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THE CHURCH, THE STATE AND THE NATIONAL LABOR RELATIONS ACT: COLLECTIVE BARGAINING IN THE PAROCHIAL SCHOOLS

KENNETH J. KRYVORUKA*

Cases challenging, under the first amendment,¹ an intrusion or involvement by the state in the affairs of the church persistently have presented some of the most perplexing and controversial constitutional questions considered by the Supreme Court.² A total separation between church and state has never been considered either practical or desirable; "where questions of entanglement are involved, the Court has acknowledged that, as of necessity, the 'wall' is not without its bends and may constitute a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'"³ Perhaps no aspect of this issue is more warmly disputed than the validity of state involvement in private school education. Although most of this controversy has focused upon state aid to private sectarian institutions,⁴ the question of entanglement also may arise when the state or federal government attempts to regulate the activities of a parochial school.⁵ Recent litigation challenging governmental regulation of the secular conduct of private sectarian schools has resulted from an inability to distinguish clearly areas that are secular, and thus susceptible to regulation, from those concerns that are purely religious.

The National Labor Relations Act⁶ [NLRA] vests in the National Labor Relations Board the power "to prevent any person from

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1. U.S. CONST. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"

2. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973).

3. *Id.* at 761 n.5 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

4. *See, e.g., Meek v. Pittenger*, 421 U.S. 349 (1975); *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973); *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

5. *See, e.g., Wolman v. Walter*, 433 U.S. 229 (1977) (state may test both teachers and students in parochial schools to ensure minimum standards of instruction are met); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (examination of parochial school records by state to determine amount spent on secular education constitutes unconstitutional entanglement of church and state); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state may regulate conduct of secular education but not compel attendance in public schools only).

6. 29 U.S.C. §§ 151-169 (1970).

engaging in any unfair labor practice . . . affecting commerce.”⁷ Attempts by the Board to exert jurisdiction over lay teachers seeking recognition rights from parochial schools highlight the potential conflict between interests protected under the first amendment and those safeguarded by the NLRA. The issue is whether regulation of labor relations in the parochial schools interferes with the religious interests of the parochial school employer, thereby breaching the barrier between church and state.

The magnitude of the problem may be appreciated when it is recognized that collective bargaining in parochial schools will affect more than 100,000 lay faculty and nearly 10,000 primary and secondary schools affiliated with the Catholic Church alone.⁸ Although the Board has asserted jurisdiction over parochial schools across the nation,⁹ not until quite recently did sectarian employers challenge this assertion of jurisdiction in the courts on first amendment grounds.

In *Catholic Bishop of Chicago v. NLRB*,¹⁰ the Court of Appeals for the Seventh Circuit held that the Board's assertion of regulatory authority over the Catholic schools was unconstitutional. The employees' labor interests evidently were outweighed by the church's

7. *Id.* § 160(a).

8. In 1972, there were over 18,000 elementary and secondary sectarian schools in the United States teaching 5.2 million children. PRESIDENT'S PANEL ON NONPUBLIC EDUCATION, FINAL REPORT 5-6, 15-19 (1972). Some 107,856 lay faculty members in 9,976 primary and secondary schools are affiliated with the Catholic Church. OFFICIAL CATHOLIC DIRECTORY 1-2 (1977).

9. See Archdiocese of Philadelphia, 227 N.L.R.B. 1178, 94 L.R.R.M. 1719 (1977); Diocese of Fort Wayne - South Bend, Inc., 224 N.L.R.B. 1226, 92 L.R.R.M. 1550 (1976); Cardinal Timothy Manning, 223 N.L.R.B. 1218, 92 L.R.R.M. 1114 (1976) (Los Angeles); Catholic Bishop of Chicago, 220 N.L.R.B. 359, 92 L.R.R.M. 1492 (1975); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 88 L.R.R.M. 1169 (1975); Henry M. Hald High School Ass'n, 213 N.L.R.B. 415, 87 L.R.R.M. 1403 (1974) (Brooklyn, New York). Some of these schools have submitted voluntarily to collective bargaining. See Archdiocese of Philadelphia, 227 N.L.R.B. 1178, 1180 (1977).

10. 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 98 S. Ct. 1231 (1978). Appeals challenging the constitutionality of the NLRA as applied to religiously affiliated schools are also *sub judice* in *Caulfield v. Hirsch*, 410 F. Supp. 618 (E.D. Pa. 1977), *appeal pending*, No. 77-1328 (3d Cir.) (appeal from district court's assertion of jurisdiction based on constitutional considerations to enjoin Board from conducting representation proceedings); *Gordon Technical High School v. NLRB*, No. 77-1583 (7th Cir.); *Cardinal Timothy Manning v. NLRB*, No. 77-1286 (9th Cir.).

Recently, in *McCormick v. Hirsch*, 99 L.R.R.M. 3342 (M.D. Pa. 1978), the court ruled that it had subject matter jurisdiction over a suit seeking injunctive relief, on first amendment grounds, to prevent the Board from asserting jurisdiction over a Catholic high school. The court relied largely upon the Seventh Circuit's decision in *Catholic Bishop of Chicago*.

right to be free of what was characterized as governmental intrusion into matters of faith and religious practice.¹¹ The effect of this decision is clear: lay teachers, unlike other employees protected by the Act, must either accept the unilateral terms and conditions of employment extended by their employer or cease employment.

Although the issue of collective bargaining in the parochial schools is novel to the courts, the Board has had experience in accommodating its assertion of jurisdiction over religiously affiliated schools in deference to the first amendment rights of the employer.¹² Unlike the court in *Catholic Bishop of Chicago*, the Board has determined that the secular interests of the employees in furthering their organizational objectives outweigh any indirect in-

11. 559 F.2d at 1117-28. The interests before the court are reflected in the manner in which the parties framed the issues in the petition for certiorari and in the brief in opposition. The Board emphasized the secular aspects of the schools, *Petition for Certiorari* at 2, *NLRB v. Bishop of Chicago*, 98 S. Ct. 1231 (1978), while the employer characterized the issue as a governmental intrusion into the adjudication of disputes between the lay faculty and the religious employer, emphasizing the sectarian aspects of the schools. Respondent's Brief in Opposition at 1-2, *NLRB v. Bishop of Chicago*, 98 S. Ct. 1231 (1978).

12. The accommodation used by the Board is best understood by contrasting its application in two situations. In *Board of Jewish Educ.*, 210 N.L.R.B. 1037, 86 L.R.R.M. 1253 (1974), the NLRB determined that the policy of the NLRA would not be furthered by asserting jurisdiction over an employer that provided religious training, stating: "[We do] not intend . . . to adopt a policy of asserting jurisdiction over institutions primarily religious and non-commercial in character and purpose, whose educational endeavors are limited essentially to furthering and nurturing their religious beliefs." *Id.*; accord, *Association of Hebrew Teachers of Metropolitan Detroit*, 210 N.L.R.B. 1053, 86 L.R.R.M. 1249 (1974) (purpose of the NLRA would not be furthered by asserting jurisdiction over an employer that operated a Jewish College, after-school religious instruction to elementary and secondary school children, and pre-school nursery classes). In *Henry M. Hald High School Ass'n*, 213 N.L.R.B. 415, 87 L.R.R.M. 1403 (1974), however, a parochial school was viewed as a substitute for public school education, in contrast to being merely supplementary to secular schools. The Board adopted the administrative law judge's finding that:

Neither the Act nor the United States Constitution declares that lay teachers must surrender Sec. 7 [of the NLRA] rights [to organize and bargain collectively] if they become employed by a religious institution. Indeed Sec. 7 rights, which are part of our national heritage established by Congress, were a legitimate exercise of Congress' constitutional power . . . Any entanglement between the Hald Association and the government which is manifested in this case was caused by the Hald Association when it hired lay teachers and . . . brought itself under the jurisdiction of the Act.

213 N.L.R.B. at 418 n.7. See generally Comment, *The Authority of Administrative Agencies to Consider the Constitutionality of Statutes*, 90 HARV. L. REV. 1682 (1977). The view that a parochial school may be a substitute for a broad-based secular education is in accord with the sentiments expressed in *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), and *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

fringement upon an employer in an institution which is merely religiously affiliated.¹³

The thesis of this Article, illustrated by reference to the Seventh Circuit, is that the exercise of jurisdiction by the Board does not intrude unconstitutionally upon those interests of the employer protected by the first amendment, regardless of whether the Board's jurisdiction is challenged under that portion of the first amendment prohibiting governmental establishment of religion or under the first amendment's protection against governmental interference with the free exercise of religion.¹⁴ The regulation of labor relations in parochial institutions involves the administration of interests which are separable from the interests protected by the first amendment. The establishment clause is concerned primarily with protecting against the advancement or inhibition of religious doctrine and practice by government conduct. This objective is implemented

13. See Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 88 L.R.R.M. 1169 (1975); note 24 *infra* & accompanying text.

14. The court in *Catholic Bishop of Chicago* treated the free exercise and establishment clauses of the first amendment jointly, stating that "there has been some blurring of sharply honed differentiations" between the two clauses and that there were "substantial aspects in the present case . . . not only of sovereign involvement in the religious activity under the establishment clause but . . . also curtailment of the free exercise of religion . . ." 559 F.2d at 1131.

The Supreme Court has recognized that the two religion clauses overlap, *Gillette v. United States*, 401 U.S. 437, 448-49 (1971), but the Court also has acknowledged that both clauses have a separate identity. *Abington School Dist. v. Schempp*, 374 U.S. 203, 223 (1963). This view is not shared by Professor Kurland, who feels that the two clauses should be read together "as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together . . . , prohibit classification in terms of religion either to confer a benefit or impose a burden." Kurland, *Of Church and State and The Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961).

The opinion in *Catholic Bishop of Chicago* did note a "tension inevitably existing between the Free Exercise and the Establishment Clauses." 559 F.2d at 1119; see Schwarz, *No Imposition of Religion: The Establishment Clause Values*, 77 YALE L.J. 692 (1968). This tension arises from a comparison of the Supreme Court cases under the establishment clause, which prohibit any aid to religion, see, e.g., *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961); *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947), with the Court's decisions under the free exercise clause, which require that persons whose religious tenets conflict with governmental obligations be given exemptions not available to others. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963). See generally Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEX. L. REV. 142 (1963); Schwarz, *supra*. The Court has yet to examine this conflict adequately. One scholar, however, has detected a trend in recent Court decisions to elevate the free exercise concerns over those of establishment of religion. Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973).

in labor relations through a religiously neutral legislative scheme the enforcement of which does not cause undue entanglement in the religious affairs of parochial schools. Free exercise claims require a balancing of the secular interest in achieving a legislative goal against the resulting infringement upon the exercise of religious belief. As the administrator of federal labor policy and legislation, the Board is peculiarly capable of achieving this balance by fashioning workable guidelines sensitive to both secular and religious concerns. The Board and the courts have exhibited an ability to weigh employee-employer interests generally and should be no less capable when one of the parties is a religious organization.

BOARD PROCEEDINGS IN CATHOLIC BISHOP OF CHICAGO

The Bishop of Chicago operates two parochial secondary schools in Chicago, Illinois: Quigley North and Quigley South. Testimony taken at the representation proceeding before the regional office of the Board relating to the schools' academic and extracurricular programs, as well as their admission and vocational guidance programs, indicated that the institutions essentially are college preparatory schools. Although the employer contended that the schools are "minor seminaries," the record indicated that very few of the schools' graduates become Catholic priests. The majority of students enter public or private colleges; the remaining students obtain secular employment.¹⁵ Religion, taught as an academic subject, is required for one period five days a week at Quigley North and for one period three days a week at Quigley South. Religion classes are taught only by priests; no lay teachers are involved directly.¹⁶ As a requisite to admission, a potential student must not only be qualified academically but also must submit evidence of his "potential for Christian leadership, either as a priest or a layman."¹⁷ Both schools are subject to state laws concerning curriculum and attendance and are fully recognized by an accrediting agency of the state as being "firmly based on a traditional secondary school program."¹⁸

In June of 1974, the Quigley Education Association, an affiliate

15. The Catholic Bishop of Chicago, 220 N.L.R.B. 359, 90 L.R.R.M. 1225 (1975).

16. Brief for Respondent at 8 n.7, Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977).

17. 559 F.2d at 1114 n.5.

18. Brief for Respondent at 8, Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977).

of the Illinois Education Association, filed a representation petition with the NLRB seeking to represent a bargaining unit composed of the lay teachers at the two high schools. At the representation hearing¹⁹ the employer contended that the Board should decline jurisdiction under the Board's own jurisdictional standard and that in any event the first amendment prohibited the Board's assertion of jurisdiction over the schools. The Board rejected the employer's jurisdictional argument, finding that the schools operated primarily as college preparatory schools similar to those over which the Board had theretofore asserted jurisdiction.²⁰ The Board directed an election in a single unit composed of all the lay faculty at both schools.²¹ The

19. Representation hearings are provided for by § 9(c)(1) of the NLRA, 29 U.S.C. § 159(c)(1) (1970) (as amended), which states in pertinent part:

Whenever a petition shall have been filed in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative . . . ;

. . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

20. 220 N.L.R.B. at 359, 90 L.R.R.M. at 1225 (quoting Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 250, 88 L.R.R.M. 1169, 1171 (1975)).

21. The Board defined the appropriate bargaining unit pursuant to § 9(b) of the NLRA, 29 U.S.C. § 159(b) (1970) as:

All full-time and regular part-time lay teachers including physical education teachers employed by the employer at the Quigley North and Quigley South Schools, . . . excluding rectors, procurators, dean of studies, business manager, director of student activities, director of formation, director of counseling services, office clerical employees, maintenance employees, cafeteria workers, watchmen, librarians, nurses, all religious faculty, and all guards and supervisors as defined in the Act.

220 N.L.R.B. at 360, 90 L.R.R.M. at 1227. For a discussion of the criteria employed by the Board in determining the appropriate unit for bargaining, see ABA SECTION OF LABOR RELATIONS LAW, *THE DEVELOPING LABOR LAW* 127 (Cum. Supp. 1976).

None of the parties in *Catholic Bishop of Chicago* objected to the exclusion of the religious faculty from the unit of lay teachers. *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972), held that the application of the Equal Employment Opportunity Act of 1964, 42 U.S.C. 2000(e) (1970), to the relationship between the Salvation Army and one of its officers, who was a minister, would violate the first amendment protections of religious freedom. Similarly, a decision by the Board to assert jurisdiction, contrary to the wishes of the church, over

union won the election and was certified²² by the Board as the exclusive representative of all forty-six lay faculty in the unit.

Following the employer's refusal to honor the union's request to bargain collectively, the union filed an unfair labor practice charge with the Board. A complaint issued charging the employer with a violation of sections 8(a)(5) and 8(a)(1) of the NLRA.²³ In its answer, the employer admitted that it refused to bargain collectively and again raised the objection that the Board had no jurisdiction over the Quigley schools.

The Board granted the union's motion for summary judgment, holding that the employer had violated the Act by refusing to bargain with the certified bargaining representative chosen by its employees. In reaching this decision the Board rejected the employer's constitutional objection, stating that: 1) the purpose of the Act is to maintain and facilitate the free flow of commerce through the stabilization of labor relations; 2) the provisions of the Act do not interfere with religious beliefs; and 3) regulation of labor relations does not violate the first amendment when it involves a minimal intrusion upon religious conduct and is necessary to obtain that

disputes between the church and its clergy or nuns arguably would run afoul of the first amendment. Recognizing the constitutional concerns, the Board has been sensitive to this problem and has determined to exclude religious faculty from a bargaining unit composed of faculty members. *Seton Hill College*, 201 N.L.R.B. 1026, 82 L.R.R.M. 1434 (1973). There have been instances, however, in which the employer or the employees have objected to the exclusion of religious faculty from the unit. *Compare Nazereth Regional High School v. NLRB*, 549 F.2d 873 (2d Cir. 1977) (exclusion of religious faculty affirmed) *with NLRB v. Saint Francis College*, 562 F.2d 246 (3d Cir. 1977) (enforcement of bargaining order denied because of employer's objection to exclusion of religious faculty). *See generally*, Comment, *Bargaining Status of Religious Faculty at Church-Affiliated Universities*, 23 CATH. L. REV. 33 (1977).

22. Section 9(c)(1) of the NLRA, 29 U.S.C. § 159(c)(1) (1970). For the text of this provision, see note 19 *supra*. See also note 21 *supra*.

23. Section 8(a) of the Act, 29 U.S.C. § 158(a) (1970), provides in part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [self-organization, collective bargaining, etc.] of this title;

...

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Although § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970), making it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment to encourage or discourage membership in any labor organization," was not in issue in either of the proceedings, the employer indicated this section in an effort to illustrate potential constitutional intrusions which might result from the Board's assertion of jurisdiction. 559 F.2d at 1125.

objective.²⁴ The Board ordered the employer to cease and desist from the unfair labor practices or from interfering with its employees' statutory rights and required the employer to bargain with the union.²⁵

Similar proceedings involved the Diocese of Fort Wayne-South Bend, Inc., which operates five parochial high schools in northeastern Indiana.²⁶ These schools are similar to the Quigley schools except that they have a lower degree of religious orientation with no non-academic limitations on admission as is the case in the Quigley schools.²⁷ The Board reached the same result with respect to a bargaining unit comprised of 182 lay faculty members.²⁸

Upon petition for enforcement²⁹ of its orders by the Board, the two cases were consolidated by the Court of Appeals for the Seventh Circuit. After hearing arguments the court held that the first amendment barred the Board from asserting jurisdiction over the parochial schools.³⁰

BASIS FOR THE BOARD'S ASSERTION OF JURISDICTION OVER PAROCHIAL SCHOOLS

Absent a specific exemption in the National Labor Relations Act, Congress has vested the Board with the fullest jurisdiction permissible under the commerce clause.³¹ The Act, however, does not require

24. The Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1222, 92 L.R.R.M. 1553, 1553 (1976) (citing Cardinal Timothy Manning, 223 N.L.R.B. 1218, 92 L.R.R.M. 1114 (1976)).

25. 224 N.L.R.B. at 1224.

26. 559 F.2d at 1114.

27. *Id.* at 1114 n.5.

28. Diocese of Fort Wayne - South Bend, Inc., 224 N.L.R.B. 1226, 92 L.R.R.M. 1550 (1976).

29. The church-related employers petitioned the Court of Appeals for the Seventh Circuit to review and set aside the Board's orders under § 10(f) of the NLRA, 29 U.S.C. § 160(f) (1970) (as amended). The Board cross-applied for enforcement of its orders under § 10(e), 29 U.S.C. § 160(e) (1970).

30. 559 F.2d at 1123-24, 1130.

31. *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam). U.S. CONST. art. I, § 8 states in part that Congress shall have the power "[t]o regulate Commerce with foreign nations, and among the several States, and with Indian Tribes." The Court has interpreted this clause as giving Congress broad legislative powers. In *United States v. Darby*, 312 U.S. 100, 115 (1941), upholding the enactment of the Fair Labor Standards Act of 1938, Pub. L. No. 718, 52 Stat. 1060 (codified at 29 U.S.C. § 201-219), as a valid exercise of congressional authority under the commerce power, the Court observed: "Whatever their motive and purpose regulations of commerce which do not infringe some constitutional prohibition are within the plenary power conferred on Congress by the Commerce Clause." This power is not unbridled, however; "the means chosen by [Congress] must be reasonably

the Board to assert its jurisdiction to these permissible limits. Instead, the Board has statutory discretion to decline jurisdiction if, in its opinion, the dispute's effect on interstate commerce is insubstantial.³²

There is no exemption in the NLRA excluding parochial educational institutions from the Board's comprehensive jurisdiction. The Board, however, sensitive to the constitutional controversy in applying the Act to parochial schools, has exercised its discretion to decline jurisdiction over, and therefore has refused to apply the Act to, schools that are "completely religious," while exercising jurisdiction over schools that merely are "religiously associated."³³ The Board has found schools to be "completely religious" if they are devoted exclusively to teaching religion or religious subjects as a supplement to the secular education provided in the public schools.³⁴ If instruction is not limited to religious subjects and the religiously associated school seeks to provide a general education,³⁵ albeit an education

adopted to the end permitted by the Constitution." *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 262 (1964).

32. The Board's discretion to decline jurisdiction over such schools is authorized by § 14(c)(1) of the NLRA, 29 U.S.C. § 164(c)(1) (1970), which provides in pertinent part:

The Board, in its discretion, may by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute is not sufficiently substantial to warrant the exercise of its jurisdiction

See *NLRB v. Carroll-Naslund Disposal, Inc.*, 359 F.2d 779, 780 (9th Cir. 1966), in which the court stated:

The question is whether the Board has violated its own self-imposed jurisdictional standards. It is well settled that the extent to which the Board chooses to exercise its statutory jurisdiction is a matter of administrative policy within the Board's discretion . . . and is not a question for the courts . . . in the absence of extraordinary circumstances, such as unjust discrimination.

Id. (citations omitted).

33. *Roman Catholic Archdiocese of Baltimore*, 216 N.L.R.B. 249, 250, 88 L.R.R.M. 1169, 1171 (1975).

34. See, e.g., *Association of Hebrew Teachers of Metropolitan Detroit*, 210 N.L.R.B. 1053, 1058, 86 L.R.R.M. 1249, 1251 (1974); *Board of Jewish Educ.*, 210 N.L.R.B. 1037, 86 L.R.R.M. 1253, 1254 (1974). Jurisdiction in these cases was declined as much out of deference to first amendment concerns as out of an absence of substantial effects on interstate commerce. Analytically, it would be difficult to understand how "completely religious" schools in the Chicago school system affect commerce any less than, for example, Ollie's Barbecue in Birmingham, Alabama. See *Katzenbach v. McClung*, 379 U.S. 294 (1964).

35. In its *amicus* brief before the Seventh Circuit in *Catholic Bishop of Chicago*, the Illinois Education Association demonstrated that the Quigley schools were merely "religiously associated" by showing that the number of sectarian subjects and training was far outweighed by the secular subjects taught. Brief for Intervenor at 8-14, 31-32, *Catholic Bishop of Chicago*

grounded on religious principles, the Board will assert its jurisdiction.³⁶

Challenges to this exercise of the Board's jurisdictional discretion fall into two related categories. First, accepting the validity and constitutional appropriateness of a distinction between "completely religious" and "religiously associated" schools, a parochial employer may urge that its school should have been found to be completely religious. Secondly, if the employer is found to have been classified properly as "religiously associated" rather than "completely religious," the employer may seek to challenge constitutionally the application of the Act to him, urging that any distinction which includes him within the purview of the Act's requirements is drawn too narrowly and results in an infringement of his first amendment rights. Such a challenge has been viewed as either a challenge of the Board's exercise of discretion or a challenge to the application of the Act to any parochial institution. If this distinction is merely an exercise of the Board's discretion, as with all such exercises, it is reviewable judicially only for abuse of discretion, a question of statutory rather than constitutional authority. Moreover, the employer may encounter substantial procedural obstacles if his claim is framed as a challenge to the Board's exercise of discretion. A court may decline jurisdiction, citing the employer's failure to exhaust his administrative remedies.

Thus, in *Grutka v. Barbour*,³⁷ the Seventh Circuit Court of Appeals reversed a district court order enjoining the Board from administering representation election proceedings in the parochial schools operated by the Diocese of Gary, Indiana, and from processing the union's unfair labor practice charge. The Catholic Bishop had sought the injunction, arguing that the Board's assertion of jurisdiction and the application of the NLRA to parochial schools "chilled" the school's first amendment rights. Implicitly viewing

v. NLRB, 559 F.2d 1112 (7th Cir. 1977). Neither employer disputed the secular functioning of its schools in representation proceedings.

36. See, e.g., Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 88 L.R.R.M. 1169 (1975). This practice is consistent with the Board's long-established policy of asserting jurisdiction over other nonprofit institutions that conduct commercial activities, even though such activities help to support and further the institution's primary cultural, charitable, or educational goals. See, e.g., The Colonial Williamsburg Foundation, 224 N.L.R.B. 718, 92 L.R.R.M. 1509 (1976); Catholic Charities of Buffalo, New York, Inc., 220 N.L.R.B. 9, 90 L.R.R.M. 1279 (1975); Port Arthur College, 92 N.L.R.B. 152, 27 L.R.R.M. 1055 (1950).

37. 549 F.2d 5 (7th Cir.), cert. denied, 431 U.S. 908 (1977).

the action as a "review" of a Board determination in a labor case, rather than as a first amendment case, the court of appeals reversed the district court's injunction and consigned the schools to the administrative remedies available under the Act. "Since the dimension of state-church entanglement can only be intelligently assessed against a developed factual background," the court stated, "and since developing a factual record in labor disputes is a task peculiarly within the competence of the Board," the court recognized the importance here of "permitting the exhaustion doctrine to run its normal course."³⁸

Thus, the court of appeals viewed the action as essentially an inquiry into the degree of state entanglement in religious affairs, an issue of law involving a factual determination which the court viewed as committed by statute to the agency and subject to review only in the court of appeals after exhausting agency procedures. The Bishop's challenge was viewed as premature, since, if the union were certified by the Board, the Bishop could refuse to bargain with the union and test the validity of the Board's jurisdiction in the courts in the context of an unfair labor practice trial. Any first amendment challenge could be raised adequately in such a trial. The court held that the mere allegation of constitutional objections did not confer jurisdiction upon the district court to review otherwise unreviewable "labor" determinations by the Board;³⁹ the statutory review procedures were found to be fully adequate to protect the school's constitutional rights.⁴⁰ Presumably, the plaintiff's "remedy" is to ignore the order to bargain, defend the enforcement of an unfair labor practice charge, and test the validity of the Board's assertion of jurisdiction in the court of appeals.

The decision in *Caulfield v. Hirsch*⁴¹ was less sympathetic to the

38. *Id.* at 9.

39. Section 10 of the NLRA, 29 U.S.C. § 160 (1970), provides that the exclusive means of obtaining judicial review of Board rulings by an aggrieved party is vested in the federal courts of appeals.

40. 549 F.2d at 9.

41. 95 L.R.R.M. 3164 (E.D. Pa. 1977), *appeal docketed*, No. 77-1328 (3d Cir. March 7, 1977). In *Caulfield* the employers contended that merely by asserting jurisdiction in order to determine an appropriate unit for bargaining, the Board was encroaching upon its constitutionally protected religious freedoms. *Id.* at 3166. The Board had concluded that the appropriate unit for bargaining consisted of all full-time lay teachers in the 273 elementary schools in the diocese of Philadelphia. Archdiocese of Philadelphia, 227 N.L.R.B. 1178, 1181-82, 94 L.R.R.M. 1719, 1723 (1977). The employers objected to this determination on the grounds that the individual elementary schools were sufficiently autonomous under church law to

Board's administrative role. Disagreeing with the Seventh Circuit's interpretation of a similar challenge in *Grutka*, the court in *Caulfield* characterized the case as involving "first amendment" rather than "labor" issues⁴² and enjoined the Board from completing a representation determination.⁴³ The court held that the impact on religious freedom outweighed the government's interest in applying the NLRA to Philadelphia's parochial school system, relying upon what it termed a "sliding-scale test."⁴⁴ Justifying its assumption of jurisdiction, the district court rejected the characterization made by the court in *Grutka* and reasoned that it was not asked to review a representation order or decision by the Board but rather was asked to entertain a lawsuit filed to protect a constitutional right by pre-

make it inappropriate for them to bargain as a multi-school bargaining unit and that the creation of a lay bargaining unit would cause dissension between lay and religious members of the faculty. Brief for Appellees at 7-9, 22-24, *Caulfield v. Hirsch*, No. 77-1328 (3d Cir. March 7, 1977). As one commentator has noted, the first objection requires no examination of church doctrine but would require the Board to accommodate the employer's religious interests by accepting without dispute the ecclesiastical aspects and incorporating them into its decision to reject a union claim for a multi-school bargaining unit. Comment, *The Free Exercise Clause, The NLRA, and Parochial School Teachers*, 126 U. PA. L. REV. 631, 645 (1978); see, e.g., Cardinal Timothy Manning, 223 N.L.R.B. 1218, 1219, 92 L.R.R.M. 1114, 1116 (1976). The second objection, often raised by private employers contesting a multi-unit determination, may be resolved without intruding upon church authority over religious teachers. In neither instance would the Board be making a determination concerning the internal structure of the church's school system or contrary to the precepts of ecclesiastical authority; rather, it would merely be considering a "secularly religious factor." See Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

In *Caulfield* the employer should have been estopped from claiming that a lay teacher unit would have a divisive effect since "[t]he Archdiocese of Philadelphia has been content since 1968 to bargain separately with its lay high school teachers," with no objection that such units are religiously divisive nor with any showing of interference with religious freedom or authority relative to the religious faculty. Comment, *The Free Exercise Clause, The NLRA, and Parochial School Teachers*, *supra*, at 646-67. Unlike *Caulfield*, there was no objection to the composition of the unit in *Catholic Bishop of Chicago*.

42. 95 L.R.R.M. at 3167.

43. See *id.* Such orders, known as "Decisions and Direction of Election," have long been held not to be "final" and thus are not reviewable in light of the case law interpreting § 10 of the NLRA, 29 U.S.C. § 160 (1970). See *AFL v. NLRB*, 308 U.S. 401, 409 (1940). The court in *Caulfield*, however, applied both of the two known exceptions to this rule: the first being that set forth in *Leedom v. Kyne*, 358 U.S. 184, 188 (1945), allowing review of a Board order made in derogation of its powers and violating a prohibition in the governing statute, and the second being that stated in *McCulloch v. Sociedad Nacional*, 372 U.S. 10, 17 (1967), allowing review where the interests involved are of such a critical nature as to provide a "uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power." 97 L.R.R.M. at 3167-68.

44. *Id.* at 3178-79.

venting *any* application whatsoever of the NLRA to parochial schools.⁴⁵

The plaintiffs do not seek review of a representation order but are asserting a non-frivolous colorable constitutional claim. To deny access to the federal courts and force plaintiffs to adjudicate their first amendment contentions before an administrative agency whose expertise lies only in labor matters cannot be justified in the absence of a clear mandate from Congress. . . . Similarly, the instant case is "not one to review . . . a decision of the Board made within its jurisdiction." It is one to restrain the order or orders of the NLRB made contrary to the first amendment. Kyne⁴⁶ may be read as standing for the proposition that where plaintiff is not seeking review of an NLRB representation order in the manner in which it would normally be reviewed by the Court of Appeals in a § 10 case, but rather is seeking relief from NLRB conduct which exceeds its statutory or constitutional power, then district court jurisdiction lies.⁴⁷

The court then held that, because the secular characteristics of parochial schools are so intertwined with the schools' religious aspects, any application of the NLRA to the schools would violate the first amendment.⁴⁸

The infirmity of holding any assertion of jurisdiction over parochial schools by the Board to be unconstitutional per se is clearly demonstrated by analyzing the court's reasoning in *Catholic Bishop of Chicago*. Relying upon recent Supreme Court cases addressing the constitutionality of state aid to parochial schools,⁴⁹ the court in *Catholic Bishop* concluded that the Board's standard, distinguishing between "completely religious" schools and those which are only "religiously associated," was a "simplistic black or white, purported rule containing no borderline demarcation of where

45. 95 L.R.R.M. at 3164.

46. In *Leedom v. Kyne*, 358 U.S. 184, 188 (1958), the Court allowed a district court to enjoin enforcement of "an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act." In such a case, considerations of the Board's expertise and the need for a fully developed factual record are irrelevant.

47. 95 L.R.R.M. at 3167-68 (quoting *Leedom v. Kyne*, 358 U.S. at 188).

48. *Id.* at 3169-80.

49. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 748-54 (1976); *Meek v. Pittenger*, 421 U.S. 349, 366 (1975); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 767-68 (1973) (referring to parochial schools as "sectarian", "substantially religious", "church-affiliated" or "religious-pervasive institutions").

'completely religious' takes over or, on the other hand, ceases."⁵⁰ Moreover, in applying this standard, the Board's approach was characterized as a *per se* rule that Catholic secondary schools are subject to the Board's jurisdiction⁵¹ and a "wooden adherence to a jurisdictional standard of 'merely religiously associated' [meaning] that simply because a school includes in its curriculum secular subjects it is thereby deprived of the protection of the Religion Clauses in its recognized pursuit of the propagation of its religious faith."⁵² The parochial aid cases, the court noted, had held that the religious purpose of parochial schools was so pervasive that it permeated even the secular curriculum and other aspects of the schools, rendering constitutionally meaningless any attempt to classify such schools as completely religious or not completely religious. Thus, the Board's standard was found to be inadequate to assure that assertion of jurisdiction by the Board would not interfere with the parochial schools' first amendment freedoms. Rather, the court concluded that application of the standard merely avoided the issue of whether the exercise of jurisdiction would have the effect of interfering with religious beliefs or practices.⁵³ The court then held that any assertion of jurisdiction by the Board over the parochial schools would abridge the religious freedom guaranteed by the first amendment.

In reaching this conclusion, the court failed to differentiate between the threshold question whether the Board has the constitutional authority to assume initial jurisdiction over some parochial schools by distinguishing "completely religious" schools from those which are "religiously associated" and the analytically distinct question of the permissible degree of Board involvement in the affairs of the school and matters of faith once jurisdiction is obtained. Immediately questioning every assumption by the Board of jurisdiction over parochial schools precludes the Board from developing standards by which the Board's jurisdiction extends only to those administrative aspects of the school's operation that are purely secular and do not involve an unconstitutional infringement of the employer's first amendment interests.

The problem is compounded by a confused reliance upon cases concerned with state aid to parochial schools. For example, the

50. 559 F.2d at 1118-19.

51. *Id.* at 1118.

52. *Id.* at 1120.

53. *Id.*

employer in *Catholic Bishop of Chicago* relied upon the findings of the Supreme Court in two parochial aid cases, *Lemon v. Kurtzman*⁵⁴ and *Meek v. Pittenger*,⁵⁵ to support its claim that parochial schools must be found to be "completely religious" and thus exempt from the Board's jurisdiction. The Board's jurisdiction, however, was based upon the secular activities and education provided in the parochial schools and excluded an inquiry into the religious functions of the schools.⁵⁶ Whether schools are "pervasively religious" for purposes of determining the validity of state aid to the institution is of questionable utility in examining the Board's findings for purposes of asserting jurisdiction. Nothing in the parochial aid decisions forbids the Board from deciding, under its own self-imposed standard, whether the assertion of jurisdiction over parochial schools would serve the purposes of the NLRA.⁵⁷

54. 403 U.S. 602 (1971), in which the Court held unconstitutional a Rhode Island statute supplementing the income of teachers of secular subjects in nonpublic elementary schools, finding that as to the sole beneficiaries of statute, the Roman Catholic elementary schools, "[r]eligious authority necessarily pervades the school system."

55. 421 U.S. 349 (1975), in which the Court stated: "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and beliefs." *Id.* at 366.

56. This fact demonstrates the impropriety of confusing the issue of "entanglement" with the issue of the Board's discretionary ability to assume or to decline jurisdiction, since the parochial aid cases, including *Lemon* and *Meek*, emphasized the necessity of pervasive regulatory agency presence in the religious affairs of parochial schools in order to monitor the allocation of public funds. The Supreme Court has not determined that parochial schools are "completely religious" for purposes of assessing the Board's jurisdictional standard; it merely has found that in the parochial schools involved in the cases before the Court the religious aspect permeated all of the activities of these institutions, that the state aid programs at issue could not constitutionally be limited to secular purposes without unduly entangling the state in the administrative operation and the religious functioning of the schools. *See, e.g., New York v. Cathedral Academy*, 434 U.S. 125, 132-33 (1977) (detailed audit by state of sectarian school expenditures constitutes excessive entanglement).

57. Given the holdings in *Grutka v. Barbour*, 549 F.2d 5 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977), and *Catholic Bishop of Chicago*, the Board should not be denied the flexibility to amend or refine its standards in an effort to accommodate the religious purposes of parochial schools. 559 F.2d at 1115. In *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971) (plurality opinion), the Court suggested that significant differences between the religious aspects of church-related colleges and universities and the parochial elementary and secondary schools affect the permissible degree of government entanglement in aid programs, indicating that each circumstance may admit to a less than mechanical resolution. *Roemer v. Board of Pub. Works*, 426 U.S. 736, 760 (1973) (plurality opinion), emphasized the importance of administrative oversight in preventing unconstitutional encroachment. *Cf. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (holding an FCC order and regulation promulgated under the "fairness" doctrine to be both statutorily authorized and constitutional). A court should not presume the Board incapable of being equally sensitive to the religious element arising

There is, moreover, ample precedent for a standard which separates the secular from the religious functions of an institution for purposes of administrative oversight.⁵⁸ Nor does the Board's administrative determination involve the constitutional problem of state evaluation of the religious content of a religious organization.⁵⁹ Nothing in the Board's determination requires an interpretation of any religious doctrine or dissection of any religious tenet; it merely requires the Board to distinguish religious activities from secular activities.

To argue that the Board's presence in the parochial schools creates an establishment issue and forecloses any administrative resolution of the problem, as the court did in *Caulfield*, is inconsistent with the Supreme Court's acknowledgement that some governmental involvement with religion is inevitable;⁶⁰ the real problem is to determine the permissible degree of such involvement.⁶¹ The mere

in a labor setting.

In *Buckley v. American Fed'n of Television and Radio Artists*, 496 F.2d 305, 312 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974), the plaintiffs, political commentators, had been compelled to join a union and submit to union discipline as a condition of employment, resulting in a chilling effect on the exercise of their first amendment rights. The court of appeals construed the NLRA to grant exclusive jurisdiction over the first amendment claim to the Board because the factual context in which the claim arose was "arguably" also an unfair labor practice under § 8(a)(3) of the Act.

58. See *Tilton v. Richardson*, 403 U.S. 672 (1971) (nonpublic colleges and universities); *Gillette v. United States*, 401 U.S. 437 (1971) (Selective Service Board conscientious objector exemption); *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (tax exemptions for church property). Indeed, a distinction between the secular and the religious functions of sectarian schools was the premise upon which some forms of state aid were upheld in *Wolman v. Walters*, 433 U.S. 229 (1977), a decision seen by some writers as retreating somewhat from the staunch insistence on separation of church and state. Comment, *Wolman v. Walter and the Continuing Debate over State Aid to Parochial Schools*, 63 Iowa L. Rev. 543 (1977). See generally *Giannella*, *supra* note 41.

Parochial schools have long been subject to a significant degree of state regulation which presupposes a severance of the religious from the secular aspects and admits to substantial control of the latter. See 37 OHIO ST. L.J. 299 (1976). Private schools are sufficiently public in nature to be subject to extensive regulation in the interests of society. Matt & Edelstein, *Church, State, and Education: The Supreme Court and its Critics*, 2 J.L. & Educ. 535, 583-84 (1973); see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

59. *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971). See generally *Giannella*, *supra* note 41. This clearly is not an instance of an administrative body "adjudicating the constitutionality of congressional enactments." *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233, 242 (Harlan, J., concurring), *quoted in* *Grutka v. Barbour*, 549 F.2d 5, 8-9 (7th Cir.), *cert. denied*, 431 U.S. 908 (1977).

60. 403 U.S. at 614.

61. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Exemptions based on the distinctions incorporated in the Board's discretionary standards for the assertion of jurisdiction are valid.

act of applying a discretionary standard does not involve any undue examination and entanglement in the religious affairs of the parochial schools. Rather, it is an administrative effort to prevent such an impermissible degree of entanglement in the religious affairs of the schools once the decision to exercise jurisdiction is implemented.

CONSTITUTIONAL OBJECTIONS TO THE EXERCISE OF JURISDICTION

Arguments that the first amendment bars the Board from assuming jurisdiction over parochial schools are based upon both the establishment and the free exercise clauses.⁶² An examination of these arguments in the context of *Catholic Bishop of Chicago* clearly demonstrates their weakness.

Free Exercise

Elements of a Free Exercise Claim

Free exercise litigation has been concerned primarily with the protection of individual rights.⁶³ The purpose of the clause is to preserve the notion of "voluntarism,"⁶⁴ or freedom of conscience in beliefs and ideas. It is in this context that one must view any infringement upon the free exercise of religion in the parochial schools. Controversies involving the free exercise clause follow two distinct patterns to which the same analysis may be applied. A governmental regulation may require an individual to perform an act that his religion prohibits.⁶⁵ Alternatively, a governmental regu-

See note 58 & accompanying text *supra*. The creation of an "all or nothing" confrontation is the least satisfying accommodation of the interests involved.

62. The opinion in *Catholic Bishop of Chicago*, 559 F.2d at 1131, made no distinction between the two religion clauses; rather it combined its discussion of "free exercise" and "establishment" principles because of its belief that there has been some "blurring of sharply honed differentiations." See note 14 *supra*. See generally Warner, *NLRB Jurisdiction Over Parochial Schools: Catholic Bishop of Chicago v. NLRB*, 73 Nw. U.L. Rev. 463 (1978).

63. "The establishment clause obviously deals with entities, i.e., the state and religion (the Church), whereas the free exercise clause apparently deals with persons, i.e., their personal free exercise of religious beliefs and faiths . . ." Forkosch, *Religion, Education, and the Constitution - A Middle Way*, 23 Loy. L. Rev. 617, 639 (1977). See generally Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967).

64. Giannella, *supra* note 41, at 517.

65. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (objection to compulsory secondary school education).

lation may prohibit an action by an individual which he claims his religious beliefs require him to perform.⁶⁶

Regardless of whether a particular free exercise claim falls into the first or second of these categories, certain elements must be established in order to prove a violation of the free exercise clause. First, as stated by the Supreme Court, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion."⁶⁷ In addition, the asserted constitutional injury cannot be speculative but must be "a demonstrable reality."⁶⁸ Compliance with the challenged governmental regulation must be directly contrary to the religious beliefs of the individual involved.^{68.1} If such a genuine conflict exists,⁶⁹ the governmental interests involved must be balanced against the degree of harm to the individual's rights.⁷⁰ Generally, if the challenged governmental

66. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (statute prohibiting minors from selling magazines in street); *People v. Woody*, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (overturning application of drug statute to Indian peyote ritual).

67. *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963), *quoted in* *Board of Educ. v. Allen*, 392 U.S. 236, 248-49 (1968). To a limited extent the requirement of some coercive effect, unnecessary to an establishment claim, serves to distinguish the two clauses.

68. *Beck v. Washington*, 369 U.S. 541, 558 (1962) (quoting *Adams v. United States ex rel. McConnell*, 317 U.S. 269, 281 (1942)). As was stated in *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937): "[The petitioner] seeks to bar all regulations by contending that regulation in a situation not presented would be invalid. Courts deal with cases upon the basis of facts disclosed, never with nonexistent and assumed circumstances." And in *Tilton v. Richardson*, 403 U.S. 672, 679 (1971), the Court declared: "A possibility always exists, of course, that the legitimate objectives of any law or legislative program may be subverted by conscious design or lax enforcement. . . . But judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional." Collective bargaining in the parochial schools does not involve the kind of conflict between individual conscience and a state interest typical of the free exercise cases decided by the courts. *Catholic Bishop of Chicago* is quite unlike the situation in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which compulsory school attendance would have struck a death knell to the Amish community. The assertion of Board jurisdiction over parochial schools clearly does not conflict with religious beliefs. Students, teachers, and administrators will continue to receive or transmit religious beliefs and education even if they are subject to the NLRA. Collective bargaining has occurred in parochial schools without inhibiting the free exercise of religion.

68.1. *Wisconsin v. Yoder*, 406 U.S. 205, 219-20 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963).

69. See generally *Giannella*, *supra* note 63, at 1423-31. For an example of the problem involved in identifying a genuine conflict in a specific context, see *United States v. Ballard*, 322 U.S. 78 (1944) (validity of religious beliefs questioned in mail fraud prosecution). For a further discussion of the problem, see Note, *Native Americans and the Free Exercise Clause*, 28 *HASTINGS L.J.* 1509 (1977).

70. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 214-15 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403, 406 (1963). See generally *Clark*, *Guidelines for the Free Exercise Clause*, 83 *HARV.*

action regulates conduct rather than belief, such action is permissible if justified by a compelling state interest.⁷¹ The means of accomplishing such a compelling purpose, however, must be those which least restrict the individual's first amendment rights.⁷²

L. REV. 327, 329-44 (1969); Giannella, *supra* note 63, at 1384, 1390-416.

In *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940), the Court recognized that, although the freedom to believe is "absolute," all "[c]onduct remains subject to regulation for the protection of society." In *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970), the court applied this distinction to require an employer to bargain despite a claim that its religious beliefs precluded it from dealing with a labor union. The court stated:

The Employers here are not required to abandon their religious belief that such acts are wrong in order to engage in good faith collective bargaining. They could still prove good faith bargaining if they had honestly attempted to come to some workable agreement despite their belief that what they were doing was wrong in a religious sense.

Id. at 889.

Similarly, the Board has determined that an activity may be both religious and commercial; the latter is not beyond the jurisdictional reach of NLRA. *The First Church of Christ, Scientist*, 194 N.L.R.B. 1066, 1068-69, 79 L.R.R.M. 1135, 1138 (1972). In *Motherhouse of the Sisters of Charity*, 232 N.L.R.B. No. 44 (1977), the Board declined to assert jurisdiction over a nursing home associated with a convent. The Board found that the services provided by the employer were non-commercial and were undertaken in the furtherance of religious objectives. The Board concluded that it would not serve the policies of the Act to assert jurisdiction in this situation. *But see Rhode Island Catholic Orphan Asylum*, 224 N.L.R.B. 1344 (1976) (non-commercial character not determinative).

71. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944) (state interest in health of minor outweighs free exercise claim). *But see Thomas v. Collins*, 323 U.S. 516, 530 (1945) ("Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."), *quoted in Sherbert v. Verner*, 374 U.S. 398, 406 (1963). *See generally Forkosch, supra* note 63, at 639.

The dichotomy between governmental regulation of belief and of conduct, originally referred to in *Reynolds v. United States*, 98 U.S. 145, 166 (1879), seemed to have been abandoned in *Sherbert*. The Court, however, sounded a similar theme in *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972), stating that "the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests." *See Comment, Racial Discrimination in Private Schools, Section 1981 and the Free Exercise of Religion: The Sectarian Loophole of Runyon v. McCrary*, 418 U. COLO. L. REV. 419, 430-32 (1977). Some scholars have suggested that *Yoder* simply transferred the power to set standards for individual conduct from the government to the Church. Kurland, *The Supreme Court, Compulsory Education and the First Amendment's Religion Clauses*, 75 W. VA. L. REV., 213, 241-42 (1973); Riga, *Yoder and Free Exercise*, 6 J.L. & Educ. 449, 466 (1977).

Recent collective bargaining decisions seem to recognize a belief-conduct dichotomy in requiring bargaining despite a religious belief opposed to such conduct. *NLRB v. Good Foods Mfg. & Processing Corp.*, 492 F.2d 1302 (7th Cir. 1974); *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970).

72. *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303-05 (1940).

Analysis of the Free Exercise Claim in Catholic Bishop of Chicago

The controversy in *Catholic Bishop of Chicago* arose from the Board's attempt to enforce its order requiring the parochial employers to bargain in good faith with the chosen representative of the lay faculty of the schools. The primary defect in the constitutional objection based on the free exercise clause in *Catholic Bishop of Chicago* arises from the employers' failure to assert that the observance of the regulation in question would violate any of their religious tenets.⁷³ Although the parochial employers claimed that the first amendment prohibits the government from requiring them to bargain collectively with a union representing their lay faculty, neither employer contended that bargaining with a lay-faculty union was contrary to their religious beliefs.⁷⁴ In order for conduct, or the abstention therefrom, to be protected by the free exercise clause it must be established that such conduct or abstention is part of the practice of religion.⁷⁵ Because the observance of the law by the parochial employers was not directly contrary to their religious beliefs,⁷⁶

73. The court will inquire whether the belief is of religious nature and therefore protected by the free exercise clause or of a "philosophical or personal" nature and therefore unprotected. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972). The courts will not examine the veracity or theological validity of the religious belief, *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *United States v. Ballard*, 322 U.S. 78, 86 (1944), but will determine whether the alleged belief is held in good faith. *In re Grady*, 61 Cal. 2d 887, 394 P.2d 228, 39 Cal. Rptr. 912 (1964); *Dobkin v. District of Columbia*, 194 A.2d 657 (D.C. 1963); *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963).

74. The Catholic Church consistently has supported "the workers' natural right to enter into association with his fellows" for the purpose of bargaining collectively with their employer and has acknowledged the obligation of the government "to protect the rights of all its people, and particularly of its weaker members, the workers . . ." *THE ENCYCLICALS AND OTHER MESSAGES OF POPE JOHN XXIII* 255-56 (1964). Indeed, the Church supported passage of the Labor Reform Act of 1977, regarded by most as pro-union in its orientation. See 123 CONG. REC. H10556 (daily ed. Oct. 4, 1977) (remarks of Rep. Clay). See also Hearings on the Labor Reform Act of 1977, H.R. 8410 Before the Subcomm. on Labor-Management Relations of the House Comm. on Educ. and Labor, 95th Cong., 1st Sess. 411-23 (1977) (remarks of Monsignor George C. Higgins). Recently, representatives of the Catholic Church joined several other church groups in signing a statement supporting a boycott of the J.P. Stevens Textile Co., which was engaged with the Amalgamated Clothing and Textile Workers Union in a long-standing labor dispute over organization of its plant. See *Catholic Leaders Urge Boycott of J.P. Stevens Co.*, Wash. Post, Sept. 7, 1978, at A26, col. 6.

75. *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972).

76. *Id.* In *Yoder* the Court stated: "A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief." *Id.* at 215.

the alleged conflict should not be viewed as a confrontation between a fundamental constitutional freedom and a valid governmental interest.

Even assuming *arguendo* that there is a good faith objection to collective bargaining because it is contrary to religious beliefs,⁷⁷ the religious importance of the objection must be balanced against any relevant compelling state interest. Moreover, the regulation implementing those interests must be the least restrictive means of accomplishing the state's interest.⁷⁸ Thus, if a statute is found to infringe upon the free exercise of an individual's religion, the extent of that encroachment is measured against the state's interest in enforcing the challenged regulation.

Religiously neutral, nondiscriminatory laws enacted for the general welfare must be observed even if such regulations incidentally impinge upon the conduct of individuals in the practice of their religion.⁷⁹ This principle supports the imposition of collective bar-

Prior to the decision in *Yoder*, courts had articulated a screening test to avoid spurious first amendment claims. As was stated in *United States v. Kuch*, 288 F. Supp. 439, 443 (D.D.C. 1968):

Those who seek the constitutional protections for their participation in an establishment of religion and freedom to practice its beliefs must not be permitted the special freedoms this sanctuary may provide merely by adopting religious nomenclature and cynically using it as a shield to protect them when participating in anti-social conduct that otherwise stands condemned.

In *Kuch* an examination of literature of the Neo-American Church revealed that the sole reason for the group was the desire to use drugs, regardless of any religious belief, and, therefore, the motivation for the conduct at issue was insufficient to invoke first amendment safeguards. See *Marshall v. Pacific Union Conference of Seventh Day Adventists*, No. CV 75-3032-R (C.D. Cal. 1977) (equal pay provisions of Fair Labor Standard Act outweighed religious objections of employer who operated several educational institutions). See generally Note, *Freedom of Religion as a Defense to a § 1981 Action Against a Racially Discriminatory Private School*, 53 NOTRE DAME LAW. 107, 115-17 (1977).

77. See, e.g., *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970).

78. See notes 71-73 *supra*. The Board's decision to exempt schools that are completely religious, as well as the decision to accommodate the religious employer by considering the religious factors of its affiliation, represents a less restrictive alternative than exerting jurisdiction over all schools, regardless of their religious character or secular content. The distinction between "completely religious" and "religiously associated" for purposes of determining the propriety of Board jurisdiction adequately serves the purposes of the Act. See 53 NOTRE DAME LAW. 463, 468-69 (1978).

79. See, e.g., *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing law enforced despite economic burden on Orthodox Jews); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state child labor law applicable to child selling religious literature); *Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954) (failure to comply with Fair Labor Standards Act not justified on religious grounds); *Biklen v. Board of Educ.*,

gaining as a means of achieving harmonious labor relations despite any tangential effect on the employer's free exercise of religion.⁸⁰ Finding that the requirement to bargain in good faith relates to conduct rather than belief and does not unconstitutionally coerce or infringe upon religious belief, the court in *Cap Santa Vue, Inc. v. NLRB*⁸¹ declared that there is a compelling public interest in applying the good faith collective bargaining requirement uniformly to all employees and labor unions.⁸² Thus, whether or not one considers the NLRA to be directly contrary to a religious belief, application of the Act to lay teachers in parochial schools may be justified under the free exercise balancing test.

Moreover, the court's holding in *Catholic Bishop of Chicago* that the order to bargain had an unconstitutional "coercive effect" upon the employers' religious practices because of the potential restriction on the bishop's control over the parochial schools and the potential threat to the continued existence of the schools⁸³ rests on a misconception of the actual functioning of the Board. The purpose of the NLRA is to encourage collective bargaining without undue governmental involvement.⁸⁴ Congress has emphasized that free collective bargaining is in the national interest⁸⁵ and that the terms

333 F. Supp. 902 (N.D.N.Y. 1971), *aff'd mem.*, 406 U.S. 951 (1972) (requirement that teachers take oath does not violate free exercise clause).

80. See, e.g., *Yott v. North Am. Rockwell Corp.*, 501 F.2d 398 (9th Cir. 1974) (discharge for refusal to pay union dues on religious grounds does not violate free exercise clause); *Linscott v. Miller Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971) (discharge for failure to pay union dues upheld); *Gray v. Gulf, M. & O. R.R.*, 429 F.2d 1064 (5th Cir. 1970) (discharge for refusal to pay fees in lieu of union membership upheld); *Ciba-Geigy Corp. v. Local 2548, United Textile Workers*, 391 F. Supp. 287 (D.R.I. 1975) (burden from Sunday work on employee's free exercise of religion justified by public interest in collective bargaining).

81. 424 F.2d 883 (D.C. Cir. 1970); see *United States v. Kissinger*, 250 F.2d 940 (3rd Cir. 1958), in which the court stated: "[T]he enforcement of a reasonably nondiscriminatory regulation of conduct by governmental authority to preserve peace, tranquility and a sound economic order does not violate the First Amendment merely because it may inhibit conduct on the part of individuals which is sincerely claimed by them to be religiously motivated." *Id.* at 943 (citations omitted).

82. 424 F.2d at 890; *accord*, *Western Meat Packers, Inc.*, 148 N.L.R.B. 444, 57 L.R.R.M. 1028 (1964), *enforcement denied on other grounds*, 350 F.2d 804 (10th Cir. 1965) (employer may not refuse to bargain with union on grounds of his religious beliefs). In *NLRB v. National Ins. Co.*, 343 U.S. 395, 402 (1952), the Court stated that the "[e]nforcement of the obligation to bargain collectively is crucial to the statutory scheme."

83. 559 F.2d at 1123.

84. See R. SWIFT, *THE NLRB AND MANAGEMENT DECISION MAKING* 8 (1974).

85. See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 105 (1962); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960); *Textile Workers Union*

and conditions of employment must be determined by private contract⁸⁶ with minimal governmental intrusion.⁸⁷ Within this legislative framework, the Board generally plays a positive role of facilitating collective bargaining.⁸⁸ Only if the process malfunctions and the public interest is undermined does the Board intervene to regulate the conduct of the parties.⁸⁹ Thus, although the sharing of decision-making over wages, hours, and working conditions with employees is inherent in the structure of collective bargaining, the actual substantive terms of the agreement are left entirely to the bargaining parties.⁹⁰

An example, presented in another context by the court in *Catholic Bishop of Chicago*, illustrates that the exercise of jurisdiction by the Board over labor relations in parochial schools will not interfere with the religious practices or beliefs of the employer. Assume that the bishop refused to renew all lay faculty teaching contracts because he believed that the training of Catholic students should be entrusted exclusively to the clergy.⁹¹ Under the case law developed by the Board and the courts, the bishop probably would not be required to bargain over that decision, if made in good faith.⁹²

Such a situation is analogous to a total closing of the employer's enterprise in the private sector.⁹³ A distinction drawn in the case law

v. *Lincoln Mills*, 353 U.S. 448, 452-54 (1957). See generally A. COX, *LAW AND THE NATIONAL LABOR POLICY* (Inst. of Indus. Relations Monograph No. 5, 1960).

86. Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 14 LAB. L.J. 1016 (1963); see *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477, 484-85 (1960); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 401-02 (1952).

87. Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389, 425-32 (1950). See also Wellington, *supra* note 86, at 1017; see generally Walther, *The Board's Place at the Bargaining Table*, 28 LAB. L.J. 131 (1977).

88. This end is accomplished through representation proceedings and certification of an appropriate bargaining unit. 29 U.S.C. § 159 (1970).

89. For example, the Board may intervene if there is evidence of employer or employee discrimination on the basis of union activities, 29 U.S.C. § 158 (a)(3) and (b)(2), or a breach of the duty to bargain in good faith on the part of either the employer or the union. 29 U.S.C. § 158 (a)(5) and (b)(3).

90. See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970) (the Board lacks authority to compel agreement on substantive contractual provisions).

91. *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1123-24 (7th Cir. 1977).

92. Any inquiry by the Board into the validity of such church doctrinal decisions is prohibited by *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

93. In view of the large number of lay faculty in the parochial schools, see note 8 *supra*, a decision to refuse to renew all lay faculty contracts might best be analogized to a decision to close the employers' business entirely. See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (total closing of union business is not an unfair labor practice although motivated by anti-union animus).

between bargaining over the decision not to renew the contracts and the requirement to bargain in good faith over the impact of that decision on the employees with regard to severance pay or possible relocation of the employees defines the permissible limits of governmental interference with the employer's management prerogative in such situations.⁹⁴ Under this distinction, the employer may be required to bargain with his employees over the effects of his managerial decision, but if the employer's decision effects a fundamental change in the business' operating procedure, he cannot be required to bargain with his employees over the substance of the decision itself.⁹⁵ If, however, the decision were motivated solely by anti-union animus, the employer's decision would be subject to mandatory collective bargaining.⁹⁶ Because the decision to replace lay teachers with clergy, or to close the schools entirely, would effect such a fundamental change in operation, the schools could not be required to bargain with the lay employees over this decision.

The requirement of impact bargaining reflects the belief that an employer should provide for the welfare of his displaced employees; but neither the union nor the Board can prevent the implementation of management's decision.⁹⁷ By requiring the religious employer to bargain over the impact but not the substance of its religiously motivated decisions, the employer's religious interests are accommodated to the interests of his employees by providing a means whereby the detriment suffered by the employees can be mitigated without interfering with adjustments within the school based on religious doctrine.⁹⁸

Thus, although the Board has authority to compel the parochial employer to bargain with the lay employee's union concerning measures to mitigate the impact of its religiously motivated managerial decisions, it has no authority to compel a party to agree on the

94. Morris, *The Role of the NLRB and the Courts in the Collective Bargaining Process: A Fresh Look at Conventional Wisdom and Unconventional Remedies*, 30 VAND. L. REV. 661, 671 (1977). Professor Morris suggests that the problem of bargaining requirements as to the effects of managerial decisions is one of accommodation of the interests of the various parties.

95. *NLRB v. Thompson Transp. Co.*, 406 F.2d 698 (10th Cir. 1969); *NLRB v. Transmarine Navigation Co.*, 380 F.2d 933 (9th Cir. 1967); *Summit Tooling Co.*, 195 N.L.R.B. 479, 79 L.R.R.M. 1396 (1972), *enforced*, 474 F.2d 1352 (7th Cir. 1973).

96. *Mobil Oil Corp.*, 219 N.L.R.B. 511, 90 L.R.R.M. 1075 (1975).

97. *Swift*, *supra* note 84, at 41-42.

98. *Id.* at 42.

substantive terms of that decision.⁹⁹ Compelling agreement when the parties are unable to agree would be a violation of the fundamental premise of the Act: that the parties, and not the Board, determine the terms of their agreement. The Board's position therefore is that the NLRA restricts only the employers' freedom to engage in unfair labor practices against lay teachers, a freedom which enjoys no first amendment protection.¹⁰⁰

99. Section 8(d) of the NLRA, 29 U.S.C. § 158(d) (Supp. V 1975), provides in pertinent part:

[T]o bargain collectively is the performance of the mutual obligations of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party, to agree to a proposal or require the making of a concession*

Id. (emphasis supplied). This obligation has been held not to conflict with any free exercise value and has been satisfied by an honest effort between the parties to reach some agreement. *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883 (D.C. Cir. 1970). *See also* *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395, 402 (1952). In the latter case, the Court stated that "the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of the collective bargaining agreement." *Id.* at 404.

100. *Cap Santa Vue, Inc. v. NLRB*, 424 F.2d 883, 889-91 (D.C. Cir. 1970); *Good Foods Mfg. & Processing Corp.*, 195 N.L.R.B. 418, 426-27, 79 L.R.R.M. 1387, 1388-89 (1972), *enforced*, 492 F.2d 1302 (7th Cir. 1974); *see* *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (freedom of press does not exempt employer from the Act); *cf. Mitchell v. Pilgrim Holiness Church Corp.*, 210 F.2d 879, 882-84 (7th Cir. 1954) (religion clauses do not exempt employer from Fair Labor Standards Act).

Another argument propounded is that the Board's bargaining order threatens the continued existence of the schools. This argument, however, is negated by the Supreme Court's decision in *McGowan v. Maryland*, 366 U.S. 420, 429 (1961), which held that an economic injury may not necessarily be raised to the level of a constitutional injury absent any tangible infringement of the plaintiff's religious freedom. *See also* *Braunfeld v. Brown*, 366 U.S. 599, 603-04 (1961) (indirect economic burden on exercise of religion outweighed by state's interest in legitimate secular goals). Moreover, those parochial schools that have complied with orders to bargain have experienced no infringement of free exercise rights and no economic collapse. *See* note 9 *supra*. The policy considerations implicated by requiring collective bargaining in the parochial schools resemble those raised in balancing governmental functions between the state and federal governments. If one views the church and state as independent sovereigns, the extent to which the federal government may regulate labor relations in church-related schools may be determined by employing a balancing test similar to that used in *National League of Cities v. Usery*, 426 U.S. 833 (1976), to reconcile the power of Congress to legislate under the commerce clause with the limitations on congressional power expressed in the tenth amendment. In *Usery* the Court held that the challenged amendments to the Fair Labor Standards Act, "while undoubtedly within the scope of the Commerce Clause," *id.* at 841, ran counter to concepts of federalism "insofar as the . . . amendments operate to directly

Establishment Clause

Elements of an Establishment Clause Claim

The essential purpose of the establishment clause is to assure government neutrality in matters of religion.¹⁰¹ The types of governmental intrusion excluded by the neutrality requirement were stated succinctly by Justice Black in *Everson v. Board of Education*.¹⁰²

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will nor force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."¹⁰³

The Supreme Court has taken the view that the wall of separation between church and state is not absolute; because some interaction in church affairs is inevitable,¹⁰⁴ the question in resolving establish-

displace the State's freedom to structure integral operations" *Id.* at 852. Under this analysis, the absence of government control over the internal decision-making process of the church, or of a significant economic impact on the church, militates against a determination that the interests of the parochial school employers protected by the first amendment outweigh the congressional mandate of the NLRA.

101. *Giannella*, *supra* note 41, at 519. In *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976), the Supreme Court reaffirmed that neutrality is the key concept governing the inevitable interaction between church and state. The plurality opinion written by Justice Blackmun declared: "The State must confine itself to secular objectives, and neither advance nor impede religious activity." *Id.* at 747. Additionally, the maintenance of neutrality may relieve the inherent tension between the free exercise and establishment clauses. See note 14 *supra*; note 197 *infra* & accompanying text.

102. 330 U.S. 1 (1947). The Court held that the reimbursement of fares paid for transportation of children to Catholic school by public carrier does not violate the establishment clause.

103. *Id.* at 15-16 (citations omitted).

104. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in which the Court reasoned: "Our prior

ment clause challenges is not whether, but to what extent may such interaction be tolerated.¹⁰⁵ The process of determining the point beyond which entanglement in church matters becomes excessive presupposes an application of "neutral principles of law,"¹⁰⁶ a prohibition against an intrusion by the state into doctrinal matters,¹⁰⁷ and a distinction in any given situation between the secular goals as opposed to the religious interests.¹⁰⁸

In *Tilton v. Richardson*¹⁰⁹ and *Lemon v. Kurtzman*¹¹⁰ the Court developed a tripartite test to implement these considerations. A failure to satisfy any one of the following criteria is sufficient to invalidate governmental conduct on establishment grounds. First, the purpose of the conduct must be the attainment of some legitimate secular interest. Second, the effect of the conduct must be neutral, neither advancing nor inhibiting religion. Lastly, the conduct must not result in excessive governmental entanglement with religion.

Analysis of the Establishment Clause Claim in Catholic Bishop of Chicago

The establishment clause issue in *Catholic Bishop of Chicago*, as in most cases,¹¹¹ centered on parts two and three of this tripartite test. The court's decision rested on the assumption that an unfair

holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* at 614 (citations omitted).

105. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (the question "is one of degree").

106. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

107. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1 (1929); *Watson v. Jones* 80 U.S. (13 Wall.) 679 (1871).

108. See, e.g., *Tilton v. Richardson*, 403 U.S. 672, 679 (1971); *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1970); *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968).

109. 403 U.S. 672, 678 (1971).

110. 403 U.S. 602 (1971).

111. Some decisions have rested on the first two elements of the test. In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), a legislative program providing financial aid to private schools failed because it had the primary effect of advancing religion and because it promoted excessive government entanglement with religion. *Epperson v. Arkansas*, 393 U.S. 97 (1968), involved an infrequent instance of impermissible religious purpose: the prohibition of the teaching of evolution in public schools. *School Dist. v. Schempp*, 374 U.S. 203 (1963), held unconstitutional a law requiring Bible readings in public school because it served to advance religion.

labor practice proceeding under the Act might require an examination by the Board of religious doctrine and that in such circumstances the Board would be unable to accommodate its established procedure to the religious nature of the employer.¹¹² The court accordingly held that the very exercise of jurisdiction by the Board interfered with religious beliefs or practices.¹¹³ Since constitutional principles do not exist in a vacuum,¹¹⁴ the establishment objection cannot be analyzed without a consideration of the specific application of the NLRA to parochial schools and the specific objections raised by the employer.

The role of the Board in collective bargaining is uniquely conducive to assuring that the secular as well as the religious interests of all concerned are protected.¹¹⁵ Moreover, the legislative scheme of the NLRA presupposes agency neutrality in matters of religion. Not only is any intrusion into doctrinal matters precluded, but an examination of any religious tenet is unnecessary to resolve issues arising in the context of labor relations. In one of the first cases construing the NLRA, *Associated Press v. NLRB*,¹¹⁶ the Court found that the Board was required to and could very easily sever the non-constitutional issues arising in an unfair labor practice proceeding from those arising under the first amendment.¹¹⁷ Regarding the freedom of the press, the Court declared:

The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and

112. 559 F.2d at 1127-30.

113. *Id.* at 1120, 1122.

114. See generally Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

115. Theoretically, lay teachers may claim that denial of the right to organize and bargain collectively under the NLRA, either through an exemption or judicial construction, inhibits their free exercise by denying them the benefits of a general legislative provision solely because of their affiliation with a religious institution. But see *Robinson v. DiCenso*, 400 U.S. 901 (1970) (lack of aid to parochial schools, resulting in school closings, does not violate the first amendment).

116. 301 U.S. 103 (1937).

117. "[I]t is said that any regulation protective of union activities, or the right collectively to bargain on the part of such employees, is necessarily an invalid invasion of freedom of the press. We think the contention not only has no relevance to the circumstances of the instant case but is an unsound generalization." *Id.* at 131.

liberties of others . . . The regulation here in question has no relation whatever to the impartial distribution of news.¹¹⁸

The notion of severability is helpful in understanding that the church will not surrender control in the management of the parochial schools if they are required to bargain with a teachers' union. Rather, the limitations inherent in enforcing the NLRA dictate that the church's control in managing the religious functions of the schools remain absolute.

As previously stated,¹¹⁹ the first step in the Board's decision whether to assert jurisdiction over a religiously oriented school is to determine whether such schools are "completely religious" or merely "religiously affiliated." The court in *Catholic Bishop of Chicago* held that recent Supreme Court cases dealing with state aid to parochial schools described parochial schools as "permeated" with religious purpose, a characterization inconsistent with a finding that such schools were merely "religiously affiliated."¹²⁰ State support of a religious organization, however, is quite distinct from the uniform application by a government agency of religiously neutral regulations to all private employers. Thus, a slavish adherence to characterizations of the nature of parochial schools for other purposes is unhelpful in the context of labor relations. In addition, the discussion of the parochial aid cases in *Catholic Bishop of Chicago* ignored the most crucial step in the analysis found in those cases: whether the regulation, in this case the statutory requirement of collective bargaining, requires "[a] comprehensive, discriminating, and continuing state surveillance"¹²¹ of the sort found to be unavoidable in the aid cases cited by the court.

The NLRA protects a wide class of employees and employers against unfair practices arising out of the collective bargaining process. In *Catholic Bishop of Chicago*, application of the Act was sought so that lay teachers, through the representative of their choosing, would enjoy the recognitional and bargaining rights common to other employees. The exercise of these rights involves no intrusion into religious principles, since the focus in resolving labor disputes is on the secular functions of the institution.¹²² Moreover,

118. *Id.* at 132-33.

119. See note 33 *supra* & accompanying text.

120. 559 F.2d at 1123-24.

121. *Lemon v. Kurtzman*, 403 U.S. at 619.

122. The Board's enforcement proceedings on behalf of the teachers can be analogized to

the protection afforded by the Act is neutral with respect to the religious freedoms guaranteed by the first amendment. It will assure that the religious character of an employer is not itself sufficient justification for the infringement of the employees' statutory rights while also guaranteeing that the secular character of the employer's activities is not sufficient justification to deprive the employer of the ability to direct the enterprise, whether or not motivated by religious considerations.¹²³ The protections afforded by the NLRA require no comprehensive, continuing regulatory surveillance; indeed, such conduct is inimical to the intent of the legislative scheme. The Board has no more concern with the religious prerogatives of the church in maintaining the parochial schools than it does with the ability of any other employer to direct his enterprise.

Requiring the religious employer to respond to an unfair labor practice charge before the Board or a court involves no examination of religious doctrine.¹²⁴ Board proceedings are directed solely to determining whether an unfair labor practice has been committed. Any inquiry by the Board necessarily is limited solely to the secular issues of anti-union animus and fairness in collective bargaining and is not concerned with the merits of any related dispute over religious doctrine.¹²⁵ As in the church property disputes,¹²⁶ the adjudication

proceedings in the judicial system to adjudicate disputes over church property. The Court stated in *Presbyterian Church v. Mary Elizabeth Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969):

Civil Courts do not inhibit free exercise merely by opening their doors to disputes involving church property. And there are neutral principles of law, developed for use in all property disputes, which can be applied without "establishing" churches to which property is awarded . . . [T]he First Amendment enjoins the employment of organs of government for essentially religious purposes . . .

Id. at 449.

123. As was noted in *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937):

The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. . . . The petitioner is at liberty, whenever the occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as a punishment for, or discouragement of, such activities as the act declares permissible.

See *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954). The courts and the Board have consistently reiterated that motivation is dispositive in finding a violation. See 48 B.U.L. REV. 142 (1968).

124. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969).

125. If a dispute requires a resolution of an underlying controversy over religious doctrine, civil courts must accept ecclesiastical rulings as dispositive "where resolution of the disputes

centers around neutral principles of law which do not inhibit or intrude upon the protected religious freedoms of the litigant.

The limits of the Board's inquiry into labor disputes between religious employers and their employees may be illustrated by examining the Board's role in evaluating charges that an employee was improperly terminated. Analytically, the issues implicated by a discharge motivated by religious doctrine, behind which lurks a possible anti-union motive, are indistinguishable from those raised by a discharge premised upon chronic absenteeism, insubordination, or disloyalty when the employee also happened to be affiliated with a union. Each of these situations involves a so-called "mixed-motive discharge."¹²⁷ In a hypothetical example raised by the court in *Catholic Bishop of Chicago*,¹²⁸ a member of the lay faculty of a parochial school is dismissed by the bishop for advocating the morality of abortion and after he had become active in union affairs. Clearly, if the bishop's motive for terminating the employee involved both religious doctrine and anti-union animus, the Board might well compel the bishop to reinstate the teacher.¹²⁹ It is a

cannot be made without extensive inquiry . . . into religious law and policy" *Serbian E. Orthodox Church v. Milivojevich*, 426 U.S. 696, 709 (1976); see note 107 *supra*.

126. *Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).

127. Such discharges were discussed in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967). Whether the employer's conduct results in severe or slight harm to employee rights under the Act, the employer bears the burden of proving a legitimate and substantial business justification for its conduct. *Id.* at 34. If the harm to employee rights is slight and the employer has shown a business justification, independent evidence of an anti-union motive must be proven to establish a violation of § 8(a)(3). *Id.* If the employer's conduct was "inherently destructive" of employee rights, then, despite an employer's showing of a substantial and legitimate business justification, a violation of § 8(a)(3) of the Act may be found if the Board determines that the policy of preserving employee rights outweighs the legitimate business end served. *Id.* at 33-34; see Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of American Shipbuilding and Great Dane Trailers*, 70 COLUM. L. REV. 81 (1970); Comment, *Employer Discrimination Under Section 8(a)(3)*, 5 U. TOL. L. REV. 722 (1974).

128. 559 F.2d at 1124.

129. See, e.g., *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1352-53 (3d Cir. 1969) (employer cannot substitute "good" reason for the "real" reason when the purpose is retaliation against an employee's protected activities). See generally Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1 (1947), in which Professor Cox states:

The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when the aggressor is not actuated by a desire to protect a

mistake, however, to assume that the bishop could not dismiss such an employee if the motive were genuinely religious and not a mere pretext. This situation often is resolved by balancing the employer's managerial rights against the inhibiting effect such conduct might have on the organizational rights of other employees.¹³⁰

Emphasizing the importance of employer motivation, the courts often have referred to those rights of the employer which were not intended to be compromised. Even if the effect of the employer's conduct is to discourage union participation, there is no violation in the absence of the proscribed motive.¹³¹ In *NLRB v. Jones &*

recognized interest, the basis for his excuse disappears. This philosophy is embedded in Section 8(3). If an employer discharges an employee to protect his interest in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful.

Id. at 20-21.

Employer knowledge of an employee's union activity is probably the most important element in determining whether the dismissal was for impermissible "secular" motives. *NLRB v. Laney & Duke Storage Warehouse Co.*, 369 F.2d 859, 868 (5th Cir. 1969); *NLRB v. Atlanta Coca-Cola Bottling Co.*, 293 F.2d 300, 309 (5th Cir. 1961); see *Retail Store Employees' Union, Local 876*, 212 N.L.R.B. 113, 87 L.R.R.M. 1251 (1974) (citing *Retail Clerks Union, Local 770*, 208 N.L.R.B. 356, 85 L.R.R.M. 1082 (1974)) (no unlawful purpose demonstrated when there is no evidence that discharged employee engaged in concerted activities and thus employer could not know of adherence to the union); Shieber & Moore, *Section 8(a)(3) of the National Labor Relations Act: A Rationale—Part II. Encouragement or Discouragement of Membership In Any Labor Organization And the Significance of Employer Motive*, 33 LA. L. REV. 1 (1972).

130. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963). Historically, this balancing has been a function of the Board in resolving unfair labor practices. See *NLRB v. Truck Drivers Local 449*, 353 U.S. 87, 96 (1957).

131. The law allows any employer to replace any employee for any reason whatsoever, excepting only his union membership or legitimate union activity. *Indiana Metal Prod. v. NLRB*, 202 F.2d 613 (7th Cir. 1953). In *NLRB v. Montgomery Ward & Co.*, 157 F.2d 486 (8th Cir. 1946), the court declared:

In considering the propriety of these discharges the question is not whether they were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These are matters to be determined by the management, the jurisdiction of the Board being limited to whether or not the discharges were for union activities or affiliations of the employee.

Id. at 490. Thus the Board is not concerned if the dismissal was for good cause, much less if it was for a religious reason. The employee clearly is not protected by the Act for conduct that violates the religious tenets of the parochial schools, just as an employee is not insulated from reasonable discipline merely because of his union affiliation. *H.L. Meyer Co. v. NLRB*, 426 F.2d 1090, 1094 (8th Cir. 1970); *NLRB v. Hanes Hosiery Div.*, 413 F.2d 457, 458 (4th Cir. 1969).

Laughlin Steel Corp.,¹³² the Supreme Court elaborated upon the purpose of section 8(a)(3) and delineated the role of the NLRB:

The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when the right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of the investigation with full opportunity to show the facts.¹³³

Clearly, therefore, the religious employer is not at all inhibited in the structuring and management of the parochial schools, if motivated by religious considerations.¹³⁴

Applying the rule in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967), to the discharge on grounds of religious doctrine of a lay teacher actively supporting the union, the Board first would determine whether the discharge was "inherently destructive" of the employee's organizational rights. Assuming the employer's action is so characterized by the Board, the employer then has the burden of showing a substantial and legitimate business reason for the discharge, in this case the religious doctrine, the validity of which cannot be challenged by the Board. See notes 107 & 125 *supra*. The Board must then "exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." 388 U.S. at 33-34. Absent proof of anti-union animus, the constitutional right of free exercise of religion would justify the effect of the discharge on the employee's exercise of his statutory rights; thus, the employer would not be found guilty of violating § 8(a)(3) of the Act. The Board, therefore, can accommodate the religious employer's interest merely by applying the rule that anti-union animus is a prerequisite for a § 8(a)(3) violation. *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49-50 (9th Cir. 1970); *Southwest Latex Corp. v. NLRB*, 426 F.2d 50, 54-55 (5th Cir. 1970); *Nix v. NLRB*, 418 F.2d 1001, 1005 (5th Cir. 1969).

132. 301 U.S. 1 (1937).

133. *Id.* at 45-46.

134. In *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), the Court stated:

[W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the acts committed may tend to discourage union membership . . . Such a construction is essential if due protection is to be accorded to the employer's right to manage his enterprise.

Id. at 311 (citations omitted). That a religious motive is legitimate, substantial, and not subject to scrutiny is clear. If a teacher advocated principles contrary to church doctrine, this would constitute a separate identifiable reason for discharge. Since in such a situation it could not be claimed that but for the employee's union activities he would not have been discharged, the Board should find no violation of § 8(a)(3).

The Board has applied the "but for" test in the context of parochial schools with no indication of religious infringement or compulsion to retain an unsatisfactory employee. In *Roman Catholic Diocese of Brooklyn*, 222 N.L.R.B. 1052, 1056-57, 91 L.R.R.M. 1419, 1425-

The absence of intrusion or entanglement in religious affairs also is evident when one considers the possibility of a mixed-motive discharge being resolved through arbitration, long an accepted forum for dispute resolution in labor relations. The preference for voluntary resolution of disputes between the parties involved, expressed both legislatively and judicially,¹³⁵ has led to a widespread inclusion of grievance arbitration mechanisms in labor contracts as a means of resolving differences between labor and management.^{135.1} Because voluntary referral of disputes to arbitration allows for private dispute resolution with minimal governmental involvement, the entanglement issue is avoided.

The Supreme Court has determined that the function of a court in reviewing the arbitrability of disputes is a limited one.¹³⁶ A court

26 (1976), a teacher was not rehired after a period of involvement in intense union activity. Although the record indicated a number of privileged religious reasons why the teacher was not rehired, the employer failed to act at the time those reasons first arose. The teacher had been rehired once before, and it was only after the teacher's union activity became visible that the decision not to rehire him a second time was made. The union activity, therefore, played the decisive role in the decision not to rehire. See *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86, 90-91 (3d Cir.), cert. denied, 321 U.S. 778 (1944) (§ 8(a)(3) violation found where employee involved in union activities was discharged after having been retained prior to such activity despite derelictions in duty). See generally Comment, *The Free Exercise Clause, The NLRA, And Parochial School Teachers*, supra note 41, at 657.

In a number of cases the courts have found that the conduct of an employee was so improper that discharge was justified in spite of the fact that he also was engaged in protected activities. *E.g.*, *Cain's Coffee Co. v. NLRB*, 404 F.2d 1172, 1175-76 (10th Cir. 1968) (poor sales record, antagonization of customers, retention of second job); *NLRB v. Red Top Cab & Baggage Co.*, 383 F.2d 547, 554-55 (5th Cir. 1967) (flagrant violations of company regulations); *Southern Oxygen Co. v. NLRB*, 213 F.2d 738, 742 (4th Cir. 1954) (violation of regulations, abusive language, insubordination).

135. 29 U.S.C. § 173(d) (1970), which deals with the Federal Mediation and Conciliation Service, states in pertinent part: "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), the Supreme Court noted that it is "the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Id.* at 105; see *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (Congressional policy favors resolution of disputes by arbitration).

135.1. In 1966, the U.S. Bureau of Labor Statistics estimated that 94% of collective bargaining agreements provided for arbitration as the final step in a grievance procedure. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. NO. 1425-6, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ARBITRATION PROCEDURES (1966). Provision for arbitration of contract negotiation disputes, however, occurred in only two percent of all collective agreements. *Id.* at 95.

136. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

need merely ascertain whether the party seeking arbitration is making a claim which on its face is governed by the terms of the contract. It may not weigh the merits of the grievance;¹³⁷ these questions are reserved to the arbitrator. This kind of limited court involvement is far from the "prophylactic contacts required to ensure that lay teachers play a strictly nonideological role . . . [which] necessarily give rise to a constitutionally intolerable degree of entanglement between church and state,"¹³⁸ attacked in the parochial aid cases.

The Board likewise has stated that it will not disturb arbitration awards if the proceedings appear to have been fair and regular, the parties agreed to be bound by the arbitrator's decision, and the arbitrator's decision is not clearly repugnant to the purposes and policies of the NLRA.¹³⁹ This notion of abstention, non-reviewability, and non-involvement in the arbitration process has been extended to the arbitral resolution of unfair labor practice cases.¹⁴⁰

137. 363 U.S. at 567-68. See generally Aaron, *Arbitration In the Federal Courts: Aftermath of The Trilogy*, 9 U.C.L.A. L. REV. 360 (1962).

138. *Meek v. Pittenger*, 421 U.S. 349, 369 (1975) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 619 (1971)). In a recent address at the University Miami Law School, Mr. Justice Rehnquist compared the role of the courts in reviewing arbitration decisions with the *Milivojevic* decision, 426 U.S. 696 (1976), which bars a court from resolving church factional disputes. Justice Rehnquist indicated that labor unions as an institution, and as collective bargaining agents, are subject to less "adversary exploration" in the courts than are other economic institutions. *Rehnquist Would Limit Availability of Courts For Individuals' Claims*, Wash. Post, Feb. 14, 1978, at A6, col. 1.

139. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955). The *Spielberg* doctrine has been applied when the parties have not exhausted their contractual rights and remedies. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 841, 77 L.R.R.M. 1931, 1936 (1971) (quoting *Consolidated Aircraft Corp.*, 47 N.L.R.B. 694, 12 L.R.R.M. 44 (1943), enforced in part, 141 F.2d 785 (9th Cir. 1944)).

140. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 841, 77 L.R.R.M. 1931, 1936 (1971). Such arbitration awards will not be honored if it is determined that the arbitrator did not consider the issue brought before the Board. *Raytheon Co.*, 140 N.L.R.B. 883, 884-85, 52 L.R.R.M. 1129, 1130-31 (1963); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1099, 47 L.R.R.M. 1451, 1452 (1961). See generally Murphy & Sterlacci, *A Review of The National Labor Relations Board's Deferral Policy*, 42 FORDHAM L. REV. 291 (1973). In this regard, the Board's policy consciously parallels the Supreme Court decisions mandating that courts give specific performance to agreements for grievance arbitration. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957); see Meltzer, *The Supreme Court, Arbitrability and Collective Bargaining*, 28 U. CHI. L. REV. 419 (1961).

It is unclear why the Board may not promulgate similar workable guidelines for dealing with an unfair labor practice dispute involving both secular and religious overtones. Such guidelines would make it clear that the religious doctrine is not to be examined in resolving

The value of arbitration in the context of labor relations in parochial schools is evident. Not only does arbitration have the therapeutic effect of ensuring that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise without sponsorship and without interference,"¹⁴¹ but arbitration is particularly helpful because labor arbitrators are experienced and skilled in resolving matters peculiar to the established collective bargaining relationship. Arbitrators, although limited to construing the literal terms of the contract,¹⁴² offer a unique expertise¹⁴³ and are able to fashion an "industrial common law of the shop"¹⁴⁴ particularly suited to resolving labor contract disputes without the intervention of any governmental entity. Thus, arbitration will result in an equitable sensitivity to the interests of the parties without causing wholesale entanglement.

Returning to the mixed-motive discharge hypothetical, submission of such an issue to an arbitration panel selected by the employer and the union does not require the sort of state involvement condemned in the parochial aid cases. Because the arbitration process assures complete neutrality and non-intervention by both the courts and the Board, the religious employer cannot claim that the exercise of his first amendment rights is inhibited, or "chilled," as a result of the submission of secular labor disputes to an arbitration panel. Like any other private employer, the church is asked merely to conform its conduct, as an employer, to the secular prohibitions of a statute serving a legitimate public interest.¹⁴⁵

the dispute. Stripping the Board of jurisdiction over such cases is not a constructive means of protecting the employer's religious interests and totally overlooks the interests of a substantial number of employees.

141. *Walz v. Tax Comm'n*, 397 U.S. at 669.

142. See generally F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 44-67 (3d ed. 1973).

143. In the case of arbitration involving lay teachers in the parochial schools, the parties might find it desirable to choose the arbitration panel from teachers, educators, labor experts, and clergy. It has been continually emphasized that "[a]rbitration is a tool of industrial self-government for unions and companies. It should be developed by them to meet their needs." Taylor, *The Effectuation of Arbitration By Collective Bargaining*, in *CRITICAL ISSUES IN LABOR ARBITRATION: PROCEEDINGS OF THE TENTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS* 151, 155 (J. McKelvey ed. 1957). In *United Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 582 (1960), the Supreme Court stated that arbitrators were free to base their decision not only upon the contract itself but also upon their personal knowledge of the "common law of the shop."

144. D. CHANIN & R. WOLLETT, *THE LAW AND PRACTICE OF TEACHER NEGOTIATIONS* 5:39-40 (1974).

145. The court in *Catholic Bishop of Chicago* compared the chilling effect of mandatory

In a less frequently encountered context, arbitration may be helpful in resolving disputes over the substantive provisions of the contract, such as determining a fair pay increase when the parties reach an impasse. In parochial schools this might be extended to the arbitration of disputes concerning management rights or the arbitration of other substantive issues arising during the course of negotiations. In neither instance is a decision to arbitrate a usurpation of the religious employer's right to manage his enterprise as he deems proper; rather, it is a voluntary agreement by the parties to submit a carefully circumscribed situation, likely to occur in the administration or negotiation of the contract, to a panel of their choosing.¹⁴⁶ Although the religious employer, as any other employer, may question the utility of agreeing to submit a management rights dispute to arbitration, this provides an important alternative to employers who are fearful of Board decisions, interpreted by them as restricting management rights, and who desire a more meticulous weighing of equities.¹⁴⁷ There is no reason to believe that the parties to the agreement would be unable to distinguish between secular objectives subject to arbitration and subjects that involve either educational policy or religious considerations and therefore should be excluded from arbitration. Nor can a decision to permit an arbitration

bargaining on the bishop's control of the schools to the effect on free speech of a loyalty oath requirement for a tax exemption, which was struck down in *Speiser v. Randall*, 357 U.S. 513 (1958). In *Speiser*, however, the requirement placed the burden of proof of lawful conduct on the individual, creating the possibility that a mistake in the fact-finding process would result in the penalization of a legitimate utterance. *Id.* at 526. In the area of labor relations, the Board has the burden of proving a violation of the Act. The court in *Catholic Bishop*, however, found a chilling effect arising from "the risk of protracted and expensive unfair labor practice proceedings before the Board which would certainly involve the Church's religious policies and beliefs." 559 F.2d at 1124. In fact, such proceedings need not be expensive or protracted, particularly if the parties have agreed to arbitrate grievances, and the Board will be prohibited from examining the validity of religious beliefs.

146. See F. ELKOURI & E. ELKOURI, *supra* note 142, at 505-58.

147. This can be accomplished by including within the contract provisions an express reservation of management rights. See F. ELKOURI & E. ELKOURI, *supra* note 142, at 432-34. Since arbitrators generally feel bound by the terms of the contract, the employers' position before the arbitrator is strengthened by the inclusion of a management rights clause. *Id.* at 434 (citing *National Cash Register Co.*, 46 Lab. Arb. & Disp. Settl. (BNA) 317, 320 (1966)). Because an arbitrator is not authorized to go beyond the language of the contract, the presumption in favor of the arbitrability of disputes and the Board's policy of deferral to arbitration may be suspended due to language in the agreement excluding a management subject, where such exclusion is in derogation of the policy of the Act. See Ordman, *The Arbitrator and the NLRB*, in *THE ARBITRATOR, THE NLRB AND THE COURTS* 47 (BNA 1967), quoted in F. ELKOURI & E. ELKOURI, *supra* note 142, at 427.

panel to determine whether a particular dispute is subject to arbitration under the agreement be equated with the kind of governmental action that results in the infringement of constitutionally protected interests.

Arbitrational decision-making involves none of the excessive intrusion or surveillance found to exist in administering some of the parochial aid programs. For example, in the hypothetical discussed previously, in which the bishop decides to replace the lay faculty with clergy for religious reasons, the arbitration panel could make one of several determinations that would not infringe upon the religious employer's exclusive right to take such action. This decision could be viewed as an exercise of management's prerogative rights either not subject to arbitration at all or not a proper subject for bargaining. Alternatively, the decision may be viewed as a permissive subject of bargaining requiring discussion over impact, similar to a secular management prerogative subject to impact bargaining. Any determination, however, that the bishop's decision is itself subject to mandatory bargaining would be unenforceable either under clear guidelines developed by the Board as administrator of the Act or by the courts. Such a determination would be repugnant to the Act because it unconstitutionally involves an interpretation of underlying religious doctrine;¹⁴⁸ the Board could at most direct impact bargaining. Alternatively, such an award by the arbitrators would not be enforceable in court¹⁴⁹ either because the arbitrator had ex-

148. The Board will not defer to an award that does not correspond to the principles and policy of the Act. *E.g.*, *Sheet Metal Workers, Local 17*, 199 N.L.R.B. 166, 81 L.R.R.M. 1195 (1972) (contract provisions discordant with criteria under the Act); *Hershey Chocolate Corp.*, 129 N.L.R.B. 1052, 47 L.R.R.M. 1130 (1960) (contract clause illegal).

The NLRB has announced in no uncertain terms what its procedure would be in resolving labor disputes involving a religious employer. In the Brief for Appellant at 11, *Caulfield v. Hirsch*, *appeal docketed*, No. 77-1328 (3d Cir. March 7, 1977), the Regional Director maintained:

The Board may decide, in the proper case and upon a proper factual background, whether bargaining on a particular subject is mandatory, permissible, or impermissible, and in so doing may take into account the peculiar circumstances of an employer's operations, and may protect the employer from a union's attempt to compel bargaining regarding an improper subject.

This accommodation applies equally to unfair labor practice charges if the employer is warranted in disciplining an employee.

149. If the arbitration involves both a violation of the collective bargaining agreement and an unfair labor practice, the authority of the courts to enforce the labor agreement under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1970), and the authority of the Board to hear the unfair labor practice charge is concurrent. *Smith v. Evening News*

ceeded his grant of authority, because the award is repugnant to the Act, or simply because enforcement of the award would be unconstitutional. In contrast, any award requiring impact bargaining causes no constitutional injury since the employer's original decision to replace the lay teachers is preserved.

The opinion in *Catholic Bishop of Chicago* raised other serious objections to requiring parochial schools to bargain in good faith with lay teachers.¹⁵⁰ The central issue underlying these objections is whether management of the schools is to be vested in the administrators or in the teachers.¹⁵¹ It is incorrect, however, to assume that once a union is recognized the employer has forever surrendered all ability to control the destiny of his enterprise. The requirement to bargain in good faith over wages, hours, and the terms and conditions of employment admittedly is rather broad. However, the religious policy of the parochial schools clearly falls outside the mandate of required bargaining; neither the Board nor the courts have authority to compel the parties to agree to substantive terms.

The precise scope of the bargaining requirement has been subject to judicial and administrative construction. In *NLRB v. Wooster Division of Borg-Warner Corp.*,¹⁵² the Supreme Court recognized three distinct categories of subjects amenable to bargaining, each with its own requirements. The first of these categories includes

Ass'n., 371 U.S. 195 (1962). If, however, the Board and the arbitrator should disagree, "the Board's ruling would, of course, take precedence; and if the employer's action had been in accord with that ruling, it would not be liable for damages under § 301." *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 272 (1964). Similarly, the courts will not enforce arbitration awards requiring an illegal act. *Associated Milk Dealers, Inc. v. Milk Drivers, Local 753*, 422 F.2d 546, 552 (7th Cir. 1970) (labor agreement violates antitrust laws); see *Local 115, Nursing Home Union v. Hialeah Convalescent Home, Inc.*, 348 F. Supp. 405 (S.D. Fla. 1972) (recognizing principle but holding public policy not vitiated by enforcement). See generally Note, *Judicial Enforcement of Labor Arbitrator's Awards*, 114 U. PA. L. REV. 1050 (1966); Symposium, *Judicial Review of Arbitration: The Role of Public Policy*, 58 NW. U. L. REV. 545 (1963). The employer also can prohibit the arbitrator from examining decisions premised on good faith religious beliefs by specifically excluding disputes based on such decisions from the general arbitration clause when the agreement is negotiated.

150. The court, quoting from Brown, *Collective Bargaining In Higher Education*, 67 MICH. L. REV. 1067, 1075 (1969), agreed with management's view that the mere obligation to recognize and bargain with employees will result in the "transmutation of academic policy into employment terms. . . ." 559 F.2d at 1123.

151. See C. PERRY & W. WILDMAN, *THE IMPACT OF NEGOTIATIONS IN PUBLIC EDUCATION: THE EVIDENCE FROM THE SCHOOLS* 168-71 (1970) (tending to demonstrate that this concern has no factual basis). See generally Comment, *Control of Educational Decision-Making*, 74 MICH. L. REV. 1485 (1976).

152. 356 U.S. 342 (1958).

demands made by either party that would be illegal and prohibited under the NLRA, such as a closed shop. Bargaining over these illegal subjects may not be required; nor may such terms be included in the collective bargaining contract even if the other party agrees.¹⁵³ The second category encompasses the mandatory subjects of bargaining found in section 8(d) of the Act,¹⁵⁴ over which the parties must bargain in good faith. The party proposing discussion of one of these subjects, such as salaries, fringe benefits, or grievance procedures, may insist on its inclusion in the final contract even if this results in an impasse in the negotiations.¹⁵⁵ Finally, there are demands which are characterized as voluntary or permissive subjects of bargaining. These are demands that fall outside the mandatory category of wages, hours, and conditions of employment. They may be proposed for inclusion in the contract, but the other party is not required to bargain concerning them or to agree to their inclusion in the contract. Insistence on inclusion of such terms as a condition to the execution of the contract may result in a violation of that party's obligation to bargain in good faith.¹⁵⁶

The *Borg-Warner* framework has been applied in resolving management objections in public education in those states that have mandated collective bargaining in the public schools, a situation

153. *Id.* at 360 (Harlan, J., concurring). See *NLRB v. National Maritime Union*, 175 F.2d 686 (2d Cir. 1949). The majority limited its discussion in *Borg-Warner* to lawful subjects of bargaining, distinguishing between those that are permissive and those that are mandatory.

A demand for a change of a parochial school policy based on religious doctrine could be construed as an illegal subject of bargaining on constitutional grounds.

154. See note 99 *supra*.

155. 356 U.S. at 349. The term "wages, hours, and other terms and conditions of employment" found in § 8(d) has been interpreted to include profitsharing plans, *Dickten & Mosch Mfg.*, 129 N.L.R.B. 112, 46 L.R.R.M. 1516 (1960); plant rules, *Miller Brewing Co.*, 166 N.L.R.B. 90, 65 L.R.R.M. 1649 (1967); and grievance procedures, *Crown Coach Co.*, 155 N.L.R.B. 625, 60 L.R.R.M. 1366 (1965). See generally Clark, *The Scope of the Duty to Bargain In Public Employment*, in *LABOR RELATIONS LAW IN THE PUBLIC SECTOR* 81 (A. Knapp ed. 1977).

In *Mayes Bros., Inc.*, 145 N.L.R.B. 181, 54 L.R.R.M. 1327 (1963), the Board held that the employer did not violate his bargaining duty when he insisted upon excluding discharge, discipline, and grievance procedures from arbitration. The Board found that the employer was willing to discuss the discharge and discipline cases through the grievance procedure and only insisted upon not arbitrating them.

156. 356 U.S. at 349. Permissive subjects for bargaining include the posting of performance bonds by the parties, *Benson Produce Co.*, 71 N.L.R.B. 888, 19 L.R.R.M. 1060 (1944); internal union affairs, *Houchens Mkt. v. NLRB*, 375 F.2d 208 (6th Cir. 1967); and use of a union label, *Kit Mfg. Co.*, 150 N.L.R.B. 662, 32 L.R.R.M. 1323 (1964), *enforced*, 365 F.2d 829 (9th Cir. 1966).

analogous to that faced by parochial school employers.¹⁵⁷ The issues raised in these cases, typically curriculum, quality of education, and other matters of basic educational policy, have been held not to be subject to mandatory bargaining in the public schools.¹⁵⁸ Just as the employer has an unassailable prerogative in managing its enterprise in the private sector, the religious employer need only bargain over such issues if it voluntarily chooses to do so. Because these subjects are merely permissive, the bishop can at any time unilaterally remove these subjects from the bargaining table without fear of any administrative or judicial ramifications, just as he can refuse to discuss them altogether.¹⁵⁹ Thus, for example, if the bishop decides

157. Although the NLRA does not apply to any state or political subdivision, judicial decisions under the Act have been applied in interpreting collective bargaining agreements in the public sector. *American Fed'n of State, County & Mun. Employees, Local 298 v. City of Manchester*, 116 N.J. 665, —, 366 A.2d 874, 876 (1976); cf. *Town of Windsor v. Windsor Police Dep't Employees Ass'n*, 154 Conn. 530, —, 227 A.2d 65, 68 (1967) (interpreting state statute based on NLRA). See generally Smith, *State and Local Advisory Reports on Public Employment Labor Legislation: A Comparative Analysis*, 67 MICH. L. REV. 891, 904-08 (1969). The case law under the NLRA has been applied to collective bargaining agreements with public school teachers. See, e.g., *Smigel v. Southgate Community School Dist.*, 388 Mich. 531, 202 N.W.2d 305 (1972) (interpreting Michigan statute based on the NLRA).

158. In *Joint School Dist. No. 8 v. Wisconsin Employment Relations Bd.*, 37 Wis. 483, 155 N.W.2d 78 (1967), bargaining over the school curriculum was found not to be a mandatory subject of bargaining, and thus the school board could determine unilaterally what the curriculum should be. The court stated: "Subjects of study are within the scope of basic educational policy and additionally are not related to wages, hours, and conditions of employment." *Id.* at —, 155 N.W.2d at 82-83. The court, however, found the school calendar to be a subject for mandatory bargaining in as much as it related to hours of employment.

The Connecticut court in *West Hartford Educ. Ass'n v. DeCoursey*, 162 Conn. 566, 295 A.2d 526 (1972), applied Supreme Court decisions interpreting the NLRA, particularly *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1950), and *Fibreboard Paper Prod. v. NLRB*, 379 U.S. 203 (1964), in determining the scope of collective bargaining in the public schools. The state court noted that the Supreme Court frequently turned to "history and custom of the industry" to determine the extent to which an issue is negotiable. 162 Conn. at —, 295 A.2d at 536. The court then determined that class size, teaching load, the assignment and compensation of teachers supervising extracurricular activities, and a grievance arbitration procedure were mandatory subjects of bargaining. *Id.* at —, 295 A.2d at 536-38. The length of the school day and the school calendar, although related to hours of employment, were found to be exempt from mandatory bargaining by state statute. *Id.* at —, 295 A.2d at 534.

159. *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *West Hartford Educ. Ass'n v. DeCoursey*, 162 Conn. 566, —, 295 A.2d 526, 533 (1972). If it is determined that a subject is permissive, it is an unfair labor practice for a party to insist upon its inclusion in the contract to the point of forcing an impasse. 356 U.S. at 349; *Detroit Police Officers Ass'n v. City of Detroit*, 391 Mich. 44, —, 214 N.W.2d 803, 808 (1974). As in the private sector, "[o]ne important distinction between a 'mandatory' and a 'permissive' subject of bargaining is that a party may take on a permissive subject without first entering into the

to replace the lay faculty with clergy or with video machines, or decides to institute a pilot project, he may do so unilaterally, especially if such a managerial decision is dictated by religious policy. At most he will be obligated to confer with the lay faculty concerning the impact of that decision, a purely secular concern.¹⁶⁰

Thus the distinction between mandatory and permissive subjects of bargaining applied in the private sector and in those states that have adopted provisions based on the NLRA is particularly helpful in refuting any alleged threat to the bishop's right to manage schools as he deems wise. Although a determination whether a demand by a lay teachers' union is subject to mandatory or merely permissive bargaining requires the application of the same tests used to make such determinations in disputes involving any other private employer, the possibility of a religious motive for management decisions provides an additional criterion for distinguishing subjects clearly within the discretion of the employer from merely secular concerns such as wages, hours, and conditions of employment vital to the economic well-being of lay employees. Any intrusion into the religious decisions of the church-employer is precluded by the standards articulated by the Board and the courts for protecting management interests in the private, non-religious sector.

THE CONSTITUTIONAL PROPRIETY OF COLLECTIVE BARGAINING IN PAROCHIAL SCHOOLS

Through adoption of the tripartite test in *Lemon v. Kurtzman*¹⁶¹ and *Tilton v. Richardson*,¹⁶² the Supreme Court abandoned the

bargaining process." *Id.* at ___, 214 N.W.2d at 809 n.7; see *In re Rutgers*, 645 Gov't EMPL. REL. REP. (BNA) E-1, E-3 (1976). The normal restriction on the employer's right to take unilateral action as to a mandatory subject does not apply during the term of an existing collective bargaining agreement under which the employer has expressly or impliedly retained the right to take the action in question. See *Ador Corp.*, 150 N.L.R.B. 1658, 1660-61, 58 L.R.R.M. 1280, 1281-82 (1965); *American Fed'n of State, County & Mun. Employees, Local 1893 v. State Bd. of Higher Educ.*, 31 Or. App. 251, ___, 570 P.2d 388, 392 (1977) (waiver by failure to object). If the parties reach a bona fide impasse in negotiations, the employer would be free to institute his own proposals unilaterally. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 224-25 (1949).

160. *Beloit City School Bd.*, 578 Gov't EMPL. REL. REP. (BNA) B-11, B-13 (1974). The Wisconsin Employment Relations Commission held in *Beloit* that when educational policies which are permissive subjects of bargaining have an impact upon teacher's hours, salaries or working conditions, the school board must bargain over that impact.

161. 403 U.S. 602 (1971).

162. 403 U.S. 672 (1971).

strict "hands-off" theory of non-establishment in favor of one emphasizing governmental neutrality, a shift necessitated in part by the expanding scope of governmental regulation.¹⁶³ The first question to be resolved under this test is whether the regulation is supported by a secular legislative purpose. In answering this question the Court has tended to look at the expressed purpose of the regulation to determine if it reflects a secular objective appropriate for governmental action.¹⁶⁴ The second part of the test focuses on whether the effect of the regulation is to advance or inhibit religion. The issue is not whether some benefit or detriment accrues to a religious institution but whether the primary effect advances religion.¹⁶⁵ Finally, the Court considers whether the administration of the regulation results in an excessive entanglement with religion. This part of the test involves an examination of "the character and purposes of the institution benefited, the nature of the aid provided by the state, and the resulting relationship between the government and the religious authority."¹⁶⁶ This change in the interpretation of the proscriptions of the establishment clause recognizes that the policies underlying both the establishment and free exercise clauses are best served by striking a balance that achieves governmental neutrality and noninvolvement in religious affairs but allows for effective governmental regulation of secular activity.

Recent cases applying the *Lemon-Tilton* test support an extension of the principles underlying this test that would result in approval of the application of the NLRA to labor relations in parochial schools. One of these cases was *Hunt v. McNair*,¹⁶⁷ in which the Supreme Court upheld a complex statutory scheme for the issuance of revenue bonds by the state to benefit a religious college. The legislation provided for the issuance of bonds by the state to finance construction of building projects at the school. Title to the buildings would remain in the state until the loan evidenced by the bonds was repaid by the college. Prior to this repayment the college would lease

163. See Giannella, *supra* note 73, at 1382-83; Giannella, *supra* note 53, at 514-15. It has been suggested that, in cases in which the establishment clause is involved, religion should be given a more restrictive definition than in those in which free exercise rights are being considered. Galanter, *Religious Freedoms In The United States: A Turning Point?*, 1966 Wis. L. Rev. 217, 265-68.

164. *Lemon v. Kurtzman*, 403 U.S. at 613; *Tilton v. Richardson*, 403 U.S. at 678-79.

165. 403 U.S. at 679.

166. 403 U.S. at 615; see *Tilton v. Richardson*, 403 U.S. at 684-89.

167. 413 U.S. 734 (1973).

the buildings from the state. Each lease contained a clause restricting the use of the building to nonreligious purposes and allowing the state to inspect the college to ensure that this clause was not violated. The document reconveying the buildings to the college contained a clause prohibiting their use for religious purposes.¹⁶⁸

In *Hunt* the Court had little difficulty finding a secular purpose for the state's action and found that the primary effect of the scheme was not to aid the religious activities at the college. The Court then focused on the entanglement issue, in particular the plaintiffs' assertion that the broad powers given the state by the statute "[t]o establish rules and regulations for the use of a project"¹⁶⁹ were so sweeping as inevitably to result in the entanglement of the state in religion. Noting state supreme court decisions limiting the scope of this regulatory power, the Court held that the state's control, as judicially construed, did not constitute an excessive entanglement in religion.¹⁷⁰

Similarly, the application of the NLRA to parochial schools is directed solely toward the secular aspects of school administration. As in *Hunt*, any consideration of the possibility of entanglement in religious affairs caused by the Board's assertion of jurisdiction should recognize that the scope of regulation in question has been limited by judicial and administrative decisions. Thus, the Board is able to order bargaining with the lay teachers but is unable to compel agreement on substantive terms. Likewise, the Board is unable to dictate managemental policy to the employer in the parochial schools. The Board's power is limited solely to the secular issue of labor relations between the parochial schools' administration and the lay teachers in those schools.

In *Roemer v. Board of Public Works*,¹⁷¹ a plurality of the Court distinguished educational institutions that are pervasively sectarian from those that are merely religiously affiliated. The plurality in *Roemer* upheld the aid in question by subdividing the "primary effect" element of the tripartite test into two parts. The first part requires that the institution not be so pervasively sectarian that secular activities could not be separated from religious activities; the

168. *Id.* at 738-39.

169. *Id.* at 747.

170. *Id.* at 747-48.

171. 426 U.S. 736 (1976).

second requires that only secular activities be funded.¹⁷² A majority of the Court in *Roemer* would have approved the district court's holding that the schools involved were not "pervasively sectarian,"¹⁷³ despite a finding that mandatory theology courses at the institutions contained elements of indoctrination.¹⁷⁴

The first portion of the primary effect element, requiring a finding that the institution is not pervasively sectarian, resembles the administrative standard the Board employs in asserting its jurisdiction. The Board will not assert jurisdiction over schools that are "completely religious" but will assert jurisdiction over those that are "merely religiously associated."¹⁷⁵ In "religiously associated" schools, the religious activities are not so pervasive that the Board cannot separate the secular from religious activities in order to regulate the former. The constitutional permissibility of state regulation of the secular aspects of the parochial schools is implicit in the decision in *Pierce v. Society of Sisters*,¹⁷⁶ which held that the state could not monopolize secular education. A sectarian school is not established merely to conduct religious activities; nor is it simply and exclusively a church institution for the teaching or practice of religion. Rather, private schools are integrated into the total educational system of the state.¹⁷⁷

Roemer is also important for Justice White's concurring opinion, in which he stated that the Court's finding that the secular and religious functions of the institutions were separable presupposed its finding of no excessive entanglement under the third part of the tripartite test adopted in *Lemon*.¹⁷⁸ Justice White adhered to the

172. *Id.* at 755-59. The first subtest of the primary effect question demonstrates the validity of treating certain interests as secularly relevant religious factors and confirms the contention that acknowledgment of a religious interest is consistent with the concept of government neutrality toward religion.

173. *Id.* at 770.

174. *Id.* at 759.

175. See note 33 *supra* & accompanying text.

176. 268 U.S. 510 (1925).

177. Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 34, 36, 38 (1961); see note 89 *supra*. Implicit in *Everson v. Board of Educ.*, 380 U.S. 1 (1947), is the acknowledgement that private schools perform a concurrent function with public schools, since assistance for specific purposes not directly and immediately identified with religious instruction was upheld as serving a public purpose. *Id.* at 5-8; see *Board of Educ. v. Allen*, 392 U.S. 236, 243 (1968).

178. 426 U.S. at 769 (White, J., concurring); see 44 TENN. L. REV. 377, 385 (1977) (Supreme Court has gradually assimilated the entanglement issue into the "primary effect" test).

view he previously expressed in *Lemon* that the excessive entanglement test was "unnecessary" and "superfluous."¹⁷⁹ Under Justice White's analysis, the entanglement criteria would serve little purpose in evaluating the propriety of the Board's role in collective bargaining in the parochial schools inasmuch as the primary effect element of the test accomplishes that for which both elements formerly were employed.

Recent aid cases have also distinguished between statutes that benefit parochial school students as well as students in other schools from those that benefit the parochial school directly. Under the so-called "child benefit" theory,¹⁸⁰ a statute providing aid to all school-children, including those in parochial schools, does not have the primary effect of aiding religion. In *Wolman v. Walter*,¹⁸¹ for example, the challenged statute provided psychological, speech, and hearing diagnostic services on the school grounds and therapeutic treatment off the school premises for those needing such treatment. The Court held that a statute providing health services to all school-children did not have the primary effect of aiding religion and that supervision by the state of public employees working within the parochial schools did not constitute entanglement.¹⁸² Similarly, leg-

179. 426 U.S. at 768; see *Lemon v. Kurtzman*, 403 U.S. 602, 664 (1971) (White, J., dissenting).

180. In these cases the Court found that the state aid was furnished to the children and their parents, not to the parochial schools. See, e.g., *Board of Educ. v. Allen*, 392 U.S. 236, 243-44 (1968); *Everson v. Board of Educ.*, 330 U.S. 1, 7, 17-18 (1947); *Cochran v. Louisiana*, 281 U.S. 370, 374-75 (1930).

The effect of a Board accommodation of the sectarian interests of the employer and the secular interests of the employees is *de minimis*. The primary benefit in the form of organizational and collective bargaining rights accrues to the individual employees and not to a religious organization. This form of "aid" has been upheld in *Everson* and *Allen*. The primary effect of required bargaining and accommodation of the religious interests of the employer is to ensure that each employee will be treated similarly to other private sector employees. It guarantees that the religious nature of the employer or institution does not penalize the employees by the loss of their rights under the NLRA. The interference with the first amendment rights of the employer is less than that resulting from a law requiring an employer to close his business on certain days. See, e.g., *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing law upheld as not in aid of religion).

181. 433 U.S. 229 (1977).

182. The court found diagnostic service to have "little or no educational content" and thus not to be "closely associated with the educational mission of the nonpublic schools." *Id.* at 244. As to the off-premises activities, the Court stated "[i]t can hardly be said that the supervision of public employees performing public functions on public property creates an excessive entanglement between church and state." *Id.* at 248. Both these lines of reasoning are applicable to the employees of the Board in their contacts with the lay teachers in the parochial schools.

islation designed to facilitate the organizational rights of employees, including lay employees of religious institutions, benefits the lay teacher and does not directly promote or inhibit the teaching of religion in the parochial schools. Nor does the Board's supervision of its employees who administer religiously neutral legislation in the parochial schools constitute excessive entanglement in religion.

Chief Justice Burger has concluded that there are three principle evils against which the establishment clause is intended to protect: "sponsorship, financial support, and active involvement of the sovereign in religious activity."¹⁸³ Although one might conclude, as did Justice Black, that "books . . . are the heart of any school" and that state financial support in this area "actively and directly assists the teaching and propagation of sectarian religious viewpoints,"¹⁸⁴ it does not follow that the application of a legislative scheme to promote the secular interests of an employee in a religiously neutral manner actively intrudes upon the religious independence of the sectarian employer. Most recently, the Sixth Circuit's decision in *Cummins v. Parker Seal Co.*¹⁸⁵ provides added support for this viewpoint. There the court rejected a challenge to the Equal Employment Opportunity Act of 1972,¹⁸⁶ a statutory program as comprehensive as that of the NLRA. The plaintiff in *Cummins* alleged that a regulation promulgated by the Equal Employment Opportunity Commission (EEOC) requiring an employer, in the absence of undue hardship, reasonably to accommodate an employee's religious practices violated both the free exercise and establishment clauses. Applying the tripartite establishment test set forth in *Lemon*, the court held that the regulation neither advanced nor inhibited religion; rather, it served the permissible purpose of prohibiting religious discrimination and guaranteeing reasonable job security.¹⁸⁷ Although the court recognized that the enforcement mechanism given the EEOC was extensive, it held that the Com-

183. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)).

184. *Board of Educ. v. Allen*, 392 U.S. 236, 253 (1968) (Black, J., dissenting).

185. 516 F.2d 544 (6th Cir. 1975), *aff'd by an equally divided court*, 429 U.S. 65 (1976), *vacated and remanded on rehearing*, 433 U.S. 903 (1977) (remanded for further consideration of employer's duty of reasonable accommodation in light of *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977)).

186. 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17 (Supp. V 1975).

187. 516 F.2d at 553.

mission determines "issues . . . considered in the labor relations context, and their resolution certainly does not necessitate any government entanglement with religion."¹⁸⁸ The precedential value of this decision is very limited, however. The Supreme Court remanded *Cummins* for further consideration in light of its decision in *Trans World Airlines v. Hardison*,¹⁸⁹ which held that the hardship resulting from the restructuring of the seniority provisions of a collective bargaining agreement would render any attempted accommodation unreasonable.¹⁹⁰ Inasmuch as the Court in *Hardison* did not reach the constitutional merits of the EEOC's accommodation requirement, the Sixth Circuit's broader discussion of the constitutional challenge to the requirement was neither accepted nor rejected by the Supreme Court in its remand order.

The criteria for evaluating claims based on the establishment clause, which have evolved primarily from a line of cases involving financial aid to religious institutions,¹⁹¹ may pose difficulties when

188. *Id.* at 554. The employer in *Cummins* objected that in determining whether the employee's claim was based on genuinely religious grounds the EEOC would be forced to study and evaluate religious doctrine. *Id.* This objection is identical to that raised in *Catholic Bishop*, namely that Board proceedings would necessarily examine "the Church's religious policies and beliefs." 559 F.2d at 1124. The court in *Cummins* felt that an EEOC investigation would "require no more government involvement in religion than the concededly nonexcessive entanglement that occurs when a state must determine whether a purported church qualifies for a property tax exemption." 516 F.2d at 554 (citing *Walz v. Tax Comm'n*, 397 U.S. 664, 674-76 (1970)). It is noteworthy that § 710 of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-9 (Supp. V 1975) provides that all hearings and investigations conducted by the EEOC are identical to those of the NLRB provided for in § 11 of the NLRA, 20 U.S.C. § 161 (1970).

189. 432 U.S. 63 (1977).

190. *Id.* at 70. The Court rested its holding that a seniority system instituted under a collective bargaining agreement need not be violated to accommodate religious beliefs of an employee on § 703(h) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(h) (1970), which provides in pertinent part:

Notwithstanding any other provisions of this subchapter it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . .

432 U.S. at 81-82. The statutory section and the Court's interpretation of it reaffirm the deference given to collective bargaining by both the legislature and the judiciary.

191. In *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), the Court stated that most establishment cases involve education and that these cases are divisible into two categories: "those dealing with religious activities within public schools, and those involving public aid in varying forms to sectarian education institutions." *Id.* at 772.

applied to nonfinancial benefits accruing to employees or to indirect economic burdens facing the employer as a result of congressional concern for labor relations. In these circumstances, only the "primary effect" portion of the *Lemon* test is useful in assessing whether regulation of such matters unconstitutionally encroaches upon establishment guarantees.¹⁹² Unlike the aid cases in which the government action directly promotes religion, the direct and immediate effect of neutral labor legislation is to promote secular interests by assuring the separation of the religious from the secular; no public instrumentality is used to further or inhibit a religious belief.¹⁹³ Once the secular aspects of the parochial schools have been separated from the religious, the Board is able to defer to the church concerning religious doctrine while compelling the church to defer to it in the area of labor relations.

The balancing test used in evaluating free exercise challenges,¹⁹⁴ which compares the governmental interest with the degree of harm to the individual's rights, may provide an appropriate alternative to the primary effect test in analyzing problems arising from governmental supervision of labor relations in the parochial schools. The broad effect of such an approach would be to accommodate the secular interests of the government and the religious interests of the individuals involved for the purpose of maintaining governmental neutrality. This approach has been applied in other situations implicating the religion clauses. In *Gillette v. United States*,¹⁹⁵ for

The test employed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and in *Nyquist* was developed in cases analyzing financial subsidies to religious schools and, as such, its application is best limited to that type of case.

192. Cf. Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1174, 1190 (1974) ("If an aid program successfully passes effects scrutiny, entanglement analysis is largely superfluous.")

193. Any supervisory contacts are confined strictly to achieving the secular objectives of the NLRA. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court relied on the principle that the first amendment merely requires the state to be neutral in its relations with groups of religious believers. *Id.* at 15-16. This does not require the state to be the adversary or advocate of the church.

194. See note 70 & accompanying text *supra*. Professor Forkosch, analogizing to employment discrimination cases such as *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), and *Washington v. Davis*, 426 U.S. 229 (1976), suggests that the intent of the regulation challenged on establishment grounds be dispositive of the constitutional issue. Thus, the question would be whether the intent is "principally or primarily one to aid or foster religion, or prefer one religion over another." Forkosch, *supra* note 63, at 657-59.

195. 402 U.S. 437 (1971) (upholding § 6(j) of the Military Selective Service Act of 1967, 50 U.S.C. App. § 456(j) (1970), providing conscientious objective exemption on basis of religious belief).

example, the Supreme Court upheld a federal statute granting exemptions from compulsory military service to the adherents of certain religions. The decision implicitly recognized that a slight effect of promoting or inhibiting religious interests must yield to a compelling governmental interest.¹⁹⁶

If one accepts that the principle of governmental neutrality in religious affairs is the common thread underlying the two religion clauses of the first amendment,¹⁹⁷ it follows that a compelling secular governmental purpose should prevail over allegations that the regulation at issue results in the advancement or inhibition of religious belief.¹⁹⁸ This analysis is similar to that advanced in the cases challenging Sunday closing laws in which the Court has held that a state's interest in providing a uniform day of rest outweighed the indirect promotion or inhibition of religion which resulted from the legislation.¹⁹⁹ Similarly, it is appropriate to balance the impact of the Board's assertion of jurisdiction on the religious interests of the employer against society's interest in peaceful labor relations and increased demands for collective bargaining rights by lay teachers in the parochial schools.²⁰⁰ Any conflict between these

196. 401 U.S. at 461-62. See also Warner, *NLRB Jurisdiction Over Parochial Schools: Catholic Bishop of Chicago v. NLRB*, 73 Nw. U.L. Rev. 463 (1978) (compelling governmental interest in enforcing the NLRA outweighs any entanglement caused by the Board's assertion of jurisdiction).

197. Giannella, *supra* note 41, at 513, 521, 532.

198. This would avoid any examination of the degree to which religious doctrine is compromised by involvement in collective bargaining, or of whether the church is able to assert a genuine religious interest in order to invoke the traditional free exercise protection.

199. *McGowan v. Maryland*, 366 U.S. 420, 449-51 (1961). If the state regulation does not make the religious belief or practice itself unlawful but only results in an economic disadvantage to the practitioner, such a burden on belief is viewed as incidental and will not outweigh a legitimate state purpose. *Braunfeld v. Brown*, 366 U.S. 603, 606 (1961). In *Linscott v. Millers Falls Co.*, 440 F.2d 14 (1st Cir.), *cert. denied*, 404 U.S. 872 (1971), the court held that the dismissal of an employee for refusal to pay union dues on religious grounds was not so severe a burden as to outweigh the government interest in furthering peaceful labor relations by means of collective bargaining. *Id.* at 18.

An overriding governmental interest is generally found when the need for governmental regulation is great or when enforcement of the regulation would be impossible if a broad exemption were granted. Compare *McGowan v. Maryland*, 366 U.S. at 449-52 (valid state purpose and no alternative means found) with *Sherbert v. Verner*, 374 U.S. 398, 406-09 (1963) (exemption would not render statutory scheme unworkable).

200. The parochial employer has not demonstrated that an alternative method of collective bargaining with lay teachers serves the compelling governmental interests in collective bargaining. Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 224-25 (1972) (Amish way of life presents viable alternative to formal secondary school education); *Teterud v. Gillman*, 385 F. Supp. 153 (S.D. Iowa 1974), *aff'd sub nom. Teterud v. Burns*, 522 F.2d 357 (8th Cir. 1975) (viable alternatives

interests may be mitigated if the Board recognizes an independent area or managerial prerogative in which the employer's religious interests are protected absolutely.

CONCLUSION

President Jefferson's "wall of separation"²⁰¹ between church and state has long been recognized as untenable fiction. The difficult issues raised in church-state relations are clouded further by the emotion and bias that often adheres to the conflicts in which these issues arise. It is clear, however, that there is no constitutional injury in the application of a neutral law which neither imposes nor restricts any religious belief and which neither mandates nor prohibits any religious activity or teaching. As in other sectors of the economy, the religious employer may not cherish the responsibility to bargain with the elected representative of its employees. This responsibility, however, may not be avoided merely because the employer is affiliated with a church or because its employees are working in a religiously associated environment. There is no constitutional right to commit unfair labor practices. The interests of the lay teachers in their wages, hours, and conditions of employment demand that they be afforded the rights granted by the NLRA when to do so would not directly affect the religious interests of their employer.

found to prison hair length rule which infringed Indian's religious beliefs). Nor is the complete exemption of parochial schools from NLRA coverage a viable alternative for the government or for the thousands of employees who would be denied their rights under the Act. The only viable alternative to the Board's attempted assertion of jurisdiction over "religiously associated" schools is a complete assertion of jurisdiction over all religious schools, which the church opposes.

201. Letter from Thomas Jefferson to the Danbridge Baptist Association, *quoted in Reynolds v. United States*, 98 U.S. 145, 164 (1879).