sup>72</sup>

Again, the D.C. Circuit declines to cite any authority to support these contentions. This failure may be the result of how notoriously difficult it is to explain consumer behavior.<sup>73</sup> Consumers buy things for a host of reasons, and those reasons differ widely from person to person.<sup>74</sup> While religious affiliation

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FALLS, *Undergraduate Catalogue*, <http://www.ugf.edu/Academics/Undergraduate/UndergraduateCatalog/tabid/237/Default.aspx>; University of Great Falls, Facebook Page, <https://www.facebook.com/ugfargos>.

<sup>68</sup> *Great Falls*, 278 F.3d at 1344.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See e.g., Stuart Elliott, *A Quest to Learn What Drives Consumer Decisions*, N.Y. TIMES (Jun. 29, 2010), <http://www.nytimes.com/2010/06/30/business/media/30adco.html> ("Understanding the foundation of consumers' behavior decisions has become more complex," [Michael Fassnacht, global chief strategic officer at Draftcb] added, as they 'consume more information and make decisions faster' than before. And the internet enables consumers to be 'in shopping and decision mode at the same time, 24/7,' Mr. Fassnacht said, which further complicates efforts to decipher their decision-making."); Robert H. Frank, *The Impact of the Irrelevant on Decision-Making*, N.Y. TIMES (May 29, 2010), <http://www.nytimes.com/2010/05/30/business/30view.html> ("[E]ven patently false or irrelevant information often affects choices in significant ways.")

<sup>74</sup> See, e.g., Todd Zywicki, "Consumer Credit and the American Economy," Part 3: *Behavioral economic analysis of consumer credit use*, THE VOLOKH CONSPIRACY (Oct. 14, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/15/consumer-credit-and-the-american-economy-part-3-behavioral-economics-analysis-of-consumer-credit-use/> ("[B]ehavioral economists . . . note that consumers often simplify, taking shortcuts and using 'rules of thumb.' Consumers are often satisfied to take small steps to goals . . . rather than making the

is often important to some consumers, its predictive accuracy is unreliable.<sup>75</sup>

The analysis of consumer behavior is even more muddled when it comes to higher education. Popular ratings services such as *U.S. News and World Report* strongly influence this market.<sup>76</sup> Worse for the D.C. Circuit's rationale for requiring open religiousness from schools is that Catholic colleges and universities in particular have seen their enrollment grow over the past decade.<sup>77</sup> This trend has occurred in the face of data showing that fewer and fewer people identify themselves as practicing Catholics.<sup>78</sup> So while it might be true that the religious affiliation of a school, in some difficult-to-articulate way, matters to the market, the idea that this holding out comes at a cost is probably inaccurate.<sup>79</sup>

The problems of the *Great Falls* test, from its inefficacy regarding its stated goal, to the court's ill-conceived rationale

effort to achieve the optimum. Culture, group membership, attitudes, past experience, and even biases may influence the decision process.”); *Understanding Why People Buy*, BLOOMBERG BUSINESS (Aug. 8, 2005), <http://www.bloomberg.com/bw/stories/2005-08-08/understanding-why-people-buy>; Alain Samson, *Seven Reasons Why We're Irrational Shoppers*, PSYCHOLOGY TODAY (Sept. 25, 2013), <https://www.psychologytoday.com/blog/consumed/201309/seven-reasons-why-were-irrational-shoppers> (identifying marketing, imitation, impulsiveness, hedonism, “hot states,” states of mind such as distraction, and habit as influencing consumer behavior).

<sup>75</sup> Jessica M. Bailey and James Sood, *The Effects of Religious Affiliation on Consumer Behavior: A Preliminary Investigation*, 5 J. OF MANAGERIAL ISSUES 328 (1993).

<sup>76</sup> See Eleanor Barkhorn, *College Rankings Really Do Influence Which Schools Students Apply To*, THE ATLANTIC (Jan. 17, 2014), <http://www.theatlantic.com/education/archive/2014/01/college-rankings-really-do-influence-which-schools-students-apply-to/283151/> (“Being on *U.S. News's* top 25 list led a school's applications to go up between six and 10 percent.”). *But see* Bob Morse, *Freshman Students Say Rankings Aren't Key Factor in College Choice*, U.S. NEWS & WORLD REPORT (Jan. 31, 2013, 10:30 AM), <http://www.usnews.com/education/blogs/college-rankings-blog/2013/01/31/freshmen-students-say-rankings-arent-key-factor-in-college-choice> (stating that college rankings placed twelfth out of twenty-three possible reasons students could choose as very important factors in deciding which school they attended).

<sup>77</sup> ASSOCIATION OF CATHOLIC COLLEGES AND UNIVERSITIES, *FAQs*, <http://www.accunet.org/i4a/pages/index.cfm?pageid=3797#sthash.Lqc76FSO.dpbs> (noting that in the 2012–2013 academic year, Catholic post-secondary schools educated 939,907 students, whereas in the 2000–2001 academic year, that number was 577,961).

<sup>78</sup> PEW RESEARCH CENTER, *America's Changing Religious Landscape*, (May 12, 2015), <http://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/> (“Catholics appear to be declining both as a percentage of the population and in absolute numbers.”).

<sup>79</sup> Richard Perez-Pena, *Muslims From Abroad Are Thriving in Catholic Colleges*, N.Y. TIMES (Sept. 2, 2012), [http://www.nytimes.com/2012/09/03/education/muslims-enroll-at-catholic-colleges-in-growing-numbers.html?\\_r=0](http://www.nytimes.com/2012/09/03/education/muslims-enroll-at-catholic-colleges-in-growing-numbers.html?_r=0).

behind it, demonstrate the need for something better. With the *Pacific Lutheran* test, the Board attempted to fashion a compromise that would satisfy the D.C. Circuit's First Amendment concerns while still allowing the Board to carry out its mandate under the NLRA.

#### 4. *The Pacific Lutheran test*

In 2014, the NLRB asserted jurisdiction over adjunct professors attempting to organize at Pacific Lutheran University ("PLU") in Tacoma, Washington.<sup>80</sup> The Board declined to use the *Great Falls* test as the D.C. Circuit had formulated it.<sup>81</sup> Instead, the Board combined an element of the *Great Falls* test with something similar to the ministerial exception to create a new test.

The *Pacific Lutheran* test mandates that for an institution to escape the NLRA by way of *Catholic Bishop*, it must (1) hold itself out as providing a religious educational environment, and (2) hold the petitioned-for faculty out as performing a religious function in furtherance of the institution's religious mission.<sup>82</sup> The Board stated the new test is sensitive to its statutory duty to assert the broadest jurisdiction permissible under the Commerce Clause while also being faithful to *Catholic Bishop*.<sup>83</sup>

The Board characterized the first part of its test as a threshold question.<sup>84</sup> Evidence that would make the appropriate showing includes corporate documents, course catalogues, handbooks, mission statements, and publications on a school's website.<sup>85</sup> To satisfy the demand of the second

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<sup>80</sup> *Pacific Lutheran University*, 361 NLRB 157, 168 (2014).

<sup>81</sup> *Id.* at 162. The Board framed its discussion of the inadequacy of the *Great Falls* test in such a way that suggests both the frailty of its components and the solution the Board offers in its new test:

Although this approach may avoid constitutionally problematic inquiries, it overreaches because it focuses solely on the nature of the institution, without considering whether the petitioned-for faculty members act in support of the school's religious mission. The *Great Falls* test could deny the protections of the Act to faculty members who teach in completely nonreligious educational environments if the college or university is able to point to any statement suggesting the school's—but not the faculty's—connection to religion, *no matter how tenuous that connection may be.*

*Id.* (emphasis added).

<sup>82</sup> *Id.* at 157.

<sup>83</sup> *Id.* at 161.

<sup>84</sup> *Id.* at 157.

<sup>85</sup> *Id.* at 162.

step, that faculty be held out by the school as executing a specific religious function, broad statements that all faculty must support the mission of the university will be insufficient.<sup>86</sup> An institution will need to provide evidence such as employment contracts, faculty handbooks, and statements made to accrediting bodies, prospective faculty, and students.<sup>87</sup>

For its inquiry into the threshold question, the Board reviewed the relevant materials from PLU and found that its public representations about its religiousness mostly espoused the school's acceptance of other faiths, its commitment to academic freedom, and an explicit de-emphasis of specific Lutheran dogma.<sup>88</sup> Nonetheless, the Board concluded that PLU holds itself out as providing a religious educational environment.<sup>89</sup> On the question of PLU's representations regarding its faculty, the Board's assessment was that "there is nothing . . . that would suggest to faculty (either existing or prospective), students, or the community that [PLU's] contingent faculty members perform any religious function."<sup>90</sup>

The Board's decision in *Pacific Lutheran* elicited two dissents aimed directly at the new test.<sup>91</sup> All three opinions laid claim to the Supreme Court's 2012 decision in *Hosanna-Tabor* recognizing for the first time a ministerial exception grounded

<sup>86</sup> *Id.* at 164 ("These types of representations do not communicate the message that the religious nature of the university affects faculty members' job duties or requirements. They give no indication 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>87</sup> *Id.*

<sup>88</sup> *Id.* at 168; *id.* at 167 ("The faculty handbook states, 'The university values as its highest priority excellence in teaching.' It describes PLU as '[s]teeped in the Lutheran commitment to freedom of thought.');" *id.* at 168 ("A specific reference to Lutheranism on PLU's website, appearing in a "Frequently Asked Questions" section for prospective students, downplays the religious character of the school:

Q: Do you have to be a Lutheran to attend PLU?

A: Not at all. Students of all faiths—or of no faith—attend PLU.

. . .

Q: Do I have to attend chapel?

A: No. . . . PLU was founded by Scandinavian immigrants, so Lutheran heritage is very important to our school, but that doesn't mean it will be forced on you. . . . There are many religious opportunities that are offered on and off-campus for people of all faiths.").

<sup>89</sup> *Id.* at 167.

<sup>90</sup> *Id.* at 170.

<sup>91</sup> *Id.* at 182 (Miscimarra, Member, concurring in part and dissenting in part); *id.* at 183 (Johnson, Member, dissenting).

in the Religion Clauses of the First Amendment.<sup>92</sup> The similarity between the *Pacific Lutheran* test and the ministerial exception described by the Supreme Court in *Hosanna-Tabor* raises the question: would the Board's new test secure the High Court's approval?

##### 5. Pacific Lutheran *and* Hosanna-Tabor

The *Hosanna-Tabor* decision arose from a suit filed by a teacher, Cheryl Perich, under the Americans with Disabilities Act ("ADA") against the Hosanna-Tabor Evangelical Lutheran School.<sup>93</sup> Perich alleged that she had been fired in retaliation for asserting her rights under the ADA.<sup>94</sup> She had been diagnosed with narcolepsy at the end of the 2003–2004 school year, and began the next school year on disability leave.<sup>95</sup> After the administration replaced Perich without notice, asked her to resign, and barred her from the school, Perich explained to the school that she intended to seek legal recourse.<sup>96</sup> Hosanna-Tabor then formally terminated Perich.<sup>97</sup> In response to her suit, the school claimed that Perich had been fired for violating the church's belief that Christians must settle disputes internally.<sup>98</sup>

In a unanimous decision, the Court dismissed Perich's claim.<sup>99</sup> Finding that Perich was a minister within the meaning of the exception, Chief Justice Roberts wrote that the First Amendment required this outcome.<sup>100</sup> If Perich were given the relief she requested, the Court said, it would penalize the church for firing her.<sup>101</sup> The ministerial exception forbids such a

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<sup>92</sup> *Id.* at 166–67; *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, 565 U.S.171 (2012).

<sup>93</sup> *Hosanna-Tabor*, 565 U.S. 171 at 179.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 178.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 180.

<sup>99</sup> *Id.* at 194.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* In the part of the opinion that explicitly denied Perich the relief she sought, Chief Justice Roberts seized the moment to deny Perich relief she did not seek: "Perich originally sought an order reinstating Perich to her former position as a called teacher. By requiring the Church to accept a minister it did not want, such an order would have plainly violated the Church's freedom under the Religion Clauses to select its own ministers." *Id.*

ruling.<sup>102</sup> “The church,” the Court stated, “must be free to choose who will guide it on its way.”<sup>103</sup>

To evaluate whether Perich was indeed a minister, the Court rejected a strict formula, preferring instead to consider the totality of the circumstances of her employment.<sup>104</sup> This choice yielded a thorough discussion of Perich’s credentials and job duties.<sup>105</sup> The Court also looked to both Perich’s and the school’s representations as to whether she was a minister.<sup>106</sup> In rejecting the Sixth Circuit’s outcome below, the Court even acknowledged that the facts to which the Sixth Circuit gave weight—lay teachers performing the same tasks as Perich and the amount of time Perich spent performing religious work—were nonetheless relevant.<sup>107</sup>

On its face, the Court’s embrace of this searching inquiry in the context of the ministerial exception certainly suggests that it would approve the *Pacific Lutheran* test’s second prong. But the Court repeatedly refused to make any one factor determinative.<sup>108</sup> Whereas Chief Justice Roberts emphasized the importance of multiple considerations throughout the opinion, the *Pacific Lutheran* test makes the fatal mistake of giving dispositive weight to only one (i.e., the holding out of faculty as performing a religious function in maintaining its religious educational environment).

The Court did begin its analysis of Perich’s role by stating that Hosanna-Tabor held her out as a minister, and later went

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<sup>102</sup> *Id.* (internal footnote omitted).

<sup>103</sup> *Id.* at 196.

<sup>104</sup> *Id.* at 191.

<sup>105</sup> *Id.* at 191–93.

<sup>106</sup> *Id.* at 193.

<sup>107</sup> *Id.* at 192–94.

<sup>108</sup> *See id.* at 192 (“In light of these considerations—the formal title given Perich by the Church, the substance reflected in that title, her own use of that title, and the important religious functions she performed for the Church—we conclude that Perich was a minister covered by the ministerial exception.”); *id.* (“Although such a title, by itself, does not automatically ensure coverage, the fact that an employee has been ordained or commissioned as a minister is surely relevant, as is the fact that significant religious training and a recognized religious mission underlie the description of the employee’s position.”); *id.* (“But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions—particularly when, as here, they did so only because commissioned ministers were unavailable.”); *id.* at 194 (“The amount of time an employee spends on particular activities is relevant in assessing that employee’s status, but that factor cannot be considered in isolation, without regard to the nature of the religious functions performed and the other considerations discussed above.”).

so far as to admonish the Sixth Circuit for saying “that an employee’s title does not matter.”<sup>109</sup> And to find that Perich was a minister, the Court reviewed evidence that would likely receive similar attention from the Board under *Pacific Lutheran*. Were they enough for the Court, these aspects of the Court’s decision would have made the *Pacific Lutheran* test’s viability more certain.

However, the Court went well beyond *Hosanna-Tabor*’s holding out of Perich as a minister. Among other things, the Court detailed the educational requirements of her title, her weekly job duties, the congregation’s role in her hiring and firing, and her own tax filings.<sup>110</sup> The multifaceted approach of the Court contrasts sharply with the *Pacific Lutheran* test’s single, decisive question regarding ministry. This conflict strongly suggests that the *Pacific Lutheran* test would not survive in the Supreme Court.

For these reasons, the *Pacific Lutheran* test seems likely to go the way of the substantial religious character test. Fortunately, the New Jersey Supreme Court has created a solution to the problem of religious schools and unions.

### III. THE NEW JERSEY SOLUTION: *ST. TERESA*’S SECULAR CONTRACT TERMS AND NEUTRAL PRINCIPLES

#### A. South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School

The New Jersey Supreme Court vindicated Catholic school teachers’ collective bargaining rights in a case called *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*. The decision was handed down in 1997, and it involved teachers working in Catholic elementary schools that the Catholic Diocese of Camden operated.<sup>111</sup> The court held that the teachers had a state constitutional right to unionize and to bargain collectively over secular contract terms such as wages and certain benefit

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<sup>109</sup> *Hosanna-Tabor*, 565 U.S. at 193.

<sup>110</sup> *Id.*

<sup>111</sup> *South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elem. Sch.*, 696 A.2d 709, 712 (N.J. 1997).

plans.<sup>112</sup> This right, the court found, did not offend the Religion Clauses of the First Amendment.<sup>113</sup> Accordingly, the court ordered the Catholic Diocese of Camden to recognize and to bargain with the teachers' union.<sup>114</sup>

The teachers had elected the South Jersey Catholic School Teachers Organization to represent them in collective bargaining.<sup>115</sup> The diocese's Board of Pastors responded by requiring the union to sign a document that vested the Board of Pastors with "complete and final authority to dictate the outcome of any dispute."<sup>116</sup> Additionally, this document forbade the teachers' union from collecting dues from the non-union members whose interests it represented.<sup>117</sup> The union refused to sign, and the Board of Pastors in turn declined to recognize

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<sup>112</sup> *Id.* The New Jersey Constitution memorializes the right to organize as follows: "Persons in private employment shall have the right to organize and bargain collectively." N.J. CONST. art. I, ¶ 19. In *St. Teresa*, the New Jersey Supreme Court treated Article I, Paragraph 19 as self-executing in the case of religious schools, i.e., the court enforced it in the absence of implementing legislation. *Id.* at 723 (quoting the Appellate Division's opinion below, 675 A.2d 1155, 1171 (1996)); see also Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 199–200 (1983) ("The courts have developed a general test for determining whether a state constitutional provision is self-executing. The test focuses on whether the provision in question is capable of application or enforcement in the absence of implementing legislation. Presumably this refers to judicial application or enforcement."). However, this is not to say that Article I, Paragraph 19 lacks such legislation. New Jersey's Employer-Employee Relations Act, while not explicitly stating that it implements Article I, Paragraph 19, nonetheless does so. N.J. STAT. ANN. § 34:13A-1 *et seq.* (2014). The Employer-Employee Relations Act's declaration of policy demonstrates the connection:

It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prevention or prompt settlement of labor disputes, both in the private and public sectors . . . and that the voluntary mediation of such public and private employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent, public and private employer-employee peace. . . .

N.J. STAT. ANN. § 34:13A-2 (2014); see also THE NEW JERSEY STATE BOARD OF MEDIATION, Website, *What We Do*, ("The NJSBM was established by statute in 1941, the Employer-Employee Relations Act [*sic*]. . . . The Board's primary mission is the prevention or prompt settlement of labor disputes involving private sector employees. . . ."). The Employer-Employee Relations Act does not apply in *St. Teresa* because it includes a specific exclusion for religious schools and their employees. N.J. STAT. ANN. § 34:13A-5.1(c) (2014).

<sup>113</sup> *St. Teresa*, 696 A.2d at 712.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 713. The document was titled, "Minimum Standards for Organizations Wishing to Represent Lay Teachers in a Parish or Regional Catholic Elementary School in the Diocese of Camden."

<sup>117</sup> *Id.*



the union or to bargain collectively.<sup>118</sup> The union then brought suit.<sup>119</sup>

The New Jersey Supreme Court addressed both of the First Amendment's Religion Clauses in the case.<sup>120</sup> Regarding the Establishment Clause, the Board of Pastors argued that requiring the diocese to bargain with the union would hamper its "right to govern its educational process."<sup>121</sup> In this way, the Board of Pastors claimed, recognition and collective bargaining inhibited religion and therefore ran afoul of the second prong of the *Lemon* test.<sup>122</sup>

The court disagreed. As the court saw it, the primary effect of the state constitutional provision did not involve religion at all.<sup>123</sup> Rather, Article I, Paragraph 19 results in nothing more than collective bargaining between a private employer and its employees' elected representative.<sup>124</sup> Here, the court referred to the peaceful history of labor relations between the diocese and its high school teachers, with whom it had been bargaining collectively over secular terms for some 13 years.<sup>125</sup> Since no inhibition occurred there, it followed that none was likely to occur in the case of the elementary teachers.<sup>126</sup>

The court was similarly unpersuaded that excessive entanglement with religion, prohibited by the third prong of the *Lemon* test, would occur under this scheme. The court said that requiring collective bargaining over secular terms would involve only minimal, not excessive, contact between the state and the schools.<sup>127</sup> The state would not impose religious beliefs, mandate the diocese negotiate terms affecting religious issues,

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 715 ("There are cases in which the Establishment and Free Exercise Clauses should be analyzed jointly because 'there has been some blurring of sharply honed differentiations' between those clauses.") (internal citations omitted).

<sup>121</sup> *Id.* at 716.

<sup>122</sup> *Id.* See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (holding that for a statute to survive Establishment Clause scrutiny it must (1) have a secular legislative purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not promote an excessive government entanglement with religion). Cf. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (combining the first two prongs of the *Lemon* test into a question of whether the government endorsed or disapproved of religion in purpose or in fact) (O'Connor, J., concurring).

<sup>123</sup> *St. Teresa*, 696 A.2d at 716.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 716–17.

<sup>126</sup> *Id.* at 717.

<sup>127</sup> *Id.* at 718.

or force the parties to agree to particular terms.<sup>128</sup> The court's vision for the state's role in collective bargaining was for it to bring the private parties to the table, and then for it to leave them alone so that they might resolve their disagreements.<sup>129</sup>

Regarding the Board of Pastors' Free Exercise claim, the court applied *Smith's* neutral law of general applicability standard, as well as the compelling state interest test.<sup>130</sup> Regarding the former, the court held that Article I, Paragraph 19's neutrality and general applicability are "beyond dispute."<sup>131</sup> The court said the intent of this provision is to better the economic well-being of private-sector workers.<sup>132</sup> It regulates neither religious conduct nor belief.<sup>133</sup> That Article I, Paragraph 19 inconveniences the free exercise of religion, the court went on, does not infringe the Free Exercise Clause of the First Amendment.<sup>134</sup>

As to the compelling state interest test, the New Jersey Supreme Court flatly denied the Board of Pastors' hybrid claims that prompted the court to apply it.<sup>135</sup> These arguments against the teachers sought to attach the school's freedom of association and parents' right to control the upbringing of their children, respectively, to the school's Free Exercise claim.<sup>136</sup> The court rejected the freedom of association claim because employers do not have a constitutional right to avoid associating if it endangers the right of employees' to organize.<sup>137</sup> On the issue of parents' control over their children's upbringing, the court stated the issue has no bearing on this case.<sup>138</sup>

Despite these conclusions, the court also applied *Smith's* compelling state interest test for hybrid claims.<sup>139</sup> Quoting liberally from the appellate opinion below, the court found that New Jersey's interest in allowing private employees to organize

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 721–23.

<sup>131</sup> *Id.* at 721.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 721–22.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 722.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

and to bargain collectively over secular contract terms was indeed compelling.<sup>140</sup> Moreover, the court held, the application of neutral principles to labor disputes by civil courts assures the protection of the schools' free exercise rights.<sup>141</sup> The court ordered the Diocese of Camden to recognize the union and to bargain collectively with it.<sup>142</sup>

*B. The St. Teresa Test, Secular Contract Terms,  
Neutral Principles, and Catholic Bishop*

The *St. Teresa* test supports teachers' right to bargain collectively where secular contract terms are at issue, and it instructs courts to apply neutral principles to disputes regarding those terms. This test should be adopted by the NLRB and embraced by federal courts. By focusing on these components of bargaining rather than on the bargainers themselves, the *St. Teresa* test and its enforcement demonstrate its ability to solve the problems of past cases.

The *St. Teresa* court explained that the doctrine of neutral principles allows civil courts to decide secular legal questions even if they occur in a religious context.<sup>143</sup> Neutral principles are entirely secular legal rules.<sup>144</sup> The use of these rules in disputes involving religious parties does not involve judgments regarding ecclesiastical matters.<sup>145</sup> As long as courts applying neutral principles are careful not to intrude on those issues, the court held, they are competent to resolve these cases.<sup>146</sup>

Neutral principles of adjudication and secular contract terms allow the *St. Teresa* test to avoid the intrusion into and entanglement with religion that *Catholic Bishop* prohibited. In *Catholic Bishop*, the Supreme Court stated collective bargaining in church-operated schools made entanglement with religion inevitable.<sup>147</sup> However, as the *St. Teresa* court held, the right to organize and to bargain over secular contract terms shows that this conclusion is erroneous.

First, union elections, at least initially, do not even concern

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 722.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 723.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).

the religious school. Just like any other private individuals, teachers at religious schools may associate and form organizations of various types on their own. If that organization is a labor union seeking recognition, the involvement between the school and the Board during the election process can be minimal or even non-existent.<sup>148</sup> This part of organizing, then, neither entangles itself with religion, nor intrudes upon it.

Second, religious schools bargain over contract terms with their employees all the time without offending the Religion Clauses of the First Amendment. When a religious school hires a particular teacher, no one would seriously dispute that the administrator and the teacher discuss all the topics that prospective employees and employers normally discuss: salary, benefits, hours, and duties. The *St. Teresa* test merely centralizes aspects of this negotiation through collective bargaining.

Furthermore, this negotiating activity happens *ad hoc* between teachers and administrators after hiring as well. For example, if a principal announces at a faculty meeting that grades are due on a particular date, teachers (needing, as all teachers do, more time to grade) may engage with her on the requirement and succeed or fail in changing it. This interaction is bargaining over a secular contract term that did not occasion any constitutional issues. Indeed, it would be rather odd if the principal's response to a request for an extra weekend to calculate grades invoked canon law.

Since religious schools already engage with teachers over the kinds of subjects the *St. Teresa* test contemplates, they can certainly continue to do so when the teachers have come together as a union. Despite the Supreme Court's assertions in *Catholic Bishop*, the engagement between teachers and administrators does not entail First Amendment infringement.

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<sup>148</sup> THE NATIONAL LABOR RELATIONS BOARD, *Conduct Elections*, <https://www.nlr.gov/what-we-do/conduct-elections>. Initially, all the NLRB Regional Office requires of the employer is posting notices regarding the election. *Id.* Thereafter, the Regional Office and all the parties concerned create an agreement regarding the election. *Id.* And the employer may avoid even this modest level of interaction with the Board by voluntarily recognizing a union elected by other means. *Id.*

C. *The St. Teresa Test, the Great Falls Test, and the Pacific Lutheran Test*

The *St. Teresa* test improves significantly on both the *Great Falls* test and the *Pacific Lutheran* test. The respective failures of those two tests, i.e., to implement federal labor policy and to meet the Supreme Court's standards, are solved by the *St. Teresa* test.

As discussed earlier, the *Great Falls* test amounts to an open door for religious institutions to exempt themselves from the NLRA.<sup>149</sup> In this way, the *Great Falls* test frustrates the NLRA's stated policy of "encouraging the practice and procedure of collective bargaining and [...] protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing."<sup>150</sup> By contrast, the *St. Teresa* test gives full weight to Congress's expressed policy. It provides a framework for teachers who had previously been shut out from the Act's protections by the *Great Falls* test to regain those rights.

The advantage of the *St. Teresa* test over the *Pacific Lutheran* test is the doctrine of neutral principles. The idea that courts may use neutral principles to decide cases dealing with religious institutions has been explicitly approved by the Supreme Court.<sup>151</sup> While the *Pacific Lutheran* test attempts a similar maneuver by using the ministerial exception to garner the Court's favor, that attempt is likely to fail.<sup>152</sup> Unlike that test, the *St. Teresa* test makes no such mistakes in its design. The New Jersey Supreme Court's explanation of neutral principles stayed true to the Supreme Court's own interpretation of the doctrine.

IV. *RERUM NOVARUM AND ST. TERESA: CATHOLIC SOCIAL DOCTRINE AND THE UNION*

The need to foster the NLRA's commitment to encouraging organized labor and collective bargaining is certainly an

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<sup>149</sup> See *supra* Part II.A.1–3.

<sup>150</sup> The National Labor Relations Act 29 U.S.C. § 151 (2012).

<sup>151</sup> *Jones v. Wolf*, 443 U.S. 595, 597 (1979). For further discussion of neutral principles of law and courts' application thereof, see LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 210–21 (3d ed. 2013).

<sup>152</sup> See *supra* Part II.A.4–5.

important reason to support the *St. Teresa* test. Yet, for Catholics, the church's own social teaching provides an even greater reason: unions and collective bargaining have been the cornerstones of Catholic doctrine regarding economic issues since the nineteenth century.

As the introduction states, Pope Leo XIII's groundbreaking encyclical *Rerum Novarum* initiated this facet of Catholic doctrine. The pope's message was clear. The then-current state of economic affairs was untenable. A very small number of people controlled the world's wealth, power, and labor, while most people were left poor and suffering.<sup>153</sup> One of the best answers to this problem, as the pope saw it, was labor unions.<sup>154</sup> And the pope specifically stated, several times, that the state should intervene where necessary to promote the interests of the poor.<sup>155</sup>

The *St. Teresa* test provides an appropriate vehicle by which to implement the Catholic social doctrine begun by Pope Leo XIII's program.<sup>156</sup> The *St. Teresa* test supports the formation of unions by preventing religious institutions from escaping the NLRA's jurisdiction under the guise of the First Amendment. It welcomes the involvement of the state to resolve disputes between employers and employees, the necessity of which the pope himself anticipated.<sup>157</sup> Not only does the test accomplish these goals, it also safeguards the religious beliefs of Catholic schools. For these reasons, Catholic schools can embrace the *St. Teresa* test and thereby live up to the expectations of Catholic social doctrine.

## V. CONCLUSION

In *Rerum Novarum*, Pope Leo XIII attributed the brutal conditions experienced by most working people to the appalling income inequality of his time. Income inequality continues to permeate the world today.<sup>158</sup> Just as the problem the pope

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<sup>153</sup> *Rerum Novarum* *supra* note 1, at 1.

<sup>154</sup> *Id.* at 49.

<sup>155</sup> *Id.* at 16, 31, 32, 35, 45.

<sup>156</sup> *But see* 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 (2004) (arguing that collective bargaining inevitably becomes embroiled in antagonism that is inconsistent with Catholic social teaching).

<sup>157</sup> *Rerum Novarum* *supra* note 1, at 45.

<sup>158</sup> *See, e.g.*, Paul Krugman, *Inequality and the City*, N.Y. TIMES (Nov. 30, 2015),

recognized still exists, so does the solution he proposed: support for organized labor.

The *St. Teresa* test offers a way for Catholic schools to embrace the pope's long-echoed answer. In addition, it may resolve the decades of sparring between the Board and the federal courts over workers' rights and the Religion Clauses of the First Amendment.