LABOR LAW—CONSTITUTIONAL LAW—APPLICATION OF NLRA TO PAROCHIAL SCHOOL EMPLOYERS VIOLATES RELIGION CLAUSES OF FIRST AMENDMENT—*Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978).

The Quigley Education Association (Quigley Association), in June of 1974, petitioned the National Labor Relations Board (NLRB or Board)[1] seeking certification as the bargaining agent for lay teachers employed by two private secondary schools in Chicago, Illinois.[2] The schools are managed by the Catholic Bishop of Chicago, a corporation controlled by the Roman Catholic Church.[3] One year later, the Community Alliance for Teachers of Catholic High Schools (Community Alliance) similarly petitioned the Board, seeking to unionize lay teachers at five Catholic high schools in Indiana.[4] These five schools are managed by the Diocese of Fort

---

[1] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1113 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). The Board is charged with carrying out the provisions of the National Labor Relations Act (NLRA or Act). National Labor Relations Act, §§ 9–10, 29 U.S.C. §§ 159–160 (1976). The Act authorizes "[e]mployees . . . to form, join, or assist labor organizations, [and] to bargain collectively through representatives of their own choosing." *Id.* at § 7, 29 U.S.C. § 157 (1976).

[2] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1113 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). The Quigley Association is an auxiliary of the Illinois Education Association, which had intervened in the case. *Id.* The two schools involved are Quigley Seminary North and Quigley Seminary South. *Id.* Although the Seventh Circuit refers to them as secondary schools, there is marked disagreement between the parties as to the exact nature of the schools. In lower Board proceedings, Catholic Bishop of Chicago claimed that the schools were "minor seminar[ies]" whose primary function was to prepare young men for the priesthood. Catholic Bishop of Chicago, 220 N.L.R.B. 359, 359 (1975). The NLRB rejected this argument, finding that admission to the Quigleys was no longer restricted to boys who intend to enter the priesthood. *Id.* The Board pointed to the similarities in curriculum between the Quigleys and other high schools and to the fact that only 16% of the Quigleys' 1974 graduates went on to the seminary college of the diocese. *Id.*

In its brief of the United States Supreme Court, Catholic Bishop of Chicago pursued its argument, attempting to show the religious importance of the Quigleys through a historical summary of the seminary's role in the Church. Brief for Respondents at 3–6, NLRB v. Catholic Bishop of Chicago, No. 77-752, *cert. granted*, 434 U.S. 1061 (1978) [hereinafter cited as Brief for the Employers]. The brief re-emphasized that the Quigleys' principal focus continues to be the preparation of young men for the priesthood. *Id.* at 8–9.

[3] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1113 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978).

[4] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1113–14 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). The five schools are Huntington Catholic High School, South Bend St. Joseph High School, Mishawaka Marian High School, Fort Wayne Bishop Luers High School, and Fort Wayne Bishop Dwenger High School. Brief for the National Labor Relations Board at 8 n.3, NLRB v. Catholic Bishop of Chicago, No. 77-752, *cert. granted*, 434 U.S. 1061 (1978) [hereinafter cited as Brief for the NLRB].

Wayne-South Bend, Inc., likewise a corporation of the Roman Catholic Church.[5]

Separate representation hearings were held with respect to the petitions[6] pursuant to section 9(c) of the National Labor Relations Act (NLRA or Act).[7] During the hearings, Catholic Bishop of Chicago and Diocese of Fort Wayne-South Bend, Inc. (Employers) challenged the assertion of jurisdiction on two grounds, arguing both that Board involvement violated the first amendment,[8] and that their schools failed to satisfy the Board's minimum revenues standard.[9] The NLRB rejected the Employers' contentions relying upon its decision in a similar case, *Roman Catholic Archdiocese of Baltimore*.[10] There, the employer's first amendment claim was dismissed based on the Board's practice of asserting jurisdiction over "religiously associated" institutions while refusing to exercise jurisdiction over "completely religious" organizations.[11] Additionally, the Board had held that a group of

[5] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1113–14 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978).

[6] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1114 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978).

[7] 29 U.S.C. § 159(c) (1976). Section 9(c) of the Act describes the necessary prerequisites for a representation hearing. *Id.*

[8] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1114 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). The first amendment of the United States Constitution states, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[9] *See* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1114 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). The applicable regulation states that the Board will exercise jurisdiction over nonprofit private colleges with yearly gross revenues exceeding $1,000,000. 29 C.F.R. § 103.1 (1977). The Board, however, extended the regulation to private nondenominational secondary schools in 1971. Shattuck School, 189 N.L.R.B. 886 (1971). Recently, the standard was applied to religiously operated high schools which otherwise met the requirements of the Act. Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 249–50 (1975); Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218, 1219 (1976).

To meet the $1,000,000 requirement, the operating budgets of the two Chicago schools, as well as the budgets of the five Indiana schools had to be combined respectively. Brief for the Employers, *supra* note 2, at 5 n.4, 10 n.10. The Board upheld this procedure on the authority of *Roman Catholic Archdiocese of Baltimore* where, in an analogous situation, it found that the employer possessed a considerable amount of control over the schools, making consolidation for jurisdictional purposes proper. *Id.* at 1114; *see* Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. at 250.

On appeal to the Seventh Circuit, the Employers did not challenge this determination and the court merely noted that "the Board was within its statutory authority of selecting an employer unit." Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1114 n.6 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978); *see* N.L.R.A. § 9(b), 29 U.S.C. § 159(b) (1976).

[10] 216 N.L.R.B. 249 (1975), *cited in* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1114 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). In *Roman Catholic Archdiocese of Baltimore*, a labor organization petitioned the Board for union representation of lay teachers employed by five private high schools owned by the archdiocese. 216 N.L.R.B. at 249.

[11] 216 N.L.R.B. at 250.

The schools in *Roman Catholic Archdiocese of Baltimore* taught secular as well as religious subjects, hence, they were held to be "religiously associated." *Id.* The "'completely

schools could be consolidated in order to meet the $1,000,000 minimum revenues standard.[12]

In decisions issued subsequent to the representation hearings, the NLRB found the two groups to be appropriate bargaining units and directed that elections be held.[13] The Quigley Association and the Community Alliance (Unions) won their respective elections and the Board certified them as the bargaining agents for the lay teachers.[14]

Despite this certification, the Employers refused to enter into collective bargaining with the Unions' representatives.[15] In December of 1975, separate unfair labor practice charges were filed against the Employers.[16] In each instance, the Board issued complaints[17] charging the Employers with violating sections 8(a)(5) and 8(a)(1) of the Act.[18] The Employers responded by challenging the

---

religious—merely religiously associated' standard," Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1118 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978), has evolved from recent Board decisions as a separate jurisdictional criterion for private, nonprofit schools. *See* notes 47–68 *infra* and accompanying text. As an administrative agency of the government, the NLRB possesses vast discretionary authority to formulate such jurisdictional rules on a case by case basis. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294 (1974); NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765–66 (1969); SEC v. Chenerey Corp., 332 U.S. 194, 203 (1947). *See generally* N.L.R.A. § 14(c), 29 U.S.C. § 164(c) (1976). Also, it has been held that the Board's jurisdictional standards are subject to judicial review only in extraordinary circumstances. NLRB v. Carroll-Naslund Disposal, Inc., 359 F.2d 779, 780 (9th Cir. 1966); *see* NLRB v. W.B. Jones Lumber Co., 245 F.2d 388, 391 (9th Cir. 1957).

[12] 216 N.L.R.B. at 249; *see* Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218, 1219 (1976).

[13] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1222 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1226 (1976).

[14] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1114 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978).

[15] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1114 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). The Employers' motive in refusing to bargain was to force a final Board order from which they could appeal pursuant to section 10(f) of the Act. *Id.*; *see* N.L.R.A. § 10(f), 29 U.S.C. § 160(f) (1976).

[16] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1221 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1226 (1976).

[17] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1221 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1226 (1976). The Board is vested with the power to prevent unfair labor practices. N.L.R.A. § 10(a), 29 U.S.C. § 160(a) (1976). Section 10(b) of the Act governs Board procedures for dealing with an unfair labor practice charge. 29 U.S.C. § 160(b) (1976). When a charge is filed with the NLRB, the Board or its agents are authorized to serve a complaint against the person alleged to have committed the unfair labor practice. *Id.*

[18] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1221 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1226 (1976). Section 8(a) of the Act establishes certain types of employer conduct as unfair labor practices. N.L.R.A. § 8(a), 29 U.S.C. § 158(a) (1976). Under section 8(a)(1), "[i]t [is] an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section" 7 of the Act. *Id.* § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976). Under section 8(a)(5) "[i]t [is] an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees." *Id.* § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). Section 7 accords employees the right to unionize and "bargain collectively." *Id.* § 7, 29 U.S.C. § 157 (1976).

NLRB's jurisdiction on grounds essentially the same as those asserted during the representation hearings.[19] The Board dismissed the Employers' claims in both cases and granted motions for summary judgment.[20] Addressing the first amendment issue specifically, the Board held, *inter alia*, that applying the provisions of the Act does not violate the religion clauses when there is only a minor interference with one's religious practices.[21] The Board ordered the Employers to bargain with the Unions and to "[c]ease and desist from" unfair labor activity.[22]

The Employers sought appellate review of the NLRB's unfair labor practice holding, pursuant to section 10(f) of the Act.[23] In *Catholic Bishop of Chicago v. NLRB*,[24] the Seventh Circuit reversed, holding initially that the exercise of jurisdiction via the "'completely religious—merely religiously associated' standard" amounted to a

---

[19] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1221–22 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1226 (1976). The Employers raised four objections to jurisdiction during the unfair labor practice proceedings. 224 N.L.R.B. at 1221; 224 N.L.R.B. at 1226. Each argued: that it was a nonprofit corporation managing catholic schools; that none of its schools satisfied the NLRB's minimum jurisdictional standards; that its schools had little commercial impact; and, that the first amendment prevented the Board from asserting jurisdiction. 224 N.L.R.B. at 1221; 224 N.L.R.B. at 1226. Although it is not clear that all of these specific objections were raised at the earlier representation hearings, the Board concluded that none of the objections were subject to litigation in the unfair labor practice proceedings. 224 N.L.R.B. at 1222; 224 N.L.R.B. at 1227. In so doing, the Board adhered to its policy of refusing to hear issues that "were or could have been" properly heard below. 224 N.L.R.B. at 1222; 224 N.L.R.B. at 1227.

[20] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1222 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1227 (1976).

[21] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1222 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1227 (1976); *see* Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218, 1218 (1976). Relying on its decision in *Roman Catholic Archbishop of Los Angeles*, the Board in both cases declared 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 of religious conduct and is necessary to obtain that objective.

224 N.L.R.B. at 1222; 224 N.L.R.B. at 1227.

[22] Catholic Bishop of Chicago, 224 N.L.R.B. 1221, 1224 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 1229 (1976).

[23] Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1115 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978). In an unfair labor practice proceeding, section 10(f) accords any losing party the automatic right to appellate review of any final order of the Board. N.L.R.A. § 10(f), 29 U.S.C. § 160(f) (1976).

The Board cross-appealed for affirmance of its findings pursuant to section 10(e) of the Act. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1115. Section 10(e) provides the Board with the right to petition the court of appeals for enforcement of its decree. N.L.R.A. § 10(e), 29 U.S.C. § 160(e) (1976).

[24] 559 F.2d 1112 (7th Cir. 1977), *cert. granted*, 434 U.S. 1061 (1978).

misapplication of the Board's discretionary powers.[25] Further, the court declared the NLRA inapplicable to the Employers, finding the act of certification itself to be an unconstitutional infringement on "the religious character of all parochial schools."[26] Of principal concern was the belief that the collective bargaining order would chill the bishops' freedom to govern "the religious mission" of the institutions.[27]

A major change in jurisdictional policy laid the groundwork for the confrontation in *Catholic Bishop*.[28] Prior to its 1970 decision in *Cornell University*,[29] the NLRB had refused to assert jurisdiction over nonprofit colleges whose operations were essentially noncommercial and closely related to the schools' "'charitable and educational'" purposes.[30] With *Cornell* as impetus, the Board systematically extended its jurisdictional arm to reach nonprofit sectarian schools.[31]

The validity of the Board's decision to exercise jurisdiction over nonprofit schools is unquestionable.[32] The NLRB's jurisdictional power, except where specifically limited by the Act,[33] extends to all labor disputes "affecting commerce."[34] The Supreme Court, in up-

---

[25] *Id.* at 1118, 1122–23. The Seventh Circuit evaluated the Board's findings in view of the United States Supreme Court decisions in cases involving the religion clauses of the first amendment. *Id.* at 1118–22. The court found that the Board gave no consideration to the impact of its decision on the Employers' first amendment rights. *Id.* at 1120.

[26] *Id.* at 1123–24. The court felt that the Employers' authority would be impeded somewhat by the Unions' right to confer on any employment decision concerning the schools. *Id.*

[27] *Id.* at 1124. It was noted that the Employer would hesitate to make legitimate, religiously motivated decisions adverse to the lay teachers' rights out of fear of long and costly confrontations with the Board. *Id.*

[28] *See* Cornell Univ., 183 N.L.R.B. 329 (1970). In *Cornell*, the Board exerted jurisdiction over nonprofit private colleges for the first time. *Id.* at 334.

[29] 183 N.L.R.B. 329 (1970).

[30] *Id.* at 329.

[31] *See, e.g.*, 559 F.2d 1112; Archdiocese of Philadelphia, 227 N.L.R.B. 1178 (1977); Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218 (1976); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975); Henry M. Hald High School Ass'n, 213 N.L.R.B. 415 (1974).

[32] *See* notes 33–36 *infra* and accompanying text.

[33] N.L.R.A. § 2(2), (3), 29 U.S.C. § 152(2), (3) (1976). Sections 2(2) and (3) of the Act contain certain exclusions from the definitions of "employer" and "employee" as those words are used in the Act. *Id.*

[34] *Id.* at §§ 9(c)(1), 10(a), 29 U.S.C. §§ 159(c)(1), 160(a) (1976). In *NLRB v. Reliance Fuel Oil Corp.*, the United States Supreme Court "declared that . . . Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." 371 U.S. 224, 226 (1963) (per curiam) (emphasis in original); *see* NLRB v. Fainblatt, 306 U.S. 601, 606–07 (1939).

At least one commentator has expressed uneasiness with the Supreme Court's statement in *Reliance Fuel*. Comment, *The Free Exercise Clause, The NLRA, and Parochial School Teachers*,

holding the constitutionality of the NLRA, acknowledged the discretionary quality of this authority, noting that it is for the Board to decide in each instance whether given activities "affect commerce."[35] Hence, it is clear that the Board possesses wide ranging power to determine when and where to exercise its jurisdictional prerogative.[36]

As a result of its discretionary authority, Board treatment of nonprofit institutions has varied since the NLRA's inception in 1935.[37] In the years immediately following the passage of the Act, no jurisdictional standards or guidelines existed. Jurisdictional determinations appeared to be based on subjective considerations,[38] although major emphasis was placed upon a nonprofit organizations dollar effect on commerce.[39] The legislative history of the 1947 amendments to the Act established the framework for the first change in this policy.[40]

---

126 U. PA. L. REV. 631, 638 (1978). The author points out that the scope of the commerce clause is much broader now than it was at the time the Act was passed. *Id.*

However, another law review article points out that the Supreme Court has interpreted legislation passed pursuant to the commerce clause in accordance with current perceptions of that power, disregarding its acknowledged limits at the time the law was passed. Sherman & Black, *The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 HARV. L. REV. 1323, 1335–36 (1970).

[35] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 32 (1937).

[36] NLRB v. Carroll-Naslund Disposal, Inc., 359 F.2d 779, 780 (9th Cir. 1966); NLRB v. W. B. Jones Lumber Co., 245 F.2d 388, 391 (9th Cir. 1957); NLRB v. Townsend, 185 F.2d 378, 383 (9th Cir. 1950). Note, however, that the Board may not *arbitrarily* refuse to assert jurisdiction over an entire class of employers not specifically excluded by the Act. Hotel Employees Local 255 v. NLRB, 358 U.S. 99, 99 (1958); Office Employees Int'l Union Local 11 v. NLRB, 353 U.S. 313, 318 (1957); Council 19, Am. Fed'n of State, County & Municipal Employees v. NLRB, 296 F. Supp. 1100, 1104–05 (N.D. Ill. 1968). The Board may decline to assert "jurisdiction on an *ad hoc* basis " where the purposes of the Act would not be served, but it may not create "a blanket rule" excluding all employers of a class. 353 U.S. at 318.

[37] *See* notes 38–68 *infra* and accompanying text.

[38] *See* cases cited in note 39 *infra*. Jurisdictional decision-making remained totally discretionary until 1950, when the Board fashioned its first jurisdictional standards. *See, e.g., In re* Hollow Tree Lumber Co., 91 N.L.R.B. 635, 636 (1950).

[39] *E.g., In re* Central Dispensary & Emergency Hosp., 44 N.L.R.B. 533 (1942), *enforced*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945); *In re* American Medical Ass'n, 39 N.L.R.B. 385, 387–88 (1942); *In re* Christian Bd. of Publication, 13 N.L.R.B. 534, 537, 546 (1939), *enforced*, 113 F.2d 678 (8th Cir. 1940). Board inquiry was usually restricted to financial aspects of the employer's operations, including one or more of the following: gross revenues; total intrastate and interstate purchases; interstate sales. *E.g.*, Central Dispensary, 44 N.L.R.B. at 533; *In re* American Medical Ass'n, 39 N.L.R.B. at 387–88; *In re* Christian Bd. of Publication, 13 N.L.R.B. at 537, 546. *But see In re* Hyde Park Coop. Soc'y, Inc., 73 N.L.R.B. 1254 (1947) (substantial dollar effect ignored, jurisdiction denied).

[40] The House of Representatives proposed an amendment to section 2(2) eliminating from the definition of "employer" a large class of nonprofit enterprises, including religious and educational institutions. H.R. 3020, 80th Cong., 1st Sess. 4 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 34 (1948). Congress rejected the proposal in favor of a more limited Senate version which excluded only nonprofit hospitals from

The effect of these legislative developments on Board jurisdictional policy surfaced in the *Trustees of Columbia University*[41] decision in 1951. There, the Board refused to assert jurisdiction over Columbia University despite acknowledgment that Columbia had a dollar effect on commerce sufficient to fulfill the normal jurisdictional requirements.[42] It was indicated that Congress, in the House Conference Report on the 1947 amendments to the NLRA, favored the assertion of jurisdiction over nonprofit institutions only where their activities are "'purely commercial.'"[43] The Board found that Co-

---

the definition. *See* Labor Management Relations Act, 1947, Pub. L. No. 101, 61 Stat. 136, 137 (1947). The House Conference Report on the Labor Management Relations Act stated that the broader House version was unnecessary because nonprofit organizations were covered by the Act only "in exceptional circumstances [involving] purely commercial activities." H.R. Rep. No. 510, 80th Cong., 1st Sess. 32 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 536 (1948).

It has been suggested that the Supreme Court might decline to apply the NLRA to employers of the type found in *Catholic Bishop*, based on one possible interpretation of the above-quoted language from the House Conference Report. *See* Comment, *supra* note 34, at 639–40. In this regard, it has been proposed "that Congress [in the House Conference Report] may not have intended to extend the Act to parochial schools regardless of whether it had the constitutional power to do so." *Id.* at 640. The author intimated that should the Court adopt this construction, it may follow a past practice—avoid the constitutional issue and decide the case on a narrow interpretation of congressional purpose. *Id.*; *see* National League of Cities v. Usery, 426 U.S. 833 (1976) (Congress' attempt to apply Fair Labor Standards Act to states held violative of 10th amendment). It was pointed out that in *McCullough v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963), the Court refused to apply the NLRA to the owners of foreign ships operating in United States waters. Comment, *supra* note 34, at 640 n.50. The Court held that where jurisdiction was likely to have an effect on international relations, the Act was not applicable absent clear congressional intent to the contrary. 372 U.S. at 21–22. Thus, it was noted that a Supreme Court decision based upon the suggested interpretation of congressional intent could effectively evade the constitutional issue posed by the Board's attempted exercise of jurisdiction over the religious institutions. Comment, *supra* note 34, at 640.

A Supreme Court decision in *Catholic Bishop* grounded on this proposed statutory interpretation would seem inappropriate for a number of reasons. First, such a decision would be inconsistent with the Supreme Court's previous interpretation of the Board's jurisdictional authority. *See* notes 34–35 *supra* and accompanying text. Second, the particular section of the House Conference Report was apparently not intended as a statement of congressional intent at all but more likely an attempt by the House to "sav[e] face" after yielding to the Senate's proposed amendment to section 2(2). NLRB v. Wentworth Inst., 515 F.2d 550, 554–55 (1st Cir. 1975); *see* Sherman & Black, *supra* note 34, at 1331–37. Third, *McCullough* is easily distinguishable from the situations present in *Catholic Bishop*. The cases under consideration in *Catholic Bishop* do not involve such extraordinary considerations as an impact on international relations. The Board has merely asserted jurisdiction based on its finding that the operations of the religious Employers affect commerce in the same manner as the activities of thousands of secular employers in this country. *See* 559 F.2d at 1114.

[41] 97 N.L.R.B. 424 (1951).

[42] *Id.* at 425. The Board noted that Columbia University earned $117,000 as rental income in the year ending June 30, 1950. *Id.* at 425 n.2. This amount alone equalled 234 percent of its then current jurisdictional standard. *Id.*

[43] *Id.* at 427; *see* note 40 *supra* and accompanying text.

lumbia's activities were essentially noncommercial and closely related to the school's "charitable . . . and educational" purposes.[44] The "purely commercial" test announced in *Columbia* governed Board decisions involving nonprofit institutions for the next nineteen years.[45] The NLRB declined jurisdiction over religious and other nonprofit institutions where activities were found to be something less than "purely commercial."[46]

A second major change in policy was announced in 1970 when the Board decided the *Cornell* case.[47] Cornell and Syracuse Universities submitted representation petitions[48] requesting that the Board overrule its decision in *Columbia*.[49] The NLRB complied, stressing that neither the 1947 amendments nor the House Conference Report prohibited it from asserting its discretionary power.[50] Further, the Board cited the 1959 amendments to the Act as congressional approval of the NLRB's power to assert "jurisdiction [over] any class of

---

[44] 97 N.L.R.B. at 427. The grounds for the Board's findings were obscured by the court's summary treatment of the case. *See id.* at 425–27. It was merely noted that Columbia, whose main objective was the promotion of education, was a nonprofit institution with revenues obtained primarily from student payments and gifts. *Id.* at 425. For a criticism of the *Columbia* decision and subsequent Board policy as to nonprofit institutions, see Sherman & Black, *supra* note 34, at 1338–51.

[45] *See* Cornell Univ., 183 N.L.R.B. at 334, *overruling* Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951).

[46] United States Book Exch., Inc., 167 N.L.R.B. 1028, 1029 (1967) (organization found to be important element of educational structure); *see* University of Miami, Inst. of Marine Science Div., 146 N.L.R.B. 1448, 1451 (1964) (institution's activities "primarily educational rather than commercial"); YMCA of Portland, Ore., 146 N.L.R.B. 20, 22 (1964) (organization's "nonprofit, charitable, and religiously oriented activities . . . are noncommercial in nature"); Lutheran Church, Mo. Synod, 109 N.L.R.B. 859, 860 (1954) (religious organization's radio station, without earned income, considered "noncommercial"). *But see* Woods Hole Oceanographic Inst., 143 N.L.R.B. 568, 569–74 (1963) (school's exploratory activities helpful to private industry, primarily commercial in nature); Disabled Am. Veterans, Inc. (Idento Tag Operation), 112 N.L.R.B. 864, 866 (1955) (manufacture and sale of identification tags similar to commercial enterprise).

[47] 183 N.L.R.B. 329 (1970); *see* notes 48–52 *infra* and accompanying text.

[48] 183 N.L.R.B. at 329. A petition was also submitted on behalf of library employees at Cornell. *Id.*

Historically, the nonprofit educational employer has *challenged* Board jurisdiction. *See, e.g.*, University of Miami, Inst. of Marine Science Div., 146 N.L.R.B. 1448 (1964). *Cornell* was atypical in this respect.

[49] 183 N.L.R.B. at 329. The universities contended that their schools "have an overwhelming impact and effect on interstate commerce." *Id.* Detailed financial data was submitted by both schools in support of the claim. *Id.*

[50] *Id.* at 331. The only jurisdictional restriction in the 1947 amendments, the Board observed, concerned nonprofit hospitals. *Id.* at 331. In the Board's opinion, the House Report did not flatly preclude NLRB jurisdiction over other nonprofit employers because Congress knew that the Board's power was discretionary and subject to change. *Id.*

employers whose operations substantially affect commerce."[51] The Board concluded that the schools involved "ha[d] a substantial effect on commerce," hence, the exercise of jurisdiction was justified under the Act.[52]

Subsequent to *Cornell*, the NLRB asserted jurisdiction over the Christian Science Church, a nonprofit religious employer which published a daily newspaper and received substantial revenues from real estate holdings.[53] The church argued that it was a noncommercial enterprise and that the paper's goal was the dissemination of news from a Christian Science perspective.[54] In the opinion of the Board, however, the paper was similar to other nonsectarian newspapers.[55] The church's first amendment objections to jurisdiction were rejected, the Board finding a compelling "societal interest" in carrying out the provisions of the Act.[56] The exercise of jurisdiction was based on the significant revenues from the newspaper and real estate businesses, the operations of which were found to be commercial in nature.[57]

---

[51] *Id.* at 331. In the 1959 amendments, Congress passed section 14(c) of the NLRA which statutorily sanctioned the Board's authority to refuse jurisdiction where it sees fit. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519, 541–42 (1959). The Board interpreted this section as further congressional buttressing of its discretionary power. 183 N.L.R.B. at 332. For a discussion of the primary aims of section 14(c) as part of the 1959 amendments, see 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 422 (1959).

[52] 183 N.L.R.B. at 334. The Board noted particularly that private colleges as a class have a massive economic impact on commerce. *Id.* at 332.

In the wake of *Cornell*, the Board promulgated a minimum revenues jurisdictional standard for nonprofit colleges which was quickly expanded to cover private nondenominational secondary schools. 29 C.F.R. § 103.1 (1977); Windsor School, Inc., 200 N.L.R.B. 991 (1972); Shattuck School, 189 N.L.R.B. 886 (1971).

[53] First Church of Christ, Scientist, 194 N.L.R.B. 1006, 1006–07 (1972).

[54] *Id.* at 1008. In publishing its newspaper, the church utilized "a constructive approach to articles of general interest." *Id.* at 1006. The Board found the paper's articles primarily nonreligious but did note that at least one religious article appeared daily. *Id.*

[55] *See id.* The Board observed that "[t]he *Christian Science Monitor* is a general circulation newspaper." *Id.* The paper contained general news and advertising, plus the standard "features [of a daily paper such] as a sports section [and a] financial section." *Id.*

[56] *Id.* at 1007-08. The church alleged that the exercise of jurisdiction would cause "excessive . . . entanglement" with its operations, resulting in violations of its "free exercise" rights. *Id.* at 1007. The Board defended its right to assert jurisdiction, pointing to Supreme Court decisions upholding the regulation "of conduct based on religious beliefs" where necessary "for the protection of society." *Id.; see e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303–04 (1940).

[57] 194 N.L.R.B. at 1009. The revenues from the Christian Science Monitor exceeded $1,000,000 per year and the rental income from the real estate exceeded $500,000 per year. *Id.* The annual revenues of each operation exceeded the Board's minimum jurisdictional standard for that type of business. *Id.* at 1009 & n.14.

The Board qualified its *Cornell* ruling in May of 1974, when it refused to exercise jurisdiction over two Jewish educational organizations.[58] In *Board of Jewish Education*,[59] the NLRB ruled that the operations of the organization were noncommercial and closely associated with its sectarian activities.[60] Subsequently, the Board summarily dismissed an unfair labor practice charge filed against the United Hebrew Schools of Metropolitan Detroit.[61]

A group of lay teachers employed at a religiously operated high school were accorded union recognition later that year.[62] One of the employers in *Henry M. Hald High School Association*[63] had charged that Board jurisdiction might result in "'excessive entanglement'" with the schools.[64] The Board accepted the rationale of its administrative law judge that no law required lay teachers to forego rights granted to them under the Act simply because they worked for a religious employer.[65]

The NLRB solidified its position regarding religiously affiliated schools in *Roman Catholic Archdiocese of Baltimore*[66] and sub-

---

[58] Board of Jewish Educ., 210 N.L.R.B. 1037 (1974); Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053 (1974).

[59] 210 N.L.R.B. 1037 (1974).

[60] *Id.* at 1037. The institution provided religious instruction to secondary school students. *Id.* The employer's annual revenues were less than one-third of the Board's minimum standard for private schools. *See id.*; 29 C.F.R. § 103.1 (1977). The Board declared that in deciding *Cornell*, it did not anticipate exercising jurisdiction over this type of noncommercial religious institution. 210 N.L.R.B. at 1037.

[61] Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053 (1974). The employer conducted educational programs for nursery, elementary, high school, and college students. *Id.* at 1056–57. There was nothing special about the nursery school except that it taught the Hebrew alphabet. *Id.* at 1057. The college was accredited only to award degrees in Hebrew literature. *Id.* Elementary and high school classes were conducted after regular school hours; although the courses were not considered religious, their goal was a better comprehension of Judaism. *Id.* at 1056–57, 1058.

The employer met the NLRB's minimum revenues standard for nonprofit schools. *Id.* at 1053. The Board, however, approved the findings of its administrative law judge that the evidence did not warrant a conclusion that the employer was part of a large class whose activities were likely to substantially effect commerce. *See id.* at 1058–59.

[62] Henry M. Hald High School Ass'n, 213 N.L.R.B. 415, 418–19 (1974).

[63] *Id.*

[64] *Id.* at 418 n.7. The claim was based on anticipated " 'bargaining orders, cease and desist orders' " and mandatory elections. *Id.*

[65] *Id.* The law judge observed "that the Hald Association projected itself and intruded into the secular world and choose [*sic*] to entangle itself in secular affairs when it employed lay teachers." *Id.* The opinion added that "[n]either the Act nor the United States Constitution" mandates relinquishment of congressionally rooted section 7 privileges. *Id.*

[66] 216 N.L.R.B. 249 (1975); *see* notes 10–12 *supra* and accompanying text.

sequent decisions.[67] In *Roman Catholic Archdiocese of Baltimore*, the Board announced its policy of asserting jurisdiction over "religiously associated" institutions while refusing jurisdiction over "completely religious" organizations.[68]

A common thread running through cases in which jurisdiction was asserted over catholic schools is the employers' first amendment objections.[69] The sectarian institutions have repeatedly contended that jurisdiction would unconstitutionally entangle the Board with the religious operations of their schools.[70]

The United States Supreme Court has decided numerous first amendment cases involving religiously operated institutions.[71] In determining the constitutionality of government regulations challenged on establishment clause grounds, the Court applies a three-pronged test.[72] To be constitutionally acceptable the regulation "must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion."[73] Based on this

---

[67] *See* Archdiocese of Philadelphia, 227 N.L.R.B. 1178 (1977); Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218 (1976).

[68] 216 N.L.R.B. at 250; *see* note 11 *supra* and accompanying text.

[69] *See* Archdiocese of Philadelphia, 227 N.L.R.B. 1178, 1178 (1977); Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218, 1218 (1976); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. at 250; *Henry M. Hald*, 213 N.L.R.B. at 418.

[70] *See* note 69 *supra*. During the relatively short period of time in which the Board has asserted jurisdiction over Roman Catholic schools, several clashes have ensued. *See* Roman Catholic Diocese of Brooklyn, 236 N.L.R.B. No. 3 (1978); Roman Catholic Diocese of Brooklyn, 222 N.L.R.B. 1052 (1976); *Henry M. Hald*, 216 N.L.R.B. at 512. For example, in February of 1975, the Board dismissed an unfair labor practice charge against the Hald Association, finding insufficient evidence to support the claim of discharge due to union activities. *Henry M. Hald*, 216 N.L.R.B. at 515a. The next year, the Board ignored the recommendations of its administrative law judge and ordered the Diocese of Brooklyn to rehire a teacher whose contract had expired. Roman Catholic Diocese of Brooklyn, 222 N.L.R.B. at 1056, 1058. At the hearing before the law judge, the employer introduced evidence demonstrating that the decision not to rehire was based on religious and work related reasons. *Id.* at 1066–67. Consequently, the law judge concluded that there was "insufficient [evidence] to support" the union's charge of termination for union activity. *Id.* at 1067. The Board, however, found the decision not to rehire "was motivated in substantial part by [the employee's] union activities." *Id.* at 1057.

[71] *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Activities v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947). The court in *Catholic Bishop* based much of its reasoning on the principles announced in this line of cases. 559 F.2d at 1118–26.

[72] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 236 (1977).

[73] *Id.* at 236; *see* Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976); Committee for Pub. Educ. & Religious Activities v. Nyquist, 413 U.S. 756, 772–73 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

test, the Court has invalidated various state statutes which had provided for financial assistance to religiously affiliated schools.[74]

The Board's reasoning, when choosing to elaborate on the religious employers' first amendment claims,[75] has been based on Supreme Court decisions involving the free exercise clause.[76] In free exercise cases, the Court has recognized permissible regulation of religiously motivated conduct, when justified by a valid social interest.[77] The Seventh Circuit acknowledged this analysis, but refused to recognize its applicability to the facts of *Catholic Bishop*.[78]

---

[74] In Wolman v. Walter, 433 U.S. 229 (1977), statutes which provided nonpublic school students with transportation for field trips and loaned educational materials and equipment were found unconstitutional; their primary effect was religious advancement. *Id.* at 248–55. However, the Court upheld the constitutionality of statutes which provided for textbook loans, standardized testing, health services, and remedial therapy to the students. *Id.* at 236–48. These statutes were found to have a secular purpose that neither inhibited nor advanced religion and it was not thought that their administration would excessively entangle government with religion. *See id.*

In Lemon v. Kurtzman, 403 U.S. 602 (1971), the constitutionality of statutes enacted in two states was before the Court. *Id.* at 606. Pennsylvania's statutory scheme authorized state reimbursement to private schools teaching secular classes, while a Rhode Island statute provided wage subsidies directly to private school teachers. *Id.* at 606–07. The Court found both statutes to be violative of the third prong of the establishment clause test, holding that the statutes invited excessive entanglement between the states and the schools. *Id.* at 613–14; *see* Meek v. Pittenger, 421 U.S. 349 (statute providing loan of educational materials and equipment to private schools unconstitutional, principal effect was advancement of religion; statute providing health and educational testing services to private school children at private schools unconstitutional, need for state surveillance to assure no religious advancement by administrators of tests would involve excessive entanglement); Committee for Pub. Educ. & Religious Activities v. Nyquist, 413 U.S. 756 (1973) (three state provisions authorizing funds to sectarian schools "for . . .'maintenance and repair of . . . facilities;' " tuition refunds to parents of private school students; and income tax deductions to parents of private school students declared unconstitutional as advancing religion). *But see* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (statutes providing tax exemptions to religious institutions does not establish religion or cause excessive entanglement, constitutionality upheld); Board of Educ. v. Allen, 392 U.S. 236 (1968) (statute providing textbook loans to students in public and private schools does not violate the establishment or free exercise clause).

[75] *See* Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218 (1976); First Church of Christ, Scientist, 194 N.L.R.B. 1006 (1972).

[76] *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Braunfield v. Brown, 366 U.S. 599 (1961).

[77] In Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court stated that religious freedom consists of "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* at 303–04.

Recently, in Wisconsin v. Yoder, 406 U.S. 205 (1972), the Court acknowledged that regulation of religion-based conduct may be justified only by a compelling state interest. *Id.* at 215. However, the Court noted that any challenge to a "reasonable state regulation" must be based on religious beliefs before any first amendment claim may be asserted. *Id.*

[78] 559 F.2d at 1124. The effect of the order to bargain collectively was seen as unconstitutionally inhibiting the Employers' "free exercise" rights. *Id.*

The court of appeals commenced its analysis of the NLRB's assertion of jurisdiction over the religious Employers by sharply criticizing the "'completely religious—merely religiously associated'" criterion.[79] The formula was termed "a simplistic black or white, purported" standard,[80] amounting in effect to "a per se rule" which automatically subjected certain religious schools to the constraints of the NLRA.[81] It was thought that any judicially acceptable decision which rendered an institution "completely religious" would require an analysis of religious principles.[82] Since the NLRB omitted any religious inquiry, the court found the standard inappropriate for use in determining when to exert jurisdiction.[83] Further, the court observed that if such religious scrutiny were to be utilized by the Board, first amendment difficulties would almost certainly arise.[84]

Because of the first amendment issue involved, the court of appeals found it proper to contrast the Board's standard against the religion clause cases decided by the United States Supreme Court.[85] Reference was made to the Supreme Court's admonitions that government remain neutral towards all religions.[86] *Walz v. Tax Commission*[87] was quoted, wherein the Court acknowledged the importance of making "value judgment[s]" as to the effect government regulation is likely to have on religion, *i.e.*, whether it would "'establish or *interfere with religious beliefs and practices or have the effect of*

---

[79] *Id.* at 1118. The Seventh Circuit consolidated the Quigley seminaries and the Indiana schools for purposes of its analysis. *Id.* at 1114 n.5. The court acknowledged that the Quigley schools were more religious than their Indiana counterparts, but made no distinction in its analysis since it concluded that the NLRA could not constitutionally be applied to either group of religiously affiliated schools. *Id.*

[80] *Id.* at 1112. The court found nothing in the standard indicating "where 'completely religious' takes over or, on the other hand, ceases." *Id.*

[81] *Id.* at 1118–20. The court observed that once religious employers acknowledge that they offer secular courses, "it becomes definitionally impossible . . . to establish that the institutions can be anything else but 'merely religiously associated.'" *Id.* at 1119.

[82] *Id.* at 1118.

[83] *See id.*

[84] *Id.* The court declared that "courts and agencies would be hard pressed to take official or judicial notice that [the religious purposes of the schools] were undermined or eviscerated by the determination to offer . . . secular subjects." *Id.*

[85] *Id.* at 1118–20.

[86] *Id.* at 1119. The recent decisions in Committee for Pub. Educ. & Religious Activities v. Nyquist, 413 U.S. 756 (1973), and Walz v. Tax Comm'n, 397 U.S. 664 (1970), were cited as evidence of the Court's mandate. 559 F.2d at 1119–20. The Supreme Court has emphasized the need " 'to maintain an attitude of 'neutrality', neither 'advancing' nor 'inhibiting' religion.' " *Id.* at 1119 (quoting Committee for Pub. Educ. & Religious Activities v. Nyquist, 413 U.S. at 788).

[87] 397 U.S. 664 (1970).

doing so.'"[88] Relying on the dictates of *Walz*, the Seventh Circuit concluded that the Board had mistakenly failed to consider the impact of its standard on freedom of religion.[89] Alluding to a group of first amendment decisions involving parochial schools, the court observed that the NLRB's "'religiously associated'" classification was inconsistent with the Supreme Court's characterizations of such institutions.[90] Under the Board's standard, it was noted, schools which the Supreme Court had found "'pervasively sectarian'" were semantically transformed into "'merely religiously associated'" organizations.[91] Based on precepts announced in both the "neutrality" and "parochaid" decisions, the Seventh Circuit was prepared to declare the "completely religious—religiously associated" standard void as "an abuse of the Board's discretion."[92]

The Supreme Court has declared "that . . . Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the commerce clause."[93] It is also recog-

---

[88] 559 F.2d at 1120 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (emphasis in original)).

[89] *See* 559 F.2d at 1120. The court deduced that the Board had neglected to make any value judgments since it recognized that to do so would require a determination of the religiosity of each Employer. *Id.* However, it was held that the Board could not simply ignore the religious issue and assert jurisdiction without considering the first amendment protections of the religious Employers. *Id.*

[90] *Id.* at 1119. The opinion cited a number of recent first amendment cases concerning the constitutionality of state statutes providing financial assistance to religiously operated schools. *Id.* In the line of decisions collectively referred to by the Seventh Circuit as the "parochaid cases," *id.*, the Supreme Court invalidated several statutes, finding that aid could not be constitutionally provided to the "religion-pervasive institutions." Meek v. Pittenger, 421 U.S. 349, 366 (1975); *see* Wolman v. Walter, 433 U.S. 229, 254 (1977) ("sectarian institutions"); Committee for Pub. Educ. & Religious Activities v. Nyquist, 413 U.S. 756, 774 (1973) ("religion-oriented institutions"); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 476 (1973) ("[c]hurch-sponsored . . . schools"); Lemon v. Kurtzman, 403 U.S. 602, 616 (1971) ("substantial[ly] religious . . . schools").

[91] 559 F.2d at 1119. The court, in referring to the Board's "per se rule," stated that

> [t]he total inability of the employers to overcome what appears to be an irrebuttable presumption in practical operation makes more understandable the complaint of the employers that the Board is cruelly whipsawing their schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation.

Id. at 1119. For further discussion of this rationale, see notes 156–59 *infra* and accompanying text.

[92] 559 F.2d at 1122–23. The Board had argued alternatively, that rejection of its discretionary standard would necessitate the Board's assertion of jurisdiction over all sectarian schools. *Id.* at 1123. For a general discussion of the Board's jurisdictional power, see notes 33–36 *supra* and accompanying text. Consequently, the court felt compelled to examine the broader first amendment issue—the constitutionality of applying the NLRA's provisions to the religious Employers. 559 F.2d at 1123; *see* notes 116–24 *infra* and accompanying text.

[93] NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) (per curiam) (emphasis in original).

nized that the extent to which the NLRB chooses to exercise this authority is generally a matter of its informed discretion, subject to judicial review only under "extraordinary circumstances, such as unjust discrimination."[94] The court of appeals obviously felt that the application of the "completely religious—religiously associated" standard had a prejudicial effect on the Employers, "sufficiently extraordinary" to warrant judicial review.[95] An examination of the origin of the dichotomous standard and the manner in which it is applied, however, does not appear to support this finding.

The "completely religious—religiously associated" standard was announced in *Roman Catholic Archdiocese of Baltimore* wherein the Board attempted to clarify its jurisdictional policy towards religiously affiliated employers.[96] Prior to this decision, the NLRB had exercised jurisdiction over a Catholic school employer whose operations met the $1,000,000 minimum revenues standard for private schools, but had declined jurisdiction over two Jewish educational institutions.[97] One of the Jewish employers failed to meet the Board's minimum revenues standard and was deemed to be a noncommercial religious institution.[98] The other met the standard but was found to be "an atypical employer," not representative of a class whose operations were likely to have a substantial effect on commerce.[99] The rationale of those decisions became clear when the Board exercised jurisdiction over the religious employer in *Roman Catholic Archdiocese of Baltimore*.[100] There, the distinction was made between "religiously associated" employers who offer a complete secular education and "completely religious" employers who provide primarily religious instruction.[101] The religious dichotomy was apparently an at-

---

[94] NLRB v. Carroll-Naslund Disposal, Inc., 359 F.2d 779, 780 (9th Cir. 1966); *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 32 (1937). The types of standards which the Board chooses to develop and the definitional limits placed on them are matters ordinarily within the Board's jurisdictional prerogative. *See* 359 F.2d at 780.

[95] 559 F.2d at 1118–19.

[96] Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. at 250.

[97] *Henry M. Hald*, 213 N.L.R.B. at 415 (jurisdiction asserted); Board of Jewish Educ., 210 N.L.R.B. at 1037 (jurisdiction denied); Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053, 1053 (1974) (jurisdiction denied).

[98] Board of Jewish Educ., 210 N.L.R.B. at 1037.

[99] Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053, 1058–59 (1974).

[100] 216 N.L.R.B. 249 (1975).

[101] *Id.* The Board referred to its past practice of "declin[ing] jurisdiction over similar institutions only when they are completely religious, not just religiously associated." *Id.* at 250. Since the employer offered secular as well as religious instruction to students, its operations were classified as "religiously associated." *Id.*

tempt by the Board to differentiate between the perceived large scale business activities of Catholic schools as a class and the much smaller operations of the Jewish educational organizations.[102] This dichotomous criterion, seemingly based solely on the size of an employer's business operations, is clearly within the NLRB's discretionary authority.[103]

Implicit in the Seventh Circuit's criticism of the standard was the feeling that the NLRB *broadly* classified the Employers without engaging in any religious inquiry.[104] There is no indication, however, that the Board intended its religious characterizations to have any significance outside of the limited jurisdictional context in which they were used.[105] The NLRB, through its dichotomous standard has merely distinguished between two markedly different types of religious employers.[106] No religious significance seems to have been contemplated by the Board, consequently the failure to engage in doctrinal analysis appears fully justified.

The *Catholic Bishop* court's finding that the Board mistakenly failed to consider the effect its standard would have on the Employers' first amendment rights necessarily rested on the presumption that the exercise of jurisdiction would violate the Employers' religious freedoms.[107] This presupposed violation of the Supreme Court's "neutrality" doctrine does not seem warranted. The NLRA is a religiously neutral set of government regulations.[108] The exercise of jurisdiction merely requires that the Employers' and the Unions' representatives bargain collectively with respect to certain

---

[102] *See* text accompanying note 99 *supra*. In the Board's opinion, the operations of the Catholic employer, serving as the functional equivalent to public school education, were of sufficient magnitude to warrant the exercise of jurisdiction. *See* 216 N.L.R.B. at 250.

[103] *See* notes 93–94 *supra* and accompanying text.

[104] *See* 559 F.2d at 1118.

[105] *See, e.g.*, Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218, 1218–19 (1976); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. at 249–50. Board of Jewish Educ., 210 N.L.R.B. at 1037. In these cases, the Board apparently employed religious descriptions in the same manner that it might use expressions such as "nonprofit" or "charitable" to describe the extent of an employer's commercial activities. *See* 223 N.L.R.B. at 1218–19; 216 N.L.R.B. at 249–50; 210 N.L.R.B. at 1037. Nowhere is it clear that the Board attempted to classify the employers in a strictly religious sense. *See* 223 N.L.R.B. at 1218–19; 216 N.L.R.B. at 249–50; 210 N.L.R.B. at 1037.

[106] *Compare* Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218 (1976) *and* Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975) (jurisdiction asserted) *with* Board of Jewish Educ., 210 N.L.R.B. 1037 (1974) *and* Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053 (1974) (jurisdiction denied).

[107] 559 F.2d at 1119–20.

[108] *See* N.L.R.A. § 1, 29 U.S.C. § 151 (1976).

mandatory subjects of employment.[109] This requirement does not appear to violate either of the religion clauses of the first amendment, hence the assertion of jurisdiction through the "completely religious—religiously associated" standard does not constitute a breach of religious neutrality.[110]

Finally, in holding the Board's standard inconsistent with the Supreme Court's religious designations, the court of appeals "mis-[took] the form in which [the expression] was cast for the substance of the [expression]."[111] The schools in the "parochaid" cases were described as "religiously pervasive" because of the perceived impossibility of separating the secular aspects of education from the religious purposes of the institutions.[112] The degree to which religion pervaded the secular education was crucial to the Court's decisions that certain forms of financial aid could not be provided to the schools without unconstitutionally advancing religion or excessively entangling the state in church affairs.[113] The findings that the schools were "religiously pervasive," though, applied solely to the factual situations under consideration.[114] In applying its "completely religious—religiously associated" standard, the Board has concerned itself with the size of the Employers' business activities disregarding the degree to which religion pervades the institutions.[115] It follows that the Employer may consistently be classified as "religiously associated" for Board jurisdictional purposes but "religiously pervasive" for purposes of considering the constitutionality of financial aid statutes.

As a result of the contention that invalidation of the "completely religious—religiously associated" standard would force the Board to exercise "jurisdiction over all religious schools," the court proceeded to consider the constitutionality of applying the provisions of the

---

[109] *Id.* § 8(d), 29 U.S.C. § 158(d) (1976). The mandatory subjects of bargaining are "wages, hours, and other terms and conditions of employment." *Id.*

[110] For a discussion of the constitutional repercussions of jurisdiction, see notes 116–55 *infra* and accompanying text.

[111] American Communications Ass'n v. Douds, 339 U.S. 382, 394 (1950).

[112] Meek v. Pittenger, 421 U.S. 349, 366 (1975); *see* note 90 *supra*.

[113] *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. & Religious Activities v. Nyquist, 413 U.S. 756 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971).

[114] The Supreme Court has not declared that its religious descriptions of Catholic schools in the "parochaid" cases are applicable in *every* judicial proceeding involving parochial schools.

[115] *See, e.g.*, Roman Catholic Archbishop of Los Angeles, 223 N.L.R.B. 1218, 1218–19 (1976); Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. at 249–50.

NLRA to the religious Employers.[116] The three judge panel unanimously agreed that the Board's fundamental grant of union authorization, with the accompanying order to bargain collectively, amounted to an unconstitutional encroachment upon the religious character of the schools.[117] The court viewed unions as trespassors into the heretofore absolute dominion of the bishops.[118] If certified, the Unions would be entitled to participate in all employment related decisions of the Employers.[119]

---

[116] 559 F.2d at 1123. In support of its alternative contention, the Board relied on its plenary discretionary power to decide when an employer's operations affect commerce. *See id.* For a discussion of the scope of the Board's jurisdictional powers, see notes 93–94 *supra.*

[117] 559 F.2d at 1123–24. Mere certification of the Unions, the Board claimed, did not present religion clause problems since an alleged constitutional injury must be more than conjectural. *Id.* at 1126. Reliance was placed on Associated Press v. NLRB, 301 U.S. 103 (1937), where the applicability of the NLRA to a news service employer was upheld over first amendment objections. 559 F.2d at 1126.

The Supreme Court, in *Associated Press,* refused to consider the employer's free press argument, noting that the case squarely dealt with the discharge of an employee for union activity. The union's allegation was unchallenged; the employer claimed an absolute right to be free from any governmental restrictions. 301 U.S. at 131–32. The Court observed that "[c]ourts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." *Id.* at 132.

The Seventh Circuit distinguished *Associated Press,* noting that, unlike *Catholic Bishop of Chicago,* the first amendment was never an issue. *See* 559 F.2d at 1126–27. The court remarked that "[f]ailure of a newspaper employee to carry out a publisher-employer's policy would not bear on freedom of the press; a failure of a lay teacher to carry out a bishop-employer's policy would directly interfere with the exercise of religion." *Id.* at 1127. The first amendment infringements which the court perceived as "inevitably" arising from union certification rendered *Associated Press* inapposite. *Id.*

[118] *Id.* at 1123. The opinion noted that the bishop derives his power from the canon law of the church. *Id.* To require him to share " 'some decision-making' with the union[s]" would violate that law. *Id.*

The court distinguished certain "permissible governmental impingements" with religious autonomy. *Id.* at 1124. Government regulations "such as fire inspections . . . [and] compulsory school-attendance laws" were acknowledged as unavoidable interferences. *Id.* The court, however, rejected the contention that the Board's regulations are analogous to these necessary government "contacts." *Id.* Adherence to essential government regulations was not seen as "inhibiting" church-teacher relations as Board regulation necessarily would. *Id.*

[119] *See id.* at 1123. The court cited two law review articles on collective bargaining to support its analysis. *Id.* Deemed important were conclusions drawn by both authorities to the effect that the subjects of bargaining in teacher contracts "extend beyond the traditional scope of collective bargaining," into matters intimately connected with the "educational and administrative policies" of the institutions. *Id.*

It is noteworthy that the articles deal with collective bargaining at the college level. Kahn, *The NLRB and Higher Education: The Failure of Policy Making Through Adjudication,* 21 U.C.L.A. L. REV. 63, 64–65 (1973); Brown, *Collective Bargaining in Higher Education,* 67 MICH. L. REV. 1067, 1067 (1969). No evidence was introduced to support the court's fear that certification of the Unions would *inevitably* lead to a decrease in the Employers' power to manage their schools. For a further discussion of the effect of the Board's collective bargaining order, see notes 127–34 *infra* and accompanying text.

In the court's opinion, the bargaining order would hamper the bishops' ability to carry out their duties under church law.[120] The possibility of a bishop being adjudged guilty of an unfair labor practice while performing duties mandated by religious canons was mentioned as a possible consequence of unionization.[121] The court also held that the order to bargain would have a "chilling" effect on the bishops' freedom to direct "the religious mission of the schools."[122] To avoid confrontations with the Unions, the bishops would be obliged to tolerate conduct contradictory to Roman Catholic teachings.[123] Moreover, if a bishop were to dismiss a Union employee for religious reasons, he would be faced with the prospect of long and costly Board proceedings.[124]

The Seventh Circuit's resolution of the constitutional issue was grounded on its determination that the mere act of union certification violates the religion clauses.[125] An examination of the tests applied

---

[120] 559 F.2d at 1123; *see* notes 121–24 *infra* and accompanying text.

[121] 559 F.2d at 1123–24. Two hypothetical situations were discussed. *Id.* In the first, a bishop terminates all union member contracts because "the union'[s] . . . policies and practices" are deemed inconsistent with the sectarian nature of the schools. *Id.* at 1123. In the second, union teachers are terminated to make room on the faculty for "religious-order teachers who . . . become available." *Id.* at 1123–24. The court relied on section 8(a)(1), (3) and (5) of the Act and the Supreme Court's decision in NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964), in concluding that an unfair labor practice verdict could result in either instance. 559 F.2d at 1124.

The pertinent sections of the Act define as "unfair labor practice[s] ," any interference with employees' rights to organize and bargain collectively, N.L.R.A. §§ 7, 8(a)(1), 29 U.S.C. §§ 157, 158(a)(1) (1976), "discrimination in regard to hire or tenure of employment," *id.* § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976), and "refus[al] to bargain collectively with the [union] representatives," *id.* § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976). In *Burnup & Sims*, the employer fired two union members after incorrectly being informed that they had threatened to destroy company property. 379 U.S. at 21–22. The Supreme Court held the employer's conduct in violation of section 8(a)(1) of the Act, finding that the wrongful discharge was apt to discourage union activity regardless of the employer's "good faith" motive. *Id.* at 23–24.

[122] 559 F.2d at 1124. "To minimize friction . . . the bishop [will be forced to] tailor his conduct and decisions to 'steer far wider of the unlawful zone.' " *Id.*

[123] *See id.*

[124] *Id.* The court also noted that the Board's inquiry into the reasons for a religiously-based discharge would entangle the Board in "the Church's religious policies and beliefs." *Id.*

In actual practice, it appears that the Board has been able to resolve unfair labor disputes involving religiously associated employers without examining religious doctrines. *See* note 146 *infra* and accompanying text. It follows that an employer's duty to defend its position in a Board proceeding involving wholly secular considerations cannot be in violation of the free exercise clause. *See* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("to have the protection of the Religion Clauses, the [defenses] must be rooted in religious belief"); Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977); Grutka v. Barbour, 549 F.2d 5 (7th Cir. 1977).

[125] 559 F.2d at 1123–24. The Seventh Circuit was of the opinion that this case involved both religion clauses of the first amendment. *Id.* at 1131. The court observed that "[t]here are substantial aspects . . . not only of sovereign involvement in the religious activity under the establishment clause but there is . . . also curtailment of the free exercise of religion." *Id.* Con-

by the Supreme Court in deciding religion clause cases, however, discloses no inherent first amendment violation in applying the Act's provisions to the Employers.[126] The NLRA is religiously neutral legislation designed to prevent interferences with "the free flow of commerce."[127] While the provisions of the Act requiring collective bargaining may limit the bishops' power to unilaterally set the terms of lay teachers' contracts, such a result does not violate the Employers' free exercise rights.[128]

In a recent case involving the free exercise clause, the Supreme Court observed that a challenge to a "reasonable state regulation" must be based on religious beliefs before first amendment protections may be asserted.[129] The concept of collective bargaining itself is not contrary to the Employers' religious beliefs; in fact, the Employers would not object to bargaining with janitors and other nonteaching personnel.[130] Thus, unless the Board's requirement to bargain is unreasonable as applied to the Employers, the order does not violate the free exercise clause.[131] The bargaining order merely compels the

---

sequently, the court restricted its decision to a finding that the NLRA was inapplicable to the religious Employers based on the prohibitions of the first amendment religion clauses. *See id.*

[126] *See* notes 129–55 *infra* and accompanying text.

In its analysis, the court of appeals looked beyond the effects of the collective bargaining requirement to the future implications of Board jurisdiction. 559 F.2d at 1123–24. The court relied heavily on the perceived "chilling" effect on the Employers' "free exercise" rights that would result from the prospect of unfair labor confrontations with the Board. *See id.* at 1124.

The troubling aspect of this reasoning is that it appears the court is dealing in speculation. The Supreme Court in *Associated Press* made it clear that cases are decided on their factual merits and not on mere surmise. *Associated Press*, 301 U.S. at 132. The NLRA does not prohibit any discharge save one motivated by union activity. *Id.* Religious employers are free to dismiss an employee for religious reasons, subject only to the possibility of being required to prove that it had acted in good faith. *See* notes 143–46 *infra* and accompanying text. Where a union member was discharged both for legitimate religious reasons and union activity, the Board would have a duty to defer to the religious authority of the employer in order to protect its first amendment rights. *See* note 146 *infra*. Accordingly, as long as an employer does not commit unfair labor practices, it should not be "chilled" by the prospect of defending itself in an unfair labor practice proceeding.

[127] N.L.R.A. § 1, 29 U.S.C. § 151 (1976).

[128] *See* notes 129–34 *infra* and accompanying text.

[129] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972). The Court observed that *if* an objection to governmental regulation is based on religious convictions "only . . . interests of the highest order and those not otherwise served can" justify the regulation. *Id.*

[130] *See* POPE JOHN XXIII, MATER ET MAGISTRA 8–9 (1961); Brief for the Employers, *supra* note 2, at 24–25. Pope John XXIII recognized "that the right of workers alone, or of groups of both workers and owners, to organize is a natural one." MATER ET MAGISTRA, *supra* at 9; *see* THE ENCYCLICALS AND OTHER MESSAGES OF JOHN XXIII 255–56 (1964).

[131] The reasonableness of the collective bargaining requirement, as applied to industrial employers, can be readily derived from an examination of the purposes of the Act. N.L.R.A. § 1, 29 U.S.C. § 151 (1976). Congress' intention in passing the NLRA was "to eliminate the

parties to bargain "in good faith with respect to wages, hours, and other terms and conditions of employment."[132] Moreover, it is important to note that the Employers are free to guard their absolute religious authority by refusing to bargain over any subject that they feel is protected by the first amendment.[133] Consequently, the requirement to bargain collectively does not inhibit the bishops' religious authority and the order is a reasonable government regulation as applied to the Employers.[134]

Where government regulations are challenged on establishment clause grounds, the Supreme Court applies a three-pronged constitutional test.[135] The NLRA undoubtedly has a "secular legislative purpose," and is therefore valid under the first criterion. The Seventh Circuit found, however, that the Board's power to resolve unfair labor disputes involving the religious Employers would result in excessive entanglement in violation of the third prong of the test.[136] The court also perceived impending violations under the second prong of the test, noting that unconstitutional advancement would result if the Board were to deviate from established rules and yield to the religious authority of the Employers under any circumstances.[137]

The NLRB had maintained that, in hearing unfair labor disputes between the parties, it could restrict its inquiry to the alleged unlaw-

---

causes of certain substantial obstructions to . . . commerce . . . by encouraging . . . collective bargaining." *Id.*

[132] *Id.* § 8(d), 29 U.S.C. § 158(d) (1976). These are the only mandatory subjects of bargaining. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348–49 (1958).

The Board itself does not participate in the negotiations, and no terms or conditions are forced upon the parties. H.K. Porter Co. v. NLRB, 397 U.S. 99, 102–06 (1970); N.L.R.A. § 8(d), 29 U.S.C. § 158(d) (1976).

[133] Any final order issued by the Board as a result of an Employer's refusal to bargain could automatically be challenged in the appropriate court of appeals. N.L.R.A. § 10(f), 29 U.S.C. § 160(f) (1976). Until judicially affirmed, the order would not bind the Employer. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 36, 48–50 (1938). Since the Employers may always resort to the "protective wall" of the religion clauses, the conclusion that the requirement to bargain will detract from their religious authority seems unjustified.

[134] Any resulting interference with the Employers' authority in strictly economic matters is analogous to the "permissible governmental impingements" recognized by the Seventh Circuit, and is justified by the legitimate secular objectives of the Act. 559 F.2d at 1124; N.L.R.A. § 1, 29 U.S.C. § 151 (1976).

[135] For a statement of the test, see text accompanying note 73 *supra*.

[136] 559 F.2d at 1125–26. For a discussion of this section of the court's analysis, see notes 138–46 *infra* and accompanying text.

[137] *See* 559 F.2d at 1129–30. For a discussion of the court's rationale in this area, see notes 147–55 *infra* and accompanying text.

ful activities, consciously disregarding any doctrinal matters.[138] The court of appeals, however, was not persuaded by this position.[139]

In the court's opinion, certain situations would undoubtedly arise where the Board would be forced to determine whether an employer's motive was truly rooted in religious doctrine or merely an excuse to fire a teacher for union activities.[140] Such an inquiry would require the Board to determine the authenticity of the doctrinal position advanced resulting in excessive entanglement between the Board and the employer.[141]

The Supreme Court, in analogous religion clause cases, has acknowledged the government's right to determine the basic factual question of whether a religious position has been advanced in good faith.[142] In *United States v. Seeger*,[143] the Court addressed the ability of courts and other governmental agencies to inquire into the legitimacy of a religion-based refusal to be inducted into the armed forces.[144] The principle was clearly stated "that while the 'truth' of a belief is not open to question, there remains the significant question whether it is 'truly held.' This is the threshold question of sincerity which must be resolved in every case."[145] The law, as announced in *Seeger*, is unquestionably applicable to the Board's position in an unfair labor practice dispute. Accordingly, it prohibits the Board from making any determinations of religious doctrine but does not forbid factual inquiry to determine whether the Employers' position is supported by the weight of the evidence.[146]

---

[138] 559 F.2d at 1125. If, however, it was determined that the NLRB was involving itself in religious affairs, the solution to the problem, the Board argued, would lie in requiring it to resolve disputes without considering religious issues, not in quashing its power to resolve labor disputes. *Id.*

[139] *Id.*

[140] *Id.*

[141] *Id.* For example, the court feared that where the particular religious precept involved conflicted with the view of the general public, the Board would be hard-pressed to objectively determine the "authenticity" of the Employer's position. *See id.*

[142] United States v. Seeger, 380 U.S. 163, 185 (1965); *see* Wisconsin v. Yoder, 406 U.S. 205, 215–16 (1972); United States v. Ballard, 322 U.S. 78, 86–87 (1944); Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 313 (5th Cir. 1977).

[143] 380 U.S. 163 (1965).

[144] *Id.* at 164–65.

[145] *Id.* at 185. As the court noted, this question of sincerity is one of fact. *Id.*

[146] *See id.* The *Catholic Bishop* court cited three unfair labor practice charges that had already been filed against one of the Employers as examples of situations where entanglement would be unavoidable. 559 F.2d at 1125. The charges grew out of the Employer's refusal to renew the contracts of three lay teachers. *Id.* In one case, the Employer defended the termination of the teacher on the grounds that she " 'expos[ed] biology students to sexual theories of Masters and Johnson.' " *Id.* In another, the claimed basis for termination was the teacher's refusal to arrange a religion course according to the supervisors' directions. *Id.* In the third

The *Catholic Bishop* court was unpersuaded by the NLRB's theory that an accommodation could be made "'to the religious purposes of the school'" if, for example, a union member was dismissed for committing heresy.[147] The court understood accommodation as requiring detailed inquiry by the Board into the religious principles involved, resulting in an unconstitutional entanglement.[148] The

---

case, the Employer contended that " 'the teacher married a divorced Catholic and was no longer in good standing with the Church.' " *Id.*

Contrary to the appellate court's opinion, the Board apparently decided these disputes without considering the validity of the church laws involved. Diocese of Fort Wayne-South Bend, Inc., 230 N.L.R.B. 267 (1977). For example, in the case report involving the sexual theories of Masters and Johnson, there is no mention of the validity of any church law. *Id.* at 270–71. The Board's inquiry centered around the facts which led to the teacher's termination. *Id.* Based on the evidence presented, the Board concluded that the refusal to rehire was motivated in "substantial part" by the employee's union activities. *Id.* at 272. Consequently, the teacher was ordered reinstated. *Id.* at 274.

This decision, however, raises first amendment problems of another sort. The Board proceeded according to its rule that a discharge, even " 'part[ially] motivated by union activity . . . violat[es] . . . the Act.' " *Id.* at 272. Thus, the NLRB did not find it necessary to determine whether the Employer's religious reasons for the termination were asserted in good faith. *Id.* Assuming, though, that the religious grounds were advanced in good faith, the Employer conceivably was forced to rehire someone whose teaching methods had violated church law. Such an imposition upon the Employer would plainly seem to violate the first amendment.

The solution to this type of problem was proposed by Board counsel during oral arguments in *Catholic Bishop*, 559 F.2d at 1128. There, counsel suggested that where a union member was legitimately discharged for religious reasons, "the Board would be compelled 'to try to make some reasonable accommodation' " in order to protect the Employer's first amendment rights. *Id.* Thus, in the case involving the theories of Masters and Johnson, the Board should have determined whether the Employer, absent the union activity, would have fired the lay teacher solely on the religious grounds. Again, the decision could have been based on factual inquiry, *i.e.*, was the teacher reprimanded for the irreligious conduct; how long after the incident did the termination take place; is there a church law inconsistent with the theories of Masters and Johnson. If the Board concluded that the teacher would have been terminated for the religion-based reason alone, then it should have deferred to the Employer's unique religious character and upheld the discharge as lawful. For a further discussion of the accommodation issue, see notes 147–55 *infra* and accompanying text.

[147] 559 F.2d at 1127–29. The Board's attorney had acknowledged "that the First Amendment [mandated that] the Board . . . take cognizance of this special kind of reason." *Id.* at 1128.

The court looked to earlier judicial interpretations of accommodation and concluded that when first amendment rights are "adjust[ed] or . . . compromise[d]" in any way, significant constitutional issues will inevitably arise. *Id.* at 1128–29. A number of recent cases involving religious accommodation in another area were cited to support the court's conclusion. *Id.* (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977); Cummins v. Parker Seal Co., 516 F.2d 544 (6th Cir. 1975); Yott v. North Am. Rockwell Corp., 428 F. Supp. 763 (C.D. Cal. 1977)).

[148] 559 F.2d at 1129. In the Seventh Circuit's opinion "[a] 'reasonable accommodation' . . . would . . . involve the necessity of explanation and analysis, and probably verification and justification, of the doctrinal precept involved." *Id.* Further, the court noted that before a bishop could persuade the Board of the need for an accommodation to religious beliefs, he would have

Seventh Circuit also noted that the accommodation position conflicts with the Board's firmly rooted "principles applicable to all other employers in the labor relations area."[149] Assuming the Board could reasonably accommodate the Employers without excessive entanglement, the court inferred that such preferential treatment would constitute an impermissible advancement of religion.[150] The court concluded that it could not conceive of an unfair labor practice situation in which an accommodation could be made "without someone's constitutional rights being violated."[151]

The Seventh Circuit's decision to exclude the religious Employers from the applicability of the Act appears to involve far greater establishment clause problems than would a decision allowing the Board to make "reasonable accommodations" to the Employers' unique nature. At the expense of thousands of lay teachers' right to unionize, the court carved a special religious exclusion out of valid secular legislation without ever mentioning the establishment clause.[152] Yet, when Board counsel suggested that a "'reasonable accommodation'" may occasionally be necessary in order to maintain a balance between the Employers' first amendment rights and the lay teachers' rights under the Act, the court implied the arrangement

---

to prove the veracity of those beliefs. *Id.* This task would be made all the more difficult by the fact that certain beliefs of the Roman Catholic Church are not universally accepted. *Id.*

The Board's position in a case requiring an accommodation is no different than in any other unfair labor practice case. The Board's decision on whether to accommodate the Employer would rest on a factual determination of the actual reason for the discharge. *See* note 146 *supra* and accompanying text.

[149] 559 F.2d at 1129. The court referred to judicially approved precedents applied in industry which presumably would be unenforceable against the religious Employers. *See id.* at 1129–30. It was noted that where an employee is terminated for both legitimate employment related reasons and union activity, the discharge violates the Act. *Id.* at 1130. Also, the Supreme Court has held that once a prima facie case has been established against an employer in an unfair labor proceeding, the employer bears the burden of proving the validity of his actions. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967), *cited in* 559 F.2d at 1129–30.

[150] *See* 559 F.2d at 1129–30. Judge Sprecher, in a concurring opinion, noted:

> The Board's assertion of jurisdiction will have the effect of inhibiting the practice of religion by regulating it, yet by conceding that this will inexorably force it to 'accommodate' and prefer religious employers and conversely to discriminate against secular employers in like situations, it will in the constitutional sense 'establish' the religions with which it deals.

Id. at 1131 (Sprecher, J., concurring).

[151] *Id.* at 1130.

[152] *Id.* at 1124. In 1977, the number of lay teachers employed in Catholic schools alone exceeded 107,000. Official Catholic Directory, general summary at 1–2 (1977).

would establish religion.[153] The two conclusions appear irreconcilable.

In its analysis of the accommodation issue, the court apparently relied on the second prong of the establishment clause test which states that a regulation "must have a principal or primary effect that neither advances nor inhibits religion."[154] The principal effect of a "reasonable accommodation" by the Board would seem to be the protection of the Employers' free exercise rights, not the advancement of religion.[155] Thus, a "reasonable accommodation" to the Employers' religious character would not appear to unconstitutionally establish religion.

The Seventh Circuit obviously presupposed that a grant of collective bargaining power to the lay teachers would necessarily lead to increased financial burdens on Catholic schools.[156] The court culminated its analysis by noting that schools which are forced to operate without financial aid from government because of their religious nature should, for that very same reason, be permitted to escape the strictures and inhibitions of the NLRA.[157] This claimed "even-handed approach to justice,"[158] however, appears overwhelmingly weighted in favor of the religious Employers. The potentiality of the Employers incurring added expenses as a result of the collective bargaining order does not warrant their exclusion from otherwise legitimate governmental regulation. The essence of the decision is the affirmation of the Employers' absolute right to set the terms and conditions of teachers' employment contracts. The lay teachers remain at the mercy of their Employers, forced not only to accept whatever terms are offered them, but also left without any form of job security.

---

[153] 559 F.2d at 1128–30.

[154] *See id.* at 1130; Wolman v. Walter, 433 U.S. 229, 236 (1977).

[155] Recently, in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), the Supreme Court implicitly affirmed the constitutionality of a "reasonable accommodation" requirement in legislation designed to protect one's religious freedoms. *Id.* at 77; 29 C.F.R. § 1605.1 (1977).

[156] *See* 559 F.2d at 1130–31.

[157] *Id.* at 1130. It should be noted, however, that the Supreme Court, in denying financial aid to parochial schools, has never declared that there are *no* constitutional means of providing aid to these institutions. The Court has upheld the constitutionality of numerous statutes which aid, albeit indirectly, this country's Roman Catholic schools. *E.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (statutes providing textbook loans, standardized testing, health services, and remedial therapy to nonpublic school students); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (statutes granting tax exemptions to religious institutions); Board of Educ. v. Allen, 392 U.S. 236 (1968) (statute providing textbook loans to students in public and private schools). Hence, the Seventh Circuit's depiction of these institutions as totally excluded from governmental assistance is misleading.

[158] 559 F.2d at 1131.

This power imbalance between employer and employee is precisely the type of inequity sought to be prevented by the NLRA.[159]

Michael F. O'Neill

---

[159] N.L.R.A. § 1, 29 U.S.C. § 151 (1976). Section 1 of the Act states in part:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id.