The Catholic Lawyer

Volume 30
Number 2 *Volume 30, Spring 1986, Number 2*

Article 5

September 2017

The Constitutionality of State Labor Relations Board Jurisdiction over Parochial Schools: Catholic High School Association v. Culvert

COMMENT

THE CONSTITUTIONALITY OF STATE LABOR RELATIONS BOARD JURISDICTION OVER PAROCHIAL SCHOOLS: *CATHOLIC HIGH SCHOOL ASSOCIATION v. CULVERT*

The First Amendment of the United States Constitution contains two clauses relating to religion.[1] The Free Exercise Clause prohibits re-

---

[1] U.S. CONST. amend. I. The first amendment's "Establishment" and "Free Exercise" clauses provide in pertinent part that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." *Id.*

The religion clauses are applicable to the states through the fourteenth amendment. Everson v. Board of Educ., 330 U.S. 1, 5 (1947) (Establishment Clause held applicable to states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (Free Exercise clause held applicable to states).

The presence of the religion clauses in the Constitution is credited to the influence of James Madison and Thomas Jefferson. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 1030 (2d Ed. 1983) [hereinafter HANDBOOK]. Madison authored MEMORIAL AND REMONSTRANCE in 1785 during a bitter fight against a tax levy for Virginia's established church. The polemic was apparently effective—the tax levy was defeated and Virginia passed its Bill for Religious Liberty, a precursor of the first amendment's religion clauses. *Id.*

strictions on religious beliefs,[2] and the Establishment Clause prohibits the government from aiding or formally establishing a religion.[3] In considering the constitutionality of state involvement in sectarian education, the Supreme Court has held that a total separation between church and state is impossible.[4] Although this controversy has focused primarily on state aid to private schools,[5] the question of excessive government intrusion recently has arisen as a result of attempts by labor relations boards [6]

---

[2] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). An individual is free to worship and be affiliated with any religious organization he chooses, *id.*, because the Constitution absolutely prohibits the proscription of any religious belief by the government. *See* HANDBOOK, *supra* note 1, at 1053.

[3] *See* Everson v. Board of Educ., 330 U.S. 1, 15 (1947). *See also* T. JEFFERSON, LETTER OF JAN. 1, 1802, *reprinted* in 16 THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Bergh ed. 1903):

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting free exercise thereof," thus building a wall of separation between Church and State.

Id. Although the original purpose of the "wall" was intended to prevent government aid to religion, the modern view is that it also prohibits all preference for religion over non-religion. *See* HANDBOOK, *supra* note 1.

[4] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). Writing for the Court, Chief Justice Burger stated: "Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable." *Id.* at 614. *See also* Zorach v. Clauson, 343 U.S. 306 (1952) (first amendment does not state in all respects church and state should be separated). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9, at 843 (1978) (impracticability of complete separation between church and state).

In *Lemon* the Court invalidated two state attempts to subsidize the cost of parochial school education. *Lemon*, 403 U.S. at 616. The Court struck down these statutes because it found that they fostered an excessive administrative entanglement between church and state. *Id.* at 618. Chief Justice Burger, writing for the majority, held that in assessing the degree of entanglement, three factors were to be considered: (1) whether the challenged law or conduct had a secular purpose; (2) whether its principle or primary effect was to advance or inhibit religion; (3) and whether it will foster an excessive entanglement of government with religion. *Id.* at 612-13.

[5] *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 371-72 (1975) (Pennsylvania statute authorizing various types of aid to parochial schools held unconstitutional except for textbook loan provision); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 482 (1973) (New York statute granting aid to parochial schools for costs incurred in test administration and record keeping was unconstitutional); Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (Pennsylvania and Rhode Island statutes providing direct subsidies to parochial schools deemed unconstitutional). *See also* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969) (examines constitutionality of state support for church-related schools).

[6] *See* National Labor Relations Act [NLRA] (codified at 29 U.S.C. §§ 151-169 (1982)). The NLRA was enacted by Congress in 1935 to prevent the obstruction of commerce by securing

to assert jurisdiction over the labor relations of parochial schools and their lay teachers.[7] While the Supreme Court has expressly left this question open,[8] lower courts have consistently held that these attempts to regulate the activities of parochial schools are unconstitutional.[9] Recently, however, in *Catholic High School Association v. Culvert*[10] the United States Court of Appeals for the Second Circuit held that the first amend-

---

for workers the right to organize and bargain collectively. NLRA, 29 U.S.C. at § 151. The Act also created a National Labor Relations Board (NLRB) to administer the Act and insure employment relations through its adjudicatory, supervisory, and rulemaking powers. *Id.*

The New York State Labor Relations Act (SLRA) was modeled after the NLRA. *See* New York State Labor Relations Bd. v. Holland Laundry, 294 N.Y. 480, 482, 63 N.E.2d 68, 72 (1945). "The [NLRA] and the [SLRA] are not only alike in their provisions but are almost identical in their language." *Id.* at 492, 63 N.E.2d at 74. *See generally* K. HANSLOWE, PROCEDURES AND POLICIES OF THE NEW YORK STATE LABOR RELATIONS BOARD 9-14 (1964) (comparing SLRA with NLRA).

While the state and national acts are substantially similar, the SLRA was amended in 1968 to include parochial school teachers. N.Y. LAB. LAW § 715 (McKinney 1977). Approving the 1968 amendment bringing employees of religious associations within the coverage of the SLRA, Governor Rockefeller stated "[t]hese workers will now enjoy the full protection of the [SLRA] so that they may bargain collectively with their respective employers through representatives of their choice." Ch. 890, 1968 N.Y. Laws 2389 (McKinney) (amending N.Y. LAB. LAW § 715 (McKinney 1977)).

[7] *See* Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), *aff'd on other grounds*, 440 U.S. 490 (1979). The United States Courts of Appeals for the Seventh Circuit concluded that the NLRB misinterpreted its scope of authority as extending to religiously affiliated schools. *Id.* at 1114. The Court noted that the NLRB's initial act of certifying a union as the bargaining agent for lay teachers would impinge upon the discretion of church authorities to direct teachers in accord with religious tenets. *Id.* Concluding that religious schools are an integral part of the Church, the Court declared that governmental interference with management prerogatives, condoned in an ordinary setting, was not acceptable in an area protected by the first amendment. *Id. See also* Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249 (1975) (NLRB jurisdiction inhibits religious exercise). *See generally* Comment, *The Free Exercise Clause, The NLRA, And Parochial School Teachers*, 126 U. PA. L. REV. 631, 632-38 (1978) (background of NLRB jurisdiction over parochial schools); Warner, *NLRB Jurisdiction Over Parochial Schools: Catholic Bishop of Chicago v. NLRB*, 73 NW. U.L. REV. 463, 472 (1978) (review of Seventh Circuit holding in *Catholic Bishop*).

[8] NLRB v. Catholic Bishop, 440 U.S. 490 (1979). In dictum, the Supreme Court noted that there was a serious risk of excessive government entanglement with religion if the NLRB asserted its jurisdiction. *Id.* at 504. However, the Court avoided the constitutional issue and held that the absence of a clear expression of congressional intent to bring parochial schools within the NLRB's jurisdiction conclusively indicated that no other authority existed for such jurisdiction at church-operated schools. *Id.* at 504-05.

[9] *See, e.g.*, Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977) (NLRB jurisdiction over lay faculty at Catholic schools unconstitutional); McCormick v. Hirsch, 460 F.Supp. 1337, 1344 (M.D.Pa. 1978) (NLRB jurisdiction over parochial schools violates Constitution's religion clauses); Caulfield v. Hirsch, 410 F.Supp. 618, 623 (E.D.Pa. 1977), *cert. denied*, 436 U.S. 957 (1978) (NLRB regulation of parochial school employer violates Free Exercise and Establishment Clauses).

[10] 753 F.2d 1161 (2d Cir. 1985).

ment did not prohibit the New York State Labor Relations Board (SLRB) from asserting jurisdiction over parochial schools.[11]

In *Catholic High School Association,* the teachers' union and the Catholic High School Association (the Association) were involved in contract negotiations over employment conditions.[12] In the midst of negotiations, the Union filed charges alleging that the Association had engaged in unfair labor practices, violating the State Labor Relations Act (SLRA).[13] After these charges were filed, the State Labor Relations Board (SLRB) conducted a confidential investigation, which resulted in the issuance of a formal complaint against the Association.[14]

In response, the Association brought an action seeking both declaratory and injunctive relief against the SLRB.[15] The Association challenged the SLRB's assertion of jurisdiction, alleging that the Board's action violated the Free Exercise and Establishment Clauses of the first amendment, and that SLRB jurisdiction was preempted by the National Labor Relations Act.[16] The Association filed a motion for summary judgment.[17] The district court granted the motion, thereby enjoining the SLRB from continuing its proceeding against the Association.[18]

---

[11] *Id.* at 1167-69. In *Catholic High School* the Second Circuit answered the constitutional question avoided by Supreme Court in *Catholic Bishop. Compare id.* at 1162 *with Catholic Bishop,* 440 U.S. at 508. The court further concluded that "the First Amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual. *Catholic High School,* 753 F.2d at 1168. However the court maintained that the SLRB "is still free to determine, using a dual motive analysis, whether the religious motive was in fact the cause of the discharge." *Id.*

[12] *Id.* From 1969 to 1980, the Union and the Board entered into a series of collective bargaining agreements governing the secular terms and conditions of employment of lay teachers. *Id.* at 1163. The agreements were expressly limited to non-sectarian issues and specifically excluded religious faculty from unions. *Id.*

[13] *Id.* at 1163. The Union alleged that the Association had violated sections 704(5) and 704(10) of the SLRA. *Id. See* N.Y. LAB. LAW § 704 (McKinney 1977). Section 704 enumerates ten labor practices in which it is unlawful for an employer to engage. N.Y. LAB. LAW § 704(5), (10) (McKinney 1977). The applicable subsections provide in pertinent part: "It shall be unfair labor practice for an employer: (5) To encourage . . . or discourage membership in any labor organization;. . .(10) To do any acts . . . which interfere with, restrain or coerce employees in the exercise of the rights guaranteed [by this Act]." *Id.*

[14] *Catholic High School,* 753 F.2d at 1164.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* Judge Lasker held that the application of the SLRA to lay teachers threatened to produce excessive entanglement between church and state and therefore violated the Establishment Clause. *Catholic High School,* 573 F.Supp. at 1156. The district court further stated that because the SLRB's good faith bargaining requirement might lead to negotiations over religion matters, entanglement might arise. *Id.* Further, because the SLRB had the power to investigate unfair labor practice charges, it will be unavoidable for the SLRB to avoid confronting religious issues. *Id.* at 1157.

On appeal, a divided Second Circuit panel reversed the district court on the constitutional issue, holding that neither the Establishment Clause nor the Free Exercise Clause had been violated.[19] In determining that the Establishment Clause had not been violated, the Second Circuit utilized the three-pronged *Lemon v. Kurtzman* test.[20] The majority held that the nature of the state intrusion into the bargaining process did not create an excessive administrative entanglement.[21]

---

[19] *Catholic High School*, 753 F.2d at 1161 (2d Cir. 1985). Judge Cardamone wrote the majority opinion in which Judge Friedman joined, and Judge Pratt filed a separate dissenting opinion. *Id.* at 1171.

The Court, deciding several threshold matters before reaching the first amendment question, affirmed the opinion of the district court holding that the NLRA did not preempt the jurisdiction of the SLRB's. *Id.* at 1165. For a further discussion of the preemption issue *see supra* note 11.

Moreover, the court maintained that a justiciable controversy existed and stated that "the record affords abundant evidence that the [SLRB's] exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses." *Catholic High School*, 753 F.2d at 1165.

While addressing the constitutional issue, Judge Cardamone noted that an accomodation could be made between the first amendment rights of the Association and the secular interests of the lay teachers. *Id.* at 1168-69. The judge relied on NLRB v. Gissel Packing Co., 395 U.S. 575, 616-17 (1969), to support the proposition that the Supreme Court seeks to accomodate apparently irreconcilable interests in the labor area whenever possible. *Catholic High School*, 753 F.2d at 1169. The Association urged that if the SLRB was permitted to assert jurisdiction, a parochial school might be forced to reinstate a teacher it might have otherwise fired for religious reasons, simply because the school administration was partially motivated by anti-union animus. *Id.*

Judge Cardamone reasoned that the SLRB may, consistent with the first amendment, protect teachers from unlawful discharge by limiting it findings of a violation of the collective bargaining agreement to those cases in which a teacher would not have been discharged "but for" the unlawful motivation. *Id.*

Judge Pratt concurred with the majority on the two threshold issues, but dissented on the constitutional issue for the reasons set forth in the district court's opinion and in the Seventh Circuit's opinion in *Catholic Bishop*. *Id.* at 1171. (Pratt, J., dissenting).

[20] *Catholic High School*, 753 F.2d at 1165. *See supra* note 4 (discussion of *Lemon v. Kurtzman*).

[21] *Id.* at 1166. To support the proposition that state intrusion in the bargaining process did not create an excessive entanglement, the court first made use of EEOC v. Mississippi College, 626 F.2d 477, 487-88 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) which held that a wide ranging investigation into many aspects of the hiring procedures of a religious college did not constitute excessive administrative entanglement. *See id.*

Second, the court relied upon the fact that the ten unfair labor practices specified in § 704 of the SLRA, *see supra* note 13, are entirely secular. *Catholic High School*, 753 F.2d at 1167. Moreover, Judge Cardamone noted that an order issued by the SLRB is not self enforcing; a parochial school may refuse to comply with SLRB orders and raise a First Amendment defense when and if the SLRB seeks judicial enforcement. *Id.*

Third, the court analogized the SLRB proceeding to those of the Equal Employment Opportunity Commission (EEOC), which have been held to be nonintrusive, stating that the SLRB proceedings are no more intrusive than those of the EEOC. *Catholic High School*,

Addressing the Association's Free Exercise claim, the Second Circuit maintained that collective bargaining was not contrary to the beliefs of the Catholic Church.[22] Judge Cardamone further stressed that SLRB jurisdiction would not impermissibly chill the Association's Free Exercise rights.[23] Moreover, the court reasoned that any indirect and incidental burden placed on religion by the exercise of SLRB jurisdiction was justified by the State's compelling interest in collective bargaining.[24]

---

753 F.2d at 1166.

[22] *Catholic High School*, 753 F.2d at 1169. The court recognized that "[f]reedom to believe is absolute. Freedom to act is not." *Id.* (citing Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)). The *Cantwell* Court recognized that although freedom to believe is absolute, all "[c]onduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

The court in *Catholic High School* relied upon Wisconsin v. Yoder, 406 U.S. 205 (1972), for a balancing test which weighs the burden SLRB jurisdiction would impose on the free exercise rights of the Association against the interest of the State in enforcing the Act. *Catholic High School*, 753 F.2d at 1169. In *Yoder*, the Supreme Court held that Wisconsin could not require members of the Amish Church to send their children to public schools after the eighth grade. *Yoder*, 406 U.S. at 205. Chief Justice Burger, writing for the majority, employed a tripartite test to consider whether: (1) the claims presented were religious in nature and not secular; (2) the state action burdened the religious exercise; (3) the state's interest was sufficiently compelling to override the free exercise of religion. *Yoder*, 406 U.S. at 214-15.

The *Catholic High School* court observed that the claim of the Association will be considered religious and not secular if regulation by the SLRB interferes with the Association's freedom to maintain certain religious beliefs. *Catholic High School*, 753 F.2d at 1169. Judge Cardamone however, concluded that the claim presented was not religious because the SLRB regulates religious conduct, not beliefs, which the state has a right to do under its police power. *Id.* The court further held that regulations which merely cause economic hardship or inconvenience are often upheld. *Id.* (citing Braunfeld v. Brown, 366 U.S. 599 (1961)) (Sunday closing laws did not violate free exercise of Orthodox Jewish merchants since only nonreligious conduct was regulated).

The court also maintained that for nearly 100 years the Catholic Church has been a strong supporter of the rights of employees to organize and bargain as a unit. *Catholic High School*, 753 F.2d at 1170. (citing Kryvourka, *The Church, the State, and the National Labor Relations Act: Collective Bargaining in the Parochial Schools*, 20 WM. & MARY L. REV. 33, 52 n.74 (1978)). The court relied on a recent Bishop's Pastoral letter which reaffirmed the commitment of the Catholic Church to social and economic justice, as well as collective bargaining. *Catholic High School*, 753 F.2d at 1170 (citing Bishop's Pastoral Letter of November 11, 1984 (reprinted in N.Y. TIMES, Nov. 12, 1984, at B-11, cols. 5 & 6)).

[23] *Catholic High School*, 753 F.2d at 1170-71. In *Catholic Bishop*, the Seventh Circuit found, "[t]o minimize friction between the Church and the [SLRB], prudence will ultimately dictate that the [Association] tailor [its] conduct and decisions to 'steer far wider of the unlawful zone' of impermissible conduct." *Catholic Bishop*, 559 F.2d at 1124. (citation omitted). Judge Cardamone rejected this argument, holding that a compelling state interest, the preservation of institutional peace and sound economic order, existed. *Catholic High School*, 753 F.2d at 1171.

[24] *Id.* Judge Cardamone reasoned that the compelling state interest in enforcing the SLRA outweighs the incidental burden on religion. *Id.*

In *Catholic High School Association*, the Second Circuit is purported to have conclusively addressed the constitutionality of SLRB jurisdiction over parochial schools. It is submitted, however, that while the court was correct in recognizing that the conflict implicated both the Free Exercise and Establishment Clauses, its analysis was insufficient to support the constitutionality of the statute in question. This Comment will suggest that a proper analysis of the two religion clauses requires a detailed factual review of the degree of intrusiveness of the continuing exercise of SLRB jurisdiction. It will also suggest that under such a comprehensive analysis of the SLRB's actual involvement with a religious school, the Board's action would not survive the appropriate first amendment scrutiny.

THE ESTABLISHMENT AND FREE EXERCISE CLAUSES

Although recognized as overlapping doctrines,[25] the two religion clauses of the first amendment have been analyzed under independent frameworks.[26] The aim of the Free Exercise Clause was to avoid interference from the state, which may coerce individuals[27] to forgo their religious practices and beliefs.[28] The Establishment Clause was intended to afford protection against "sponsorship, financial support, and active involvement of the sovereign in religious activity."[29] Despite their being cast in absolute terms,[30] the religion clauses cannot completely be sepa-

---

[25] *See Catholic Bishop*, 559 F.2d at 1131. (each clause has the identical purpose of maintaining separation between Church and State); McCormick v. Hirsch, 460 F. Supp 1337, 1351 (M.D.Pa. 1978) (recognizing that the two religion clauses are intertwined). *See also* Kurkland, *Of Church and State and The Supreme Court*, 29 U. CHI. L. REV. 1, 96 (1961) (Free Exercise and Establishment Clause should be read as stating single precept).

[26] *See infra* note 27 and accompanying text for the Free Exercise analysis and, *see infra* note 29 and accompanying text for a discussion of the Establishment Clause analysis.

[27] *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973); School Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 222-23 (1963); Engel v. Vitale, 370 U.S. 421, 430 (1962). In each case the court mentioned the need to prove the coercive effect of government regulations. It has been suggested that any regulation which substantially impairs the practice of religion will be sufficiently coercive to merit further review. *See* HANDBOOK, *supra* note 1.

[28] *See, e.g., Yoder*, 406 U.S. 205 (1972) (objection to mandatory secondary education by Amish parents); Gillette v. United States 401 U.S. 437 (1971) (conscientious objector exemption); Prince v. Massachusetts, 321 U.S. 158 (1944) (statute prohibiting minor from selling magazines). *See also* Forkosch, *Religion, Education, and the Constitution - A Middle Way*, 23 LOY. L. REV. 617, 639 (1977) ("the free exercise clause apparently deals with persons, i.e., their personal free exercise of religious beliefs and faiths . . .").

[29] *Lemon*, 403 U.S. 602, 612 (1971). *See also supra* note 4, (no absolute separation of church and state) *See generally* M. MCCARTHY, A DELICATE BALANCE: CHURCH, STATE AND THE SCHOOLS (1983) (overview of function of establishment clause in relation to parochial schools).

[30] *See* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970). Writing for the Court, Chief Justice

rated.[31] When either is extended to its logical extreme, there is a clash between the policies of each clause.[32] Inasmuch as the Establishment and Free Exercise clauses represent different aspects of religious freedom,[33] it is submitted that both religion clauses must be considered in determining the constitutionality of SLRB jurisdiction over parochial schools.

FREE EXERCISE : THE *Yoder* TEST APPLIED

The right to free exercise of religion can be separated into freedoms of belief, action, and religious hierarchy.[34] The Supreme Court, in *Wisconsin v. Yoder*,[35] determined that it is necessary to ascertain whether the claims presented involve the practice of a legitimate religious belief, the state action burdens the religious exercise, and if the state interest is sufficiently compelling to override the constitutional right of free exercise.[36]

LEGITIMACY OF RELIGIOUS BELIEF

A legitimate religious belief is one which is founded upon theocratic principles which pervade the daily lives and lifestyles of its believers.[37] It

---

Burger maintained that the religion clauses "are cast in absolute terms." *Id.* Thomas Jefferson described the religion clauses as a "wall of separation" between church and state. *See supra* note 3.

[31] *See* Walz v. Tax Comm'n, 397 U.S. at 670. Chief Justice Burger also stated that "no perfect or absolute separation is really possible." *Id. See also supra* note 25, (discussing overlapping of Establishment and Free Exercise Clauses).

[32] *See Walz*, 397 U.S. at 668-69. The Court stated that if either is "expanded to a logical extreme, [each clause] would tend to clash with the other." *Id.* There is a "natural antagonism between the prohibition of establishing a religion and the desire not to inhibit its practices." HANDBOOK, *supra* note 1, at 1029. This antagonism between the clauses frequently requires the Supreme Court to choose among competing values in first amendment cases. *Id.* The Court is generally guided by the concept of neutrality. *Id.* The competing values also demand that the State act to achieve only secular goals and that it achieve in a religiously neutral manner. *Id.* Unfortunately, cases arise where the State has no alternative but to indirectly aid or infringe upon religious practices. *Id.*

[33] *See* Everson v. Board of Educ., 330 U.S. 1, 40 (1947) (Rutledge, J., dissenting). Judge Rutledge stated that " '[E]stablishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom." *Id.*. Similarly, in School Dist. of Abington Township v. Schempp, 374 U.S. 203, (1963) (Brennan, J., concurring), Justice Brennan reasoned that "[t]he inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty upon either clause." *Id.* at 232

[34] *See supra* note 22 and accompanying text.

[35] 406 U.S. 205 (1972); *see supra* note 22.

[36] *Id.*

[37] *See Yoder*, 406 U.S. at 215-17. In *Yoder* the Court found that the Amish lifestyle, educational practices and refusal to submit their children to further secular education were religion. *Id.* Central to this determination were the following facts: (1) this was a shared belief

is generally maintained that the operation of a parochial school constitutes the practice of a legitimate religious belief.[38] The purpose of such a school is to perpetuate the teachings of the religion,[39] and all teachers are expected to assist in this ecclesiastical undertaking.[40] The Supreme Court has stated that secular education and religious mission in parochial schools are "inextricably intertwined," with religious mission in fact being the "only reason for the schools' existence."[41]

The Second Circuit, while not questioning the legitimacy of the Association's religious beliefs, noted that "courts have long upheld regulation that merely causes economic hardship or inconvenience."[42] The Supreme Court, however, has determined that the relative directness of governmental interference is not an appropriate standard.[43] If the standard suggested by Judge Cardamone is applied, however, the SLRB would have the power to issue direct orders if the Association's conduct was found to constitute an unfair labor practice."[44] Therefore, it is suggested that the parochial schools at issue were sufficiently religious to meet the constitu-

---

by an organized group rather than a personal preference, (2) the belief related to certain theocratic principles and interpretations of religious literature; (3) the system of beliefs pervaded and regulated their daily lives; (4) the system of belief and life style resulting therefrom had been in existence for a substantial period of time. *Id.*

[38] *See e.g.*, Lemon v. Kurtzman 403 U.S. 602, at 618-19 (1971) (schools are a powerful vehicle for transmitting Catholic faith). Public Funds for Public Schools of N.J. v. Byrne, 590 F.2d 514, 517 (3d Cir.) (generally accepted "fact" that parochial schools are pervasively religious), *aff'd*, 442 U.S. 907 (1979); Catholic Bishop v. N.L.R.B. 559 F.2d 1112, 1120-23 (7th Cir. 1977). (parochial schools are pervasively religious institutions). *See also* L. BOETTNER, ROMAN CATHOLICISM 360 (1962) (purpose of schools is to make loyal Roman Catholics).

[39] THE CODE OF CANON LAW, Canons 803 (English trans. 1983). *See also* DECLARATION ON CHRISTIAN EDUCATION IN THE DOCUMENTS OF VATICAN II 642-43 (1966) (Church is bound to give parochial school children education through which their "entire lives can be penetrated with the spirit of Christ"); J. FICHTER, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY 86 (1958) (parochial school taught with the goal of religious education in mind).

[40] *See* Meek v. Pittinger, 421 U.S. 349, 366 (1975); *Lemon*, 403 U.S. at 635; *Catholic Bishop*, 559 F.2d at 1122.

[41] *Lemon*, 403 U.S. at 657 (1971).

[42] *Catholic High School*, 753 F.2d at 1169. *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, (1961) (Pennsylvania Sunday closing law did not violate free exercise of Orthodox Jewish merchants).

[43] *See e.g.*, Sherbert v. Verner, 374 U.S. 398, (1963) (statute that denied plaintiff unemployment benefits when she was discharged for observing Saturday Sabbath unconstitutional); Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Brennan, J., dissenting) (relative directness of interference not appropriate standard). *See also* Comment, *Religious Accomodation Under Sherbert v. Verner: The Common Sense of the Matter*, 10 VILL. L. REV. 337, 345 (1965) (directness of governmental interference not a helpful standard).

[44] *See* N.Y. LAB. LAW § 706 (1) (McKinney 1977). Section 706(1) gives the SLRB the power to directly intervene to insure that unfair labor practices do not violate any employees' rights. *Id.* The section provides that "the board is empowered and directed. . . to prevent any employer from engaging in any unfair labor practice." *Id.*

tional test for a legitimate free exercise claim. [45]

BURDENS ON RELIGIOUS EXERCISE

A statute burdens religious conduct if, because of its application, it unreasonably restricts the exercise of that religion in some cognizable fashion.[46] Collective bargaining is not per se an unreasonable burden to the beliefs of the Catholic Church;[47] indeed, many parochial schools have permitted their lay teachers to organize.[48]

Parochial schools, however, maintain that because their teachings are so pervasively religious,[49] nearly all activities that are appropriate for mandatory collective bargaining embrace religious matters.[50] Moreover, once a union bargaining agent has a statutory mandate, such as that granted by the SLRB, those subjects that are open to labor negotiation often expand to include issues religious in nature.[51] Such expanded jurisdiction may have a chilling effect on the religious freedom of parochial

---

[45] *Compare Catholic High School*, 753 F.2d 1161 (parents have right to choose alternate parochial school education for their children) *with Yoder*, 406 U.S. 205 (1972) (parents' right to instruct their children in attitudes consistent with Amish religion). *See also* Freund, *supra* note 5, at 664 (comparing the religious claim in *Yoder* with the parochial school labor relations cases).

[46] *See Yoder*, 406 U.S. at 214-15; HANDBOOK, *supra* note 1, at 1061.

[47] *Catholic High School*, 753 F.2d at 1170; *see supra* note 24.

[48] *See Catholic High School*, 753 F.2d at 1163; *Catholic Bishop*, 559 F.2d at 1114; McCormick v. Hirsch, 460 F. Supp. at 1340. *See generally* Kryvoruka, *The Church, The State and The National Labor Relations Act: Collective Bargaining in the Parochial Schools*, 20 WM. & MARY L. REV. 33, 34 (review of NLRB cases involving parochial schools).

[49] *See supra* notes 39-42 and accompanying text.

[50] *See Catholic Bishop*, 559 F.2d at 1129; McCormick v. Hirsh, 460 F.Supp. 1337, 1353 (M.D.Pa. 1978); Caulfield v. Hirsch, 410 F. Supp. 618, 624 (E.D.Pa. 1976). *See also* M. MCCARTHY, A DELICATE BALANCE OF CHURCH AND STATE AND THE SCHOOLS 153 (1983) (NLRB jurisdiction over parochial schools would "open the door to conflicts between clergy-administrators and the [NLRB] or conflicts with negotiators for unions.")

[51] *See* Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067, 1075 (1969). Professor Brown has stated that:

> Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of work load, work load is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies.

Id. This observation has been documented by other commentators. *See, e.g.*, Klaus, *The Evolution of Collective Bargaining Relationships in Public Education: New York City Changing Seven-Year History*, 67 MICH. L. REV. 1033, (1969) (graphic illustration of how bargaining over minor subjects in school negotiations escalates to encompass major issues). *See generally* Kahn, *The NLRB and Higher Education: The Failure of Policymaking through Adjudication*, 21 U.C.L.A. L. REV. 63, 80 (1973) (quoting Prof. Brown, includes evidence that his assertions are correct).

schools.[52] Indeed, a school may agree to bargain and compromise on policy questions because litigation through the SLRB proceedings is too costly or upsetting. [53]

SLRB jurisdiction over the Association further burdens free exercise rights by dividing the faculty into camps of lay and religious teachers.[54] This division, although alleged to be secular, violates the right of the parochial school to maintain the single, undivided community of faith contemplated by its religious mission.[55] The first amendment, however, was designed to protect against the evil of "division along religious lines."[56] Ironically, because parochial schools are such an integral part of the Church's religious mission, they are often prohibited from receiving public funds.[57] Allowing the SLRB to assert jurisdiction as the Second Circuit has done would "cruelly whipsaw" the parochial schools by holding them too religious to receive government assistance, yet not religious enough to be exempt from government regulation.[58]

The Supreme Court, in *Yoder*, has committed religious education

---

[52] *See supra* note 25.

[53] *See Catholic Bishop*, 559 F.2d at 1124. The Seventh Circuit noted that "to minimize friction between the Church and the [NLRB], prudence will ultimately dictate that the bishop tailor his conduct and decisions to 'steer far wide of the unlawful zone' of impermissible conduct. *Id. But cf.* Comment, *Catholic Bishop of Chicago v. NLRB*, 53 NOTRE DAME LAW. 463, 472 (1978) (criticism of "chill" analysis in *Catholic Bishop*).

[54] *See* McCormick v. Hirsch, 460 F. Supp. at 1353. In *McCormick*, the court noted that divisiveness along religious lines seems inevitable when lay and religious teachers are separated into two discrete and possibly conflicting camps. *Id.*; Caulfield v. Hirsch, 410 F. Supp. at 625.

[55] *See supra* note 51. *But see* Comment, *supra* note 7, at 646 (any interference with religious freedom that is claimed to be caused by divisiveness along religious lines in this instance is minimal and consequently need not be viewed seriously).

[56] Roemer v. Maryland Pub. Works Bd., 426 U.S. 736, 749 (1976) *See* Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (danger of political divisiveness). *But see* Note, *The Sacred Wall Revisited*, 67 NW. U.L. REV. 118 (1972) (criticism of political divisiveness inquiry because it is difficult to apply). *But cf.* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring) (political divisiveness never independent ground for holding government practice unconstitutional).

[57] *See supra* note 5 for a discussion of parochial aid cases.

[58] *Catholic Bishop, 559 F.2d at 1119.* Noting that the NLRB wishes to assert jurisdiction despite the fact that attempts by government to aid parochial schools have been invalidated, the court stated:

> A church which chooses to educate its own young people in schools which it is required essentially to finance without governmental aid should because of the essentially religious permeation of its curriculum be equally freed of the obviously inhibiting effect and impact of the restrictions of the [NLRA] in conducting the teaching program of those schools.

Id. at 1130 *See*, Comment, *Catholic Bishop v. NLRB*, 53 NOTRE DAME LAW. 463, 479 (1978). The potential effect of holding parochial schools too religious to be regulated by the NLRB makes any future attempts at providing government aid troublesome. *Id.*

and upbringing to the private processes of church and family.[59] This protects not only a family's choice of a child's parochial school education, but the schools operation as well.

COMPELLING STATE INTEREST

A state interest is compelling when it is of great enough importance to warrant superiority over an individual's free exercise rights and would be impaired by allowing the exercise of those rights to override the statutory regulation.[60]

In considering the state interests involved, the Second Circuit reasoned that even if the exercise of SLRB jurisdiction was an indirect and incidental burden on parochial school employment decisions involving religious issues, this intrusion was minimal and was justified by the compelling interest of the state in collective bargaining.[61] The Supreme Court, however, has yet to find an instance when a burden on religious exercise is justified by a weightier state interest.[62] Indeed, the Court has invalidated aid programs to parochial schools on first amendment grounds despite the fact that the continued existence of the schools was essential to avoid a crisis in the public schools.[63]

An appropriate analysis of the state's interest must seriously consider the presence of an extraordinary free exercise interest in the parochial school, that of transferring shared values and beliefs from one generation to the next.[64] Moreover, parochial schools provide parents with an alternative in the educational and religious development of their children, which adds credence to the parochial school's free exercise claim.[65] It is

---

[59] *Yoder*, 406 U.S. at 233 (1972). *See also* Stanley v. Illinois, 405 U.S. 645 (1972) (state may not enter private realm of family life without justification); Farrington v. Tokushige, 273 U.S. 284, 288 (1927) (state cannot strip parents control of child's education). *See generally* M. MCCARTHY, A DELICATE BALANCE BETWEEN CHURCH, STATE AND THE SCHOOLS 143 (1983) (overview of the right of parents to send children to parochial schools).

[60] *See Yoder*, 406 U.S. at 214; HANDBOOK, *supra* note 1.

[61] *Catholic High School*, 753 F.2d at 1171.

[62] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 241-48 (1977) (state interest in providing publicly supported diagnostic, therapeutic and remedial services by public employees at parochial school held unconstitutional); Meek v. Pittenger, 421 U.S. 349, 371 (1975) (state interest in providing publicly supported remedial and therapeutic counseling given inside parochial school held to violate the Free Exercise Clause). *See generally* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1178 (1979) (no government interest is compelling enough to justify entanglement).

[63] *See supra* note 5.

[64] *See supra* notes 38-40 and accompanying text. *See also* A. GRELLEY, W. MCCREADY AND K. MCCOURT, CATHOLIC SCHOOLS IN A DECLINING CHURCH 157-95, 251-53 (1976) (survey research indicates Catholic Schools have measurable permanent effects on their graduate's values).

[65] *See supra* note 60 and accompanying text; Lemon v. Kurtzman, 403 U.S. at 625 (schools represent both institutional and parental rights in religious education).

therefore submitted that the free exercise interests of the parochial schools — the religious freedom of continuity and choice — outweigh the state's interest in regulation of labor relations.

ESTABLISHMENT — THE *Lemon* TEST APPLIED

The Establishment Clause prohibits government aid to religion, as well as the favoring of religion over non-religion.[66] The Supreme Court, in *Lemon v. Kurtzman*, determined that when a government practice is alleged to be in violation of the Establishment Clause, it is necessary to ascertain whether: the challenged law or conduct has a secular purpose; its principal or primary effect is to advance or inhibit religion; and whether it will foster an excessive entanglement of government with religion.[67]

Following this tripartite analysis the court in *Catholic High School* concluded that the exercise of SLRB jurisdiction did not violate the Establishment Clause.[68] While it is clear that the SLRA has a secular purpose and that its primary effect is neither to advance nor inhibit religion,[69] it remains necessary to determine if SLRB surveillance of religious institutions or its resolution of internal religious disputes will foster an excessive administrative entanglement.[70]

The religious nature of the schools is not contested.[71] In such sectarian schools the Supreme Court has recognized that religious doctrine may mix with secular instruction.[72] Thus, while the SLRA provides for mandatory collective bargaining between the employer and the union

---

[66] *See* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 766 F.2d 932, 956 (6th Cir. 1985), *rev'd*, 91 L.Ed.2d 512 (1986) In *Dayton*, the court stated "the prohibitions which the clause represents apply equally to government benefits to and burdens on religion." *Id. See also* HANDBOOK, *supra* note 1 (accepted view today is that Establishment Clause prohibits preference for religion over non-religion).

[67] *See supra* note 2. *But cf.* Wallace v. Jaffe, 53 U.S.L.W. 4679 (U.S. June 28, 1985) (Rehnquist, J., dissenting) (suggests abandoning the *Lemon*-establishment test).

[68] *Catholic High School*, 753 F.2d at 1167-1170. *See supra* notes 20-22 and accompanying text.

[69] *See supra* note 21.

[70] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 869-70 (1978). *See infra* notes 72-76 and accompanying text. *See also* McCormick v. Hirsch, 460 F. Supp. at 1357 (apply Tribe test for excessive entanglement).

[71] *See supra* notes 38-40 and accompanying text.

[72] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. at 618-19 (parochial schools and teachers will inevitably experience great difficulty remaining religiously neutral); Meek v. Pittenger, 421 U.S. at 370 (religious doctrine will become intertwined with secular matters); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. at 472, 480 (1973) (religious doctrine will mix with secular education). *See generally* Ripply, *The Entanglement Test of The Religion Clauses - A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980) (overview of interrelation between religious doctrine and secular instruction in parochial schools).

over such secular issues as "wages, hours of employment, or other conditions of employment,"[73] religious issues may also become intertwined in negotiations. This is especially true given the statutory certification of the bargaining process and the expansive construction given the phrase "terms and conditions of employment".[74] This might lead to inquiry by the SLRB into the good faith of religious positions asserted by parochial administrators.[75]

Furthermore, the Supreme Court has reasoned that it is not only the conclusion reached by a regulatory agency that may impinge on the school's first amendment rights, but the "very process of inquiry leading to findings and conclusions."[76] Thus, it is submitted that in light of the pervasively religious character of the schools, there is a genuine threat that sectarian matters will become part of the bargaining process as a result of SLRB jurisdiction, creating an unconstitutionally excessive administrative entanglement.

CONCLUSION

The resolution of the constitutional question presented in *Catholic High School Association v. Culvert* will profoundly affect the future of parochial school labor relations. Notwithstanding the observations of the Second Circuit that SLRB jurisdiction does not violate the constitutional standard developed by the Supreme Court, it is suggested that the regulatory requirements imposed by the *Catholic High School* court are violative of both first amendment religion clauses. The resulting conflicts and confrontations between the SLRB and the schools will result in an entan-

---

[73] N.Y. LAB. LAW § 705(1) (McKinney 1977). *See supra* note 6.

[74] *See supra* note 51 and accompanying text. *See, e.g.*, NLRB v. Fireboard Paper Prods. Corp., 379 U.S. 203 (1964) (subcontracting); *In re* Ozark Trailers, Inc., 161 N.L.R.B. 516 (1966) (partial shutdown); *In re* United States Co., 97 N.L.R.B. 889 (1951) (timing and sequence of layoffs), *modified on others grounds*, 206 F.2d 410 (5th Cir. 1953).

[75] *See Catholic Bishop*, 440 U.S. 490, 502. The Supreme Court noted that it is clear that the Board's action will go beyond resolving factual issues. *Id.* The resolution of such charges by the NLRB, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the administrators and its relationship to the school's religious mission. *Id.* It is not only the conclusions that may be reached by the NLRB which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to the findings. *Id.* See also HANDBOOK, *supra* note 1, at 1080.

The majority in *Catholic Bishop* added an appendix to its opinion which was an excerpt of an inquiry by an NLRB hearing officer regarding prayers at schools that involved the questioning of a Catholic priest concerning the nature of a liturgy and its use in parochial schools. *Catholic Bishop*, 440 U.S. at 507. The Chief Justice noted that this type of involvement between secular and religious authorities presented significant dangers to the values protected by the Establishment Clause. *Id.*

[76] Catholic High School v. Culvert, 573 F. Supp. 1550, 1557 (S.D.N.Y. 1983) (quoting NLRB v. Catholic Bishop, 440 U.S. 490, 502).

gling relationship that violates the spirit of freedom for religious organizations that the religion clauses were intended to protect.

Louis F. Simonetti, Jr.