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**NLRB Jurisdiction Over Religious Schools and the Religion Clause of the First Amendment***

**Introduction**

Operating under a grant of authority which has been characterized as being "coextensive with Congressional authority under the commerce clause," the National Labor Relations Board (NLRB or Board) repeatedly has come under fire for its historically conservative assertion of jurisdiction over nonprofit employers. Despite its frequent refusal to exercise this authority, however, the Board recently has utilized its broad discretionary

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*This article is a student work prepared by Richard J. Curiale, a member of the St. Thomas More Institute for Legal Research.

1 Sherman & Black, *The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 Harv. L. Rev. 1323, 1326 (1970). The National Labor Relations Board (NLRB or Board) is empowered by the National Labor Relations Act (the NLRA or the Act) to assert jurisdiction where "it has reasonable cause to believe that a question of [collective bargaining] representation affecting commerce exists." 29 U.S.C. § 159(C)(1) (1976). The Board has promulgated regulations under this authority setting forth minimum amounts of economic activity required for finding that an organization's commercial activities substantially affect interstate commerce, therefore bringing it within the scope of the Board's power. See, e.g., 29 C.F.R. § 103.1 (1977) (private nonprofit colleges must have gross annual revenue of $1 million).


3 See, e.g., United States Book Exch., Inc., 167 N.L.R.B. 1028 (1967) (policy of declining jurisdiction extended to institutions having any connection to educational institutions); University of Miami, Inst. of Marine Science Div., 146 N.L.R.B. 1448 (1964) (declination of jurisdiction where activities of institution were deemed to be "primarily educational"); YMCA of Portland, Or., 146 N.L.R.B. 20 (1964) (jurisdiction declined in light of the "activities, purposes, and character" of the organization); Lutheran Church, Missouri Synod, 109 N.L.R.B. 859 (1954) (declination of jurisdiction over nonprofit religious institution); Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951) (declination of jurisdiction over nonprofit educational institution). For further discussion of these cases, see notes 14-19 & accompanying text infra.

4 Students and attorneys of labor law have lamented the fact that the "[c]onsistency of refusal has been confined . . . to the principle, rather than to the test for its application."
powers\textsuperscript{5} by asserting jurisdiction over elementary and secondary parochial schools.\textsuperscript{6} The resulting constitutional challenges to the Board's authority require analysis of its power in light of the protection afforded religious institutions by the first amendment.\textsuperscript{7} The purpose of this Note is to highlight the constitutional and judicial principles that the Supreme Court will undoubtedly apply if and when it is called upon to decide the issue of NLRB jurisdiction over religious schools. Discussion will also focus on the standards developed by the Board in determining whether to assert jurisdiction over nonprofit organizations in general, and religious institutions in particular. These standards will then be examined in a constitutional framework, applying principles developed by the Supreme Court for dealing with issues involving governmental interference with religious institutions.

**Development of NLRB Jurisdictional Standards**

*The Board and the Nonprofit Employer*

As early as 1950, conflict arose concerning the Board's policy regarding jurisdiction over nonprofit institutions. In *In re Sunday School Board of the Southern Baptist Convention*,\textsuperscript{8} the Board asserted jurisdiction over a nonprofit Tennessee corporation which "was organized for the purpose of establishing, supporting, and maintaining the Sunday school undertakings of the Convention."\textsuperscript{9} The Board determined that the employer made sales in excess of $500,000, at least fifty percent of which represented shipments to points outside the state.\textsuperscript{10} Although the employer claimed that it was a nonprofit organization engaged in purely religious activities and not engaged in commerce within the meaning of the National Labor Relations Act (NLRA or Act),\textsuperscript{11} the Board disagreed and concluded that "it would effectuate the policies of the Act to assert jurisdiction in this case."\textsuperscript{12} Applying an objective standard similar to that utilized by the federal courts when analyzing congressional authority to enact legislation affecting the states,\textsuperscript{13} the Board determined that it would assert jurisdiction over


\textsuperscript{7} U.S. Const. amend. I provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

\textsuperscript{8} 92 N.L.R.B. 801 (1950).

\textsuperscript{9} Id. at 801.

\textsuperscript{10} Id. at 802.

\textsuperscript{11} 29 U.S.C. § 159(C)(1) (1976); see note 1 supra.

\textsuperscript{12} 92 N.L.R.B. at 802.

\textsuperscript{13} See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972).
any corporation which participated in interstate commerce without regard to the corporation's nonprofit status.

One year after its decision in *Southern Baptist*, however, the Board reversed itself and declined jurisdiction in *Trustees of Columbia University*,\(^4\) despite a finding that the activities of the university substantially affected interstate commerce.\(^5\) Apparently returning to its former policy of declining jurisdiction over nonprofit corporations, the Board noted that since Columbia University was a nonprofit educational corporation whose sole purpose was to promote education,\(^6\) "it would [not] effectuate the policies of the Act for the Board to assert jurisdiction."\(^7\) The Board observed that unlike in previous cases, the decision to assert jurisdiction would be grounded in a determination of whether the activities were "intimately connected with the educational activities of the institution and are noncommercial in nature."\(^8\)

For nearly 20 years, the Board applied the *Columbia* doctrine rather than the objective interstate commerce test and steadfastly refused jurisdiction over nonprofit community-oriented organizations.\(^9\) In 1970, how-

\(^4\) 97 N.L.R.B. 424 (1951). The petitioner in *Columbia* sought to represent a unit consisting of clerical workers in the libraries of Columbia University.

\(^6\) Id. at 425.

\(^7\) Id.

\(^8\) Id. Prior to 1947, the NLRA contained no statutory jurisdictional exemption for nonprofit employers. In 1947, however, a bill was introduced in the House which would have granted exemption from NLRB jurisdiction to certain employees involved in nonprofit enterprises. The bill attempted to grant exemptions to "any corporation, community chest, fund, or foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . . " H.R. REP. No. 245, 80th Cong., 1st Sess. 47 (1947), reprinted in I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MGMT. ACT, 1947, at 297 (1948). This amendment failed, however, and instead an exemption from NLRB jurisdiction was granted only to nonprofit hospitals. 29 U.S.C. § 152(2) (1970) (repealed 1974); see Serritella, supra note 2, at 324. It has been noted that rather than using the House Minority Report as justification for declining jurisdiction over nonprofit institutions, "[o]ne might argue that the rejection of the House version [of the 1947 amendment to the NLRA] should be interpreted as a deliberate retreat from wholesale exemption of nonprofit employers, precluding administrative adoption of this broad exemption." Sherman & Black, supra note 1, at 1331; see, e.g., The Trustees of Columbia Univ., 97 N.L.R.B. 424 (1951), wherein the Board noted that "whether or not [the Conference Report] provides a mandate, it certainly provides a guide." Id. at 427.

\(^9\) 97 N.L.R.B. at 426. The Board distinguished *Southern Baptist Convention* on the ground that the Convention's activities were commercial in a "generally accepted sense," and, therefore, did not constitute binding precedent for *Columbia*. Id. at 425.

\(^10\) In Lutheran Church, Missouri Synod, 109 N.L.R.B. 859 (1954), the Board declined to assert jurisdiction over a nonprofit religious institution without any substantial consideration of whether the employer came within the jurisdiction of the Act by virtue of its activities in interstate commerce. Id. at 860. The employer, radio station KFUO, contended that it did not operate the radio station for profit, sold no advertising, and received no compensation for the programs which it broadcast. Id. It did, however, make out-of-state purchases of approximately $3,700. Id. In refusing to consider the jurisdictional question raised by the employer's interstate activities, the Board simply dismissed the petition. The Board con-
ever, the Board dramatically reversed this policy and determined that it would "best effectuate the policies of the Act" to take jurisdiction over two nonprofit educational institutions, Cornell and Syracuse Universities. In *Cornell University*, the Board noted that Congress had never indicated an intention to restrict the Board to the self-imposed limitations which it had heretofore exercised. Thus, the Board retained its statutory jurisdiction over nonprofit educational institutions and stated that it would "no
longer decline to assert jurisdiction over such institutions as a class." 22

Pointing to the impact on commerce, the increase in labor disputes which had recently surfaced at a number of universities, and the inadequacy of state legislative remedies for employees of private educational institutions, 23 the Board concluded that it would "best effectuate the policies of the Act [to assert] jurisdiction over nonprofit, private educational institutions where [it is] appropriate." 24 The Board subsequently retreated from the liberal trend that seemed to be evolving from Cornell, 25 however, and stated that it has "erroneously departed . . . from [the] congressionally approved general practice of declining jurisdiction over nonprofit charitable organizations" whose impact on commerce was not as substantial as that in Cornell. 26

22 183 N.L.R.B. at 331.
23 Id. at 333-34.
24 Id. at 334. The Board expressly overruled Columbia in an effort "to insure the orderly, effective, and uniform application of the national labor policy." Id.
25 See, e.g., Children's Village, Inc., 186 N.L.R.B. 953 (1970), in which the Board exercised jurisdiction over a nonprofit educational institution whose purposes included training and educating delinquent children, providing family counselling services, and studying the emotional problems of children. Id. at 953. The Board noted that although the Village's $3.5 million annual gross revenues were primarily derived from state and local agencies, the Village annually purchased from $300,000 to $400,000 worth of goods from out of state. Id. at 953-54. At no point did the Board refer to the "activities, purposes, or character" of the institution as it did in YMCA of Portland. See note 19 supra. The test here was limited to the twofold determination of whether the Village was involved in interstate commerce and could be excluded under the statutory nonprofit hospital exception. See 29 U.S.C § 152(2) (1970) (repealed 1974) which provided in pertinent part: "The term 'employer' . . . shall not include . . . any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual . . . ." Applying a strictly objective standard, the Board concluded that the interstate commerce activity was the determinative factor which justified assertion of jurisdiction. 186 N.L.R.B. at 954.

In Jewish Orphan's Home, 191 N.L.R.B. 32 (1971), the Board asserted jurisdiction over a California nonprofit corporation whose purposes were, inter alia, to treat emotionally disturbed children and to provide an adoption service for unwed mothers. Id. at 32. As part of its overall function, which included administering a religious program, the Jewish Orphan's Home employed social workers, house parents, counselors, teachers and religious school teachers. Id. While the employer conceded that under the NLRA § 9(b)(1), 29 U.S.C. § 159(b)(1) (1976), the social workers and teachers had a right to self-determination elections, 191 N.L.R.B. at 33, it claimed that the houseparents, counselors, and religious-school teachers should not "be included in a unit with employees who are not directly involved in the Employer's child care functions." Id. Analyzing the duties and responsibilities of each employee, the Board disagreed with the employer's contention and applied what it termed the "community of interest doctrine." Id. In light of the similarities of the terms and conditions of their employment, the Board concluded that there was a sufficient community of interest among the various workers and directed that if a vote so determined, a unit could include both professional and nonprofessional workers. Id.

26 Ming Quong Children's Center, 210 N.L.R.B. 899, 900-01 (1974). Recognizing that the activities of the Ming Quong Children's Center were similar to those in both Children's Village and Jewish Orphan's Home, id. at 899, and that the Center's income was "sufficient to fall within certain . . . jurisdictional standards," id., the Board was either obliged to assert jurisdiction over this institution or to reevaluate its jurisdictional policies completely. The
The freedom with which the Board has reevaluated its policies concerning jurisdiction over nonprofit organizations has frustrated all attempts to predict with any degree of certainty whether or not jurisdiction will be asserted over a particular class of employers. Since the assertion of jurisdiction frequently has been grounded in subjective considerations, i.e., what policies will best effectuate the purposes of the Act, the Board's recent assertion of jurisdiction over elementary and secondary religious schools will be examined in light of these considerations in order to discern the rationale behind this unexpected shift in policy.

The Board and the Religious School

In Board of Jewish Education, a 1974 decision, the Board determined that the nonprofit employer "operated for the sole purpose of furthering Jewish education among the Jewish population in the Greater Washington area." The employer provided religious training to high school age students and trained teachers in Judaism and Hebraic study. Observing that the educational purpose of the institution was "limited essentially to furthering and nurturing . . . religious beliefs," jurisdiction was declined.

Similarly, in Association of Hebrew Teachers, the Board affirmed the findings of the Administrative Law Judge and declined jurisdiction over an employer whose activities were aimed at developing an appreciation of a particular religion. Noting that the after-school religious education in Board chose the latter position, declining jurisdiction and thereby reversing much of the policy that had been developed since Cornell University.

Sherman & Black take the position that the Board's justification for its self-imposed pre-Cornell reticence cannot withstand analysis. Sherman & Black, supra note 1, at 1328. After considering the Board's rationale for declining jurisdiction over nonprofit institutions, the authors conclude: "The continued failure of the Board to heed or acknowledge [the Act's concerns with the needs and rights of employees] in its practice of declining jurisdiction over nonprofit charities merits condemnation not merely as an undesirable administrative practice but as a basic violation of federal labor policy." Id. at 1351 (emphasis added).

See Ming Quong Children's Center, 210 N.L.R.B. 899 (1974), where, in a dissenting opinion, Member Fanning stated: "I believe the proliferation of jurisdictional standards is approaching the point of introducing pointless complications and uncertainties into our jurisdictional determinations." Id. at 902 (Fanning, Mem., dissenting).

See note 19 supra.


Id. at 1037. The Board noted that the employer owned none of the facilities which it used. The training was conducted in various synagogues which were spread throughout the greater Washington, D.C. area. Id.

Id.

Id. The Board distinguished the Cornell holding, noting that Cornell did not signal an intention to amend its policies so as to require assertion of jurisdiction over institutions whose activities were primarily religious in nature. Id. The Board noted that where the educational endeavors of the institution were "limited essentially to furthering and nurturing their religious beliefs . . . [it] would not effectuate the policies of the Act for the Board to assert jurisdiction over such an institution." Id.


Id. at 1058. There were 67 children enrolled in the nursery school classes, 1500 children
the instant case differed completely from the kinds of educational activities present in previous cases where jurisdiction has been asserted, the Board refused to assert jurisdiction over what was termed a "new class of employer." In a vigorous dissent, Member Fanning pointed out that the Board's decision to decline jurisdiction was inconsistent with prior policy. In addition, the dissent noted that jurisdiction was declined despite "the Admin-

attendng the after-school elementary classes, and 230 students at the high school level. Approximately 225 students attended Midrasha College. 

See, e.g., Shattuck School, 189 N.L.R.B. 886 (1971), in which the employer was a nonprofit corporation operating an in-residence secondary school in Minnesota. Id. at 886. With an annual gross revenue of approximately $1,174,000, purchases of goods from outside the state totalling more than $71,000, and only 44 out of 173 students who were Minnesota residents, the Board found that it would "effectuate the policies of the Act to assert jurisdiction" over this institution. Id. See also Cornell University, 183 N.L.R.B. 329 (1970), discussed in notes 20-25 & accompanying text supra.

210 N.L.R.B. at 1058.

20 N.L.R.B. at 1058.

Id. at 1053-54. Member Fanning, in a lengthy dissent, noted that subsequent to the adoption of NLRB Rules and Regulations, Series 8, as amended by 29 C.F.R. § 103.1 (1977), which established that the Board would assert jurisdiction over nonprofit colleges and universities which had revenues of $1 million or more, the Board had extended this standard to both nonprofit secondary schools, see Shattuck School, 189 N.L.R.B. 886 (1971), discussed in note 35 supra, and to proprietary private secondary schools. 210 N.L.R.B. at 1054 (Fanning, Mem., dissenting). See Windsor School, Inc., 200 N.L.R.B. 991 (1972), wherein the Board applied to for-profit secondary schools the $1 million annual gross revenue standard that had been established for nonprofit secondary institutions. Id. Member Fanning criticized the majority for disregarding these prior decisions, noting that "[i]n failing to apply these principles and in declining jurisdiction, my colleagues relegate the labor relations of this employer to a 'no-man's-land' in which no orderly dispute resolving machinery can be brought to bear to bring about a peaceful resolution of this labor dispute." 210 N.L.R.B. at 1054 (Fanning, Mem., dissenting).

The "no-man's land" to which Member Fanning referred is a significant concept in labor law. It was officially recognized in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957), wherein the Supreme Court noted that although the activities of an employer might affect commerce within the meaning of the Board's jurisdictional grant, jurisdiction would be declined if the employer were either too small or too local to meet the Board's quantitative standards. Id. at 8-12. In an attempt to eliminate this "no-man's-land," Congress, in 1959, passed the Landrum-Griffin Act, which allowed an agency of the state to assert jurisdiction over labor disputes where the impact was not substantial enough to warrant jurisdiction by the Board. Section 14(c) of the Act provides in pertinent part:

(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to [the Administrative Procedure Act], decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959. (2) Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction.

Administrative Law Judge’s determination that the fact that the employer’s activities are 'dedicated to a sectarian religious purpose is not a sufficient reason for the Board to refrain from asserting jurisdiction.'” Notwithstanding this contention, however, the Board concluded that when the educational activities of the institution are “largely directed to an understanding and appreciation of a particular religion,” jurisdiction will be declined.

The decisions in *Board of Jewish Educators* and *Hebrew Teachers* are firmly supported by the Board’s long recognized discretionary power to exempt certain classes of employers from its jurisdiction. When the Board has decided to exercise jurisdiction based on the conclusion that an employer’s activities are “just religiously associated,” however, then, as will be subsequently discussed, questions of constitutional magnitude arise.

In *Roman Catholic Archdiocese of Baltimore*, the petitioner-union sought to represent certain lay professional employees of five private religious high schools. In light of the schools’ aggregate interstate activity, their receipt of federal financial aid, the dispersion of their graduates outside the state, and their interstate fundraising activities, the Board determined that statutory jurisdiction was present. The employer conceded that providing a religious education was not its sole purpose, but maintained that the schools were established to provide an “atmosphere and philosophy” conducive to “provid[ing] an education based on Christian

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30 210 N.L.R.B. at 1054.
31 *Id.* at 1058.
32 See notes 3-5 & accompanying text *supra.*
34 216 N.L.R.B. 249 (1975).
35 *Id.* at 249. The petitioner union sought to form a bargaining unit consisting of full and part-time lay faculty members, including teachers, nurses, librarians, guidance counselors, and administrators, but excluding religious, office clericals, maintenance, teachers’ aides, cafeteria workers, guards, and supervisors as defined in the Act. *Id.* at 250; see 29 U.S.C § 152(11) (1970), which, in part, defines “supervisor” as “any individual having authority . . . to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees . . . .” The employer contended that vice-principals, department chairmen, athletic directors, business managers, and nurses should be excluded from the unit. 216 N.L.R.B. at 250. Focusing on the community of interest of the various employees, *see note 25 supra*, the Board concluded that the vice-principals, department chairmen and athletic director possessed the authority to evaluate, reprimand, and in some instances, hire and fire employees, so as to bring them within the classification of supervisors. 216 N.L.R.B. at 250-51. In addition, since the nurses did not teach courses, were not on the faculty wage scale, and did not possess a uniform fringe benefit package, the Board concluded that they lacked a “sufficient community of interest” to be included in the faculty members’ unit. *Id.* at 251.
36 The Board found that the operating budgets of the five schools individually ranged from $380,000 to over $670,000, and, in the aggregate, totalled close to $3 million. 216 N.L.R.B. at 249. Focusing on the interstate commerce activities of the schools, the Board found that each school purchased goods and services from outside Maryland which ranged in value from $30,000 to more than $90,000, with aggregate purchases of slightly less than $300,000. *Id.*
37 *Id.*
38 See note 1 *supra.*
principles," and contended that jurisdiction should not be asserted. The Board rejected this argument and held that despite the religious characteristics of the institution, the schools "form[ed] an appropriate unit for the purposes of collective bargaining." Stating that its past policy had been to decline jurisdiction only when an institution was found to be "completely religious," and not merely "religiously associated," the Board noted that the mere fact that "[m]ost religiously associated institutions seek to operate in conformity with their religious tenets," was insufficient grounds for declining jurisdiction.

Similarly, in Catholic Bishop of Chicago (Catholic Bishop I), the Board asserted jurisdiction over two private high schools operated by the Archbishop of Chicago. Unlike the employer in Roman Catholic Archdiocese of Baltimore, however, who conceded that its school system was not primarily designed to provide a religious education, the employer in Catholic Bishop I claimed that its schools were completely religious in nature since they were minor seminary schools. As a result, it was maintained that the "assertion of jurisdiction would constitute an impermissible entanglement between the State and Church." The Board rejected the employer's contention, however, noting that the broad admissions policy of the schools and the small percentage of graduates which did in fact pursue the vocation of the priesthood placed the schools within the class "over which the Board [had heretofore] asserted jurisdiction." The Board concluded that since the schools were "religiously associated . . . [but] . . . not completely religious," jurisdiction would be asserted.

The Religion Clauses of the First Amendment

The Board's policy regarding jurisdiction over religious schools may be

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4 216 N.L.R.B. at 249.
5 Id.
6 Id. at 250.
7 Id.
8 220 N.L.R.B. 359 (1975). In order to eliminate confusion between this case and Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112 (7th Cir. 1977), cert. granted, 98 S. Ct. 1231 (1978), the former case will be referred to as Catholic Bishop I and the latter as Catholic Bishop II.
9 220 N.L.R.B. at 359. The Board rejected this contention, concluding that "in reality, [the schools] operate primarily as college preparatory schools within the class over which the Board has heretofore asserted jurisdiction." Id. The Board pointed out that the literature describing the school referred to it as "a metropolitan, contemporary, college preparatory, seminary high school." Id. Additionally, the Board found that the curriculum, extracurricular activities and intramural sports programs of the schools were similar to those found in other public and private high schools. Id.
10 See note 53 supra.
11 The records showed that following the 1970 change in admissions policy, the percentage of graduates going on to matriculate at the Diocesan Seminary College dropped from a pre-1970 level of 25% to 30% to a post-1970 rate of 16%. 220 N.L.R.B. at 359.
12 Id.
13 Id.
characterized as an attempt to qualitatively determine whether the school's activities are completely religious or merely religiously associated and thus incidental to the school's primary purpose of providing a general education. Such a policy presupposes that a governmental body has the right to examine and objectively determine the extent and nature of a school's religious activity. It is submitted, therefore, that the Board's policy gives rise to a constitutional question based upon the religious protections afforded by the first amendment, i.e., whether the Board's standard amounts to an impermissible entanglement between church and state. Any attempt to analyze the Board's decision to assert jurisdiction over religious schools requires a twofold consideration of the principles applied by the Supreme Court to freedom of religion in general and to parochial schools in particular.

In *Lemon v. Kurtzman,* the Court declared unconstitutional two statutes which provided for state aid to elementary and secondary parochial schools. Although the question of such state aid is not the concern of this Note, the Court's opinion touched upon several fundamental issues, the resolution of which may ultimately determine how the question of NLRB jurisdiction over parochial schools will be resolved. Initially noting that "[t]he language of the Religion Clauses of the First Amendment is at best opaque," the *Lemon* Court stated that the drafters clearly intended to prevent governmental sponsorship or financial support of religious organizations and curtail "active involvement of the sovereign in religious activity." The Court set forth a tripartite test to determine

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403 U.S. 602 (1971).


Under the Rhode Island statute, a nonpublic elementary school teacher qualified for the salary supplement if his salary as supplemented did not exceed the maximum salary which was paid to teachers in the state's public school system. 403 U.S. at 607. The supplement was granted on the condition that the teacher work in a nonpublic school where the average per-pupil expenditure was less than the average spent per pupil in the public school system. In addition, the teacher was required to teach only the kinds of secular subjects which were taught in the public schools, and to "first agree in writing 'not to teach a course in religion for so long . . . as he or she receiv[ed] any salary supplements' under the Act." Id. at 607-08. Under the Pennsylvania statute, the state granted direct reimbursement for salaries, textbooks and materials which were limited to the teaching of courses in "mathematics, modern foreign languages, physical science, and physical education." Id. at 609-10 (footnote omitted). In any course that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect," reimbursement was prohibited. Id. at 610.

42 403 U.S. at 612. The Court noted the "absence of precisely stated constitutional prohibitions." Id.

43 Id. (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)). In *Walz,* the Court held that the New York State Tax Commission could constitutionally exempt from taxation church property which was used exclusively for religious purposes. Referring to the historical founda-
whether the application of a statute affecting religious activity is constitutionally permissible: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;84 finally, the statute must not foster 'an excessive governmental entanglement with religion.'"85 The Lemon Court further stated that a finding of excessive and therefore unconstitutional entanglement must be based upon "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."86 Noting that one of the requirements for aid to a parochial school in the instant case was the teachers' agreement not to teach religion,87 the Lemon Court stated that it could not "ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education."88 Since the teachers were interviewed before being hired by both the Diocesan Superintendent of Schools and a principal appointed by the Superintendent or the Mother Provincial, "[r]eligious authority necessarily pervad[ed] the school system."89 This fact, coupled with a

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84 403 U.S. at 612; see Board of Education v. Allen, 392 U.S. 236 (1968), wherein a divided Court upheld a New York law which provided for the free loan of textbooks to children in parochial schools. The Allen Court noted:

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."

Id. at 243 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963)) (emphasis added) (citation omitted).

85 403 U.S. at 612-13 (citations omitted); see Walz v. Tax Comm'n, 397 U.S. 664 (1970). The Walz Court stated: "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." Id. at 674.

86 403 U.S. at 615.

87 See note 60 supra.

88 403 U.S. at 617.

89 Id. The Court pointed out that the standards which governed the schools were contained in a "'Handbook of School Regulations," which emphasized the "'[t]he prime factor for the success or the failure of the school is the spirit and personality, as well as the professional
consideration of the "mission of the church," led the Court to conclude that "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral." The Court therefore concluded that state "surveillance" of the teacher necessary to insure religious neutrality, would "involve excessive and enduring entanglement between state and church." Thus, the Court recognized that the purpose of a parochial school is to foster and teach primarily religious beliefs.

Additionally, when first amendment rights are at issue, the Court clearly affords these rights a special protection, "sometimes even at the expense of other interests of admittedly high social importance." For example, in Wisconsin v. Yoder, a compulsory education statute requiring children to attend secondary school until reaching the age of sixteen was struck down as unconstitutional when applied to Amish children. The Court applied a "balancing process" to weigh the governmental interest in regulating certain aspects of modern community life against a claim that this regulation "impinges on fundamental rights and interests." The Court noted that a claim of protection under the first amendment may be sustained only if "rooted in religious belief" rather than grounded in secular considerations. This difficult determination requires that an initial distinction be made between a personal preference and a deeply rooted religious conviction. Once a belief has in fact been determined to be religious, the Court may then proceed to analyze the conflict between the governmental assertion of authority and the religious belief. Unless the competency, of the teacher" and that "[r]eligious formation is not confined to formal courses; nor is it restricted to a single subject area." The Court does not go on to describe precisely what the "mission of the church school" is.

Id. at 619.

Id. at 618.

Id. at 619.


Id. at 214.

Id. at 215.


While the State in Yoder agreed that religious beliefs are protected by the first amendment, 406 U.S. at 219, it argued that "'actions,' even though religiously grounded, are outside [this] protection." See, e.g., State v. Garber, 197 Kan. 567, 419 P.2d 896 (1966), cert. denied, 389 U.S. 51 (1967); State v. Hershberger, 103 Ohio App. 188, 144 N.E.2d 693 (1955); Commonwealth v. Beiler, 168 Pa. Super. Ct. 462, 79 A.2d 134 (1951). The Court rejected this contention, but conceded that religiously based activities were often properly subjected to a state's police power for the purpose of protecting the health, safety, and welfare of its citizens. 406 U.S. at 220; see, e.g., Braunfeld v. Brown, 366 U.S. 599 (1961); Prince v. Massachusetts, 321 U.S. 158 (1944). The Yoder Court held that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment," and as a result, these areas were not subject to the control of the government, "even under regulations of general applicability." 406 U.S. at 220; see, e.g., Sherbert v. Verner, 374 U.S. 398 (1963). Justice Harlan, in a dissenting opinion
government is able to show an interest "of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause,"" there is no constitutional basis for superseding vital first amendment rights.73

In Yoder, the State attempted to advance its interest in compulsory education through the claim that a certain "degree of education [was] necessary to prepare citizens to participate effectively and intelligently in our open political system." Rejecting this contention, the Court held that the additional two years that the Amish children would be required to attend the public school system would not significantly serve the State's interests.74 The Court also noted that if the compulsory education laws were applied to Amish parents "in the same manner as to other parents

in Sherbert, noted that constitutional neutrality "is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation." Id. at 422 (Harlan, J., dissenting). See also Zorach v. Clauson, 343 U.S. 306 (1952), where Justice Douglas, writing for the Court, noted: "The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State." Id. at 312.

While the Yoder Court recognized the State's claim that Wisconsin's compulsory education law was in accord with the state's valid interest in educating its young citizens, 406 U.S. at 213, the Court concluded that even this interest "is not totally free from a balancing process" when it conflicts with "the religious upbringing of . . . children." Id. at 214. As a result, only interest having the "highest order" would be able to "overbalance legitimate claims to the free exercise of religion." Id. at 215. Balancing a state's interest in education against an individual's fundamental rights under the first amendment is not a novel concept. See, e.g., Pierce v. Society of Sisters, 268 U.S. 510 (1925). In Pierce, a religious school sought to enjoin the enforcement of an Oregon statute which required parents to send their children between the ages of eight and sixteen to the public school system. Sustaining the lower court's grant of an injunction, the Court noted:

[W]e think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . [R]ights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right . . . . to recognize and prepare him for additional obligations.

Id. at 534-35.

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Id. at 534-35.

The Court observed that where religious freedom claims are presented, it is necessary to "searchingly examine the interests" of the state in order to determine if these interests are so compelling as to override the rights of the individual. Id. Reviewing the historical and contemporary aspects of Amish life, the Court concluded that "Wisconsin's interest in compelling the school attendance of Amish children to age 16 emerges as somewhat less substantial than requiring such attendance for children generally." Id. at 228-29.

The Court recognized that the Amish community was a "highly successful social unit within our society." Id. The members of the Amish group were productive, law abiding, and self-sufficient. The Court was apparently persuaded by the testimony of expert witnesses such as Dr. Donald Erickson, who testified that the Amish "system of learning-by-doing was an 'ideal system' of education in terms of preparing Amish children for life as adults in the Amish community." Id. at 223. In terms of this preparation, Dr. Erickson noted: "I would be inclined to say they do a better job in this than most of the rest of us do." Id.
. . . the State [would] in large measure influence, if not determine, the religious future of the child." Therefore, the balance of interests could not be tipped in favor of the State. The Yoder Court concluded that "more than merely a . . . 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 83

The continuing viability of the tests developed by the Supreme Court in Lemon and Yoder was reaffirmed in Meek v. Pittenger, 84 where the Court struck down as unconstitutional legislation which provided for auxiliary services to non-public schools at governmental expense. 85 With reference to the Lemon triparte test, the Meek Court stated:

These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws "respecting an establishment of religion," and thus provide the proper framework of analysis for the issues presented in the case before us. 86

The Court cautioned, however, that while these tests remained viable, they should "not be viewed as setting the precise limits" of any constitutional analysis since they are only "guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." 87

In Meek, the auxiliary aid offered by the State, including the "direct loan of instructional material and equipment," was held to produce the

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83 Id. at 231-32. The State attempted to take the position that while Amish education was apparently fine for life in the Amish community, if the Amish child decided at a later date to break away from the Amish lifestyle, he would not be prepared to enter the world unless he had the additional one or two years of education that was required by the state. Id. at 224. The Court, however, rejected this theory, since the State had presented no evidence relating to the loss of Amish children by attrition or that such persons, if in fact lost, had become burdens on society. Id.

84 Id. at 233. The Court noted that although the state had shown a compelling interest in compulsory education, it had not shown that the lack of application of these laws to Amish children would produce the kind of harm that the laws were attempting to avoid. In holding for the respondents, the Court concluded:

The record strongly indicates that accommodating the religious objections of the Amish by foregoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society.

In the face of our consistent emphasis on the central values underlying the Religion Clauses in our constitutional scheme of government, we cannot accept a parens patriae claim of such all-encompassing scope and with such sweeping potential for broad and unforeseeable application as that urged by the State.

Id. at 234.


86 Id. at 372.

87 Id. at 358.

88 Id. at 359.
"unconstitutional primary effect of advancing religion because of the 
*predominantly religious character* of the schools benefiting." As was 
characteristic of the Court's analysis of the religious school's purpose in both 
*Lemon* and *Yoder*, the *Meek* Court rested its decision on the grounds that 
the mission of the religious school encompassed more than providing for a 
general education. Although certain types of governmental aid can be 
"earmarked for secular purposes," such aid must be deemed unconstitutional "when it flows to an institution in which religion is so pervasive that 
a substantial portion of its functions are subsumed in the religious mission." Examining the contention that "inadvertent fostering of religion" 
would less likely be present in subjects such as remedial math, the Court 
noted that "diminished probability of the impermissible conduct" would 
not be sufficient to satisfy the first amendment guarantees. Based upon 
the inevitable "political . . . and . . . administrative entanglement" 
which could in turn lead to fragmentation and confrontation between secular and sectarian interests, the legislation which provided for auxiliary services to religious schools was declared unconstitutional.

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8 Id. (emphasis added). The *Meek* Court noted that the only requirement imposed on the 
parochial school in order to qualify for the material and equipment loans was proof of satisfaction 
of the state's compulsory attendance law by offering in English the subjects and activities 
required by the state. Id. The Court pointed out that as a matter of policy, the state did "not 
inquire into the religious characteristics . . . of the . . . schools requesting the aid." *Id.* at 
364. Even if it was found that the school's "dominant purpose was the inculcation of religious 
values," the aid would not be denied. *Id.* The *Meek* Court, however, distinguished between 
direct and indirect aid to parochial schools. As the Court opined:

> It is, of course, true that as part of general legislation made available to all 
> students, a State may include church-related schools in programs providing bus trans-
> portation, school lunches, and public health facilities—secular and nonideological 
> services unrelated to the primary, religion-oriented educational function of the sectarian 
> school. The indirect and incidental benefits to church-related schools from those 
> programs do not offend the constitutional prohibition against establishment of religion . . . . 
> But the massive aid provided the church-related nonpublic schools of Pennsylvania by Act 195 is neither indirect nor incidental. 

*Id.* at 364-65 (citations omitted).

9 *Id.* at 366 (citing *Hunt v. McNair*, 413 U.S. 734, 743 (1973)).

10 *421 U.S.* at 366. The Court, agreeing with the opinion that the secular education of the 
parochial schools "goes hand in hand with the religious mission," see 403 U.S. at 657, con-
cluded:

> For this reason, Act 195's direct aid to Pennsylvania's predominantly church-related, 
> nonpublic elementary and secondary schools, even though ostensibly limited to wholly 
> neutral, secular instructional material and equipment, inescapably results in the direct 
> and substantial advancement of religious activity . . . and thus constitutes an imper-
> missible establishment of religion.

*421 U.S.* at 366 (footnote and citation omitted).

11 *412 U.S.* at 370-71.

12 Id. at 372.
FREEDOM OF RELIGION PRINCIPLES AND EXPANSION OF NLRB JURISDICTION OVER RELIGIOUS SCHOOLS

The contention that the Board’s assertion of jurisdiction over religious schools creates an “impermissible entanglement between the State and Church” presents for judicial review at any level a constitutional principle which is easier to deal with in the abstract than it is to apply in reality. As the Supreme Court has noted, “[j]udicial caveats against entanglement must recognize that the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.” Since the Court has adopted the view that the primary purpose of the parochial school is religious in nature, and that this purpose “necessarily pervades the [parochial] school system,” it is clear that application of the NLRA to elementary and secondary religious schools will have to withstand the Lemon tripartite test as well as the balancing test discussed in Yoder.

Analyzing NLRB jurisdiction over religious schools in light of the Supreme Court’s concern for the protection of first amendment principles, the District Court for the Eastern District of Pennsylvania, in Caulfield v. Hirsch, held that the exercise of jurisdiction by the Board over Catholic elementary schools created an impermissible conflict with the free exercise and establishment clause. Noting that the evidence supported the employer’s position that the schools were “profoundly religious in character,” and that the terms and conditions of employment were often “inseparable from [their] religious missions,” the court concluded that the Board’s assertion of jurisdiction over these schools would constitute interference with religious activity. The court noted that the Board’s exercise of authority in the case of an unfair labor practice would involve weighing the moral, spiritual and ecclesiastical concerns of the school against the purely secular concerns of the union. For example, in the event of dismissal or discipline of a lay teacher “for conduct considered morally or spiritually incompatible with the Catholic faith,” but which

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10 Id. at 617.
12 Id. at 2025. In Caulfield, the employer, the Philadelphia Catholic elementary school system, was seeking an injunction in order to stop the NLRB from conducting representative elections among the lay teachers. Id.
13 Id.
14 Id. The court noted that the exercise of jurisdiction by the Board over the lay teachers in essence “sanctioned the division of lay teachers from religious teachers.” Id. Therefore, viewing the school system as a “single undivided community of faith as contemplated by the schools’ religious mission,” id., the court concluded that this interference would burden the free exercise of religion in the schools. Id.
15 In light of the fact that “[t]he schools were so pervasively religious,” id., even if the Board made an attempt to afford some degree of protection to the religious aspects of the school, the court found that the task of separating the secular from the religious would be insurmountable.
16 46 U.S.L.W. at 2025.
the teacher contended was primarily a penalty in response to his union activity, the Board would ultimately be forced to determine a matter of ecclesiastical concern. Noting also that the investigatory powers of the Board could ultimately require the production of information by the school which could lead to an examination by the Board of the school's employment practices, the court concluded that this requirement might result in "excessive Government entanglement" which "[could] result in numerous conflicts and confrontation between the board and the church school."101 Accordingly, it was held that such inquiries and examinations would involve considerations which would "transgress the limit of the board's constitutional authority."102 Pointing to the inseparability of many of the terms and conditions of employment and the religious mission of the schools,103 the Caulfield court concluded that "[t]o governmentally compel the schools to bargain with a union over ecclesiastical concerns would certainly constitute a constraint upon the free exercise of religion."104 The court additionally held that the Board's interest in asserting jurisdiction was not sufficiently compelling to counterbalance the school's first amendment rights, reasoning that "only the gravest abuses, endangering paramount interests, give occasion for permissible governmental limitation."105

A similar conclusion was reached by the Seventh Circuit in Catholic Bishop of Chicago v. NLRB (Catholic Bishop II).106 In a challenge to the Board's assertion of jurisdiction over seven parochial secondary schools, the employer refused to enter into collective bargaining with the certified union.107 The Board contended that if it could not adopt a standard which

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101 Id.
102 Id.
103 Id.
104 Id.
105 Id. While the importance of the Board's authority to regulate the national labor policy was not questioned, the court rejected the possibility that nonapplication of the Act to religious schools would "conjure up an impression of grave abuses endangering paramount federal interests." Id.
106 559 F.2d 1112 (7th Cir. 1977), cert. granted, 98 S. Ct. 1231 (1978). In Catholic Bishop II, two employers, the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend, Inc., were involved. In order to simplify the discussion, however, and since the contentions of the employers and the issues involved were identical, only the Catholic Bishop of Chicago will be referred to in both text and notes.
107 Id. at 1114. The employer in Catholic Bishop II operated two secondary schools located in Chicago, Illinois. On June 12, 1974, the Quigley Education Association filed a petition with the Board seeking to represent the lay faculty at Quigley Seminary North and Quigley Seminary South. The Board ordered an election at the two Quigley schools. The union won the elections and was certified by the Board as the lay faculty's exclusive representative. Id. at 1113-14. Following this election, however, the employer "refused to bargain in order to obtain judicial review of the Board's representation decisions." Id. at 1114. The union filed an unfair labor practice charge against the employer. Id. The Board held that the employer had violated § 8(a)(1), (5) of the Act, 29 U.S.C. § 158(a)(1), (5), which provides that "it shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." Accordingly, the Board ordered the employer to
would exempt from its jurisdiction partly or completely religious schools, it "would . . . have to assert jurisdiction over all religious schools in view of the . . . inclusive scope of the statute under which it operates." The Catholic Bishop II court, therefore, found it necessary to analyze this position in light of the "larger constitutional question involved." Criticizing the "completely religious-merely religiously associated" standard adopted by the Board on the ground that it provided "no workable guide to the exercise of discretion," the court concluded that the standard "essentially adopted a per se rule" which would subject all Catholic secondary schools to the Board's statutory jurisdiction. This would occur since, under the Board's rationale, if a school's curricula included subjects such as math and chemistry it would be classified as "merely religiously associated" rather than "completely religious." The court noted that Board involvement with the union's activities would inhibit the broad authority granted the bishop under church law, since the bishop would now have to share decisionmaking with the union and would have to "consult the lay faculty's representative on all matters bearing upon the cease and desist from the unfair labor practice. 559 F.2d at 1115. The Court of Appeals for the Seventh Circuit took jurisdiction over the dispute under § 10(f) of the Act, 29 U.S.C. § 160(f) (1970), which provides that "any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in . . . ." 559 F.2d at 1115.

The court implied that perhaps in the absence of this contention, the larger constitutional questions would not have to be addressed.

The court labeled the Board's standard "a simplistic black or white, purported rule containing no borderline demarcation of where 'completely religious' takes over or, on the other hand, ceases." Id. The court noted that the standard adopted by the Board "implies very sensitive questions of faith and tradition." Id. (citing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

The Catholic Bishop II court noted that, in reality, all the Board had done in adopting its "completely religious-merely religiously associated" standard was to eliminate from the "completely religious" category all those Catholic schools which offered the normal range of secular subjects. Id. As was recognized by the Lemon Court in its examination of the structure of the parochial school: "The schools are governed by the standards set forth in a 'Handbook of School Regulations,' which has the force of synodal law of the diocese." Lemon v. Kurtzman, 403 U.S. at 612. The Catholic Bishop II court found that an NLRB order to enter into collective bargaining, or an investigation necessitated by the filing of an unfair labor practice charge, would inhibit the religious institution's free exercise of authority under its regulations. No longer, for example, could the bishop "refuse to review all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions." 559 F.2d at 1123. If the religious school "wanted to replace lay teachers with religious-order teachers who had become available," the court held that the right to do so would exist under ecclesiastical law, but under the NLRA, the school "might well be found guilty of an unfair labor practice." Id.

Church law requires the bishop to remain "the sole repository of authority." 559 F.2d at 1123.
RELIGIOUS SCHOOLS employment agreement." In the court's eyes, the requirement of bargaining and the possibility of an unfair labor practice would result in a "chilling" effect on the "exercise of the bishops' control [over] the religious mission of the schools." While the Board took the position that its actions would be limited to the investigation of unfair labor practices, the court concluded that this involvement would result in excessive entanglement in the doctrinal matters of the church. Once again calling attention to the possibility of a teacher's dismissal, the court reasoned that if such dismissal was predicated upon the teaching of a doctrine or the adopting of a lifestyle which was "at odds with the tenets of the Roman Catholic faith," the inquiry by the Board would ultimately lead to an examination of the validity of the justification given for the discharge. Based upon these considerations, the court concluded that the constitutional separation of church and state required that the schools be "freed of the obviously inhibiting effect

114 Id. Deferring to the thinking of Professor Brown, Associate Dean of Yale Law School, the court made note of the fact 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 workload; workload 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. The transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur. Id. at 1123 (citing Brown, Collective Bargaining in Higher Education, 67 Mich. L. Rev. 1067, 1075 (1969)).

115 559 F.2d at 1124. To support its position that the possibility of an unfair labor practice might have a "chilling" effect on the religious policies of the school, the court used an example of the teacher who became involved in union work and then subsequently advocated a philosophy or cause which was in direct contradiction with the teachings of the Catholic Church, e.g., advocacy of birth control or abortion. The court noted that if the bishop desired to discharge the employee for these actions, he would have to do so "at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs." Id. Given the choice of tolerating the employee or facing an NLRB hearing, perhaps the employer would accept the path of tolerance. This choice, in essence, would "inhibit" the manner in which the employer conducted his operations. Id.

116 Id. at 1125.

117 Id.

118 Id.

119 Id. In its brief, the employer in Catholic Bishop II noted three unfair labor practices that had been filed by the union. In one instance, the employer refused to renew the contract of a teacher who had introduced her biology students "to the sexual theories of Masters and Johnson" which were in contrast to those of the Church." Id. In another instance, a teacher was not retained because she had married a divorced Catholic and "was no longer in good standing with the Church." Id. Finally, a teacher's contract was not renewed because the teacher refused to "structure a course in religion" as per the directions of the principal and chairman of the religion department. Id. In all of these instances, the Board would be required to determine if the firing were for cause, and would therefore necessarily have to make a value judgment concerning the gravity of the teacher's "error" and the validity of the employer's explanation for the discharge.
and impact of the restrictions of the National Labor Relations Act.'\textsuperscript{120}

The conclusions reached by the Caulfield and Catholic Bishop II courts seemed to be consistent with principles developed by the Supreme Court for analyzing challenges to freedom of religion. As one commentator has noted: "While the Court often submissively defers to any arguably rational legislative judgment in [other] areas, it vigilantly guards against . . . legislative infringements of 'fundamental' . . . freedoms.'\textsuperscript{131}

Ironically, protection afforded religious institutions by the first amendment is not itself anchored to a foundation which calls for total separation between church and state. In its analysis of the excessive entanglement doctrine, the Lemon Court noted that "total separation is not possible in an absolute sense."\textsuperscript{122} The Lemon majority pointed out that regulations relating to fire inspections, building, zoning, and school attendance laws are areas of "necessary and permissible contacts."\textsuperscript{123} Likewise, Justice Stewart, writing for the majority in Meek, noted that the constitutional tests which are applied in determining excessive governmental entanglement with religion "must not be viewed as setting the precise limits to the necessary constitutional inquiry . . . . 'The problem, like many problems in constitutional law, is one of degree.'"\textsuperscript{124} In light of the Supreme Court's view towards this "blurred, indistinct, and variable" prohibition against excessive entanglement, the determination that the governmental interference is excessive and, therefore, impermissible, must be grounded in an analysis of the "resulting relationship between the government and the religious authority."\textsuperscript{125}

The application of the excessive entanglement doctrine will, however, ultimately depend upon the judicial determination of the character and purposes of the institution which is being subjected to the alleged governmental intrusion. While the Board's determination to assert jurisdiction over religious schools was grounded in the conclusion that parochial schools "while religiously associated, [were] not completely religious" in nature,\textsuperscript{126} the Supreme Court's view of the parochial school system is somewhat different. As the Lemon Court noted:

\textsuperscript{120} Id. at 1130.
\textsuperscript{121} Bond, The National Labor Relations Act and the Forgotten First Amendment, 28 S.C.L. Rev. 421, 429 (1977). See also United States v. Carolene Prods. Co., 304 U.S. 144 (1938), wherein the Court noted that "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless . . . it is of such character as to preclude the assumption that it rests upon some rational basis." Id. at 152. The Court went on to point out, however, in an oft-quoted footnote, that "[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth." Id. n.4.
\textsuperscript{122} 403 U.S. at 614.
\textsuperscript{123} Id.
\textsuperscript{124} Id.
\textsuperscript{125} Meek v. Pittenger, 421 U.S. 349, 359 (1975) (citation omitted).
\textsuperscript{126} 403 U.S. at 615.
\textsuperscript{127} Catholic Bishop of Chicago, 220 N.L.R.B. 359 (1975).
The District Court concluded that the parochial schools constituted "an integral part of the religious mission of the Catholic Church." The various characteristics of the schools make them "a powerful vehicle for transmitting the Catholic faith to the next generation." . . . In short, parochial schools involve substantial religious activity and purpose. 137

It is this view by the Court which presents the greatest threat to the Board's apparent determination that parochial schools are "merely religiously associated," since the Supreme Court has characterized them as institutions with a "predominantly religious character,"138 and, therefore, fit subjects for the application of the excessive entanglement protection.

While the Supreme Court has not as yet determined that this protection is available to the religious school as insulation against the jurisdictional authority of the NLRB, both the Caulfield and Catholic Bishop II courts have aptly demonstrated the applicability of this principle in this particular circumstance. Since an investigation of an unfair labor practice would involve "verification and justification of the doctrinal precept involved,"139 the excessive entanglement between the Board and the religious institution would be unavoidable.140

Clearly, the assertion of jurisdiction by the NLRB over religious schools does give rise to the kinds of entanglement that both Caulfield and Catholic Bishop II labeled as excessive, and therefore impermissible. Ultimately, however, the degree of involvement which is required for the NLRB to effectively carry out its purpose will not be declared excessive per se unless it is determined that the interest of the Board in effectuating its statutory grant of authority is not sufficiently compelling to override the first amendment rights of the parochial schools.141

The government's interest in asserting jurisdictional authority over institutions which may become enmeshed in labor disputes is clearly articulated in the Act.142 It is the policy of the United States to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid of protection."143 While the alleviation of "industrial strife and unrest"144 is unquestionably an interest of significant importance to the government, it is not "totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment."145 In other words,

137 403 U.S. at 616.
138 421 U.S. at 363.
139 559 F.2d at 1129.
140 Id. at 1129-30.
143 Id.
144 Id.
145 406 U.S. at 214.
the contention that the statutory authority of the NLRB should be upheld if there is any possible basis for determining that it serves a rational purpose is inapplicable when the infringement upon a fundamental right is in issue. In this instance, "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion."  

Both the Caulfield and the Catholic Bishop II courts concluded that the governmental interest exhibited by the NLRB was not so sufficiently compelling that it could "be permitted to override the conflicting First Amendment right." It is reasonable to conclude that, if the issue of NLRB jurisdiction over religious schools does come before the Supreme Court, the authority of the Board to assert this jurisdiction will be upheld only if the government can show an "interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."  

CONCLUSION

The first amendment principles developed by the Supreme Court in cases such as Lemon v. Kurtzman, Wisconsin v. Yoder, and Meek v. Pittenger clearly establish the guidelines for determining whether the assertion of jurisdiction by the NLRB over parochial schools is constitutionally permissible. More importantly, however, the application of these principles may characterize the Caulfield and Catholic Bishop II decisions as ones "in which the legislation impinges on a constitutional or fundamental right," viz., the right to be free from legislation which inhibits the free exercise of religion. This classification in constitutional litigation would subject the NLRB to the task of "convincing the Court that there is a compelling governmental interest which supports the interference." Such a classification would place upon the governmental agency an overwhelming burden of proof. The result of having to shoulder such a burden would, in all probability, dismantle the jurisdictional standard which is currently being applied to religious schools. At present, however, it is sufficient to note that the principles which have been developed by the Supreme Court in the religion cases seem to indicate that the determination to assert jurisdiction over parochial schools does in fact violate the first amendment principles.

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137 46 U.S.L.W. at 2025. The Catholic Bishop II court concluded:
A church which chooses to educate its own young people in schools in 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 National Labor Relations Act in conducting the teaching program of those schools.


139 Id.
amendment of the Constitution. The ultimate resolution of this issue should vindicate the conclusions of both *Caulfield v. Hirsch* and *Catholic Bishop of Chicago v. NLRB*. 