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NLRA and Religious Colleges: The Application of Catholic Bishop to Higher Education Institutions

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The NLRB certified unions of lay faculty at two Catholic high schools. The Appellate Court (7th Cir) denied enforcement, holding that the NLRB had no jurisdiction because it would present significant risks that the First Amendment would be infringed. The 7th Cir. concluded that the Board’s distinction between “completely religious” and “merely religiously associated” failed to provide a workable guide.
The Court noted that the Board’s policy in the past has been to decline jurisdiction over parochial high schools only when they are completely religious, not just religiously associated.

The Court also noted that the Board had concluded that regulation of labor relations does not violate the First Amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain the Act’s objective.
The Supreme Court and First Amendment (Constitutional) Avoidance

- The Court first stated that it must decide: “Whether the exercise of the Board’s jurisdiction presents a significant risk that the First Amendment will be infringed?”
- The Supreme Court found that not only could the Board’s conclusions impinge on First Amendment rights, but the very process of inquiry may also impinge on the First Amendment rights.
- Because the Court found that the risk existed, it turned to the issue of Congressional intent to include church-operated schools and it found an absence of a clear expression by Congress.
In *Barber-Scotia College* (1979) and *College of Notre Dame* (1979), the NLRB concluded that *Catholic Bishop* applied only to parochial elementary and secondary schools and not to colleges and universities.

The Board found that in *Tilton v. Richardson* (1971), the Supreme Court articulated a fundamental distinction between these two types of schools in determining whether there was an excessive government entanglement with religion.
In *Trustees of St. Joseph* (1986), the Board held that *Catholic Bishop* applies to all schools regardless of the level of education.

The Board concluded that it can more properly accommodate First Amendment concerns by considering the application of *Catholic Bishop* to all educational institutions on a case-by-case basis.

The Board has examined a multitude of factors to determine whether the Board’s assertion of jurisdiction would present a significant risk that the First Amendment will be infringed. (often referred to as the “substantial religious character” test)
In *University of Great Falls v. NLRB* (2002), the D.C. Circuit endorsed a 3-part test, which would exempt a school if it:

1. Holds itself out to students, faculty and community as providing a religious educational environment;
2. Is organized as a non-profit; and
3. Is affiliated with, or owned, operated, or controlled, directly or indirectly, at least in part, with reference to religion.

The D.C. Cir. found that this approach avoided being too intrusive, while providing some assurance that it is a *bona fide* religious school.
In *Carroll College* (2009), the D.C. Cir. reaffirmed its 3-part test. It found that to determine whether Great Falls held itself out as “providing a religious educational environment,” that the court looked to its course catalogue, mission statement, student bulletin, and other public documents, with no inquiry as to the content of the school’s religious beliefs.
Some Issues:

- How is *Catholic Bishop* to be applied to faculty at higher education institutions?
- Even if it does apply to a specific school, are certain faculty or other employees clearly exempt, such as adjunct (part-time) faculty who do not teach religious subjects and are not hired to infuse specific religious values/doctrines in classes they teach?
Current Challenges to NLRB Jurisdiction under Catholic Bishop

- **St. Xavier University**—involves union attempt to organize housekeepers
  - The employer has argued that under *Catholic Bishop*, the First Amendment prohibits the NLRB from exercising jurisdiction over religious institutions’ employees regardless of the employees’ job duties or function.

- **Duquesne University**—involves the organizing of adjunct faculty.