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LABOR RELATIONS IN PAROCHIAL SCHOOLS:
SHOULD LAY TEACHERS BE DENIED
PROTECTION OF THE GENERAL
LAWS?

In the 1979 case of NLRB v. Catholic Bishop of Chicago the
United States Supreme Court held that religious organizations
were not "employers" as that term is used in the National Labor
Relations Act. The effect of that holding was to deprive lay paro-
chial school teachers of statutory protection of their right to en-
gage in collective bargaining. This Comment urges congressional
redefinition of the term "employer" and examines the constitu-
tional questions that would arise should the NLRB be given stat-
utory authority to assert jurisdiction over parochial schools.

INTRODUCTION

Nonpublic schools save taxpayers a substantial amount of
money by relieving the financial burden on public schools. But
as the cost of education rises nonpublic schools in general, and
church-operated schools in particular, are less able to operate in-
dependently. Lay parochial school teachers have borne a share
of their employers' financial plight in the form of salaries substan-
tially lower than those of their public school counterparts. In the

1. Over 4.2 million students were enrolled in nonpublic schools during the
1976-77 school year. NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, A STATISTICAL
REPORT ON U.S. CATHOLIC SCHOOLS 1978-79 at 5 (1979). The average per pupil ex-
penditure in public elementary and secondary schools in the 1976-77 school year
was $1,816. WORLD ALMANAC 184 (Hammond ed. 1979). Thus, the taxpayers' sav-
ings are substantial. The savings are especially significant in larger urban areas
where public schools are finding it increasingly difficult to make ends meet. See,
e.g., Plan OK'd to Save Chicago Schools, L.A. Times, Jan. 6, 1980, § 1, at 1, col. 3.
2. See generally NATIONAL CATHOLIC EDUCATIONAL ASSOCIATION, A STATISTI-
3. Parochial school teachers are either religious (nuns, brothers, priests) or
lay (non-religious). This Comment is concerned only with employment relations
between church-operated elementary and secondary schools and their lay teach-
ers. When used in the text, unless otherwise indicated, "parochial school teach-
ers" refers only to the lay teachers in parochial schools.
4. Nationwide parochial school salary statistics are not available, but a com-
early 1970's parochial school teachers began organizing in order to bargain collectively with their employers. The teachers elected representatives who were certified by the National Labor Relations Board (NLRB) as the teachers' exclusive bargaining agents. But in 1979, the United States Supreme Court, in *NLRB v. Catholic Bishop of Chicago*, held that the National Labor Relations Act (NLRA) does not apply to church-operated schools. By so doing, the Supreme Court deprived parochial school teachers of statutory protection of their associational right to organize and bargain collectively.

This Comment will examine the history of the NLRA, focusing on the Supreme Court's construction of the Act in *Catholic Bishop*. The Comment will discuss the constitutional questions raised by the application of the NLRA to parochial schools. Finally, the Comment will suggest remedial legislation to protect the right of parochial school teachers to organize and bargain collectively. Such legislation is necessary to ensure that parochial school teachers are fairly treated in the job market.

While Chicago and Fort Wayne-South Bend parochial school teachers were trying to get their employers to the negotiating table, their public school counterparts were making significant gains through collective bargaining. The public school teachers obtained higher salaries, as well as new or improved insurance benefits and better sick leave provisions. Collective bargaining by public school teachers in other areas led, in some cases, to additional compensation for an above normal workload, and for teacher participation in extracurricular activities. In addition to

| 5. See text accompanying notes 36-44 infra. |
| 13. Id. at 16-17. |
| 14. C. Perry & W. Wildman, *The Impact of Negotiations in Public Education* 201 (1970). In some cases where extra compensation was not awarded, teachers did succeed in distributing the extra work equally among the staff. Id. |
the pecuniary benefits, a recent Rand Corporation study reports many positive consequences of collective bargaining between public schools and teachers.\textsuperscript{15} The Rand study found that in many cases the greater teacher autonomy resulting from gains made in collective bargaining actually led to better relations between teachers and administrators.\textsuperscript{16} Public school teachers are able to bargain collectively because of state laws that govern the relations between the state and its employees.\textsuperscript{17} These state laws do not cover the employment relations in parochial schools. Parochial school teachers must, therefore, look to the NLRA for protection of their right to organize and bargain collectively.

\textbf{THE NLRA AND PAROCHIAL SCHOOLS}

In 1935, Congress enacted the NLRA (Wagner Act) in order to eliminate obstructions to commerce by encouraging collective bargaining and protecting employees' rights to freedom of association.\textsuperscript{18} Congress recognized that unequal bargaining power between individual employees and organized employers resulted in depressed wages and poor working conditions, which in turn led to strikes.\textsuperscript{19} In passing the Wagner Act, Congress legislated to the full extent of its commerce clause power.\textsuperscript{20} Congress vested the NLRB with "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."\textsuperscript{21} To facilitate its expansive coverage, the Wagner Act defined "employer" in broad terms, including in the definition any "person" acting in the interests of an employer, but excluding certain governmental entities.\textsuperscript{22}

\textsuperscript{15} Teachers' Stronger Voice in School Management, USA TODAY, Oct. 1979, at 9. The Rand study found that while collective bargaining did not give teachers control of the schools, it did give teachers more input into school operations, as well as input into teacher evaluation and promotion. \textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} See, e.g., CAL. GOVT. CODE §§ 3540-3549.3 (West Supp. 1967-1979).

\textsuperscript{18} National Labor Relations Act of 1935 (Wagner Act) ch. 372, § 1, 49 Stat. 449 (1935).

\textsuperscript{19} \textit{Id.} See also A. GOLDMAN, THE SUPREME COURT AND LABOR-MANAGEMENT RELATIONS LAW 71-73 (1976).

\textsuperscript{20} U.S. CONST. art. 1, § 8, cl. 8.


\textsuperscript{22} The Wagner Act defined "employer" as:

any person acting in the interest of an employer . . . but shall not include the United States, or any state, or political subdivision thereof, or any person subject to the National Railway Labor Act, . . . or any labor organiza-
In 1947, Congress passed the Taft-Hartley Act which amended the Wagner Act and changed the definition of "employer." The original House bill would have changed the definition of "employer" to exclude corporations and foundations operating exclusively for educational or religious purposes. However, the final version limited the exclusion to nonprofit hospitals.

The next major change in the NLRA came in 1974. Congress again changed the definition of "employer," this time removing the nonprofit hospital exemption. The change came in response to recognition strikes by hospital employees asserting their rights to bargain collectively. Faced with the large number of nonprofit hospital employees and the hospitals' substantial impact on commerce, Congress could no longer justify denial of NLRA protection to these employees. Even so, NLRA protection is not guaranteed to nonprofit hospitals since the NLRB will exercise jurisdiction over nonprofit organizations only if the Board's discretionary jurisdictional criteria are met. The NLRB determined that the schools operated by the Catholic Bishop of Chicago, and the Diocese of Fort Wayne-South Bend met its jurisdictional criteria.

When Congress passed the Wagner Act in 1935 there was no need for the NLRB to assert jurisdiction over parochial schools. In 1935, eighty-eight percent of the teachers in parochial schools

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27. Id. § 1.
29. Id.
were nuns, brothers, or priests. The NLRB did, however, assert jurisdiction over a nonprofit religious publishing company, and in 1970 the Board stated that it would no longer refuse to assert jurisdiction over nonprofit educational institutions. In recent years religious organizations have come to rely heavily on lay teachers to staff their elementary and secondary schools. In response to this change in parochial school faculty composition, the NLRB began to assert jurisdiction over parochial schools meeting its discretionary jurisdictional criteria. Faced with NLRB interference, parochial schools asserted first amendment challenges to NLRB jurisdiction. The NLRB rejected the constitutional challenges, but decided to assert jurisdiction only over church-operated schools that were merely “religiously associated” and not over “completely religious” schools.

Applying its discretionary criteria, the NLRB asserted jurisdiction over secondary schools run by the Catholic Bishop of Chicago, and the Diocese of Fort Wayne-South Bend. Lay teachers employed in both school systems sought to elect repre-

34. Cornell Univ., 183 N.L.R.B. 329 (1970) (the Board stated that it would no longer refuse to assert jurisdiction over nonprofit educational institutions). In NLRB v. Yeshiva Univ., 444 U.S. 672 (1980), the Supreme Court overruled Cornell, at least in so far as Cornell afforded NLRA protection to professors in private universities. The Court held that Yeshiva University professors were “managerial employees” and thus not “employees” entitled to NLRA protection. Id. at 686-90. The decision was based on findings that at Yeshiva, the faculty decides what courses will be offered, when classes will be scheduled, the teaching methods to be employed, grading policies, and matriculation standards. Id. at 686. Whatever the ramifications at the university level, Yeshiva does not prevent application of the NLRA to parochial elementary and secondary schools. Elementary and high school teachers do not have the same control that Yeshiva University professors have. Decisions as to curriculum, length of the school day, and grading standards are made initially by the state, leaving a church-operated school free to offer additional courses, extend the school day, and impose stricter academic standards. Yeshiva will likely result in a lobbying effort to persuade Congress to amend the NLRA definition of “employee” to include private university professors.
37. Id.
sentatives for the purpose of collective bargaining with their employers. The NLRB ordered the representative elections.\textsuperscript{41} The lay teachers elected union representatives which the NLRB certified as the exclusive bargaining agents of the lay faculty members.\textsuperscript{42} When the employer-schools refused to bargain, the unions filed unfair labor practice charges with the NLRB.\textsuperscript{43} Rejecting first amendment challenges to its jurisdiction, the NLRB ordered the schools to bargain with the unions.\textsuperscript{44} Still the schools refused to bargain and sought review in the Seventh Circuit Court of Appeals.\textsuperscript{45}

The Seventh Circuit's opinion is significant in three respects. First, the court found that religious organizations are "employers" within the meaning of the NLRA.\textsuperscript{46} Second, the court rejected the NLRB's "completely religious—merely religiously associated" standard as an unworkable guide in exercising Board discretion.\textsuperscript{47} Third, the circuit court held unconstitutional the application of the NLRA to parochial schools, because its application resulted in excessive governmental entanglement with religion.\textsuperscript{48}

The NLRB then sought review in the United States Supreme Court. In \emph{NLRB v. Catholic Bishop},\textsuperscript{49} the Supreme Court did not reach the constitutional issues considered by the Seventh Circuit. Rather, the Supreme Court limited its holding to a construction of the NLRA. Finding "no clear expression of an affirmative intention of Congress"\textsuperscript{50} that parochial school teachers be protected by the NLRA, the Court declined to construe the NLRA as granting Board jurisdiction over teachers in church-operated schools.\textsuperscript{51} The Court would apparently require "religious organizations" or "church-operated schools" to be expressed in the NLRA's definition of "employer" before affording the Act's protection to parochial school teachers.

The "affirmative intention" language quoted and relied upon by

\begin{itemize}
\item \textsuperscript{41} Catholic Bishop of Chicago, 220 N.L.R.B. 359 (1975).
\item \textsuperscript{42} Catholic Bishop of Chicago, 224 N.L.R.B. 1221 (1976); Diocese of Fort Wayne-South Bend, 224 N.L.R.B. 1226 (1976).
\item \textsuperscript{43} \textit{Id.}
\item \textsuperscript{44} \textit{Id.}
\item \textsuperscript{45} Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977). (The Catholic Bishop and Fort Wayne-South Bend cases were consolidated for review.)
\item \textsuperscript{46} \textit{Id.} at 1115. (Relying on NLRB v. Wentworth, 515 F.2d 550 (1st Cir. 1975).
\item \textsuperscript{47} Catholic Bishop v. NLRB, 559 F.2d 1112, 1118 (7th Cir. 1977). The court recognized that rejection of this standard would result in the NLRB asserting jurisdiction over all religious schools. For that reason the court examined the first amendment problems. \textit{Id.} at 1123.
\item \textsuperscript{48} \textit{See text accompanying notes 95-100 infra.}
\item \textsuperscript{49} 440 U.S. 499 (1979).
\item \textsuperscript{50} \textit{Id.} at 504.
\item \textsuperscript{51} \textit{Id.}
\end{itemize}

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the Catholic Bishop majority originally appeared in Benz v. Compañía Naviera Hildalgo,52 and later in McCulloch v. Sociedad Nacional.53 In the latter two cases the Court refused to apply the NLRA to foreign seamen working aboard foreign flag vessels in United States ports. Those decisions rested upon legislative history which indicated that the NLRA's purpose was to protect American, not foreign, workers.54 Neither Benz nor McCulloch is on point because in Catholic Bishop the NLRB asserted jurisdiction to protect American teachers. The Court advances no theory to explain why American teachers should be treated the same as foreign seamen whose employment relations are governed by the laws of the vessel's flag state.55

However, the employment relationship in Catholic Bishop is analogous to the relationship between a press organization and its employees. In Associated Press v. NLRB,56 the Supreme Court did not require Congress "affirmative intent" before applying the NLRA to an organization that, like the Catholic Bishop of Chicago, is protected by the first amendment.57 The Court found that the Associated Press was an "employer" under the NLRA because of that organization's numerous contacts with interstate commerce.58 The Court then rejected the Associated Press claims of first amendment infringement. The Court held that the first amendment does not grant an immunity from the general laws to

52. 353 U.S. 138 (1957). "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed." Id. at 147 (emphasis added).
55. In Wildenhus's Case, 120 U.S. 1 (1887), the Supreme Court stated: From experience... it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves. And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. Id. at 12.
56. 301 U.S. 103 (1937).
57. "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. 1.
the press. In Catholic Bishop the NLRB relied heavily on Associated Press to support the constitutionality of its jurisdiction. The Catholic Bishop majority distinguished Associated Press from Catholic Bishop on constitutional grounds, an intriguing sleight of hand since Catholic Bishop rested solely on statutory construction. In Associated Press the Court did not even suggest the requirement of an affirmative congressional intent to apply the NLRA. Associated Press rested on a finding that affording NLRA protection to press employees did not infringe first amendment press freedoms. Catholic Bishop, however, addressed the first amendment issues only in dicta. The Catholic Bishop majority distinguished the holding in Associated Press from dicta in Catholic Bishop.

The Catholic Bishop majority’s construction of the NLRA follows Chief Justice Marshall’s admonition, in The Charming Betsy, that an act of Congress should not be construed to violate the Constitution if any other construction is possible. Chief Justice Marshall’s test was later refined in Crowell v. Benson, in which the Supreme Court stated that, if a question arises as to the constitutionality of a statute, the “Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided.” Justice Brennan, dissenting in Catholic Bishop, concludes that a construction of the NLRA that judicially creates an additional exception to the Act’s definition of “employer” is not “fairly possible.” Brennan’s is the better construction given the wide jurisdictional discretion formerly accorded the NLRB. Under Justice Brennan’s view the

59. “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 liberties of others.” Id. at 132-33. Cf. Reynolds v. United States, 98 U.S. 145 (1878) (upholding statutory ban on polygamy against a free exercise challenge).


61. The majority’s language limiting its decision is unmistakably clear: “Thus if we were to conclude that the Act granted the challenged jurisdiction we would be required to decide whether that was constitutionally permissible under the Religion Clauses of the First Amendment.” Id. at 498. “[I]n the absence of a clear expression of Congress’ intent . . . we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of . . . the . . . Religion Clauses.” Id. at 507.


63. Id. at 118.

64. 235 U.S. 22 (1913).

65. Id. at 62 (emphasis added). See also Machinists v. Street, 367 U.S. 740 (1961) (holding it was possible to construe the Railway Labor Act to deny unions the right to use union dues for political causes opposed by union members).


Court would have had to reach the constitutional issues using the analytical framework developed in prior religion clause cases.\(^6\)

The *Catholic Bishop* holding places the burden of protecting the associational rights of parochial school teachers on Congress. Congress should change the NLRA definition of "employer" to include church-operated schools. In considering such amending legislation, Congress must determine whether NLRB jurisdiction over parochial schools is violative of the first amendment religion clauses. The remainder of this Comment examines the constitutional issues arising from application of the NLRA to church-operated schools.

**CONSTITUTIONALITY OF NLRB JURISDICTION OVER CHURCH-OPERATED SCHOOLS**

The first amendment's religion clauses are stated in absolute terms: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."\(^6\) The object may have been complete and permanent separation between church and state,\(^7\) but the Supreme Court has refused to place religious belief above the law of the land.\(^7\) The first amendment does not secure religious conduct which encroaches upon the freedoms of others or threatens a community's security.\(^7\) Schools figure prominently in the development of law under the religion clauses. The constitutionality of various forms of state aid to parochial schools has been challenged in the courts.\(^7\) Pau-
rochial school aid may not take the form of money payments to lay teachers, to the schools, or to parents of parochial school pupils. However, aid directed to parochial school students in the form of book loans and services has been allowed. Of course, any form of aid that allows parochial schools to perform secular functions frees church funds which can then be spent for religious purposes. But as Chief Justice Burger recently stated "total separation is not possible" and constitutionality does not depend upon the reality of economic impact. Faced with situations where religious guarantees conflicted with other societal interests the Supreme Court developed a three-pronged test for determining constitutionality under the religion clauses. A statute must have a secular legislative purpose, and a primary effect that neither advances nor inhibits religion, and it must not foster excessive governmental entanglement.

**Secular Legislative Purpose**

To withstand constitutional analysis under the religion clauses, a statute must at least be justifiable in secular terms. A statute providing religious study release time from public schools cannot be justified in secular terms and is therefore unconstitutional. Similarly, a statute requiring prayer in public schools is unconstitutional because it clearly has a religious purpose. The "secular purpose" requirement is probably best viewed as a threshold test. This test is rarely decisive because modern statutes are usually

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81. Id. at 653. See generally L Tribe, American Constitutional Law 835-80 (1978).
carefully drafted to reflect a secular purpose.\textsuperscript{85}

The NLRA clearly states a secular legislative purpose. Even when applied to parochial schools, the Act's purpose remains, "to eliminate the causes of certain substantial obstructions to the free flow of commerce."\textsuperscript{86}

**Primary Secular Effect**

In addition to a "secular purpose," legislation must have "a primary effect that neither advances nor inhibits religion"\textsuperscript{87} in order for it to withstand a constitutional attack on first amendment grounds. In *Committee for Public Education v. Nyquist*,\textsuperscript{88} the Supreme Court invalidated a statute that provided for "maintenance and repair" grants to nonpublic schools. Virtually all of the beneficiaries of the statute were Roman Catholic schools. The statute, however, did not restrict the use of grant funds to the maintenance of secular facilities. A Catholic school was thus able to expend state funds for the maintenance of the school chapel or other sectarian facilities. Absent restrictions on the uses for which the state funds were expended, the statute's primary effect was to advance religion because it directly subsidized the religious activities of sectarian schools.\textsuperscript{89}

The statute struck down in *Nyquist* also provided for financial assistance to the parents of nonpublic school students. Depending on family income, a parent could qualify for aid in the form of a tuition reimbursement\textsuperscript{90} or a tax benefit.\textsuperscript{91} These provisions had the primary effect of advancing religion because they encouraged parents to send their children to parochial schools.\textsuperscript{92}


\textsuperscript{88} 413 U.S. 756 (1973).

\textsuperscript{89} Id. at 774. The statute, N.Y. EDUC. LAW, art. 12, §§ 549-553 (Supp. 1972-1973), allowed state funds to be used to pay the salaries of employees who maintain the school chapel.


\textsuperscript{91} Id. at 789-94.

\textsuperscript{92} The statute, N.Y. EDUC. LAW, art. 12, §§ 549-553 (Supp. 1972-1973), was written in terms of nonpublic schools. However, approximately 85% of the state's non-
The primary effects of the NLRA are to encourage collective bargaining and protect workers' rights to organize. Legislation amending the NLRA definition of employer to include church-operated schools will extend statutory protection to parochial school teachers' rights to organize. Opponents of such legislation may contend that it inhibits religion because parochial schools, forced by collective bargaining to pay higher salaries and provide better benefits, will be less able to provide for the religious needs of students. But economic impact is not determinative of a statute's constitutionality, and the primary effect of including church-operated schools in the NLRA's definition of employer is to protect the rights of the teachers.

**Government Entanglement with Religion**

Even though a statute satisfies the "secular purpose" and "secular effect" requirements, the danger of excessive government entanglement remains. There are two lines of cases that are relevant to a discussion of the constitutionality of permitting NLRB jurisdiction over parochial schools. The first line of cases sets out generally the parameters of permissible government entanglement with religion. The second line of cases deals specifically with the application of civil rights legislation to religious organizations. These cases are especially helpful because the fact-finding involved in the application of civil rights legislation to religious organizations is analogous to the fact-finding necessary for effective NLRB jurisdiction over parochial schools.

**Excessive versus Permissible Government Entanglement**

Entanglement occurs where policing is necessary to ensure a statute's secular effect. In *Lemon v. Kurtzman*, the Supreme Court held that a state may not use public funds to supplement parochial school teachers' salaries. The statute involved contained restrictions to ensure its secular effect. However, the restrictions themselves fostered excessive entanglement because extensive policing would be required to ensure that the restric-

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95. 403 U.S. 602 (1971).
96. Under the statute, an eligible recipient was restricted to teaching only courses taught in the public schools. Recipients could use only texts and materials found in public schools and could not teach a course in religion. 403 U.S. 602, 613 (1971).
tions were observed.  

Since total separation is impossible, permissive entanglement is a matter of degree. In *Walz v. Tax Commission*, New York taxpayers challenged a statute that provided a property tax exemption to religious organizations. The Supreme Court upheld the exemption because it created "only a minimal and remote involvement between the church and state and far less than taxation of churches."  

Entanglement is most intrusive if civil courts attempt to resolve conflicts of church policy. A state court may not order reinstatement of a bishop who has been defrocked by church authorities. But, the relationship between a church and its lay employees is distinguishable from the relationship between a church and its ministers. The former relationship is essentially dependent on the job market for its existence, while the latter depends solely upon the faith and calling of the individual. The application of the NLRA to church-operated schools will result in government entanglement with religion. The entanglement will be in the form of NLRB supervision of representative elections and NLRB inquiries into charges of unfair labor practices. Whether that entanglement is excessive and, therefore, prohibited, depends upon the permissible scope of factual inquiries under the religion clauses.  

While a civil court may not determine the truth of a religious  

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97. The Supreme Court found excessive entanglement where: A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglements between state and church.  

Id. at 619. See also Wolman v. Walter, 433 U.S. 229 (1977) (upholding statutory provisions of various neutral site services and objective testing and diagnostic services, but disallowing field trip transportation and loans of instructional equipment and materials to students). Cf. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upheld statute providing funds to private institutions of higher learning to be used for secular purposes only); New York v. Cathedral Academy, 434 U.S. 125 (1977) (audit necessary to ensure state funds were not used for secular purposes constituted excessive entanglement).  


99. Id.  

100. Id. at 676.  


belief, the court may determine the sincerity of a professed belief. In addition, circumstances may necessitate an inquiry into how central a practice affected by a statute is to a religion. These, along with the determination of whether or not a particular activity is religious, are precisely the inquiries which the NLRB would have to make if church-operated schools were included in the definition of “employer.”

The Supreme Court long ago sanctioned factual inquiries in property tax cases involving exemptions for religious organizations. In Gibbons v. District of Columbia the Court found that certain church-owned land was used for the production of income rather than for religious purposes. The applicable property taxing statute provided an exemption to church-owned property only if it were used for religious purposes. The Court accordingly held that the income property was not exempt from taxation. Similarly, in a labor dispute a civil court would be competent to decide whether the NLRB were correct in finding that a particular labor practice was or was not religiously-based.

A determination of the sincerity of religious belief is now established as proper judicial fact-finding. In United States v. Ballard, respondents were convicted of using the mails to defraud. The indictment charged that respondents knowingly asserted false religious doctrines. The trial court charged the jury to consider the sincerity of respondent’s belief and not the truth of the religious doctrine. The United States Supreme Court approved the trial court’s decision to withhold the question of the truth of the belief from the jury.

The Supreme Court in Wisconsin v. Yoder held that a state may not force parents, against their religious beliefs, to send their children to school after the eighth grade. The opinion described

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106. Id.
107. Id. at 407.
110. Id. at 80.
111. Id. at 82.
112. Id. The Court remanded the case to the circuit court for consideration of other issues. The dissent would have reinstated the trial court's decision. “On the issue submitted to the jury in this case it properly rendered a verdict of guilty.” Id. at 92 (Stone, C.J., dissenting). See also Giannella, Religious Liberty, Non-establishment, and Doctrinal Development (pt. 1), 80 HARV. L. REV. 1381, 1417 (1967).
the principles of faith which led Amish parents to withdraw their children from school. Because the Amish parents demonstrated the sincerity of their beliefs, the Court held that the state's interests in compulsory secondary education did not require attendance by Amish children.

In Catholic Bishop v. NLRB, the Seventh Circuit concluded that application of the NLRA to parochial schools would result in excessive government entanglement with religion. The circuit court feared that in processing an unfair labor practice charge, the NLRB would necessarily concern itself with whether a discharge resulted from the cause stated by the employer or whether the stated cause was merely a pretext to disguise a discharge in retaliation against an employee's union activity. But such an inquiry would not be unique to employment relations in parochial schools. The NLRB must routinely look behind the stated cause for dismissal to determine if the employer is acting in good faith. A parochial school may discharge a teacher for cause based on sincere religious belief. For example, a teacher in a Catholic school who advocated the use of contraceptives to control world population would not be immune to disciplinary action or termination by school officials. But if the NLRA applied to church-operated schools, a parochial school could not use religious belief merely as a pretext for firing a teacher. Should the NLRB find that a parochial school employer was not engaged in the good faith practice of a religious belief in discharging a teacher, it would order the teacher reinstated. Absent statutory protection a parochial school teacher, fired for engaging in union activity, is unable to vindicate his or her associational rights to engage in union activity.

The cases involving judicial resolution of church-owned property disputes also shed light on the constitutionality of NLRB in-

114. The Amish life style depended upon manual labor and did not require great intellectual development. Respondents demonstrated at trial that they believed that they and their children would be subject to the censure of the church if the children attended high school. Id. at 209.
115. Id. at 235.
116. 559 F.2d 1112 (7th Cir. 1977).
117. Id.
118. Id. at 1125.
119. It is the duty of the administrative law judge to inquire into the facts to determine whether the respondent engaged in the unfair labor practices alleged in the complaint. 29 C.F.R. § 102.35 (1979).
quiries into parochial school employment relations. Civil courts may not resort to interpretation of ecclesiastical law to resolve property disputes. However, the Supreme Court has recognized that "neutral principles of law" applicable to all property disputes are equally applicable to disputes involving church-owned property. The "neutral principles" approach allows civil courts to consider language in the deed, statutes governing the holding of property by religious organizations, the charters of local church corporations, and pertinent provisions of the church's general constitution. The application of the "neutral principles" approach is not without difficulty. The United States Supreme Court stated that civil courts must be careful to study the various documents in purely secular terms.

The principle which emerges from the above case is that judicial determination of secular issues is permissible so long as the secular issues are kept distinct from the religious issues. Analogous to the fact-finding involved in applying the NLRA to parochial schools is that done in regard to alleged civil rights violations by religious organizations.

Religion and Civil Rights Legislation

Courts enforcing civil rights legislation against religious organizations must determine whether or not the organization is engaged in the good faith practice of a religious belief. Similarly, an amendment to the NLRA, which includes church-operated schools in the definition of "employer," would require the NLRB to determine whether religious organizations were engaged in the

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120. See, e.g., Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872).
123. Jones v. Wolf, 443 U.S. 593, 604 (1979). The Court also noted the advantages:

The primary advantages of the neutral-principles approach are that it is completely secular in operation, and yet flexible enough to accommodate all forms of religious organization and polity. The method relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges. It thereby promises to free civil courts completely from entanglement in questions of religious doctrine, polity, and practice.

Id. at 603.
124. See text accompanying notes 139-150 infra.
good faith practice of religion. The case law regarding application of civil rights legislation to religious organizations indicates that such inquiries by the NLRB are constitutionally permissible.

Section 1 of the Civil Rights Act of 1866, 125 codified at 42 U.S.C. § 1981, "prohibits racial discrimination in the making and enforcement of private contracts." In Runyon v. McCrary, 126 the Supreme Court considered the applicability of 42 U.S.C. § 1981 to private schools that refused admission to black children. 127 The Court held that the racial exclusion practiced by the schools amounted to a classic violation of section 1981. 128 At the outset the Court carefully limited its holding to the practices of private nonsectarian schools. 129 Still, the Court faced the problem of first amendment infringement. The Court recognized a first amendment right of parents to send their children to schools that teach that racial segregation is desirable. The Court refused, however, to afford the same first amendment protection to the practice of excluding racial minorities from such institutions. 130

Subsequent to Runyon the Fifth Circuit considered a section 1981 charge against a sectarian school in Brown v. Dade Christian Schools, Inc. 131 Dade Christian Schools refused admission to black children. The school asserted that its racial policy was based upon sincerely held religious beliefs and protected by the free exercise clause. 132 The circuit court found Dade Christian Schools in violation of section 1981, but carefully limited its opinion, reviewing only the trial court's determination of whether the school's racial practices were actually founded upon religious belief. 133 The circuit court upheld the trial court's finding that the school's racial policy was not an exercise of religion. 134 However, the Dade Christian court indicated that a free exercise defense

127. Id.
128. Id.
129. Id. at 167-68.
130. Id. at 172.
131. Id. at 176. See also Everson v. Board of Pub. Educ., 330 U.S. 1, 31 (1947).
133. Id. at 311.
134. Id. at 312.
135. We do not hold that a belief must be permanently recorded in written form to be religious in nature. However, the absence of references to school segregation in literature stating the church's beliefs, . . . is strong evidence that school segregation is not the exercise of religion. . . . [T]he trial judge concluded that, if belief in school segregation was religious in
would be available to a sectarian school or church against a section 1981 claim if the alleged discrimination were in fact based on tenets of the religion.136

In McLure v. Salvation Army,137 the Fifth Circuit Court of Appeals considered the applicability of title VII of the Civil Rights Act of 1964 to religious organizations.138 Congress passed title VII to eliminate employment discrimination based upon race, color, religion, sex, or national origin.139 Mrs. McClure was a minister who alleged that her employer, the Salvation Army, discriminated against her because of her sex.140 The court first determined that the Salvation Army, a religious organization, was an employer subject to title VII.141 Even so, the court held that title VII does not cover the employment relationship between a church and its minister.142 The court did not determine title VII’s applicability to employment relations between a church and its lay employees. The court did state, however, that only certain employment relationships are exempt and that religious organizations are not completely free from title VII’s discrimination prohibitions.143

The factual inquiries necessary to apply the NLRA to parochial schools are similar to those approved in Dade Christian and McClure. Although NLRA applications will result in entanglement, the NLRB will not be called upon to resolve ecclesiastical disputes. The NLRA empowers the NLRB to prevent any “person”

nature, neither the officers of the school nor the congregation of the church were aware of it.

Id. at 312-13.

136. "Whether or not it is the exercise of religion or simply a policy of the institution not presenting a constitutional issue is a question of fact." Id. at 314. See also General Council on Fin. of the United Methodist Church v. Superior Court of San Diego, 439 U.S. 1369 (Rehnquist, Circuit Justice 1979).

137. 460 F.2d 553 (5th Cir. 1972), cert. denied, 409 U.S. 896 (1972).


140. McClure v. Salvation Army, 460 F.2d 553, 555 (5th Cir. 1972).

141. Id. On Congressional intent that title VII cover religious organizations, the court stated:

[T]he intention of Congress to allow such an organization to qualify as an "employer" is shown by the fact that in subsequent provisions of Title VII, limited and specific exemption from the Title's prohibitions were provided for them. The effect of these provisions is to cause a religious organization qualifying as such to be considered as an "employer," and to eliminate only certain of their employment relations from the prohibitions of Title VII.

Id. at 557 (emphasis added).

142. "The relationship between an organized church and its ministers is its life-blood. . . . Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern." Id. at 558-59. See also Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

143. McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir. 1972).
from engaging in unfair labor practices. The Board may certify employees' bargaining representatives, and order an employer to bargain with its employees. The Board may not interfere with the bargaining parties' freedom of contract by compelling agreement. In fact, if bargaining reaches a good faith impasse an employer is free to impose its terms without fear of NLRB reprisal. While protecting employees' associational rights, the NLRA does not strip employers of their freedom of contract. Given these limitations on NLRB power, it is unrealistic to fear, as some do, that a church will have to defer to teachers on policy matters in its schools. In NLRB v. Jones & Laughlin Steel Corp., the Supreme Court recognized that Congress did not create the right of employees to organize. The right to organize is a first amendment right—an associational right protected by the first amendment. Thus, when dealing with employment relations in parochial schools, courts face two first amendment rights in conflict: the right of a religious organization to be free from excessive governmental entanglement versus the right of employees to organize and bargain collectively. Since the entanglement created by applying the NLRA to parochial schools does not exceed a limited fact-finding inquiry, the employees' associational rights should prevail. If the NLRB oversteps its authority and encroaches upon ecclesiastical matters, the aggrieved reli-

147. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937). "It must be stressed that the duty to bargain collectively does not carry with it the duty to reach an agreement ..." S. REP. No. 573, 74th Cong., 1st Sess. 12 (1955).
149. Thomas v. Collins, 323 U.S. 516 (1945). "Those guarantees include the workers' right to organize freely for collective bargaining ... Necessarily correlative was the right of the union, its members, and officials ... to discuss with and inform the employees ... These rights of assembly and discussion are protected by the First Amendment." Id. at 533-34. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). See generally D. FELLMAN, THE CONSTITUTIONAL RIGHT OF ASSOCIATION 42-53 (1963).
CONCLUSION

The National Labor Relations Act was passed pursuant to a secular legislative purpose. It was intended to maintain the free flow of commerce through collective bargaining. As applied to parochial schools, the NLRA has a primarily secular effect. It does not prevent the free exercise of religious beliefs, nor does it operate to benefit or inhibit a particular religion. Application of the NLRA results in only minimal governmental entanglement with religion. If a court or administrative body finds that an employer school is acting pursuant to religious beliefs, the inquiry halts. Should an employer dispute the fact-finder's determination, it has recourse to judicial review. If the Act is not applied to parochial schools, employees of those schools are completely denied statutory protection of their right to organize and bargain collectively.

Teachers should not be denied protection of the general laws because they choose, or are forced by market conditions, to work for parochial schools. Congress should respond to Catholic Bishop by amending the NLRA definition of “employer” to specifically include religious organizations. Legislation amending the NLRA should carefully state a secular purpose and ensure that application of the amendment will neither advance nor inhibit religion. Congress should avoid “excessive entanglement” problems by specifying the procedures for the NLRB to follow when asserting jurisdiction over parochial schools. At the very least such legislation will force the Supreme Court to address squarely the “difficult and sensitive” constitutional questions.

GERALD SIMS