



2004

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Recommended Citation

Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining under Federal and State Labor Laws: Freedom from and Freedom For*, 49 Vill. L. Rev. 77 (2004).

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RELIGIOUS ORGANIZATIONS AND MANDATORY COLLECTIVE
BARGAINING UNDER FEDERAL AND STATE LABOR LAWS:
FREEDOM FROM AND FREEDOM FOR

KATHLEEN A. BRADY*

I. INTRODUCTION

THE National Labor Relations Act (NLRA or the “Act”) and state labor laws require covered employers to bargain collectively with union representatives chosen by their employees, and the statutes provide a framework for the collective bargaining process. Whether the application of these laws to religious organizations violates the First Amendment is a longstanding question that the courts have wrestled with for over twenty years. The landmark case is the Supreme Court’s 1979 decision in *National Labor Relations Board v. Catholic Bishop of Chicago*.¹ The litigation in *Catholic Bishop* arose when two Catholic dioceses refused to bargain with unions of lay teachers at church-operated secondary schools.² The unions had been certified by the National Labor Relations Board (NLRB or the “Board”) under the NLRA.³ The dioceses argued that the Board’s assertion of jurisdiction and the resulting duty to bargain would impinge upon their control over the religious mission of the schools and, thus, violate the First Amendment.⁴ The Supreme Court held that the exercise of jurisdiction by the Board would raise a number of serious constitutional ques-

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1. 440 U.S. 490 (1979).

2. *See id.* at 491-94.

3. *See id.* at 493-94.

4. *See id.* at 493; *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1123 (7th Cir. 1977).

tions,⁵ but the Court ultimately side-stepped resolving any constitutional issues. According to the Court, in view of these serious questions, there must be a clear affirmative intent by Congress to cover the teachers before the Court would construe the Act to apply to them.⁶ Finding none, the Court declined to construe the Act to confer jurisdiction.⁷

While *Catholic Bishop* did not resolve any constitutional questions, its analysis has shaped later decisions by lower federal and state courts. In the decade after *Catholic Bishop*, federal courts decided a series of cases addressing a range of religiously affiliated organizations, including hospitals,⁸ nursing homes,⁹ homes for neglected and troubled children,¹⁰ day care centers¹¹ and universities.¹² In more recent years, federal and state courts have been reexamining the issues raised in *Catholic Bishop* as they evaluate the constitutionality of applying state labor laws to church-operated elementary and secondary schools.¹³ With few exceptions, the trend among these federal and state courts has been to narrow the reach of *Catholic Bishop*. During the 1980s, federal circuit courts generally agreed that no serious constitutional issues arise when the NLRA is applied to church-affiliated social services programs as long as these programs function in the same way as secular charitable enterprises and do not involve the dissemination of religious doctrine.¹⁴ The only area of significant disagreement is whether the NLRA applies to church-affiliated colleges and

5. See *Catholic Bishop*, 440 U.S. at 501-04.

6. See *id.* at 501.

7. See *id.* at 507.

8. See *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193 (7th Cir. 1983); *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436 (9th Cir. 1983).

9. See *Tressler Lutheran Home for Children v. NLRB*, 677 F.2d 302 (3d Cir. 1982).

10. See *Volunteers of Am.-Minn.-Bar None Boys Ranch v. NLRB*, 752 F.2d 345 (8th Cir. 1985); *NLRB v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981); see also *Denver Post of the Nat'l Soc'y of the Volunteers of Am. v. NLRB*, 732 F.2d 769 (10th Cir. 1984) (addressing church-operated programs for troubled children as well as programs providing shelter for women and children and program for victims of crime), *overruled on other grounds by Aramark Corp. v. NLRB*, 179 F.3d 872 (10th Cir. 1999).

11. See *NLRB v. Salvation Army of Mass. Dorchester Day Care Ctr.*, 763 F.2d 1 (1st Cir. 1985).

12. See *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (en banc). In 2002, the D.C. Circuit also decided a case involving a religiously affiliated university. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002).

13. See *Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161 (2d Cir. 1985); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992); *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709 (N.J. 1997); *N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960 (N.Y. 1997).

14. See *infra* text accompanying notes 41-50.

universities.¹⁵ Courts evaluating the constitutionality of applying state labor laws to church-operated elementary and secondary schools have also answered in the affirmative. According to these courts, because the state laws in question clearly cover teachers at church-operated schools, the constitutional issues avoided in *Catholic Bishop* must be addressed.¹⁶ Upon examination of these issues, the courts have unanimously concluded that any First Amendment problems can be solved by adjusting the scope of collective bargaining and the remedial powers of the state.¹⁷ It is not necessary, therefore, to exclude teachers from coverage altogether.

While courts continue to hear a steady stream of cases addressing the application of labor laws to religious organizations and there has been a continuing trend to narrow the reach of *Catholic Bishop*, scholarly interest has not kept pace, and little attention has been given to this topic since the 1980s. In this Article, I hope to renew interest in this topic by taking a fresh approach which demonstrates that existing case law and scholarship miss many of the important First Amendment issues that are raised when religious organizations are forced to bargain collectively under labor laws.

My approach will be to ask an intriguing and perplexing question. Many of the cases where litigation over collective bargaining has arisen have involved organizations affiliated with the Catholic Church.¹⁸ A num-

15. For example, in *Bayamon*, 793 F.2d at 398-99, the First Circuit, sitting *en banc*, was evenly divided over whether the Supreme Court's analysis in *Catholic Bishop* applied to a church-operated university. There were four opinions written in that case. Judge Coffin wrote the opinion for the three-judge panel finding that NLRB jurisdiction over the university would not violate the First Amendment. *See id.* at 383-84. Judge Torruella dissented from the panel and argued that Board jurisdiction would violate the First Amendment and would be contrary to the Supreme Court's decision in *Catholic Bishop*. *See id.* at 391. Judge Breyer (now Justice Breyer) announced the split in the *en banc* court and delivered an opinion for half of the judges stating that the university falls within the scope of *Catholic Bishop*. *See id.* at 401-03. Judge Coffin wrote again for four of the judges and argued that *Catholic Bishop* does not apply to this case. *See id.* at 403-04. In 2002, the D.C. Circuit approved of Breyer's opinion and held that *Catholic Bishop* applies to religiously affiliated colleges and universities when they are operated on a nonprofit basis and hold themselves out to the public as religious institutions. *See Univ. of Great Falls*, 278 F.3d at 1342-43.

16. *See Culvert*, 753 F.2d at 1163, 1164 (observing that New York State Labor Relations Act was amended in 1968 to bring employees of charitable, educational and religious organizations within its scope); *Hill-Murray*, 487 N.W.2d at 862 (stating that while legislature did not consider application of Minnesota Labor Relations Act to religious organizations, Minnesota's rules of statutory construction clearly support their coverage); *St. Teresa*, 696 A.2d at 714 (observing that New Jersey Constitution guarantees persons in private employment right to organize and bargain collectively).

17. *See infra* text accompanying notes 66-74.

18. *See, e.g., NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490 (1979); *Univ. of Great Falls*, 278 F.3d 1335; *St. Teresa*, 696 A.2d 709; *Christ the King*, 682 N.E.2d 960; *Hill-Murray*, 487 N.W.2d 857; *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295 (9th Cir. 1991); *Bayamon*, 793 F.2d 383; *Culvert*, 753 F.2d 1161; *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193 (7th Cir. 1983); *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436 (9th Cir. 1983).

ber of the courts in these cases have pointed to the well-known fact that the Catholic Church has long been a strong supporter of worker rights and unions.¹⁹ Indeed, the American Catholic bishops have expressly recognized the rights of their own employees to join unions and bargain collectively.²⁰ Why, then, one wonders, would Catholic employers resist collective bargaining with their employees under federal and state laws? Is it mere "hypocrisy" as one scholar has suggested,²¹ or is there something more at stake? As I closely examine the Church's teaching on collective bargaining, I will argue that the picture of collective bargaining that emerges from this teaching and the relationship between Church doctrine and the claims of Catholic employers demonstrate that the First Amendment problems are more far-ranging and complex than is currently recognized by courts and scholars. While some of the problems that arise when religious organizations are required to bargain collectively can be solved by limiting and adjusting applicable laws in religious contexts, other problems that may not be as easily recognized cannot be.

Church documents addressing labor issues envision collective bargaining in a radically different way than is provided for under the NLRA and state labor laws. While the NLRA presumes and perpetuates an adversarial relationship between workers and management, Catholic teaching encourages relations that are more cooperative and collaborative and, indeed, reflect ideals of love and mutual concern rather than distrust and self-interest. To require Church institutions to comply with the bargaining processes established by the NLRA would be to channel their employment relations into patterns of behavior that are deeply at odds with the Church's basic vision for social life. While few Catholic employers have articulated these concerns explicitly, the absence of such explicit reference will illustrate additional problems with mandatory bargaining.

The Article concludes with an examination of why protecting religious organizations from state interference is so important. Scholars who defend the autonomy of religious institutions from government regulation must have an answer for the growing number of scholars who argue that religious organizations and other institutions of civil society need to be shaped and molded, indeed "tamed," to support the shared national values essential for democratic self-government.²² A common response is that religion is a spiritual and transcendent matter beyond the competence of government.²³ My examination of Catholic social teaching sug-

19. See, e.g., *Hill-Murray*, 487 N.W.2d at 865; *Culvert*, 753 F.2d at 1170.

20. See NATIONAL CONFERENCE OF CATHOLIC BISHOPS, ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE U.S. ECONOMY 132 (10th anniversary ed., 1997) (1986) [hereinafter *ECONOMIC JUSTICE FOR ALL*].

21. David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27, 67 (1992).

22. As discussed below, one of the most prominent scholars who has advocated this position is Stephen Macedo. See *infra* text accompanying notes 441-44.

23. See *infra* text accompanying notes 457-59.

gests, however, that this is only half of the answer; the response implicit in Catholic teaching goes much further. The Church does not view religious principles as spiritual or transcendent matters that exist apart from political relations. Rather, the Church's long-time support for collective bargaining and unions reveals that it believes that it has a message for the entire community, including the nation's laws. For the Catholic Church, the spiritual and transcendent necessarily reach into the political and social. It is precisely this broad reach that worries those who would like to tame religious messages that challenge shared national values. However, the impulse to tame religion is shortsighted. While not all religious organizations will use their freedom well, the ability of churches to develop and model alternate visions for social life is critical for the health of the larger community. As a prophetic voice, religious organizations can push the larger community to reevaluate social and legal norms in light of new visions, and these new visions can transform existing national values in progressive directions unimagined by prevailing orthodoxies. Thus, protecting religious institutions *from* state interference is, at the same time, providing benefits *for* the larger community.

The Church's teaching on labor issues is an example. The Church's vision of a more cooperative model for collective bargaining presents an important alternative to the adversarial model in the NLRA, and to force religious employers to follow the processes and rules in the Act would prevent the church from presenting this new possibility to the larger society. To be sure, few of the Catholic employers in the litigation discussed in this Article may have successfully modeled this new vision. However, it is important to preserve their opportunity to try. While giving religious organizations space to play a transformative role in society necessarily entails the risk of failure and abuse, not taking these risks leaves both religion and the entire community impoverished.

II. EXISTING CASE LAW AND SCHOLARSHIP

This section begins with an analysis of the constitutional issues identified by the Supreme Court in *Catholic Bishop*. The questions raised by the Court have shaped the way that lower courts and scholars have evaluated the constitutionality of mandatory collective bargaining by religious organizations, and much of the debate among courts and scholars revolves around these questions. While the Court in *Catholic Bishop* did not decide any of the constitutional issues that it raised, the Court viewed these issues as very serious, and the entire thrust of the opinion was to emphasize the numerous problems that would arise if church-operated schools were forced to bargain under the NLRA. Indeed, the reasoning in the opinion strongly suggests that the justices would have found mandatory collective bargaining in this case unconstitutional had they been required to face the issue.

Scholars who have drawn upon *Catholic Bishop* to support broad protections for religious organizations from government interference have elaborated the constitutional concerns raised in *Catholic Bishop*, and they argue that mandatory collective bargaining in at least some religious settings is not only constitutionally problematic but constitutionally prohibited.²⁴ By contrast, other scholars and most lower court opinions have minimized the constitutional concerns raised by the Supreme Court. In recent cases, lower courts have routinely held that the constitutional questions in *Catholic Bishop* can be resolved easily by adjusting the scope of mandatory bargaining and the remedial powers of the state rather than by denying workers collective bargaining rights altogether. Thus, blanket exemption of religious organizations from labor statutes becomes gratuitous favoritism if these statutes can be tailored to avoid interference with religious matters.

In this section I will argue that the First Amendment issues raised in *Catholic Bishop* are not, in fact, as problematic as they initially appear and that adjustments to the scope and operation of labor laws can resolve most of these issues. However, in the next section my examination of Catholic teaching on labor issues and the relationship between this teaching and the claims made by Catholic employers will demonstrate that very real First Amendment problems exist, but these problems lie deeper and in different places than courts and scholars expect.

Many of the constitutional issues identified by the Court in *Catholic Bishop* relate to the danger of excessive entanglement between church and state. Eight years before its decision in *Catholic Bishop*, the Court decided the landmark case *Lemon v. Kurtzman*,²⁵ and in its famous *Lemon* test for Establishment Clause violations, the Court prohibited excessive entanglement between religion and government. Government actions must have a secular purpose, their primary effect must neither advance nor inhibit religion and they must not foster “‘excessive government entanglement with religion.’”²⁶

Like *Catholic Bishop*, *Lemon* arose in the context of church-operated schools with a substantial religious mission and character. At issue in *Lemon* were two state aid programs designed to supplement the salaries of nonpublic school teachers.²⁷ According to the *Lemon* Court, when the

24. See *infra* text accompanying notes 119-30.

25. 403 U.S. 602 (1971).

26. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). These are the three prongs of the *Lemon* test, and the prohibition against excessive entanglement is the third prong. More recently, the Court has understood the entanglement inquiry to be part of *Lemon*'s second prong, which forbids government actions whose primary effect is to advance or inhibit religion. See *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). Regardless of whether it is understood as a separate prong under the original *Lemon* test or part of the effects prong, the prohibition against excessive entanglement remains a central component of the Court's Establishment Clause analysis.

27. See *Lemon*, 403 U.S. at 606-10.

state gives aid to religious schools, the aid must be specifically targeted to secular instruction.²⁸ Where schools have a substantial religious character, it will be difficult to restrict public funds to secular instruction because teachers will have difficulty separating religious doctrine from secular teaching.²⁹ Teachers in parochial schools play a critical role in disseminating religious beliefs and doctrine, and, thus, religion is intertwined with secular instruction.³⁰ In such circumstances, policing the use of government funds to ensure that no funds go to religious instruction will require “comprehensive, discriminating, and continuing state surveillance” that will involve “excessive and enduring entanglement between church and state.”³¹

The Court in *Catholic Bishop* emphasized the similarity between the schools in both cases as well as the similar role of the teacher in inculcating religious beliefs, and the Court concluded that mandatory collective bargaining would give rise to the same type of entanglement that was threatened in *Lemon*.³² According to the Court, “[g]ood intentions by government—or third parties—can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon*”³³ The employment relationship between teachers and religious schools is suffused with religious content, and, thus, mandatory collective bargaining between teacher unions and schools will risk entangling the state with the schools’ religious activities and mission.

The Court in *Catholic Bishop* also argued that unconstitutional entanglement would be threatened where school administrators are charged with an unfair labor practice and the administrators respond by claiming that the challenged action was mandated by church doctrine.³⁴ For example, the Seventh Circuit’s opinion in *Catholic Bishop* discussed an allegation that school administrators had discharged or otherwise discriminated against an employee in violation of section 8(a)(3) of the NLRA.³⁵ Section 8(a)(3) makes it an unfair labor practice for an employer to discriminate in employment with the purpose of encouraging or discouraging union membership.³⁶ Discrimination or discharge *per se* is not unlawful,

28. *See id.* at 619 (“State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion”).

29. *See id.* at 618-19.

30. *See id.* at 616-19.

31. *Id.* at 619.

32. *See NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 501-02 (1979).

33. *Id.* at 502.

34. *See id.*

35. *See Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1125 (7th Cir. 1977).

36. Under section 8(a)(3), it is an unfair labor practice for an employer “by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3) (2001).

but employment actions based on antiunion animus are. If the school responds to such an allegation by claiming that the motivation for the action was not antiunion animus but, rather, a religious reason mandated by church doctrine, the Board will likely become entangled in an inquiry into the good faith of the position asserted by the school and the relationship of the reasons given by the school to the school's mission.³⁷

In addition to entanglement concerns, the Court in *Catholic Bishop* also discussed the effect of NLRB jurisdiction on the autonomy of religious schools. According to the Court, mandatory collective bargaining "necessarily represents an encroachment upon the former autonomous position of management."³⁸ The Court pointed out that the Board would be required to identify the "terms and conditions of employment" that are mandatory subjects of bargaining under the NLRA and that mandatory subjects of bargaining are generally interpreted broadly under federal and state labor laws.³⁹ The Court also predicted that the Board's inquiries would give rise to conflicts between school administrators and the Board, which would further entangle religion and government.⁴⁰

While the Supreme Court's opinion in *Catholic Bishop* underscored the far-ranging and serious First Amendment problems with mandatory collective bargaining in religious settings, two waves of lower court decisions have minimized these concerns and narrowed the reach of *Catholic Bishop*. In the 1980s, federal circuit courts consistently decided that the holding in *Catholic Bishop* does not apply to religiously affiliated social services organizations such as hospitals, nursing homes, day care centers and homes for neglected and troubled children.⁴¹ These courts distinguished *Catholic Bishop* on the grounds that the schools in *Catholic Bishop* were permeated with a religious purpose and function. The lay teachers who sought to unionize in *Catholic Bishop* played a critical role in this religious mission, and it was this key role in the religious mission of the school that gave rise to First Amendment problems.⁴² By contrast, the religiously affiliated social services programs addressed by the circuit courts were not de-

37. See *Catholic Bishop*, 440 U.S. at 502.

38. *Id.* at 503 (quoting Pa. Labor Relations Bd. v. State Coll. Area Sch. Dist., 337 A.2d 262, 267 (Pa. 1975)).

39. *Id.* at 502-03. Section 8(d) of the NLRA requires employees to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). State labor laws have similar requirements, though the terminology may differ slightly.

40. See *Catholic Bishop*, 440 U.S. at 503-04.

41. See *supra* notes 8-12 for a list of cases.

42. See NLRB v. Salvation Army of Mass. Dorchester Day Care Ctr., 763 F.2d 1, 5 (1st Cir. 1985); Volunteers of Am.-Minn.-Bar None Boys Ranch v. NLRB, 752 F.2d 345, 348-49 (8th Cir. 1985); Denver Post of the Nat'l Soc'y of the Volunteers of Am. v. NLRB, 732 F.2d 769, 771-72 (10th Cir. 1984), *overruled on other grounds by* Aramark Corp. v. NLRB, 179 F.3d 872 (10th Cir. 1999); Tressler Lutheran Home for Children v. NLRB, 677 F.2d 302, 305 (3d Cir. 1982); NLRB v. St. Louis Christian Home, 663 F.2d 60, 63-64 (8th Cir. 1981).

signed to propagate religious faith.⁴³ Rather, they operated just like secular charities,⁴⁴ and had a primarily secular function.⁴⁵ While these programs may have been motivated by a religious purpose, this purpose was secondary to the actual provision of services, which was comparable to the provision of services by secular institutions.⁴⁶ In such settings, circuit courts found the constitutional questions raised by the Court in *Catholic Bishop* unlikely to arise.⁴⁷ Any entanglement between religion and government or interference with religious matters would be minimal⁴⁸ and outweighed by the state's interest in protecting worker rights and fostering labor peace.⁴⁹ Several of the circuit courts also noted that the organizations operating these programs did not oppose collective bargaining on religious grounds.⁵⁰

The arguments made by these circuit courts are deceptively simple. Essentially their position is that First Amendment problems do not arise where the activities of religious employers do not involve the propagation of religious faith or some other inherently religious activity but, rather, resemble the operations of secular charities. Collective bargaining in these settings is distinguishable from *Catholic Bishop* because the type of institution is different. Religiously affiliated organizations performing essentially secular functions do not generate the same type of First Amendment issues that would accompany mandatory bargaining in church-operated schools. The emphasis in *Catholic Bishop* on the religious character of parochial schools and the role of the teachers in this religious mission invites the distinction drawn by the circuit courts, but it is faulty logic

43. See *Volunteers of Am., L.A. v. NLRB*, 777 F.2d 1386, 1389-90 (9th Cir. 1985); *Salvation Army*, 763 F.2d at 6; *Bar None Boys Ranch*, 752 F.2d at 348-49; *Denver Post*, 732 F.2d at 771-72; *Tressler*, 677 F.2d at 305; *St. Louis Christian Home*, 663 F.2d at 63-64.

44. See *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193, 1196 (7th Cir. 1983); *Tressler*, 677 F.2d at 305; *St. Louis Christian Home*, 663 F.2d at 64-65.

45. See *Salvation Army*, 763 F.2d at 6; *Denver Post*, 732 F.2d at 772-76; *St. Elizabeth Hosp.*, 715 F.2d at 1196; *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1441-42 (9th Cir. 1983); *Tressler*, 677 F.2d at 305.

46. See *St. Elizabeth Hosp.*, 715 F.2d at 1196; *Tressler*, 677 F.2d at 305.

47. See *Volunteers of Am., L.A.*, 777 F.2d at 1390; *Salvation Army*, 763 F.2d at 6; *Bar None Boys Ranch*, 752 F.2d at 349; *Denver Post*, 732 F.2d at 772-73; *Tressler*, 677 F.2d at 306; *St. Louis Christian Home*, 663 F.2d at 64-65.

In *NLRB v. Hanna Boys Center*, 940 F.2d 1295 (9th Cir. 1991), the Ninth Circuit also found that the constitutional questions identified by the Court in *Catholic Bishop* would not arise if the Board asserted jurisdiction over nonfaculty employees at a religiously affiliated residential school for boys. *Id.* at 1302. Although the school in *Hanna* had a significant religious mission, the Ninth Circuit found that the nonfaculty employees had secular work responsibilities unrelated to that mission and, thus, that mandatory collective bargaining with nonteachers would not violate the First Amendment. *Id.* at 1304-06.

48. See *Denver Post*, 732 F.2d at 773; *St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1442; *Tressler*, 677 F.2d at 306; *St. Louis Christian Home*, 663 F.2d at 64-65.

49. See *St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1442-43; *Tressler*, 677 F.2d at 306-07.

50. See *St. Elizabeth Cmty. Hosp.*, 708 F.2d at 1442; *Tressler*, 677 F.2d at 306.

to assume that no serious problems will arise where mandatory collective bargaining occurs at religiously affiliated organizations less suffused with religious character and purpose. Just because a religiously affiliated organization engages in activity that is similar to the operations of nonreligious charities does not mean that there will be no threat of excessive entanglement between religion and government or no dangers of interference with religious matters.

Indeed, it is easy to imagine a situation where such an organization is charged with an unfair labor practice and the organization responds by claiming that its conduct was motivated by a religious purpose. For example, at a religiously affiliated home for troubled children an employee might be disciplined for making highly critical statements of the home's administrators in front of the home's residents. The disciplined worker alleges that the employer's conduct was the result of antiunion animus. The home claims that it disciplined the employee because the use of acrimonious speech in front of children is inconsistent with the fundamental religious principles upon which its ministry is based, such as mutual respect and concern. The ensuing litigation will involve precisely the same type of risk of entanglement that the Supreme Court warned of in *Catholic Bishop*. Similarly, employees at a religiously affiliated day care center might seek to bargain with the center about a more casual dress code, but the center refuses on the grounds that it has a fundamental religious commitment to modest and professional attire for adults in work settings. Dress codes have been identified by the NLRB as a mandatory subject of bargaining,⁵¹ but, in this case, the religious organization is arguing that bargaining over this subject would involve religious matters and impede its control over its religious mission.

There are other problems with the reasoning of federal circuit courts that have declined to apply *Catholic Bishop* in the context of religiously affiliated social services programs. For instance, these courts assume that the religious purpose and motivation of these organizations can be neatly separated from their essentially secular activities and functions. However, the fact that the activities of a religiously affiliated organization look just like the activities of a secular charity does not mean that these activities are not suffused with religious character. Indeed, one might argue that, historically, it has been secular charities that have imitated religious ones, not vice versa. Justice Brennan makes this point eloquently in his concurrence in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*.⁵² According to Justice Brennan, religious charities typically view the nonprofit provision of community services "as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster."⁵³ In short, for religiously affiliated social services organi-

51. See, e.g., *Am-Gard, Inc.*, 334 N.L.R.B. No. 42 (2001), available at 2001 WL 677278, at *2-*3 (June 13, 2001).

52. 483 U.S. 327 (1987).

53. *Id.* at 344 (Brennan, J., concurring).

zations, helping those in need is quintessential religious activity; it is tantamount to a statement of religious belief and values.

Yet another weakness of the reasoning of these federal circuit courts can be glimpsed in more recent opinions addressing mandatory collective bargaining in the context of religiously affiliated colleges and universities. As noted above, the only significant disagreement among federal courts regarding the application of the NLRA to religious organizations concerns religiously affiliated colleges and universities. The NLRB's policy is to exercise jurisdiction over colleges and universities except where they have a substantial religious character.⁵⁴ In its 2002 decision in *University of Great Falls v. NLRB*, the D.C. Circuit rejected the Board's test on the grounds that "'trolling'" through a school's mission to determine whether it is substantially religious in character involves unconstitutional entanglement.⁵⁵ Then Judge Breyer made a similar argument for half of the members of an evenly divided *en banc* court in *Universidad Central de Bayamon v. NLRB*.⁵⁶ If the D.C. Circuit and Justice Breyer are correct, similar dangers of entanglement would seem to be threatened by examination into the religious character of social services organizations. The distinction drawn by federal courts between the church-operated schools in *Catholic Bishop* and the primarily secular activities of religiously affiliated social services programs strongly resembles the type of inquiry struck down in *Great Falls*.⁵⁷

54. See *Univ. of Great Falls*, 331 N.L.R.B. 1663, 1664-65 (2000), *enforcement denied*, 278 F.3d 1335 (D.C. Cir. 2002); see also *Livingstone Coll.*, 286 N.L.R.B. 1308, 1309-10 (1987) (asserting jurisdiction where purpose of college is primarily secular and church is not involved in day-to-day administration). *But see* *Trustee of St. Joseph's Coll.*, 282 N.L.R.B. 65, 67-68 (1986) (declining to assert jurisdiction where religious order controlled college and faculty were required to promote goals of order and to conform to Catholic doctrine).

55. *Univ. of Great Falls*, 278 F.3d at 1341-42 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality opinion)).

56. 793 F.2d 383, 402 (1st Cir. 1986) (*en banc*). Justice Brennan's concurrence in *Amos* supports this entanglement argument. Justice Brennan noted that the distinction between the religious and secular activities of religious organizations is not "self-evident," and a legal rule predicated on such a distinction may result in "considerable ongoing government entanglement in religious affairs." *Amos*, 483 U.S. at 343. For further discussion of *Amos* and Justice Brennan's concurrence, see *infra* notes 136, 138.

57. To be sure, the distinction between schools with a substantial religious mission and religiously affiliated schools without such a mission has a long pedigree in Supreme Court decisions evaluating the constitutionality of aid to religious schools, and the Court has not shied away from making this inquiry in that context. See *Tilton v. Richardson*, 403 U.S. 672, 687 (1971) (distinguishing church-operated elementary and secondary schools in *Lemon* from colleges and universities whose predominant mission is to provide students with a secular education; aid to latter involves less risk of entanglement); see also *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 755-62 (1976) (plurality opinion) (finding that colleges receiving aid under state program are not pervasively sectarian and, thus, entanglement dangers are reduced). *But see Mitchell*, 530 U.S. at 826 (Thomas, J., plurality opinion) (arguing that relevance of whether school is pervasively sectarian is in "sharp decline" in Court's decisions regarding aid to religious organizations and should be "dispense[d] with"); *Id.* at 857-58 (O'Connor, J., concurring in the judgment) (re-

However, regardless of whether the distinction that the federal circuit courts have drawn between church-operated schools and religious organizations with primarily secular functions is sustainable, the importance of this distinction has been declining in recent years as a second wave of lower courts evaluating state labor laws are now finding that mandatory collective bargaining is constitutional even in quintessentially religious enterprises. Beginning with the Second Circuit's decision in *Catholic High School Ass'n v. Culvert*, one federal circuit court and three state supreme courts have reexamined the constitutionality of mandatory collective bargaining in the context of church-operated schools. In each case, lay teachers sought to bargain under state labor provisions. All four courts that addressed these claims found that the constitutional issues raised in *Catholic Bishop* do not preclude coverage. These courts recognized that a substantial religious mission permeates church-operated schools and that teachers are key players in this mission. However, according to the courts, the process of collective bargaining need not interfere with this religious mission. As long as the scope of mandatory bargaining is limited to secular matters and the remedial powers of the state are similarly restricted to nonreligious issues, mandatory collective bargaining under state labor regimes need not excessively entangle state with religion nor interfere with the autonomy of religious organizations over their religious practices and mission.

The first of these decisions, the Second Circuit's decision in *Culvert*, upheld the application of the New York State Labor Relations Act to lay teachers employed at schools within the New York Archdiocese's Catholic High School Association.⁵⁸ In *New York State Employment Relations Board v. Christ the King Regional High School*, the New York Court of Appeals reached a similar result in a case involving lay teachers employed at a Queens County Catholic high school.⁵⁹ *Culvert* was decided in 1985 and *Christ the King* twelve years later in 1997. In the meantime, in 1992, in *Hill-Murray Federation of Teachers v. Hill-Murray High School*, the Minnesota Supreme Court held that teachers at Hill-Murray High School, also a Catholic school, could bargain collectively under the Minnesota Labor Relations Act.⁶⁰ In 1997, the New Jersey Supreme Court followed suit in *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*.⁶¹ The New Jersey court held that lay teachers at church-operated schools, like other private employees in New Jersey, have a state

jecting presumption in *Lemon* that teachers in church-operated elementary and secondary schools will divert state aid to religious uses).

58. *Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

59. *N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960 (N.Y. 1997).

60. *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857 (Minn. 1992).

61. *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709 (N.J. 1997).

constitutional right to bargain collectively with their employers and that this right does not violate the First Amendment.

The courts in each of these cases made similar arguments supporting the constitutionality of mandatory collective bargaining. For example, the courts argued that collective bargaining under state labor laws will not involve the same type of comprehensive and continuing surveillance that resulted in excessive entanglement in *Lemon*.⁶² Once a union is certified, state boards and courts only become involved if an unfair labor practice claim is filed,⁶³ and state boards and courts have no authority to compel agreement between employers and unions.⁶⁴ Like the NLRA, state labor provisions only bring the parties to the bargaining table and leave them to negotiate their own agreements.⁶⁵

The courts also argued that the autonomy of school administrators over religious matters can be protected by limiting the scope of bargaining to wages, hours and other clearly nonreligious terms of employment.⁶⁶ Indeed, in *Culvert*, the Second Circuit noted that New York's Catholic High School Association had voluntarily agreed to bargain with its teachers in 1969 and subsequently negotiated a series of agreements expressly limited to nonreligious terms of employment.⁶⁷ During that time, the Association never complained that the collective bargaining process interfered with its religious mission,⁶⁸ and even the unfair labor practices at issue in the *Culvert* litigation did not involve religious matters.⁶⁹ In *St. Teresa* as well, the Diocese of Camden had a history of voluntarily bargaining with its high school teachers, and their collective bargaining agreements also expressly excluded religious matters from coverage.⁷⁰

62. See *St. Teresa*, 696 A.2d at 718; *Hill-Murray*, 487 N.W.2d at 864; *Culvert*, 753 F.2d at 1166-67; *Christ the King*, 682 N.E.2d at 965 (following *Culvert*).

63. See *Culvert*, 753 F.2d at 1167.

64. See *St. Teresa*, 696 A.2d at 718; *Hill-Murray*, 487 N.W.2d at 864; *Culvert*, 753 F.2d at 1167.

65. See *St. Teresa*, 696 A.2d at 718; *Hill-Murray*, 487 N.W.2d at 864; *Culvert*, 753 F.2d at 1167.

66. See *St. Teresa*, 696 A.2d at 712, 716-17; *Hill-Murray*, 487 N.W.2d at 866, 867; see also *Culvert*, 753 F.2d at 1167 (all state can do is "order an employer who refuses to bargain in good faith to return and bargain on the mandatory bargaining subjects, all of which are secular"); *Christ the King*, 682 N.E.2d at 967 ("The First Amendment's metaphorical wall of separation between church and State does not per se prohibit appropriate governmental regulation of secular aspects of a religious school's labor relations operations."). The Minnesota Supreme Court also noted that matters of inherent managerial policy, which would include religious doctrine and practice, are already nonnegotiable under Minnesota law. See *Hill-Murray*, 487 N.W.2d at 866.

67. See *Culvert*, 753 F.2d at 1163.

68. See *id.* at 1163.

69. See *id.* at 1164.

70. See *St. Teresa*, 696 A.2d at 716-17. Indeed, the willingness of the Catholic High School Association and the Diocese of Camden to negotiate with teacher unions over secular terms of employment was not unusual. In the latest published survey by the National Catholic Educational Association, twenty-three percent of

According to the New Jersey Supreme Court, this history suggests that bargaining limited to secular terms and conditions of employment will not interfere with the religious mission of church-operated schools.⁷¹

The *Culvert* court also addressed the Supreme Court's concern that litigation over unfair labor practices would entangle government with religion if school administrators claimed that their actions were mandated by their religious creeds. The Court in *Catholic Bishop* was worried that such litigation would involve the NLRB in an inquiry into the good faith of the position asserted by the school administrators and the relationship of this position to the schools' religious mission and beliefs. According to the Second Circuit in *Culvert*, the dangers of entanglement in religious matters can be avoided if labor boards are prohibited from examining the religious reasons offered by school administrators.⁷² If the religious justifications offered by the administration are accepted as plausible and legitimate interpretations of church doctrine, labor boards can still focus on secular factors to determine if these religious justifications were, in fact, the cause of the employer's conduct.⁷³ The New York Court of Appeals in *Christ the King* agreed with this analysis.⁷⁴

All of the courts addressing mandatory collective bargaining under state labor laws have recognized that there is a possibility that restrictions on the scope of bargaining and the remedial powers of the state will not prevent every burden on religious practice and belief.⁷⁵ However, these courts have argued that relief can be sought from the judiciary if First Amendment problems do occasionally arise.⁷⁶ Furthermore, any burdens

Catholic secondary schools reported that "at least some of their teachers 'are represented during contract negotiations by some negotiating groups.'" MICHAEL J. GUERRA, DOLLARS AND SENSE: CATHOLIC HIGH SCHOOLS AND THEIR FINANCES 1994 14 (Nat'l. Catholic Educ. Ass'n 1995) (data from 1993-94 school year).

The National Association of Catholic School Teachers, the largest union of Catholic school teachers, has agreed that collective bargaining should not intrude upon the authority of church officials in matters of faith and morals. See Nat'l Ass'n of Catholic Sch. Teachers, *The Economics Pastoral and the Rights of Teachers*, 17 Origins, NC Documentary Serv. 50, 51 (1987) (Mar. 1987 statement).

71. See *St. Teresa*, 696 A.2d at 716.

72. See *Culvert*, 753 F.2d at 1168.

73. See *id.* at 1168.

74. See *N.Y. State Employment Relations Bd. v. Christ the King Reg'l. High Sch.*, 682 N.E.2d 960, 966 (N.Y. 1997).

75. See *St. Teresa*, 696 A.2d at 723 (recognizing legitimate concerns regarding church autonomy); *Christ the King*, 682 N.E.2d at 964, 966 (recognizing that burdens on religion are possible but not presented on the record); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 867 (Minn. 1992) (recognizing possibility of minimal infringement on free exercise of religious beliefs); *Culvert*, 753 F.2d at 1170-71 (recognizing that state board jurisdiction may chill free exercise rights if school administrators tailor their activities to steer clear of possible impermissible conduct).

76. See *St. Teresa*, 696 A.2d at 723; *Culvert*, 753 F.2d at 1167. In *Christ the King*, the New York Court of Appeals declined to determine whether individualized First Amendment claims are legally cognizable. See *Christ the King*, 682 N.E.2d at 964. However, the court did leave open that possibility. See *id.* at 966. According to the

will be minimal,⁷⁷ and to the extent they are unavoidable, these burdens are justified by the government's compelling interests in protecting worker rights and preserving labor peace.⁷⁸

The arguments developed by lower courts reviewing state labor laws suggest that when the constitutional issues in *Catholic Bishop* are placed under a microscope with adjustments and accommodations for First Amendment principles, the problems vanish. For example, the Court's concern in *Catholic Bishop* that mandatory collective bargaining will encroach upon the autonomy of religious employers can be addressed by limiting the scope of mandatory bargaining to secular terms and conditions of employment. If mandatory subjects of bargaining exclude religious matters, the autonomy of religious employers will still be diminished but not with respect to religious issues.⁷⁹ To be sure, the line between secular conditions of employment and religious matters is not self-evident, and there may be conflicts between labor boards and religious employers over where to draw that line. These conflicts can be minimized, however, if boards and courts defer to religious employers over the characterization of religious matters. Deferring to religious employers on the characterization of bargaining subjects as either religious or secular may result in far fewer mandatory subjects of bargaining than would be the case if the labor boards made these determinations, and there is undoubtedly an incentive for employers to characterize as religious as many subjects as possible. Moreover, for those employers whose religious mission suffuses their activities and operations, very few aspects of the employment relationship may be devoid of religious significance. However, religious employers will almost always recognize at least some purely secular terms and conditions of employment even if these terms do not extend much beyond wages, hours, pensions and retirement packages, and other classic subjects of bargaining. Protecting bargaining rights regarding such purely secular matters will provide important benefits to workers even if their ability to bargain over the full range of employment conditions is limited.

Limiting the scope of mandatory bargaining to secular terms and conditions of employment also has support under the NLRA as well as judicial interpretation of state law. Section 8(d) of the NLRA provides that em-

court, "[i]f, on individual application in the collective bargaining process or implementation, a line is crossed or the wall of separation is breached, that is the time and circumstance to assert and have adjudicated such arguably actual infringements." *Id.* at 966.

77. *See St. Teresa*, 696 A.2d at 718, 723; *Christ the King*, 682 N.E.2d at 964; *Hill-Murray*, 487 N.W.2d at 867; *Culvert*, 753 F.2d at 1171.

78. *See St. Teresa*, 696 A.2d at 722; *Hill-Murray*, 487 N.W.2d at 866-67; *Culvert*, 753 F.2d at 1171.

79. The Minnesota Supreme Court made this point in *Hill-Murray*: "While *Hill-Murray* may have demonstrated that the application of the MLRA [Minnesota Labor Relations Act] interferes with their authority as an employer, they have not established that this minimal interference excessively burdens their religious beliefs." *Hill-Murray*, 487 N.W.2d at 866.

employers and unions have a mutual obligation to confer in good faith with regard to “wages, hours, and other terms and conditions of employment.”⁸⁰ These are the mandatory subjects of bargaining under the NLRA, and employers cannot make unilateral changes with respect to these issues unless the parties have bargained in good faith and reached an impasse.⁸¹ In its landmark decision in *First National Maintenance Corp. v. NLRB*, the Supreme Court addressed whether these mandatory subjects of bargaining include fundamental management decisions regarding the scope or direction of an enterprise.⁸² The Court noted that many fundamental business decisions can have a direct impact upon the employment relationship and even result in the elimination of jobs altogether.⁸³ However, according to the Court, employers cannot be required to bargain over all decisions that directly affect the employment relationship.⁸⁴ Employers must be free to make management decisions essential for the running of a profitable business, and if all decisions that directly affect the employment relationship are mandatory subjects of bargaining, the ability of employers to effectively operate their businesses would be jeopardized.⁸⁵ Instead, the Court developed a balancing test and held that bargaining over such decisions should only be required if “the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business.”⁸⁶

The Supreme Court’s reasoning in *First National Maintenance* provides a basis for limitations on the scope of bargaining where the employer is a religious organization and decisions touching upon religious matters are at stake. Like fundamental management decisions regarding the scope and direction of for-profit enterprises, decisions regarding religious matters are integral to the basic mission and purpose of religious organizations. Just as submitting fundamental business decisions to collective bargaining will impede the employer’s ability to conduct a successful commercial operation, requiring religious employers to share decision making over religious matters will interfere with their ability to define and achieve the organization’s religious mission. Instead of a balancing test, however, the appropriate approach in the First Amendment context would be to exclude all decisions over religious doctrine and practice from mandatory negotiation. Mandatory bargaining over any of these issues threatens the autonomy of religious organizations over religious goals and purposes and infringes upon important free exercise values.

In *Catholic Bishop*, the Court used the example of the required number of liturgies in religious schools as a problematic area for judicial in-

80. 29 U.S.C. § 158(d) (2001).

81. See *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674-75 (1981).

82. See *id.* at 677-78.

83. See *id.* at 677.

84. See *id.* at 677-79.

85. See *id.* at 678-79, 686.

86. *Id.* at 679.

quiry.⁸⁷ Under the interpretation of *First National Maintenance* above, the number of liturgies required in religious schools would be solely within the control of school administrators. Decisions regarding the moral and religious qualifications of teachers would also be matters within the sole control of school administrators as would the number of pupils to be served, school closure decisions and other matters implicating the schools' religious mission.

Under *First National Maintenance*, employers still have a duty to bargain with employees about the effects of fundamental management decisions on employment conditions, and the Court recognized that effects bargaining will have an impact upon these management decisions.⁸⁸ For example, the Court stated that a union engaged in effects bargaining "may achieve valuable concessions from an employer" and "indirectly may ensure that the decision itself is deliberately considered."⁸⁹ Thus, the decision in *First National Maintenance* would not insulate religious employers from having to bargain over the effects of religious decisions. School administrators would be free to make unilateral decisions regarding the number of required liturgies during the school year, the size of the student body and which schools to close or open, but teachers would still be able to bargain about the effects of such decisions on salary, hours of work and other secular matters. To the extent that effects bargaining indirectly affects the employer's deliberations about religious decisions, there will admittedly be some interference with the authority of religious employers over religious matters. Negotiations over salaries may affect how many schools administrators can afford to keep open, and a plan to increase the number of liturgies during noninstructional hours may be scrapped in the face of hard bargaining by teachers over hours. However, if religious matters themselves are excluded from mandatory negotiation, the impact of any mandatory bargaining over effects should be minimal. Moreover, the employer's duty to bargain over effects and other mandatory subjects does not require agreement to any demands as long as negotiations are undertaken in good faith.⁹⁰

A prohibition on labor board inquiry into religious doctrine during the course of unfair labor practice litigation, as suggested by the Second Circuit in *Culvert*, will also prevent entanglement and interference with religious matters. When an employee of a religious organization claims that the employee has been discriminated against or discharged because of unlawful antiunion animus, the employer may well claim that it had a religious justification for the decision, but litigation of the claim need not entangle reviewing boards and courts in an inquiry into this justification. Take, for example, the case of an employee who argues that the religious

87. See *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 502 n.10, app. 507-08 (1979).

88. See *First Nat'l Maint.*, 452 U.S. at 682.

89. *Id.* at 682.

90. See *infra* text accompanying notes 257-59.

reason given by the employer is a pretext or “sham.” When an employee claims unlawful discrimination or discharge, it is common for employers to respond that they had a legitimate reason for their actions.⁹¹ Typically, pretext is shown by proving that the purported reason or rule offered by the employer either did not exist or was not actually relied upon by the employer.⁹² Where a religious employer offers a religious reason for its conduct, an examination into whether the religious principle or rule referred to by the employer actually exists would, indeed, be problematic as would an inquiry into whether the reason is a valid interpretation of church doctrine or an appropriate justification for the employer’s actions. Examination of any of these matters would certainly entangle government institutions in religious questions and threaten the organization’s control over its own doctrine and beliefs.

However, an employee might still claim that the religious reason offered by the employer was not, in fact, the cause of the action. When evaluating such claims under the NLRA, the NLRB and reviewing courts typically consider a variety of secular factors that would not involve litigants and decision-makers in religious questions. For example, reviewers consider whether other employees have been treated in a similar manner under the same circumstances.⁹³ If an employer disciplines an employee who is active in union affairs in circumstances where it has not penalized other workers, this disparate treatment suggests that antiunion animus, rather than a legitimate business reason, was the cause of the employer’s action. Other secular factors that suggest unlawful motivation are the timing of the discipline if it corresponds with union activity, a failure by the employer to give any warning to the employee or to investigate the incident in accordance with established procedures, the failure to give a reason for the action at the time it occurred, and shifting or inconsistent justifications for its action.⁹⁴

In what are commonly referred to as “dual motive” cases, these secular factors are also relied upon by reviewing boards and courts. In dual motive cases (as distinguished from pretext cases), the employee proves that antiunion animus was a contributing cause for the discrimination or discharge, but the employer argues that it also had a legitimate reason that factored into the decision.⁹⁵ For example, a religious employer may argue that religious principles were part of the reason it took the action that it did even if these religious justifications were not the sole factor. Under the NLRA, dual motive cases are treated under the NLRB’s analysis in

91. See *Wright Line*, a Div. of *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1083-84 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

92. See *id.* at 1084.

93. See 1 PATRICK HARDIN & JOHN E. HIGGINS, JR., *THE DEVELOPING LABOR LAW* 298-99 (4th ed. 2001).

94. See *id.* at 294-99.

95. See *Wright Line*, 251 N.L.R.B. at 1084.

Wright Line.⁹⁶ Under the *Wright Line* test, the burden of establishing that an unlawful antiunion purpose has contributed to the employer's decision is on the General Counsel of the Board, who litigates the employee's claim under the NLRA.⁹⁷ Once the General Counsel has established its prima facie case, the burden shifts to the employer to demonstrate that it would have taken the same action for legitimate reasons even in the absence of any unlawful purpose.⁹⁸ The Board views the employer's burden as an affirmative defense.⁹⁹ Thus, if a religious employer would have discharged an employee for religious reasons even in the absence of antiunion animus, there is no violation of section 8(a)(3). The same factors that the NLRB relies upon to infer pretext are also used to infer unlawful purpose in dual motive cases, and, indeed, similar factors often reappear again to undercut an employer's affirmative defense. Disparate treatment of employees involved in union activity, a history of antiunion animus, the timing of the action, the failure to give a reason for the action at the time it occurred, departure from established procedures, failure to investigate and shifting justifications are all relevant.¹⁰⁰

Thus, in both pretext and dual motive cases, the fact that labor boards and courts cannot second-guess the validity or existence of religious justifications for employer conduct does not foreclose inquiry into the employee's claim altogether. If the inquiry remains focused on secular matters, there is nothing entangling about determining whether religious motives were, in fact, the actual cause of the employer's conduct. There are plenty of secular factors that litigants can rely upon to break the causal connection between the employer's religious justification, which is assumed to be valid, and the employer's action.

The dual motive analysis in *Wright Line* also protects religious employers from having to reinstate workers who would have been discharged even apart from their union activity. Prior to the NLRB's decision in *Wright Line*, the Board found a violation of section 8(a)(3) any time an employer's action was based "in part" on unlawful motivations even if the

96. 251 N.L.R.B. 1083, 1083-84 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). The NLRB's analysis in *Wright Line* was approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983), and in *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267 (1994), the Court recognized its continuing validity. The *Culvert* court drew upon the analysis in *Wright Line* for its approach to dual motive cases involving religious employers. See *Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1168-69 (2d Cir. 1985).

97. See *Wright Line*, 251 N.L.R.B. at 1089. For the responsibilities of the General Counsel, see section 3(d) of the NLRA. 29 U.S.C. § 153(d) (2003).

98. See *Wright Line*, 251 N.L.R.B. at 1089.

99. See *id.* at 1088 n.11; see also *Transp. Mgmt. Corp.*, 462 U.S. at 400-04 (discussing and approving Board's position).

100. See I HARDIN & HIGGINS, *supra* note 93, at 260-61, 284-85. For cases considering such factors, see *Transp. Mgmt. Corp.*, 462 U.S. at 404-05 and *Wright Line*, 251 N.L.R.B. at 1090-91.

primary motivation was legitimate.¹⁰¹ The Seventh Circuit's decision in *Catholic Bishop* correctly noted that this "in part" test would present troubling First Amendment issues.¹⁰² The Second Circuit in *Culvert* did the same.¹⁰³ According to the *Culvert* court, "[w]ere the Board allowed to apply an 'in part' test in addressing an asserted religious motive, . . . [a] parochial school might be forced to reinstate a teacher it otherwise would have fired for religious reasons simply because the school administration was also partly motivated by antiunion animus."¹⁰⁴ The Court in *Culvert* addressed this problem by applying a rule identical to the NLRB's *Wright Line* test. A religious employer does not violate the law unless its conduct would not have occurred absent the unlawful motivation.¹⁰⁵

The Supreme Court seemed to recognize the permissibility of the type of inquiry described above in its brief opinion in *Ohio Civil Rights Commission v. Dayton Christian Schools*.¹⁰⁶ In this case, Dayton Christian Schools (DCS) refused to renew the contract of one of its teachers, Linda Hoskinson, after it learned that she had become pregnant.¹⁰⁷ The stated reason was that mothers should be at home when their children are young.¹⁰⁸ After Hoskinson consulted an attorney, DCS rescinded its earlier decision on the grounds that Hoskinson had not received adequate prior notice of DCS's policy, but it terminated Hoskinson because she failed to follow the "Biblical chain of command" in seeking relief.¹⁰⁹ Hoskinson then filed a claim of gender discrimination with the Ohio Civil Rights Commission.¹¹⁰ The Sixth Circuit enjoined the administrative proceeding on the grounds that the Commission's exercise of jurisdiction would violate the Free Exercise Clause,¹¹¹ and involve the same type of entangling inquiry into "intent, motive, causation, and pretext" found problematic in *Catholic Bishop*.¹¹² The Supreme Court reversed the lower court on abstention grounds.¹¹³ In response to DCS's contention that the mere exercise of jurisdiction by the Commission would violate the First Amendment, the Court responded that "the Commission violates no constitutional rights by merely investigating the circumstances of Hoskinson's

101. See *Wright Line*, 251 N.L.R.B. at 1084-89.

102. See *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1130 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

103. See *Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1168-69 (2d Cir. 1985).

104. *Id.* at 1169.

105. See *id.* (citing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983)).

106. 477 U.S. 619 (1986).

107. See *id.* at 623.

108. See *id.*

109. *Id.* at 622-23.

110. See *id.* at 623-24.

111. See *Dayton Christian Sch., Inc. v. Ohio Civil Rights Comm'n*, 766 F.2d 932, 955 (6th Cir. 1985), *rev'd*, 477 U.S. 619 (1986).

112. *Id.* at 959-60.

113. See *Dayton Christian Sch.*, 477 U.S. at 625-28.

discharge in this case, if only to ascertain whether the ascribed religiously-based reason was in fact the reason for the discharge.”¹¹⁴ While the Supreme Court’s opinion in *Dayton Christian Schools* was brief and the Court did not explore the relationship between this statement and its earlier analysis in *Catholic Bishop*, this case suggests that labor board jurisdiction over unlawful discrimination or discharge claims is permissible if the reviewers limit their inquiry to secular matters and focus solely on the causal connection between the employer’s actions and its asserted religious beliefs.

The claim by lower courts that mandatory collective bargaining would not involve the comprehensive and continuing surveillance that was present in *Lemon* is weaker. While labor boards do not become involved unless an unfair labor practice charge is filed and labor regulations generally leave the parties alone to negotiate their own agreements, unfair labor practices are not uncommon in the bargaining process and, thus, boards and courts are frequently involved.¹¹⁵ Moreover, the NLRA and state labor laws patterned after the NLRA include detailed provisions governing the bargaining process. The NLRA and Board decisions have established complex standards for matters ranging from what can be said during a representation election,¹¹⁶ what is required for good faith bargaining¹¹⁷ and when the parties can use economic weapons such as strikes and lock-

114. *Id.* at 628.

115. During fiscal year 2001 (ending September 30, 2001), 28,124 unfair labor charges were filed with the NLRB. See NATIONAL LABOR RELATIONS BOARD, SIXTY-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 200, at 6 (2003).

116. Employers commit an unfair labor practice when they threaten employees with reprisal if they vote for unionization. See *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 618 (1969). Promises or grants of benefits designed to influence the outcome of an election also constitute an unfair labor practice. See *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409-10 (1964); see also *infra* text accompanying notes 296-304. In addition, the NLRB has held that communications by employers and unions may justify setting aside an election even when they do not amount to an unfair labor practice. In *General Shoe Corp.*, 77 N.L.R.B. 124 (1948), the Board envisioned the representation election as a “laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees.” *Id.* at 127. Where the required laboratory conditions are not present, “the experiment must be conducted over again.” *Id.* Under its “laboratory conditions” doctrine, the Board has placed limits on electioneering at or near the polls. See *Milchem, Inc.*, 170 N.L.R.B. 362 (1968). The Board has also prohibited election speeches to captive assemblies of workers within twenty-four hours of the election. See *Peerless Plywood Co.*, 107 N.L.R.B. 427 (1953). In *General Shoe*, the Board restricted the ability of employers to assemble and propagandize groups of employees in places regarded by employees as “the locus of final authority in the plant.” *General Shoe*, 77 N.L.R.B. at 126-27.

117. For detailed treatment of this “unruly” obligation, see 1 HARDIN & HIGGINS, *supra* note 93, ch. 13.

outs.¹¹⁸ In short, labor laws are quite comprehensive, and involvement by labor boards is not infrequent.

However, the type of entanglement that was present in *Lemon* is very different from the type of state involvement in the labor context. The Court's claim in *Catholic Bishop* that mandatory collective bargaining will raise the same entanglement issues as policing aid to church-related schools ignores the differences between aid programs and labor regulations. The Court in *Lemon* found unconstitutional entanglement because it assumed that any government aid must be limited to secular instruction and then concluded that separating religious from secular instruction in schools with a substantial religious character would be difficult and require ongoing and comprehensive surveillance by state actors. By contrast, in the collective bargaining context, there is no requirement that state agencies be able to separate the religious aspects of an employee's job duties from the secular elements. Rather, what is critical is that the bargaining process and any board or judicial oversight be limited to secular aspects of the *employment relationship* between the parties. The accommodations and adjustments to labor regimes discussed above suggest that this can be done. Indeed, an employee's job duties may be suffused with religious purpose and content, but if mandatory collective bargaining is restricted to secular terms and conditions of employment, such as wages and hours, the type of entanglement that occurred in *Lemon* would not arise. Similarly, if claims of unlawful discrimination or discharge can be resolved without labor boards and reviewing courts becoming involved in religious questions or doctrine, there would seem to be no entanglement with religious matters. Permitting religious organizations to seek individualized relief on a case-by-case basis if some aspect of the bargaining process does, in fact, impinge on Establishment Clause or free exercise principles provides additional protection.

Thus, with some adjustments and accommodations, it seems to be very possible to limit the involvement of state actors to secular issues and to leave all religious matters to the autonomous control of employers. If, in fact, state involvement can be limited to the secular aspects of the employment relationship, the type of blanket exclusion from NLRB coverage that occurred in *Catholic Bishop* is unnecessary. Indeed, such exclusion is not only unnecessary, but it also appears to be gratuitous favoritism that no other type of charitable or nonprofit organization enjoys. Put quite simply, if neither entanglement nor interference with religious matters is threatened, why should religious employers be excluded from coverage under federal and state labor laws?

Scholars who have drawn upon *Catholic Bishop* to support broad protections for religious organizations from government interference have a number of responses to this question. Douglas Laycock gives one such

118. See 2 HARDIN & HIGGINS, *supra* note 93, chs. 19, 20; see also *infra* text accompanying notes 267-81.

response when he defends what he calls the “right of church autonomy.”¹¹⁹ According to Laycock, one of the facets of the Free Exercise Clause is the right of religious institutions to manage their internal affairs free from government interference even when such interference would not require the institution to violate its religious principles.¹²⁰ This right of autonomy extends to the selection of leaders, the resolution of disputes, the definition of doctrine and other aspects of church operations, including routine administrative matters.¹²¹ It is essentially a right of religious institutions to be “left alone” by government except where a compelling state interest justifies interference.¹²² In Laycock’s view, church labor relations are a clear example of internal operations protected by this right.¹²³ For Laycock, one of the reasons that government interference with church affairs is so dangerous is that it can influence and alter the dynamic process by which religious doctrines and beliefs develop and change even if the interference violates no readily identifiable religious principle or doctrine.¹²⁴ Mandatory collective bargaining, in particular, is especially intrusive because it interferes with the way authority and influence are allocated within religious organizations.¹²⁵ The type of ad hoc relief envisioned by the lower courts discussed above offers insufficient protection because it is often impossible to predict or ascertain when government regulations are affecting the process of religious formation.¹²⁶

Laycock’s central concern is that government not be permitted to affect the formation and development of religious belief. While such a position is, in theory, quite appealing, the weakness of this position is that it is

119. Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1373 (1981).

120. *See id.* at 1373, 1398.

121. *See id.* at 1389, 1394, 1398.

122. *See* Douglas Laycock, *The Right to Church Autonomy as Part of Free Exercise of Religion*, in GOVERNMENT INTERVENTION IN RELIGIOUS AFFAIRS II, at 28, 39 (Dean M. Kelley ed., 1986).

123. *See* Laycock, *supra* note 119, at 1398, 1408-09.

124. *See id.* at 1391. Frederick Mark Gedicks has made a similar argument: State intervention into the affairs of a religious community frequently destroys the daily development of the group’s historical and theological narratives. Accordingly, government regulation may seriously disrupt and distort the spiritual life of that community even when the state’s demands would not violate clearly identifiable doctrines, beliefs, or practices. Such intervention breaks the link between evolution of group meaning and group authority and thus reinterprets and recasts such meaning. Frederick Mark Gedicks, *Toward a Constitutional Jurisprudence of Religious Group Rights*, 1989 WIS. L. REV. 99, 144.

125. *See* Laycock, *supra* note 119, at 1391-92.

126. *See id.* at 1392. Gedicks has also argued that judges may not be able to accurately evaluate the burdens on religious groups whose beliefs and practices are unusual or obscure or whose “religious experience does not easily translate into the rational language required by the legal system.” Gedicks, *supra* note 124, at 145-46. Judicial bias against religious belief systems may also reduce the effectiveness of ad hoc relief. *See id.* at 141.

impossible to achieve in practice. All sorts of government activity affects the development of beliefs in the larger society, including religious beliefs, and it is impossible to seal religious organizations off from government influence. Even government policies very indirectly related to religious organizations can have profound effects on faith and doctrine.¹²⁷

Moreover, Laycock's right of church autonomy would give religious organizations the widest possible scope for freedom on the basis of the most speculative of harms. For Laycock, religious organizations should be free from government interference in all but the rare instances where a compelling state interest is involved. Religious organizations are accorded such broad freedom because there is a *possibility* that some regulations *might* affect the development of church doctrine in ways that are often unidentifiable. Where government regulations directly affect religious matters, it is easy to justify a claim for church autonomy, but the blanket protection that Laycock advocates seems to be based on only the most tenuous of free exercise burdens.

To this critique, Carl Esbeck might reply that where religious matters are at stake, a special wariness is constitutionally warranted. Esbeck envisions the Establishment Clause as a "structural restraint on governmental power"¹²⁸ that bars the state from interfering with inherently religious matters, such as doctrine, polity, administration and membership and leadership decisions.¹²⁹ Where there is an "appreciable risk" of such interference, a "special wariness" is justified, and the boundary of government involvement should be drawn well before actual problems arise.¹³⁰

Others have argued that the type of burden on free exercise that Laycock sees is not merely speculative. They worry that mandatory collective bargaining will have a "chilling" effect on religious activity even if negotiations are ostensibly limited to secular terms and conditions of employment and labor boards and courts are forbidden to engage in questions of church doctrine. The Seventh Circuit in *Catholic Bishop* made such an argument¹³¹ as did Judge Torruella in his dissenting opinion in *Universidad Central de Bayamon v. NLRB*.¹³² According to the Seventh Circuit, "[t]o

127. William Marshall and Douglas Blomgren make a similar point. See William P. Marshall & Douglas C. Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 309-10 (1986).

128. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 2 (1998).

129. See Esbeck, *supra* note 128, at 10-11, 44, 77, 109; Carl H. Esbeck, *Myths, Miscues, and Misconceptions: No-Aid Separationism and the Establishment Clause*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 285, 307-08 (1999).

130. Carl H. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 378, 381-82 (1984).

131. See *Catholic Bishop of Chi. v. NLRB*, 559 F.2d 1112, 1124 (7th Cir. 1977), *aff'd*, 440 U.S. 490 (1979).

132. See *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 397-98 (1st Cir. 1985) (Torruella, J., dissenting). In *Bayamon*, a panel of First Circuit judges held that the result in *Catholic Bishop* did not extend to a religiously affiliated university and that NLRB jurisdiction over the university's lay faculty was proper. See

minimize friction between the Church and the Board, prudence will ultimately dictate that the [religious employer] tailor his conduct and decisions to 'steer far wider of the unlawful zone' of impermissible conduct."¹³³ The Seventh Circuit gave an example involving a Catholic school teacher who delivered a strong pro-union speech at a meeting one week and advocated birth control or abortion the next.¹³⁴ In such a case, dismissing the teacher would risk a "protracted and expensive unfair labor practice proceeding" that may involve the church's religious beliefs and policies.¹³⁵ In order to avoid such litigation, the school may well choose not to discipline the teacher and, thus, forgo asserting its free exercise rights.¹³⁶

Judge Torruella was also worried that the type of ad hoc relief proposed in recent lower court cases will have a chilling effect on the religious activities of religious organizations.¹³⁷ According to Judge Torruella, requiring the religious employers to engage in "interminable and ad hoc litigation" to vindicate their First Amendment rights will have a "substan-

id. at 385. When the First Circuit reheard the case *en banc*, the court was evenly divided, and, consequently, the NLRB's decision to exercise jurisdiction was not enforced. *See id.* at 398-99.

133. *Catholic Bishop*, 559 F.2d at 1124 (quoting *Speiser v. Randall*, 357 U.S. 513 (1958)).

134. *See id.* at 1124.

135. *Id.*

136. *See id.*; *see also* *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 467 (D.C. Cir. 1996) (making similar argument in Title VII context).

The Supreme Court made a similar argument in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). In *Amos*, the Court addressed the exemption of religious organizations from Title VII's prohibition against religious discrimination in employment. *See id.* at 329-30. The question presented to the Court was whether the application of this exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause. *Id.* The Court held that it did not. *Id.* According to the majority, even if the Free Exercise Clause only requires an exemption for the religious activities of religious organizations, extension of the exemption to all nonprofit activities is a permissible alleviation of government interference in the mission of religious groups. *Id.* at 335-36. An exemption limited to religious activities would have a chilling effect on the group's ability to define and implement this mission. *Id.* The line between religious and secular activities is not clear, and, thus, religious organizations would have a difficult time predicting where courts would draw the line. The consequence will be that "[f]ear of potential liability might affect the way an organization carried out what it understood to be its religious mission." *Id.* at 336.

In his concurrence, Justice Brennan made the same point. Because the characterization of organizational activity as religious or nonreligious is not "self-evident," determinations will have to be made on a case-by-case basis, and the prospect of such litigation may chill religious organizations in their free exercise activity. *Id.* at 343-44 (Brennan, J., concurring in the judgment). In order to avoid litigation and unpredictable outcomes, religious organizations may decide to characterize activities as religious only where there would be no dispute about the characterization and decline to claim an exemption for other activities even if they regarded these activities as religious in nature. *Id.* at 343-44.

137. *See Bayamon*, 793 F.2d at 397 (Torruella, J., dissenting).

tial chilling effect” on the exercise of those rights and will also involve the type of continuous surveillance found to be unconstitutional entanglement in *Lemon*.¹³⁸

The response to all of these concerns is to defer to religious organizations regarding the characterization of their activities as religious or non-religious and to use heightened standards of proof in cases alleging unfair labor practices. If labor boards and reviewing courts defer to religious organizations regarding what terms and conditions of employment have a religious significance, religious employers should not feel compelled to bargain about religious matters. Furthermore, if reviewers require clear proof of a violation in pretext and dual motive cases, unfair labor practice litigation need not chill religious activity. For example, in pretext cases, claimants could be required to produce clear and convincing evidence that the religious reason offered by the employer was not, in fact, relied upon by the organization. In dual motive cases, instead of shifting the burden to the employer once the claimant establishes that an unlawful purpose contributed to the employer’s conduct, reviewers could keep the burden on the claimant, who would also be required to prove that the employer would not have taken the action that it did in the absence of the unlawful purpose. Religious employers should feel comfortable disciplining workers for religious reasons if employees must overcome a high hurdle to prove that religious motivations were not, in fact, the cause of the employer’s action.

To be sure, unfair labor practice litigation will not disappear nor will conflicts over what are mandatory subjects of bargaining. There will also be times when religious organizations will need to vindicate particularized burdens on their religious freedom through ad hoc litigation. However, deference to religious organizations on religious issues and heightened standards of proof in unfair labor practice cases should reduce the occurrence of such litigation and the unpredictability of judicial outcomes.¹³⁹ Furthermore, the mere fact that some litigation will be unavoidable is not,

138. *Id.* at 397. Justice Brennan made a similar entanglement argument in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987). For a discussion of *Amos*, see *supra* note 136. According to Justice Brennan, ad hoc litigation over whether the activities of religious organizations are religious or secular will “result[] in considerable ongoing government entanglement in religious affairs.” *Id.* at 343 (Brennan, J., concurring in the judgment).

139. Deference to religious organizations on religious issues would also address Frederick Mark Gedicks’s concerns about ad hoc litigation. As noted above, Gedicks worries that judicial bias and unfamiliarity with religious belief systems may prevent courts from accurately evaluating burdens on religious groups and reduce the effectiveness of ad hoc litigation as a means for relief. See discussion *supra* note 126. However, if labor boards and courts routinely defer to religious organizations on religious matters as well as the impact of state action on religious activity, ad hoc litigation need not be ineffective. Furthermore, the need to seek judicial relief will be minimized if labor boards defer to religious groups regarding the characterization of bargaining subjects as secular or religious, and use heightened standards of proof when employers are charged with unfair labor practices.

in itself, sufficient to prove a violation of the First Amendment. Religious organizations are involved in litigation all the time, and much of this litigation will affect the internal practices of the organization even if it does not touch directly on religious matters. In the labor context, as long as labor boards and reviewing courts do not become embroiled in religious inquiries and religious organizations can be reasonably certain that the government will not interfere with religious decision making and practices, the effect of such litigation on the groups' religious missions should be minimal. Of course, deference to religious organizations and heightened standards of proof will narrow the scope of mandatory bargaining and restrict the remedial powers of the state. However, creating a comfortable buffer between government regulation and religious activity is necessary to accommodate First Amendment concerns without excluding religious organizations from coverage altogether.

Scholars who draw upon *Catholic Bishop* to support broad protections for religious organizations from government regulation frequently cite Supreme Court case law regarding intra-church disputes over property and ecclesiastical governance for additional support.¹⁴⁰ For example, Laycock draws upon this case law when defending his understanding of church autonomy.¹⁴¹ Esbeck and other scholars who argue that government has no competence in core religious matters also do so.¹⁴² However, these precedents do not decide the issue at hand. In each of these cases, at least one of the litigants opened the door to secular court intervention by asking the court to resolve a dispute implicating religious doctrine. The Supreme Court has consistently held that when addressing disputes within religious organizations, courts may not become involved in resolving ecclesiastical questions,¹⁴³ and when the outcome of a dispute within a hierarchical church turns on such a question, the court must defer to the highest church tribunal.¹⁴⁴ In none of these cases, however, were the liti-

140. The principal decisions are *Jones v. Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese for the United States and Canada v. Milivojevic*, 426 U.S. 696 (1976); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, 344 U.S. 94 (1952); *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

141. See Laycock, *supra* note 119, at 1394-98; Laycock, *supra* note 122, at 32-33; cf. Gedicks, *supra* note 124, at 131-36 (drawing upon intra-faith dispute cases to support broad protection for religious group rights).

142. See Esbeck, *supra* note 130, at 351-52, 381-82, 390-97; see also Bruce N. Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM. L. REV. 1514, 1540-41 (1979) (drawing on Supreme Court precedent regarding intra-church disputes to support view that core spiritual activities of religious organizations are outside scope of government regulation).

143. See *Wolf*, 443 U.S. at 602; *Milivojevic*, 426 U.S. at 709-10; *Hull*, 393 U.S. at 449.

144. See *Wolf*, 443 U.S. at 602, 604; *Milivojevic*, 426 U.S. at 709.

gants seeking exemption from neutral government regulation targeted to secular aspects of church operations.

There is, to be sure, ringing language in some of these cases about the freedom of religious institutions from state interference. For example, in *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in North America*, the Court spoke of its precedent as “radiat[ing] . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”¹⁴⁵ However, the scope of this freedom remains unclear. It certainly covers decisions on ecclesiastical questions, including “questions of discipline, or of faith, or of ecclesiastical rule, custom, or law.”¹⁴⁶ The Supreme Court has never directly addressed, though, whether it extends to secular aspects of church administration.¹⁴⁷ With the adjustments and accommodations discussed above, labor laws do not impinge on religious aspects of polity, administration, custom or law, and labor boards and courts need not become involved in ecclesiastical questions. The discussion above also suggests that a broad freedom to be left alone in all matters, religious and secular, is asking too much if autonomy over religious matters is not endangered. If there is essentially nothing at stake, why should religious organizations receive this special privilege?

III. LESSONS FROM CATHOLIC SOCIAL TEACHING ON LABOR RELATIONS

In this section, I begin with the question I have posed at the end of Part II. If neither entanglement nor interference with religious matters is threatened, why should religious employers be excluded from coverage

145. *Kedroff*, 344 U.S. at 116.

146. *Id.* at 115 (citing *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 727 (1872)); see also *Milivojevic*, 426 U.S. at 713 (“[C]ivil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.”); *Watson*, 80 U.S. at 728-29 (“The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned.”).

147. Indeed, in *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), the Court assumed, without deciding, that the Free Exercise Clause only requires protection from state interference with the religious activities of religious organizations. At issue in *Amos* was the constitutionality of Title VII’s exemption of religious organizations from its prohibition against religious discrimination in employment. *Id.* at 329. The statutory exemption extends to the religious activities of religious employers as well as secular functions. The Court assumed for the sake of argument that the Free Exercise Clause only requires Congress to exempt religious activities from the reach of Title VII. *Id.* at 335-36. According to the Court, the First Amendment does not prohibit Congress from extending the exemption to the secular nonprofit activities of religious groups as well, *id.* at 336-39, but whether the Constitution requires autonomy over such matters was left an open question, see *id.* at 339.

under federal and state labor laws? If nothing is at stake, why should religious organizations receive a special privilege that other charitable enterprises do not? In the discussion that follows, I will demonstrate that there is actually a lot at stake, and the application of labor laws to religious organizations would give rise to very real First Amendment problems. Examination of the Catholic Church's teaching on labor issues and the relationship of this teaching to the claims made by Catholic employers will reveal important First Amendment problems that existing case law and scholarship miss. Then, in Part IV, I will demonstrate why exempting religious organizations from state interference is so important.

The Catholic Church has long supported the right of workers to unionize and bargain collectively with their employers.¹⁴⁸ In 1986, the American Catholic Bishops affirmed that these rights extend to Church employees, who have the right to organize and bargain collectively with Church institutions.¹⁴⁹ Why, then, one wonders, would Catholic employers resist collective bargaining under federal and state labor laws? Is this resistance, as one scholar has argued, a hypocritical attempt to avoid clear religious duties?¹⁵⁰ Not surprisingly, the reasons that Catholic employers have given in litigation following the Supreme Court's decision in *Catholic Bishop* have tended to draw upon the entanglement and autonomy concerns raised in that case. Church employers, litigants argue, will lose autonomy over religious matters and government will become entangled in religious doctrine and practices.¹⁵¹ As discussed above, these entanglement and autonomy concerns seem to disappear where courts carefully tailor the scope of collective bargaining and the remedial powers of the state to address First Amendment issues.

148. See POPE LEO XIII, *RERUM NOVARUM* (ON THE CONDITION OF THE WORKING CLASSES) 42-44 (Daughters of St. Paul transl.) (1891) [hereinafter *RERUM NOVARUM*]; POPE PIUS XI, *QUADRAGESIMO ANNO* (ON SOCIAL RECONSTRUCTION) 18 (Daughters of St. Paul transl.) (1931) [hereinafter *QUADRAGESIMO ANNO*]; SECOND VATICAN COUNCIL, *GAUDIUM ET SPES* (PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD) (1965) [hereinafter *GAUDIUM ET SPES*], reprinted in *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* 166, 212 (David J. O'Brien & Thomas A. Shannon eds., 1992) [hereinafter *CATHOLIC SOCIAL THOUGHT*]; POPE JOHN PAUL II, *CENTESIMUS ANNUS* (ON THE HUNDREDTH ANNIVERSARY OF *RERUM NOVARUM*) 15 (Daughters of St. Paul transl.) (1991) [hereinafter *CENTESIMUS ANNUS*].

149. See *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 132.

150. See Gregory, *supra* note 21, at 67.

151. See *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1337, 1340 (D.C. Cir. 2002); *NLRB v. Hanna Boys Ctr.*, 940 F.2d 1295, 1305 (9th Cir. 1991); *Catholic High Sch. Ass'n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1164, 1166-67, 1169 (2d Cir. 1985); *Universidad Cent. de Bayamon v. NLRB*, 793 F.2d 383, 383 (1st Cir. 1985) (en banc opinions 1986); *St. Elizabeth Cmty. Hosp. v. NLRB*, 708 F.2d 1436, 1438 (9th Cir. 1983); *St. Elizabeth Hosp. v. NLRB*, 715 F.2d 1193, 1195 (7th Cir. 1983); *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 863, 865-66 (Minn. 1992); *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 714, 718 (N.J. 1997).

However, when one examines Catholic teaching on labor and other social issues, it becomes clear that the problems with mandatory collective bargaining under federal and state laws go much deeper than the First Amendment issues framed in *Catholic Bishop* and discussed in subsequent legal scholarship. For the Catholic Church, the relationship between employer and employee, including the collective bargaining relationship, is understood as part of a larger vision for human relations based on the Gospel principles of love, cooperation, forgiveness and reconciliation. There is, in fact, no real separation between the religious and the secular in the employment relationship. All aspects of the relationship, like all facets of social life, have a religious dimension and destiny, and these relationships will be distorted if they are cut off from the ethical and spiritual norms that ground human existence.

The problem with requiring Church institutions and agencies to bargain under federal and state labor laws is that these laws reflect a very different vision for human relations than Catholic teaching, and they channel labor-management interactions into patterns that are deeply inconsistent with Church doctrine. In the discussion that follows, I will be focusing on the NLRA. As I will show, the NLRA reflects a fundamental distrust of the employer and separates employer and employee into an adversarial, arms-length relationship based upon equality of bargaining power rather than mutual concern and collaboration. To impose the NLRA's rules for the collective bargaining process on Church institutions would, therefore, effectively prevent these institutions from structuring their internal social relations according to religious norms.

A. *Principles of Catholic Social Thought*

The Church's teaching on social issues is not monolithic. With each Pope, the Church's teaching has taken on a different flavor, and concepts articulated in earlier documents are often developed in new directions. However, the basic principles for social relations have remained constant. The Church's contemporary teaching on social issues has its origins in Pope Leo XIII's encyclical *Rerum Novarum*, which was promulgated in 1891. The background for *Rerum Novarum* was the desperate condition of the working classes at the height of the industrial age. As the Church looked out on the socioeconomic landscape of Europe in the late nineteenth century, she saw workers suffering from extreme poverty and exploitation and business owners greedily accumulating the vast wealth produced by the new capitalist machinery for themselves. She also saw the ensuing clash between these two classes, which threatened to ignite a "passion for revolutionary change."¹⁵²

In *Rerum Novarum*, Pope Leo XIII cautioned that it is "a capital evil" to assume that the present clash between labor and management is inevitable

152. *RERUM NOVARUM*, *supra* note 148, at 5.

or acceptable.¹⁵³ Social relationships are properly founded upon unity and concord,¹⁵⁴ the recognition of mutual duties¹⁵⁵ and pursuit of the common good,¹⁵⁶ not conflict and division.¹⁵⁷ Indeed, the perfection of human relations requires more. It requires the “closest neighborliness and friendship”¹⁵⁸ and, beyond even friendship, “brotherly love”¹⁵⁹ and “charity,”¹⁶⁰ which is “the mistress and queen of the virtues.”¹⁶¹ At the root of the labor problem is, therefore, something inescapably moral and spiritual. Employers have neglected their duties towards workers and have sought instead their own good at the expense of others, and workers have been aroused to bitterness, exaggerated demands and even violence.¹⁶² Just as the problem has moral and spiritual roots, so too the only sure path to social healing will require moral renewal.¹⁶³ Employers and employees must both be motivated by concern for the good of each other so that employers are “mindful of their duties,” workers “press their claims with reason” and both work together to address the conditions of workers.¹⁶⁴ Public officials must also use the resources of the state to assist, though never replace,¹⁶⁵ private actors in promoting the common good and seeking the basic principles of justice that guarantee to workers what is required for human dignity.¹⁶⁶ It is only when all elements within society

153. *See id.* at 17.

154. *See id.* at 17-18.

155. *See id.* at 18.

156. *See id.* at 21-22.

157. *See id.* at 17-18, 20, 24.

158. *Id.* at 20.

159. *Id.* at 24.

160. *Id.* at 53.

161. *Id.*

162. *See id.* at 18-20.

163. *See id.* at 52-53. Pope Leo XIII writes:

And since religion alone, as We said in the beginning, can remove the evil, root and branch, let all reflect upon this: First and foremost Christian morals must be re-established, without which even the weapons of prudence, which are considered especially effective, will be of no avail to secure well-being.

Id.; *see also id.* at 26 (“Wherefore, if human society is to be healed, only a return to Christian life and institutions will heal it.”).

164. *Id.* at 52.

165. While the Church teaches that the state has an important role in promoting the common good and achieving the requirements of justice, the Church’s doctrine of subsidiarity cautions that the state must not unduly restrict the freedom of private actors and associations; rather, the state must increase their freedom by preserving their responsibility to perform functions that do not require government intervention. *See id.* at 32-33; QUADRAGESIMO ANNO, *supra* note 148, at 40-41; POPE JOHN XXIII, MATER ET MAGISTRA (CHRISTIANITY AND SOCIAL PROGRESS) (1961) [hereinafter MATER ET MAGISTRA], *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 148, at 84, 92-93; POPE PAUL VI, OCTOGESIMA ADVENIENS (A CALL TO ACTION ON THE EIGHTIETH ANNIVERSARY OF RERUM NOVARUM) (1971) [hereinafter OCTOGESIMA ADVENIENS], *reprinted in* CATHOLIC SOCIAL THOUGHT, *supra* note 148, at 265, 282; CENTESIMUS ANNUS, *supra* note 148, at 71.

166. *See RERUM NOVARUM*, *supra* note 148, at 29-40.

work together for the good of all that lasting peace can be established, and the needs of the most vulnerable members met.¹⁶⁷

In later documents, the Church continues to teach that social relations must be founded on principles of love and mutual concern.¹⁶⁸ The Church envisions all people and nations as members of one family.¹⁶⁹ Between individuals and groups there must be unity,¹⁷⁰ harmony,¹⁷¹ charity,¹⁷² a spirit of brotherhood¹⁷³ and an attitude of mutual respect¹⁷⁴ and

167. According to Pope Leo XIII:

Certainly, the well-being which is so longed for is chiefly to be expected from an abundant outpouring of charity; of Christian charity, We mean, which is in epitome the law of the Gospel, and, which, always ready to sacrifice itself for the benefit of others, is man's surest antidote against the insolence of the world and immoderate love of self

Id. at 53.

168. See *QUADRAGESIMO ANNO*, *supra* note 148, at 68-69; *MATER ET MAGISTRA*, *supra* note 165, at 85; POPE JOHN XXIII, *PACEM IN TERRIS* (PEACE ON EARTH) (1963) [hereinafter *PACEM IN TERRIS*], *reprinted in CATHOLIC SOCIAL THOUGHT*, *supra* note 148, at 131, 158; *GAUDIUM ET SPES*, *supra* note 148, at 185; POPE PAUL VI, *POPULORUM PROGRESSIO* (ON THE DEVELOPMENT OF PEOPLES) (1967) [hereinafter *POPULORUM PROGRESSIO*], *reprinted in CATHOLIC SOCIAL THOUGHT*, *supra* note 148, at 240, 256-57; *SYNOD OF BISHOPS, JUSTICE IN THE WORLD* (1971) [hereinafter *JUSTICE IN THE WORLD*], *reprinted in CATHOLIC SOCIAL THOUGHT*, *supra* note 148, at 288, 293; POPE PAUL VI, *EVANGELII NUNTIANDI* (ON EVANGELIZATION IN THE MODERN WORLD) (1975) [hereinafter *EVANGELII NUNTIANDI*], *reprinted in CATHOLIC SOCIAL THOUGHT*, *supra* note 148, at 303, 313; POPE JOHN PAUL II, *DIVES IN MISERICORDIA* (THE MERCY OF GOD) 44 (Daughters of St. Paul transl.) (1980) [hereinafter *DIVES IN MISERICORDIA*]; POPE JOHN PAUL II, *SOLLICITUDO REI SOCIALIS* (ON SOCIAL CONCERN) (1987) [hereinafter *SOLLICITUDO REI SOCIALIS*], *reprinted in CATHOLIC SOCIAL THOUGHT*, *supra* note 148, at 395, 418, 423; *CENTESIMUS ANNUS*, *supra* note 148, at 19; *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 41, 136.

169. See *QUADRAGESIMO ANNO*, *supra* note 148, at 69; *PACEM IN TERRIS*, *supra* note 168, at 150; *GAUDIUM ET SPES*, *supra* note 148, at 180; *POPULORUM PROGRESSIO*, *supra* note 168, at 250.

170. See *QUADRAGESIMO ANNO*, *supra* note 148, at 42, 68; *GAUDIUM ET SPES*, *supra* note 148, at 180, 184; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 423; *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 41.

171. See *QUADRAGESIMO ANNO*, *supra* note 148, at 42; *MATER ET MAGISTRA*, *supra* note 165, at 97, 99.

172. See *QUADRAGESIMO ANNO*, *supra* note 148, at 68-69; *MATER ET MAGISTRA*, *supra* note 165, at 125; *PACEM IN TERRIS*, *supra* note 168, at 151, 158; *GAUDIUM ET SPES*, *supra* note 148, at 185; *JUSTICE IN THE WORLD*, *supra* note 168, at 293; *EVANGELII NUNTIANDI*, *supra* note 168, at 313; *DIVES IN MISERICORDIA*, *supra* note 168, at 44; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 418, 423; *CENTESIMUS ANNUS*, *supra* note 148, at 19; *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 41.

173. See *MATER ET MAGISTRA*, *supra* note 165, at 110; *PACEM IN TERRIS*, *supra* note 168, at 159; *GAUDIUM ET SPES*, *supra* note 148, at 180; *POPULORUM PROGRESSIO*, *supra* note 168, at 250; *EVANGELII NUNTIANDI*, *supra* note 168, at 313; *DIVES IN MISERICORDIA*, *supra* note 168, at 43-44.

174. See *MATER ET MAGISTRA*, *supra* note 165, at 99; *POPULORUM PROGRESSIO*, *supra* note 168, at 255.

service.¹⁷⁵ Interactions must take the form of cooperation,¹⁷⁶ collaboration¹⁷⁷ and togetherness,¹⁷⁸ and all persons should seek the common good¹⁷⁹ and try to solve problems through mutual understanding,¹⁸⁰ sharing¹⁸¹ and solidarity.¹⁸² Where there is conflict or disagreement, a spirit of forgiveness¹⁸³ and reconciliation¹⁸⁴ should prevail.

By emphasizing the centrality of charity in human affairs, the Church does not neglect a concern for justice, and, indeed, the Church understands the requirements of justice expansively. The breadth of these requirements is described by the Second Vatican Council:

[T]here must be made available to all men everything necessary for leading a life truly human, such as food, clothing, and shelter; the right to choose a state of life freely and to found a family; the right to education, to employment, to a good reputation, to respect, to appropriate information, to activity in accord with the

175. See *PACEM IN TERRIS*, *supra* note 168, at 135; *GAUDIUM ET SPES*, *supra* note 148, at 185; *POPULORUM PROGRESSIO*, *supra* note 168, at 260; *OCTOGESIMA ADVENIENS*, *supra* note 165, at 281; *JUSTICE IN THE WORLD*, *supra* note 168, at 293; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 422; *CENTESIMUS ANNUS*, *supra* note 148, at 74.

176. See *QUADRAGESIMO ANNO*, *supra* note 148, at 52; *MATER ET MAGISTRA*, *supra* note 165, at 97; *GAUDIUM ET SPES*, *supra* note 148, at 228; *POPULORUM PROGRESSIO*, *supra* note 168, at 253; *OCTOGESIMA ADVENIENS*, *supra* note 165, at 282; *JUSTICE IN THE WORLD*, *supra* note 168, at 299; *CENTESIMUS ANNUS*, *supra* note 148, at 48, 84; *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 120.

177. See *MATER ET MAGISTRA*, *supra* note 165, at 99; *PACEM IN TERRIS*, *supra* note 168, at 136; *GAUDIUM ET SPES*, *supra* note 148, at 228; *POPULORUM PROGRESSIO*, *supra* note 168, at 257; POPE JOHN PAUL II, *LABOR EXERCENS (ON HUMAN WORK)* 37 (Daughters of St. Paul transl.) (1981) [hereinafter *LABOR EXERCENS*]; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 416, 423; *CENTESIMUS ANNUS*, *supra* note 148, at 48, 64; *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 120.

178. See *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 423.

179. See *QUADRAGESIMO ANNO*, *supra* note 148, at 25, 42; *MATER ET MAGISTRA*, *supra* note 165, at 100; *PACEM IN TERRIS*, *supra* note 168, at 139; *POPULORUM PROGRESSIO*, *supra* note 168, at 244; *OCTOGESIMA ADVENIENS*, *supra* note 165, at 270; *JUSTICE IN THE WORLD*, *supra* note 168, at 300; *LABOR EXERCENS*, *supra* note 177, at 37; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 421; *CENTESIMUS ANNUS*, *supra* note 148, at 64; *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 51.

180. See *POPULORUM PROGRESSIO*, *supra* note 168, at 250.

181. See *id.* at 253.

182. See *MATER ET MAGISTRA*, *supra* note 165, at 88; *POPULORUM PROGRESSIO*, *supra* note 168, at 250; *JUSTICE IN THE WORLD*, *supra* note 168, at 297; *EVANGELII NUNTIANDI*, *supra* note 168, at 310-11; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 418; *CENTESIMUS ANNUS*, *supra* note 148, at 19, 84; *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 41.

183. See *QUADRAGESIMO ANNO*, *supra* note 148, at 69; *DIVES IN MISERICORDIA*, *supra* note 168, at 45-46; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 423; *CENTESIMUS ANNUS*, *supra* note 148, at 41.

184. See *PACEM IN TERRIS*, *supra* note 168, at 146; *GAUDIUM ET SPES*, *supra* note 148, at 212; *DIVES IN MISERICORDIA*, *supra* note 168, at 44; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 423.

upright norm of one's own conscience, to protection of privacy, and to rightful freedom in matters religious too.¹⁸⁵

However, justice can never be understood apart from love.¹⁸⁶ Indeed, justice must always be sought in charity, which should be the animating principle of all human life. Church documents repeat that "the Church's teaching on social matters . . . has truth as its guide, justice as its end, and love as its driving force."¹⁸⁷ Thus, the Church seeks social relationships "built" on justice,¹⁸⁸ and "inspired and perfected by mutual love."¹⁸⁹

Indeed, to give oneself for others in love is the path to human fulfillment and true freedom.¹⁹⁰ When Christ revealed to humanity that God is love, he also "taught us that the new command of love was the basic law of human perfection and hence of the world's transformation."¹⁹¹ Thus, neither individual perfection nor social renewal is possible without love at its core.¹⁹² Movements for social, economic or political change that do not seek "justice in charity" "carr[y] within [themselves] the germ of [their] own negation."¹⁹³ Instead of healing social relations, reform ef-

185. GAUDIUM ET SPES, *supra* note 148, at 181. For further elaboration of these rights, see PACEM IN TERRIS, *supra* note 168, at 132-35. The Church teaches that all the rights of persons are inseparably connected with corresponding duties. See *id.* at 135. For example, the right to a decent standard of living entails the "duty of living it becomingly," and the right to investigate truth entails the "duty of seeking it ever more completely and profoundly." *Id.*

186. See, e.g., JUSTICE IN THE WORLD, *supra* note 168, at 293 ("Christian love of neighbor and justice cannot be separated."); DIVES IN MISERICORDIA, *supra* note 168, at 37 (teaching that "justice alone is not enough").

187. MATER ET MAGISTRA, *supra* note 165, at 120-21; see also PACEM IN TERRIS, *supra* note 168, at 136-37, 155, 159; GAUDIUM ET SPES, *supra* note 148, at 181.

188. GAUDIUM ET SPES, *supra* note 148, at 181.

189. PACEM IN TERRIS, *supra* note 168, at 137.

190. See GAUDIUM ET SPES, *supra* note 148, at 180; POPULORUM PROGRESSIO, *supra* note 168, at 250; OCTOGESIMA ADVENIENS, *supra* note 165, at 281, 283; JUSTICE IN THE WORLD, *supra* note 168, at 293; CENTESIMUS ANNUS, *supra* note 148, at 60-61.

191. GAUDIUM ET SPES, *supra* note 148, at 188; see also EVANGELII NUNTIANDI, *supra* note 168, at 313 ("Evangelization . . . also includes the preaching of hope in the promises made by God in the new Covenant in Jesus Christ, the preaching of God's love for us and of our love for God; the preaching of brotherly love for all men—the capacity of giving and forgiving, of self-denial, of helping one's brother and sister—which, springing from the love of God, is the kernel of the Gospel . . .").

192. As Pope John Paul II explains:

Man is alienated if he refuses to transcend himself and to live the experience of self-giving A society is alienated if its forms of social organization, production and consumption make it more difficult to offer this gift to self and to establish this solidarity between people.

Centesimus Annus, *supra* note 148, at 61.

193. EVANGELII NUNTIANDI, *supra* note 168, at 315. Similarly, in his encyclical *Dives in Misericordia*, John Paul II writes that "[t]he experience of the past and of our time demonstrates that justice alone is not enough, that it can even lead to the negation and destruction of itself, if that deeper power, which is love, is not allowed to shape human life in its various dimensions." DIVES IN MISERICORDIA, *supra* note 168, at 37. Pius XI's encyclical *On Social Reconstruction* makes the same point:

forts that do not recognize and promote humanity's call to love distort the human community and retard human development.¹⁹⁴ For example, efforts to build peace on a mere balance of power rather than mutual trust will fail.¹⁹⁵ Efforts to solve labor problems are similarly misguided if they pit labor and management against each other like "two armies . . . engaged in combat."¹⁹⁶ A society founded upon "classes with contradictory interests and hence opposed to each other" is "prone to enmity and strife."¹⁹⁷ Strife is also assured if forgiveness is eliminated from human relations and justice alone pursued:

A world from which forgiveness was eliminated would be nothing but a world of cold and unfeeling justice, in the name of which each person would claim his or her own rights *vis-a-vis* others; the various kinds of selfishness latent in man would transform life and human society into a system of oppression of the weak by the strong, or into an arena of permanent strife between one group and another.¹⁹⁸

As in *Rerum Novarum*, the Church has also continued to teach that at the root of all social problems is human sin and the "structures of sin" that are built up through sin.¹⁹⁹ Thus, any solution to social problems must change "spiritual attitudes" and "conver[t]" the mind and heart.²⁰⁰ It is,

[J]ustice alone, even though most faithfully observed, can remove indeed the cause of social strife, but can never bring about a union of hearts and minds. Yet this union, binding men together, is the main principle of stability in all institutions, no matter how perfect they may seem, which aim at establishing social peace and promoting mutual aid. In its absence, as repeated experience proves, the wisest regulations come to nothing.

QUADRAGESIMO ANNO, *supra* note 148, at 68.

194. See, e.g., EVANGELII NUNTIANDI, *supra* note 168, at 316 ("[T]he best structures and the most idealized systems soon become inhuman if the inhuman inclinations of the human heart are not made wholesome, if those who live in these structures or who rule them do not undergo a conversion of heart and of outlook.").

195. See PACEM IN TERRIS, *supra* note 168, at 149; see also GAUDIUM ET SPES, *supra* note 148, at 220 (teaching that peace is "the fruit of love").

196. QUADRAGESIMO ANNO, *supra* note 148, at 41-42; see also *id.* at 44 (stating that "the unity of human society cannot be built upon class-warfare").

197. *Id.* at 41.

198. DIVES IN MISERICORDIA, *supra* note 168, at 45.

199. SOLLICITUDO REI SOCIALIS, *supra* note 168, at 419-20.

200. *Id.* at 421; see also QUADRAGESIMO ANNO, *supra* note 148, at 47-48 (reconstructing social order requires reform of morals); POPE JOHN PAUL II, REDEMPTOR HOMINIS (THE REDEEMER OF MAN) 33 (Daughters of St. Paul transl.) (1979) [hereinafter REDEMPTOR HOMINIS] ("This difficult road of the indispensable transformation of the structures of economic life is one on which it will not be easy to go forward without the intervention of a true conversion of mind, will and heart."); EVANGELII NUNTIANDI, *supra* note 168, at 309 (stating that Church's evangelizations seeks "interior change" and "conver[sion]" of both "personal and collective consciences of people"); ECONOMIC JUSTICE FOR ALL, *supra* note 20, at 40 ("The world is wounded by sin and injustice, in need of conversion and of the transformation

therefore, a mistake to believe that social progress can be made without seeking to improve moral and spiritual well-being as well, and both should always be sought together.²⁰¹

The Church recognizes that all earthly progress will be imperfect. The Kingdom of God will be initiated by Christ at the end of history, and it should not be confused with any human achievement.²⁰² However, the Church still has “confidence . . . in man”²⁰³ so that progress toward social reconstruction and renewal is not only possible²⁰⁴ but also an essential responsibility for all.²⁰⁵ As social relations are transformed according to charity, brotherhood and peace, human society becomes a “foreshadowing”²⁰⁶ of God’s kingdom and “reflect[s] and in a sense anticipate[s] the glory of th[is] kingdom.”²⁰⁷

In this process, the Church plays a critical role as both an example and an instrument of social unity. Church documents describe the Church as an example of a “new brotherly community,”²⁰⁸ a “leaven and . . . a kind of soul for human society,”²⁰⁹ a “witness” of God’s love,²¹⁰ a sign of “transformation” and “newness of life,”²¹¹ and a “model of collabora-

that comes when persons enter more deeply into the mystery of the death and Resurrection of Christ.”).

201. See *PACEM IN TERRIS*, *supra* note 168, at 140; see also *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 21 (stating that economy must “serve the material and spiritual well-being of people”). In his encyclical *Centesimus Annus*, Pope John Paul II states:

The world today is ever more aware that solving serious national and international problems is not just a matter of economic production or of juridical or social organization, but also calls for specific ethical and religious values, as well as changes of mentality, behavior and structures. . . .

The Church has constantly repeated that the person and society need not only material goods but spiritual and religious values as well.

CENTESIMUS ANNUS, *supra* note 148, at 84-85.

202. See *GAUDIUM ET SPES*, *supra* note 148, at 188-89; *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 430.

203. *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 429.

204. See *id.*; *GAUDIUM ET SPES*, *supra* note 148, at 188 (“To those . . . who believe in divine love, he gives assurance that the way of love lies open to all men and that the effort to establish a universal brotherhood is not a hopeless one.”).

205. See *GAUDIUM ET SPES*, *supra* note 148, at 189 (stating that “the expectation of a new earth must not weaken but rather stimulate our concern for cultivating this one”); *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 430 (stating that expectation of coming Kingdom “can never be an excuse for lack of concern for people in their concrete personal situations and in their social, national, and international life”).

206. *GAUDIUM ET SPES*, *supra* note 148, at 189; *OCTOGESIMA ADVENIENS*, *supra* note 165, at 278.

207. *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 430.

208. *GAUDIUM ET SPES*, *supra* note 148, at 185; see also *EVANGELII NUNTIANDI*, *supra* note 168, at 308 (teaching that Church is a “community of brotherly love”).

209. *GAUDIUM ET SPES*, *supra* note 148, at 189.

210. *SOLLICITUDO REI SOCIALIS*, *supra* note 168, at 431.

211. *EVANGELII NUNTIANDI*, *supra* note 168, at 311.

tion and participation.”²¹² In this way, the Church functions as a “sacrament” or, in other words, a “sign and instrument” of intimate union with God and the unity of all mankind.²¹³ The Church “shows the world that an authentic union, social and external, results from a union of minds and hearts,” and she injects within society the force of “faith and charity put into vital practice.”²¹⁴

The Church’s vision for labor-management relations is part of this larger vision for social life. While the Church’s understanding of labor unions has changed and developed since *Rerum Novarum* was promulgated in 1891, the Church continues to envision unions as a way for workers to collaborate with management to overcome divisions and improve the conditions of workers in a spirit of understanding and mutual concern. When the Church first discussed worker associations in 1891, it depicted a type of association that is very different from the labor unions that we are familiar with today. Instead of organizations composed entirely of workers and designed to be a bargaining agent with management, worker associations resembled mutual aid societies that served both economic and religious functions.²¹⁵ Composed either of workers alone or workers and management together, these associations would promote the prosperity of workers while also providing moral and religious training.²¹⁶ The worker associations that the Church favored in 1891 were essentially Catholic organizations imbued with religious principles and directed towards both spiritual and material ends.²¹⁷ Consistent with its view that workers and employers should work together to improve the conditions of labor, the Church expressed approval of “eminent men” and “Catholics of great wealth” who were voluntarily assisting workers to form these associations.²¹⁸

When the Church celebrated the fortieth anniversary of *Rerum Novarum* in 1931 with Pius XI’s encyclical *Quadragesimo Anno*, the Church continued to view the ideal union as a Catholic association directed towards the spiritual as well as economic improvement of workers.²¹⁹ At times, Pius XI also spoke of vocational groups that would unite employers

212. ECONOMIC JUSTICE FOR ALL, *supra* note 20, at 134.

213. SECOND VATICAN COUNCIL, LUMEN GENTIUM (DOGMATIC CONSTITUTION ON THE CHURCH) 7 (Daughters of St. Paul transl.) (1964); *see also* GAUDIUM ET SPES, *supra* note 148, at 191 (quoting *Lumen Gentium*). The U.S. Bishops also describe the Church as “a communion of people bonded by the Spirit with Christ as their Head, sustaining one another in love, and acting as a sign or sacrament in the world.” ECONOMIC JUSTICE FOR ALL, *supra* note 20, at 129.

214. GAUDIUM ET SPES, *supra* note 148, at 191.

215. *See* RERUM NOVARUM, *supra* note 148, at 42, 48-49.

216. *See id.*

217. Leo XIII spoke of these associations as “associations of Catholics,” *id.* at 50, 52, and associations of “Christian workers,” *id.* at 51.

218. *Id.* at 47.

219. *See* QUADRAGESIMO ANNO, *supra* note 148, at 17-18. The Church recognized that in some situations it would not be possible for Catholic workers to form Catholic unions. *Id.* at 17. Consequently, the Church permitted workers to join neutral trade unions if these unions posed no danger to religion and existed side

and employees together within the same organization and, thereby, help to abolish conflict between the classes.²²⁰ The Church specifically rejected a model of labor relations where workers and management are divided into two opposing parties and bargaining proceeds as between “two armies . . . engaged in combat.”²²¹ Instead, the Church envisioned a harmonious collaboration among employees and employers for the common good.²²²

By 1961, when Pope John XXIII issued the next major encyclical on Catholic social teaching, *Mater et Magistra*, the Church’s understanding of the function of labor unions had changed substantially. The Church no longer viewed unions as specifically Catholic associations, nor as organizations that might include labor and management together in the same group. Rather, the Church now understood unions to be collective bargaining agents representing workers in negotiations with management over terms and conditions of employment.²²³ Thus, the Church gave her approval to the type of labor organization that had emerged in Europe and America in the twentieth century. However, the Church continued to describe the relationship that should exist between worker and employer as a collaborative one based upon mutual concern and the common good, and Church documents repeatedly refuse to view this relationship in divisive or adversarial terms.²²⁴ Unions and employers must work together in

by side with Catholic “associations which aim at giving their members a thorough religious and moral training.” *Id.* at 17-18.

220. *See id.* at 41.

221. *See id.* at 41-42.

222. *See id.* at 17, 41-43, 46.

223. *See* MATER ET MAGISTRA, *supra* note 165, at 100; *see also* GAUDIUM ET SPES, *supra* note 148, at 212; OCTOGESIMA ADVENIENS, *supra* note 165, at 270; LABOREM EXERCENS, *supra* note 177, at 48.

The development of the Church’s understanding of labor unions reflects, in part, the historical evolution of worker associations in the late nineteenth and also twentieth centuries. In the United States, for instance, prior to the late nineteenth century, unions often played a role as mutual aid societies with reform goals. *See* CHARLES C. HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 16-17 (1988). With the rise of the Knights of Labor in the 1880s, a national worker organization emerged that combined educational and social reform goals with the goal of economic improvement. *See* FOSTER RHEA DULLES & MELVIN DUBOFSKY, *LABOR IN AMERICA: A HISTORY* 120-41 (4th ed. 1984); HECKSCHER, *supra*, at 17. However, beginning in the late nineteenth century with the rise of the American Federation of Labor, worker associations gradually evolved into the form we recognize today: collective bargaining agents focused on securing higher wages and better working conditions for their members. *See* DULLES & DUBOFSKY, *supra*, at 142-57; HECKSCHER, *supra*, at 17-25.

224. *See, e.g.*, MATER ET MAGISTRA, *supra* note 165, at 104 (teaching that relationships between workers and management must be “readjusted according to norms of justice and charity”); OCTOGESIMA ADVENIENS, *supra* note 165, at 270 (“The important role of union organizations must be admitted: their object is the representation of the various categories of workers, their lawful collaboration in the economic advance of society, and the development of the sense of their responsibility for the realization of the common good.”).

a spirit of brotherhood and charity and pursue common aims, rather than strife,²²⁵ and like all groups in society, both sides must bring their interests into harmony with the good of the entire community.²²⁶

The Church recognizes that disputes between employees and employers will arise. However, the Church cautions that the proper response should be to seek a peaceful resolution through mutual understanding and “sincere discussion.”²²⁷ While there may be circumstances when even a strike will be necessary to defend the rights of workers,²²⁸ strikes are “an extreme means,”²²⁹ and when they are used, the parties must resume negotiations and “discussion of reconciliation” as quickly as possible.²³⁰ Thus, peace among workers and management, like peace among nations, requires the use of reasoned discussion, cooperation and the desire for reconciliation.²³¹ Force or power, even a balance of power among contending parties, cannot bring lasting peace; peace is, rather, the “fruit of love.”²³² Unions must also be careful not to abuse the use of strikes for narrow self-interest, and strikes must not jeopardize the health or safety of the larger community.²³³ The Church rejects the view that unions are part of a “class struggle which inevitably governs social life”: unions reflect a struggle “for” social justice and the common good, but should never be viewed as a tool or weapon in a struggle “against” others.²³⁴

Church documents also emphasize two additional principles for labor-management relations, and both of these principles have been amplified in Pope John Paul II’s encyclicals. First, the Church teaches that

225. See *MATER ET MAGISTRA*, *supra* note 165, at 100.

226. See *PACEM IN TERRIS*, *supra* note 168, at 139-40; *OCTOGESIMA ADVENIENS*, *supra* note 165, at 270; *cf.* *GAUDIUM ET SPES*, *supra* note 148, at 212 (stating that through participation in labor unions, workers “will be brought to feel that according to their own proper capacities and aptitudes they are associates in the whole task of economic and social development and in the attainment of the universal common good”).

227. *GAUDIUM ET SPES*, *supra* note 148, at 212.

228. See *id.*

229. *LABOREM EXERCENS*, *supra* note 177, at 50; see also *GAUDIUM ET SPES*, *supra* note 148, at 212 (referring to strikes as “ultimate . . . means” for defense of worker rights); *OCTOGESIMA ADVENIENS*, *supra* note 165, at 270 (describing strikes as “a final means of defense”).

230. *GAUDIUM ET SPES*, *supra* note 148, at 212.

231. See *PACEM IN TERRIS*, *supra* note 168, at 146 (stating that peace requires “a mutual assessment of the reasons on both sides of the dispute, . . . a mature and objective investigation of the situation, and . . . an equitable reconciliation of differences of opinion”).

232. *GAUDIUM ET SPES*, *supra* note 148, at 220; see also *PACEM IN TERRIS*, *supra* note 168, at 149 (“There can be . . . no doubt that relations between states, as between individuals, should be regulated not by the force of arms but by the light of reason, by the rule, that is, of truth, of justice and of active and sincere cooperation.”).

233. See *LABOREM EXERCENS*, *supra* note 177, at 50-51; *OCTOGESIMA ADVENIENS*, *supra* note 165, at 270.

234. *LABOREM EXERCENS*, *supra* note 177, at 49.

workers must be given the opportunity to participate in the operation and management of business enterprises.²³⁵ This principle first appeared in *Quadragesimo Anno*, which taught that, whenever possible, workers should be made “sharers” in some way in the ownership, management or profits of the company.²³⁶ Later, the Church described worker responsibility in the productive enterprise as one of the ways in which employees perfect themselves and realize their dignity as persons.²³⁷ The importance of worker participation in the life of the firm has been given special emphasis by the United States Catholic Bishops in their 1986 pastoral letter on Economic Justice for All.²³⁸

Related to this first principle is the Church’s teaching that productive enterprises must be understood as “communi[ties] of persons”²³⁹ or “true human fellowship[s].”²⁴⁰ The workplace is a vehicle for uniting people as they work together to benefit themselves as well as others, including the larger society.²⁴¹ All participants in this community, workers and management alike, must collaborate harmoniously in a spirit of “mutual respect, esteem, and good will.”²⁴² The U.S. Bishops have also given considerable attention to the need for greater partnership and cooperation between workers and management in American businesses.²⁴³

235. See *MATER ET MAGISTRA*, *supra* note 165, at 99; *GAUDIUM ET SPES*, *supra* note 148, at 212; *POPULORUM PROGRESSIO*, *supra* note 168, at 246; *LABOREM EXERCENS*, *supra* note 177, at 36; *CENTESIMUS ANNUS*, *supra* note 148, at 471.

236. See *QUADRAGESIMO ANNO*, *supra* note 148, at 34.

237. In *Mater et Magistra*, Pope John XXIII stated that “[j]ustice is to be observed not merely in the distribution of wealth, but also in regard to the conditions under which men engaged in productive activity have an opportunity to assume responsibility and perfect themselves by their efforts.” *MATER ET MAGISTRA*, *supra* note 165, at 97. In *Populorum Progressio*, Pope Paul VI stated:

John XXIII gave a reminder of the urgency of giving everyone who works his proper dignity by making him a true sharer in the work he does with others Man’s labor means much more still for the Christian: the mission of sharing in the creation of the supernatural world which remains incomplete until we all come to build up together that perfect man of whom St. Paul speaks “who realizes the fullness of Christ.”

POPULORUM PROGRESSIO, *supra* note 168, at 246-47 (quoting *Ephesians* 4:13). When commemorating the hundredth anniversary of *Rerum Novarum* in *Centesimus Annus*, John Paul II wrote that the Church’s teaching:

Recognizes the legitimacy of workers’ efforts to obtain full respect for their dignity and to gain broader areas of participation in the life of industrial enterprises so that, while cooperating with others and under the direction of others, they can in a certain sense “work for themselves” through the exercise of their intelligence and freedom.

CENTESIMUS ANNUS, *supra* note 148, at 63 (citation omitted).

238. See *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 44, 113-16.

239. *CENTESIMUS ANNUS*, *supra* note 148, at 52.

240. *MATER ET MAGISTRA*, *supra* note 165, at 99.

241. See *CENTESIMUS ANNUS*, *supra* note 148, at 47-48, 52-53.

242. *MATER ET MAGISTRA*, *supra* note 165, at 99; see also *LABOREM EXERCENS*, *supra* note 177, at 49.

243. See *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 113-16.

For John Paul II, all of these principles concerning labor-management relations come together in a rich theology of work. John Paul II understands work as essential for human fulfillment. In work, individuals express their dignity by exercising their intelligence and freedom in a creative process that shares in the creative activity of God.²⁴⁴ Work is, therefore, something personal to the worker; he is the “true subject of work,” and in the production process, he must be able to know that he is “working ‘for himself.’”²⁴⁵ However, work takes place as part of a community of workers, and the individual also realizes himself in this community when he collaborates with others for the good of others.²⁴⁶ In short, for John Paul II, individuals realize their full humanity in work by expressing their creative potential in community, for others, and, through this process, by drawing closer to God.²⁴⁷

B. *Catholic Social Teaching and the Model of Collective Bargaining in the NLRA*

The Church’s teaching regarding labor-management relations makes clear that the employment relationship in a Catholic context is not neatly separable into secular and religious components. When the U.S. Bishops affirmed that workers in Catholic institutions have a right to organize and bargain collectively with their employers, they intended Church organizations to be an exemplary model for employment relationships in the larger society.²⁴⁸ Thus, the entire relationship between Catholic employers and their employees must be based upon the principles of love, mutual concern and cooperation that the Church believes should guide economic and social relations in the larger world. There is no aspect of the employment relationship that can escape the ethical and religious dimension that the Church envisions for social relations. While wages and hours may appear to be quintessentially secular matters, the process of bargaining over these matters is not. Like all aspects of the employment relationship, collective bargaining must be understood as part of and guided by the Church’s religious vision. To be sure, the Church no longer views unions of employees as specifically religious organizations with a responsibility for developing the religious and spiritual well-being of workers. Nonetheless, for the Church, unions remain a religious concept through and through. Unions are part of the Church’s vision for human society and, as such, their role in labor-management relations is colored by religious principles.

The Church’s understanding of collective bargaining is not only a religious concept through and through, but the model for collective bar-

244. See *LABOREM EXERCENS*, *supra* note 177, at 57; *CENTESIMUS ANNUS*, *supra* note 148, at 63.

245. *LABOREM EXERCENS*, *supra* note 177, at 38.

246. See *CENTESIMUS ANNUS*, *supra* note 148, at 63-64.

247. See *LABOREM EXERCENS*, *supra* note 177, at 56.

248. See *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 131-32.

gaining in the Church's teaching is very different from the model in federal and state labor laws. As mentioned above, this Article will focus on the NLRA. The NLRA structures an arms-length relationship between employer and employee founded upon an essentially distrustful attitude towards employers and the assumption that the interests of employers and employees inevitably conflict. The adversarial relationship that results from collective bargaining under the NLRA is very different from the cooperative relationship based on mutual concern and charity envisioned by the Church.

When Congress passed the NLRA in 1935, it described the Act as a mechanism for reducing the strikes and other forms of labor strife that disrupt the free flow of interstate commerce.²⁴⁹ The aim of the Act was, therefore, to promote labor peace.²⁵⁰ The basic approach of the Act was to reduce the inequality of bargaining power between employers and employees by protecting the right of workers to organize and bargain collectively through representatives of their own choosing.²⁵¹ Section 7 of the Act guarantees this right,²⁵² and section 8 specifies a series of unfair labor practices by employers and unions that impermissibly interfere with section 7 rights.²⁵³ For example, section 8(a)(1) prohibits employers from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7."²⁵⁴ Under section 8(a)(2), employers may not "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."²⁵⁵ As discussed above, section 8(a)(3) prohibits employers from discrimination in employment with the purpose of encouraging or discouraging union membership.²⁵⁶

Collective bargaining is described in section 8(d) as the mutual obligation of both employer and employee representatives to meet at reasonable times and confer in "good faith" with respect to mandatory bargaining subjects.²⁵⁷ The duty to bargain in good faith does not require either

249. See 29 U.S.C. §§ 141, 151 (2001).

250. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34, 42, 45 (1937).

251. See 29 U.S.C. § 151.

252. *Id.* § 157. Section 7 states that:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities

Id.

253. *Id.* § 158 (enumerating unfair labor practices).

254. *Id.* § 158(a)(1).

255. *Id.* § 158(a)(2). For further discussion of section 8(a)(2), see *infra* text accompanying notes 328-94.

256. *Id.* § 158(a)(3). For a further discussion of section 8(a)(3), see *supra* note 36 and accompanying text.

257. *Id.* § 158(d).

party to assent to a proposal or make a concession.²⁵⁸ The parties must, however, have a desire to reach agreement and make a serious effort to find common ground.²⁵⁹

Under section 9, a union becomes the representative of a unit of employees when the union is “designated or selected” by a majority of the employees in the unit.²⁶⁰ The selected union becomes the “exclusive” representative for all the employees in the unit, and the employer is prohibited from bargaining with any other labor organization or with employees directly.²⁶¹ Section 9 also provides for an election procedure for selecting union representatives that is supervised by the NLRB.²⁶² The Board has the authority to determine appropriate bargaining units, investigate representation questions, police the election process to ensure that the outcome fairly represents the choice of employees, and certify collective bargaining agents.²⁶³ The Act also gives the Board the responsibility for supervising the collective bargaining process.²⁶⁴ The Board adjudicates unfair labor practice charges, including claims that one or both parties have refused to comply with their duty to bargain in good faith.²⁶⁵

While the NLRA is designed to promote labor peace by equalizing the bargaining power of employees and employers and bringing both sides to the bargaining table,²⁶⁶ the process of collective bargaining is not envisioned as a serene or idealized dialogue between friendly parties. In a series of decisions addressing the rights of employees and employers to use economic weapons to advance their bargaining position, the Supreme Court has rejected the view that collective bargaining can be equated with an “academic discussion”²⁶⁷ or “collective search for truth.”²⁶⁸ The NLRA does not assume that “perfect understanding among people would lead to perfect agreement among them on values.”²⁶⁹ Thus, the Board has erred when it has sought to prohibit weapons that it believes interfere with rea-

258. *See id.*

259. *See* NLRB v. Ins. Agents’ Int’l Union, 361 U.S. 477, 485-86 (1960).

260. 29 U.S.C. § 159(a).

261. *Id.*

262. *See id.* § 159. While elections are the preferred mechanism for determining representation questions, the Act does not require an election. Generally, employers may insist upon an election, but the NLRB can recognize a union as the exclusive bargaining representative of a unit of employees without an election in certain cases where the employer has committed unfair labor practices that have the tendency to undermine the union’s majority and impede a fair election. *See* NLRB v. Gissel Packing Co., 395 U.S. 575, 610-15 (1969).

263. *See* 29 U.S.C. § 159.

264. *See* H.K. Porter Co. v. NLRB, 397 U.S. 99, 103 (1970).

265. *See* 29 U.S.C. § 160.

266. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42, 45 (1937).

267. NLRB v. Ins. Agents’ Int’l Union, 361 U.S. 477, 495 (1960).

268. *Id.* at 488.

269. *Id.* at 488-89.

soned discussion and interchange.²⁷⁰ Rather, the Act leaves employees and employers free to use economic weapons not specifically prohibited by the Act.²⁷¹

For example, in *NLRB v. Insurance Agents' International Union*, the Supreme Court found that a union of insurance agents did not violate the Act when it sought to press its position by having members refuse to solicit new business, refuse to comply with company reporting procedures, report late to work and leave early, and engage in other on-the-job activities designed to harass the company and interfere with its business.²⁷² Similarly, no violation occurred when the employers in *American Ship Building Co. v. NLRB*²⁷³ and *NLRB v. Brown*²⁷⁴ sought to advance their bargaining position with lockouts.²⁷⁵ As long as employers do not use weapons as a device to undermine the union or the collective bargaining process and their weapons are not inherently destructive of employee rights without a significant economic justification, the Board cannot interfere.²⁷⁶

In *Insurance Agents*, the Supreme Court explained that an idealized vision of collective bargaining as a process of reasoned discussion and persuasion does not fit with the realities of the employment relationship. According to the Court, “[t]he parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.”²⁷⁷ Thus, the use of economic weapons, “should more peaceful measures not avail,”²⁷⁸ is not some “grudging exception” to the Act’s vision for collective bargaining.²⁷⁹ To the contrary, “[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and

270. See *id.* at 497-500; see also *Lodge 76, Int’l Ass’n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 149-50 (1976).

271. See *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 316-18 (1965); *NLRB v. Brown*, 380 U.S. 278, 292 (1965); *Lodge 76*, 427 U.S. at 143-44.

272. See *Ins. Agents*, 361 U.S. at 479-81.

273. 380 U.S. 300.

274. 380 U.S. 278.

275. In *American Ship Building*, the employer temporarily locked out and laid off employees to bring economic pressure on the union. 380 U.S. at 301-02. In *Brown*, a multi-employer bargaining group locked out its employees and used temporary replacements in response to a whipsaw strike against one member of the group. 380 U.S. at 279-81.

276. See *Am. Ship Bldg.*, 380 U.S. at 308-09, 311-12; *Brown*, 380 U.S. at 280-84, 286-88. In *Lodge 76, International Ass’n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), the Supreme Court also held that, like the NLRB, state labor relations boards may not prohibit the use of weapons that are not proscribed under the Act. *Id.* at 149-51, 153-55 (holding that union members’ refusal to work overtime in order to bring economic pressure on employer “must be free of regulation by the States”).

277. *Ins. Agents*, 361 U.S. at 488.

278. *Am. Ship Bldg.*, 380 U.S. at 317.

279. *Ins. Agents*, 361 U.S. at 495.

Taft-Hartley Acts [the NLRA] have recognized.”²⁸⁰ The Supreme Court has also argued that the Board’s attempt to regulate the use of these weapons to ensure an idealized or balanced dialogue will inevitably involve intrusion into the substantive terms of collective bargaining agreements, which the Act forbids.²⁸¹

To be sure, the NLRA does not contemplate that the collective bargaining process will be solely an antagonistic one, nor that the parties will always resort to economic weapons or pressure tactics to achieve their interests. As the parties deal with one another, bonds between them will develop and cooperation and collaboration will occur.²⁸² Much of the antagonism between the parties will, therefore, be “channel[ed]” into discussion and “defus[ed]” through the negotiating process,²⁸³ which will have a “mediatory influence” on controversies and disagreements.²⁸⁴ Moreover, the parties cannot evade their duty to engage in collective negotiations. The duty to bargain in good faith requires a sincere and serious effort to reach common ground, and it prohibits either party from refusing to negotiate or from engaging in actions that directly impede the process of discussion.²⁸⁵

However, behind the bargaining process and a key factor in motivating the parties to reach agreement is the availability of economic weapons

280. *Id.* at 489.

281. *See id.* at 488-90; *see also Lodge 76*, 427 U.S. at 153.

282. *See Ins. Agents*, 361 U.S. at 489-90. The Supreme Court in *Insurance Agents* quotes from Archibald Cox:

Collective bargaining is curiously ambivalent even today. In one aspect collective bargaining is a brute contest of economic power somewhat masked by polite manners and voluminous statistics. As the relation matures, Lilliputian bonds control the opposing concentrations of economic power; they lack legal sanctions but are nonetheless effective to contain the use of power. Initially it may be only fear of the economic consequences of disagreement that turns the parties to facts, reason, a sense of responsibility, a responsiveness to government and public opinion, and moral principle; but in time these forces generate their own compulsions, and negotiating a contract approaches the ideal of informed persuasion.

Id. (quoting Archibald Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401, 1409 (1958)).

283. *First Nat’l Maint. Corp. v. NLRB*, 452 U.S. 666, 674 (1981).

284. *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 211 (1964); *see also H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) (“The basic theme of the Act was that through collective bargaining the passions, arguments, and struggles of prior years would be channeled into constructive, open discussions leading, it was hoped, to mutual agreement.”).

285. For example, in *NLRB v. Katz*, 369 U.S. 736 (1962), the Supreme Court held that an employer may not make unilateral changes in mandatory subjects of bargaining during the negotiations process. *Id.* at 743, 747. According to the Court, such unilateral changes would be tantamount to a refusal to negotiate. *Id.* In *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956), the Supreme Court also stated that claims made during collective negotiations should be honest claims. *Id.* at 152. The Court found that when the employer in that case refused to provide information that would support its claim of inability to pay higher wages, it violated the duty to bargain in good faith. *Id.* at 152-53.

and the threat that they will be used.²⁸⁶ The presence of these weapons and a corresponding “‘area of labor combat’”²⁸⁷ is, as the Supreme Court has said, part and parcel of the structure of the Act. Labor peace is achieved under the Act by balancing the power of employers and employees, directing both parties to bargain in good faith, and giving each party wide discretion in the use of weapons should less adversarial tactics fail.

This vision of the collective bargaining process is deeply inconsistent with the Church’s vision. For the Church, the animating spirit in labor-management relations must be one of brotherhood and cooperation. Strikes, and perhaps other economic weapons, are permitted, but the Church cautions that they should only be used in extreme cases, never abused for the purposes of advancing a party’s narrow self-interest and followed quickly by a mutual endeavor to seek reconciliation. Rather than seeking peace through a balance of power between contending parties, the Church teaches that lasting peace can only be achieved through mutual trust. Just conditions, too, must be sought with love. Thus, for the Church, the collective bargaining process is not one where the parties necessarily proceed from antagonistic viewpoints and concepts of self-interest. To the contrary, each party must try to understand the other’s position, even put themselves in the other’s position, and genuinely seek reasoned interchange and a harmonious outcome. The common good, not merely common ground, should be the object of the negotiating process, and the primary motivation for reaching agreement should be love, not fear. Indeed, for the Church, when individuals or groups oppose one another with a self-interested attitude, true human fulfillment and social renewal is impossible. One cannot give oneself in love if one faces the other as an “adversar[y].”²⁸⁸ Nor is a genuine “community of work”²⁸⁹ possible where workers and management view each other as potential enemies rather than joint participants in a common enterprise. Requiring Catholic employers to bargain under the NLRA would, therefore, subject them to a very different model for collective bargaining than the Church desires for its own institutions and for the larger world.

Several specific provisions of the Act are also deeply inconsistent with the Catholic vision for collective bargaining. One example is the NLRB’s long-standing position regarding promises or grants of benefits made by employers during an organizing campaign.²⁹⁰ As noted above, one of the roles of the Board under the Act is to police representation elections and

286. See *Ins. Agents*, 361 U.S. at 489 (approving of scholarship “describing economic force as ‘a prime motive power for agreements in free collective bargaining’”) (quoting GEORGE W. TAYLOR, *GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS* 18 (1948)).

287. *Lodge 76*, 427 U.S. at 146 (citing *Garner v. Teamsters Union*, 346 U.S. 485, 500 (1953)).

288. *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 317 (1965).

289. See discussion *supra* notes 239-43 and accompanying text.

290. See *NLRB v. Exch. Parts Co.*, 375 U.S. 405 (1964).

ensure that outcomes fairly reflect employee choices.²⁹¹ One of the ways that an employer may undermine employee choice is through conduct that amounts to an unfair labor practice, such as by threatening employees with reprisals if they vote for the union²⁹² or by discharging union supporters in order to discourage other workers from voting for the union.²⁹³ The Board has also developed additional regulations for campaign speech and conduct to ensure that the election functions as a “laboratory” for determining the “free and untrammelled choice” of employees.²⁹⁴ Violations of these “laboratory conditions” regulations do not amount to unfair labor practices, but they do provide a basis for setting aside the election and holding a second election at a later time.²⁹⁵

The Board has held that promises or grants of benefits made by an employer during an election campaign constitute an unfair labor practice if the employer made the promises or grants in order to influence the outcome of the election.²⁹⁶ Such promises and grants violate section 8(a)(1), which prohibits employers from “interfer[ing] with, restrain[ing], or coerc[ing]” employees in the exercise of their section 7 rights to organize and bargain collectively with representatives of their own choosing.²⁹⁷ While section 8(c) of the Act states that employer speech alone cannot constitute an unfair labor practice, it contains an exception for expression that contains a “threat of reprisal or force or promise of benefit.”²⁹⁸

In *NLRB v. Exchange Parts Co.*,²⁹⁹ the Supreme Court approved the Board’s position and provided two rationales for why promises and grants of benefits interfere with employee free choice.³⁰⁰ While the employer conduct in *Exchange Parts* involved only grants of benefits, later courts have routinely relied upon the decision and analysis in *Exchange Parts* in cases involving promises of benefits as well.³⁰¹ According to the Court in *Exchange Parts*:

291. See *supra* notes 262-65 and accompanying text.

292. Threats of reprisal are a violation of section 8(a)(1).

293. Such discharges violate section 8(a)(3).

294. Gen. Shoe Corp., 77 N.L.R.B. 124, 126-27 (1948).

295. *Id.* at 127.

296. This has been a long-standing position of the Board. See, e.g., Hudson Hosiery Co., 72 N.L.R.B. 1434, 1436-37 (1947); see also *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 408-09 (1964) (describing and approving Board’s position).

297. 29 U.S.C. § 158(a)(1) (2001).

298. *Id.* § 158(c). In *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), the Supreme Court found that section 8(c) is consistent with the First Amendment. *Id.* at 616-20.

299. 375 U.S. 405 (1964).

300. See *id.* at 409-10. The Supreme Court also expressed approval in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944) (“[T]he action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats or domination.”).

301. See, e.g., *V & S ProGalv, Inc. v. NLRB*, 168 F.3d 270, 277-78 (6th Cir. 1999); *NLRB v. Century Moving & Storage, Inc.*, 683 F.2d 1087, 1091-92 (7th Cir.

The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.³⁰²

Thus, the Court found that employees would interpret grants of benefits as the equivalent of a threat of reprisal should the employees choose the union. The Supreme Court provided an additional basis for the Board's rule when it refuted the claim that the Board's rule would discourage benefits for labor. According to the Supreme Court:

The beneficence of an employer is likely to be ephemeral if prompted by a threat of unionization which is subsequently removed. Insulating the right of collective organization from calculated good will of this sort deprives employees of little that has lasting value.³⁰³

In other words, when employers make promises or grants of benefits, they are not to be trusted, and any benefits will be fleeting. A promise or grant of benefit is essentially a misleading gesture by employers designed to stave off unionization rather than a genuine expression of good will. Employees need to be protected from such promises and grants because there is a danger that they will believe their employers and rely upon their representations when voting.³⁰⁴

The Supreme Court's reasoning in *Exchange Parts* has been criticized by many scholars. Scholars have argued that employees do not need the protection that the Board's rule provides. They are not naive about the risks associated with their employer's representations, and the union will be vigorous in pointing out these risks.³⁰⁵ Furthermore, employer promises or grants of benefits need not always be distrusted. Employers have a strong interest in following through with any promises because if they do not, disgruntled employees can choose a union in the future.³⁰⁶

1982); *Sioux Prods., Inc. v. NLRB*, 684 F.2d 1251, 1254 n.4 (7th Cir. 1982); *NLRB v. Garry Mfg. Co.*, 630 F.2d 934, 941-42 (3d Cir. 1980).

302. *Exch. Parts*, 375 U.S. at 409.

303. *Id.* at 410.

304. In *NLRB v. Gissel Packing Co.*, the Supreme Court made a similar assumption that employees need protection from manipulative employer tactics. According to the Court, the balance between employee rights under the Act and employer speech rights under section 8(c) must "take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 395 U.S. at 617.

305. See, e.g., Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the NLRA*, 78 HARV. L. REV. 38, 115 (1964).

306. See *id.* at 114; Charles C. Jackson & Jeffrey S. Heller, *Promises and Grants of Benefits Under the National Labor Relations Act*, 131 U. PA. L. REV. 1, 55 (1982).

In a well-known study on employee voting behavior in representation elections, Julius Getman, Stephen Goldberg and Jeanne Herman have also disputed the Board's assumptions that employees pay attention to company tactics and are influenced by them.³⁰⁷ According to the authors of this study, the data show that employees do not view promises and grants of benefits as threats of reprisal,³⁰⁸ and such promises and grants do not have an impact on employee choice.³⁰⁹ The Getman, Goldberg and Herman study reaches similar conclusions regarding a wide range of unlawful campaign practices. Employees are not generally attentive to the employer's campaign.³¹⁰ They have strong predispositions regarding unionization prior to the campaign, and employer campaign tactics, even those that are unlawful, have little effect on employee choice.³¹¹ The authors' claim that campaign tactics generally have little impact on the outcome of elections has been controversial. Other scholars have disputed the study's conclusions on a number of grounds, including methodology.³¹² However, the Supreme Court's view that employees will perceive grants of benefits as threats of reprisal and naively rely on such grants without attempting to assess the genuineness of their employers' motivations does seem far-fetched. Where a union has an incentive to challenge the employer's representations, employees are unlikely to rely on promises or grants of benefits without considering the risks, and they will be in a good position to evaluate the sincerity of their employers.³¹³

Still other criticisms have been made of the Supreme Court's analysis in *Exchange Parts*. Scholars have argued that the Board's restrictions on employer speech are inconsistent with the First Amendment.³¹⁴ They have also argued that the Board's rule deprives employees of important

307. See JULIUS G. GETMAN, STEPHEN B. GOLDBERG & JEANNE B. HERMAN, *UNION REPRESENTATION ELECTIONS: LAW AND REALITY* 111, 140-47 (1976).

308. See *id.* at 119, 151.

309. See *id.* at 141, 147, 151.

310. See *id.* at 140.

311. See *id.* at 140-46.

312. For works disputing the soundness of the study's methodology and conclusions, see, for example, W. Dickens, *The Effects of Company Campaigns on Certification Elections: Law and Reality Once Again*, 36 *INDUS. & LAB. REL. REV.* 560 (1983); Patricia Eames, *An Analysis of the Union Voting Study from a Trade-Unionist's Point of View*, 28 *STAN. L. REV.* 1181 (1976); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 *HARV. L. REV.* 1769, 1783-86 (1983) (drawing on Dickens's work). For support for the study's findings, see, for example, Laura Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's Gissel Decision*, 79 *NW. U. L. REV.* 87 (1984).

313. See Bok, *supra* note 305, at 116 (arguing that promises or grants of benefits before election are of "doubtful efficacy").

314. See Julius Getman, *Labor Law and Free Speech: The Curious Policy of Limited Expression*, 43 *MD. L. REV.* 4 (1984). *But see* Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 *BERKELEY J. EMP. & LAB. L.* 357, 390 (1995) (employer speech is corporate commercial speech and should be regulated as such).

information for making a reasoned and informed choice about unionization.³¹⁵ If employers are not permitted to make promises or grants of benefits that they would otherwise be willing to make to discourage unionization, employees will not have accurate knowledge about what working conditions would be like in a nonunionized environment, and, thus, their ability to evaluate and compare the benefits of unionization and nonunionization will be skewed.³¹⁶ The Board's rule has also been criticized as difficult to enforce,³¹⁷ and for providing few benefits for the cost of administration.³¹⁸ It has also been criticized as favoring unionization rather than true free choice.³¹⁹

There are defenders of the Board's position. Some have viewed promises or grants of benefits as ugly "bribes" that have no place in a fair election.³²⁰ Other scholars have defended the Supreme Court's assumption that employees need protection from employer tactics. In the view of these scholars, the employment relationship is inherently unequal, and the economic dependence of workers on employers means that employer speech has more coercive power than may initially be supposed.³²¹ In his article *Promises to Keep*, Paul Weiler has made a similar argument that the willingness of employers to use unlawful tactics to intimidate and the "skyrocketing"³²² occurrence of coercive tactics "foster[] an environment in which employees . . . take very seriously even subtle warnings about the consequences of joining a union."³²³ Thus, paternalistic protections for employees are not only appropriate but are necessary to protect employee free choice. Indeed, these scholars would place even greater limitations on the role of the employer in the election process than the Board has

315. See Bok, *supra* note 305, at 115; Jackson & Heller, *supra* note 306, at 25, 56, 62-63. *Bul see* Story, *supra* note 314, at 457 ("In the 1990s, voting employees already have no shortage of information sources to find out the employer's side of the unionization option and the alleged threat that unions impose.").

316. See Bok, *supra* note 305, at 115; Jackson & Heller, *supra* note 306, at 25, 62.

317. See Bok, *supra* note 305, at 116.

318. See GETMAN, GOLDBERG & HERMAN, *supra* note 307, at 161-62; *see also* Bok, *supra* note 305, at 64 (arguing that costs of administration counsel against retaining rules of speculative value). Charles Jackson and Jeffrey Heller also argue that the Board's rule encourages gamesmanship, *see* Jackson & Heller, *supra* note 306, at 55, and they join the authors of the Getman, Goldberg and Herman study in criticizing the Board's position for generating costly litigation, *see id.* at 64; GETMAN, GOLDBERG & HERMAN, *supra* note 307, at 162.

319. See Jackson & Heller, *supra* note 306, at 53.

320. Edward B. Miller, *The Getman, Goldberg and Herman Questions*, 28 STAN. L. REV. 1163, 1174 (1976) (former NLRB chairman); *see also* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 575 (1993) (analogizing grants of economic benefits to "vote-buying").

321. *See, e.g.*, Story, *supra* note 314, at 456 ("[T]he explicit and 'hidden' coerciveness and hierarchy of the employment relationship invest most employer speech with coercive power.").

322. Weiler, *supra* note 312, at 1769.

323. *Id.* at 1781.

done. Weiler has argued for “the elimination of the representation campaign through a system of instant elections.”³²⁴ Instant elections will reduce the opportunities for employers to manipulate employee choice.³²⁵ Others have argued that employers should have no legally sanctioned role in representation elections³²⁶ or should be prohibited from intervening altogether.³²⁷

What all of these scholars miss, supporters of *Exchange Parts* and detractors alike, is that the Board’s rule deprives employees and employers of something that the Church would view as even more important than informed choice, efficient administration or broad scope for employer speech. What the prohibition on promises and grants of benefits does is restrict the ability of employers to offer, and employees to accept, a gesture of reconciliation. Under the Board’s rule, an employer cannot listen to employee complaints, genuinely try to understand them, and then respond with an overt offer to meet employee concerns outside the context of unionization. If the employer says, “yes, I understand. You have legitimate claims and I will try to meet them. Take these benefits and let us avoid an adversarial bargaining system under the NLRA,” the employer has committed an unfair labor practice. While such a conversation may not occur very often in the commercial world of corporate employers, it is very foreseeable in a Church context. Church employers may understandably want to avoid collective bargaining under the NLRA because the Act’s model for collective bargaining is so different from the Church’s more cooperative vision for labor-management relations. Church employers can also be expected to try to meet employee demands with promises and grants of benefits, and they may well hope and intend that these promises will encourage workers to reject unionization and collaborate with management in a less adversarial mode than the NLRA envisions. In such a context, the promise or grant of benefits is, in essence, an attempt at reconciliation, and if the gesture is accepted by employees, the acceptance is an act of forgiveness.

What the Court in *Exchange Parts* misses is that a promise or grant of benefits may be neither a fist nor even an ugly bribe but, rather, an olive branch extended in an act of conciliation. The Supreme Court assumes that gestures of beneficence by employers are not to be trusted and that employees need protection from their misleading promises. When promises or grants of benefits are made, the interchange is necessarily exploitative. Workers are threatened, and they will likely be hoodwinked by ephemeral benefits. The Supreme Court seems to have been unable to imagine that a promise of benefits might be what it appears to be: an olive branch designed to achieve peace and mutual good. Thus, the Supreme

324. See *id.* at 1770.

325. See *id.* at 1770, 1816.

326. See Becker, *supra* note 320, at 500-01, 585-86.

327. See Story, *supra* note 314, at 456.

Court follows the Board in cutting off that very possibility. Reconciliation is an unimagined possibility, and, as a consequence, it becomes an actual impossibility.

If the NLRA is applied to religious institutions, these same assumptions and restrictions will be applied to the Church. If a religious employer tries to make a promise or grant of benefits during an election campaign with the intent of encouraging workers to vote against unionization, the law will assume that the employer is acting in bad faith. Church institutions will be unable to make such gestures even if they genuinely want to address worker concerns and to strive for a labor-management relationship more consistent with Church principles. To prevent Catholic institutions from making such gestures to their employees would certainly be a significant infringement on religious freedom. The law would, in essence, be prohibiting speech and conduct that is suffused with a religious meaning and purpose.

Another provision of the NLRA that is inconsistent with the Catholic vision for labor-management relations is section 8(a)(2).³²⁸ Section 8(a)(2) makes it an unfair labor practice for an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”³²⁹ The purpose of section 8(a)(2) was to eliminate “company unions,” which had proliferated in the years before the passage of the Act.³³⁰ The term “company union” referred to unions or employee committees set up by management as an alternative to independent unions.³³¹ Senator Robert Wagner, the leading proponent and drafter of the original Act, condemned company unions as “sham” unions.³³² Employers establish these unions to give workers the impression that they have a voice in company affairs, but in reality, management controls the union and, thus, the outcome of any interactions with it. In Wagner’s words, “[c]ollective bargaining becomes a sham when the employer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing.”³³³

As the language of section 8(a)(2) indicates, the way that this section works is to make it unlawful for employers to “dominate,” “interfere with” or “support” a “labor organization.” A labor organization is defined in

328. See 29 U.S.C. § 158(a)(2) (2001).

329. *Id.* § 158(a)(2).

330. For historical background on section 8(a)(2), see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1442-61 (1993); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 518-34 (1986).

331. See Kohler, *supra* note 330, at 519-20.

332. See 79 CONG. REC. 2372 (1935), reprinted in 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1313 (1949) [hereinafter LEGISLATIVE HISTORY].

333. *Hearings on S. 1958 Before the S. Comm. on Educ. and Labor*, 74th Cong., 1st Sess. 40-41 (1935) (statement of Sen. Robert Wagner), reprinted in 1 LEGISLATIVE HISTORY, *supra* note 332, at 1416-17.

section 2(5) of the Act as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”³³⁴ The Board has broken down this definition into three elements. An organization is a “labor organization” under section 2(5) if (1) employees participate, (2) the organization exists, at least in part, for the purpose of “dealing with” an employer and (3) the dealing concerns any of the subjects listed in the statute, including wages, hours, grievances and other conditions of work.³³⁵ Where the organization is an employee “representation committee or plan,” there must also be evidence that the organization serves that representational role.³³⁶

The Act does not define what it means for a labor organization to “deal with” an employer. In *NLRB v. Cabot Carbon Co.*, the Supreme Court held that the term “dealing with” should be construed broadly and goes beyond actual collective bargaining.³³⁷ In recent decisions, the Board has given further guidance. An organization deals with an employer whenever their interaction involves a “bilateral process” in which employees make proposals and these proposals are considered by management.³³⁸ In the Board’s words, dealing with “involves . . . a bilateral mechanism between two parties. That ‘bilateral mechanism’ ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.”³³⁹ The Board has carved out a series of “safe havens” where it has found that a bilateral relationship does not exist.³⁴⁰ For example, brainstorming groups or other groups formed for the purpose of sharing information do not deal with management if the group does not make proposals to man-

334. 29 U.S.C. § 152(5).

335. *Electromation, Inc.*, 309 N.L.R.B. 990, 994, 996 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

336. The NLRB has not decided whether an organization must have a representational function to meet the requirements of a labor organization. *See Polaroid Corp.*, 329 N.L.R.B. 424, 424 (1999).

337. *See NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959).

338. *Electromation*, 309 N.L.R.B. at 997 & n.21.

339. *E.I. Du Pont De Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993). The Board further states:

If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.

Id.

340. *Polaroid*, 329 N.L.R.B. at 425.

agement.³⁴¹ Committees with a “suggestion box” procedure also do not involve dealing where proposals are made by individual employees rather than on a group basis.³⁴² Where committees exist solely for the purpose of planning educational programs, there is no dealing.³⁴³ The delegation of management functions to employee groups also does not involve dealing between management and workers.³⁴⁴

Organizations of employees that deal with management are not labor organizations under the Act if the dealings do not concern matters covered under section 2(5). Thus, if the organization does not address “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work,” there is no violation of the Act.³⁴⁵ For example, the Board has suggested that employee committees established to work with management on quality or efficiency issues, rather than working conditions, do not violate the Act.³⁴⁶

If an organization meets the definition of a “labor organization” under section 2(5), section 8(a)(2) is violated whenever an employer dominates, interferes with or supports the organization. Domination is the more serious infringement. If the Board finds that a company has dominated a labor organization, it will order the employer to cease dealing with or recognizing the organization and completely disestablish it.³⁴⁷ If the company has only interfered with or supported the organization, the organization need not be disestablished, but the Board will order the company to cease and desist from the unlawful activity.³⁴⁸ While the line separating domination from other unlawful activity is often imprecise, and reviewing courts often differ from the Board on this issue, the Board has clearly stated that domination exists where a labor organization has been created by management, management has determined its structure and function, and its continued existence depends on management.³⁴⁹

According to the Board, the purpose of section 8(a)(2) is to ensure that labor organizations that deal with management on working condi-

341. *See id.*; *Du Pont*, 311 N.L.R.B. at 894.

342. *Polaroid*, 329 N.L.R.B. at 425; *Du Pont*, 311 N.L.R.B. at 894.

343. *See Du Pont*, 311 N.L.R.B. at 895.

344. *See Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

345. 29 U.S.C. § 152(5) (2001).

346. *See Electromation*, 309 N.L.R.B. at 998.

347. *See, e.g., Keeler Brass Auto. Group*, 317 N.L.R.B. 1110, 1116 (1995); *Carpenter Steel Co.*, 76 N.L.R.B. 670, 673 (1948).

348. *See, e.g., M.K. Morse Co.*, 302 N.L.R.B. 924, 925-26, 932-34, 940 (1991). If the unlawful support consists of recognition of a union that does not have the support of a majority of employees, the Board will order the employer to cease recognizing the union or giving effect to any contract with it unless and until the union is properly certified by the Board. *See, e.g., ILGWU v. NLRB (Bernhard-Altman Texas Corp.)*, 366 U.S. 731, 735, 739-40 (1961); *Wayne County Neighborhood Legal Servs., Inc.*, 333 N.L.R.B. 146, 149 (2001); *Carpenter Steel*, 76 N.L.R.B. at 673.

349. *See Electromation*, 309 N.L.R.B. at 995.

tions and other section 2(5) matters are independent of management. The independence of labor organizations is important for several reasons. First, it protects employees from being deceived by employers who use management-dominated organizations to give the impression that employee concerns are being addressed bilaterally when, in fact, they are not.³⁵⁰ Second, requiring labor organizations to be independent protects the rights of employees to select representatives of their own choosing, free from employer interference and coercion.³⁵¹ The freedom of employees to choose their own representatives is endangered where management-controlled organizations are presented as suitable alternatives to collective bargaining because these organizations can never provide the loyal representatives that the Act envisions. Senator Wagner made this point when he argued that freedom for workers to “select a form of organization that is not free is a contradiction in terms.”³⁵² In the Board’s words, “[m]uch of the harm implicit in employer-dominated organizations is that, when they are successful, they appear to employees to be the result of an exercise of statutory freedoms, when in fact they are coercive by their very nature.”³⁵³

The effect of section 8(a)(2) is to funnel all bilateral dealing between employers and employees over working conditions and other section 2(5) matters into collective bargaining or some other type of arms-length relationship. When bilateral discussions over wages, hours and other working conditions occur, employers and employees must be separated into independent camps. Joint labor-management committees and other structures that do not preserve full employee independence are prohibited.³⁵⁴ Instead, the parties must sit across the negotiating table from one another, and employers, in particular, are restrained from joining employees on their side of the table. The assumption under the Act is that such a strict separation is necessary because too close a relationship between labor and management is dangerous. Management will abuse joint committees and other nonindependent organizations to give employees the illusion that true bilateral discussions are occurring. Thus, section 8(a)(2) reflects a profound distrust of the motives and conduct of employers. In addition, the Act also assumes that employees will not be able to protect themselves from manipulative employer practices by exercising their rights under the Act to form independent unions. Presumably this is because employees

350. *See id.* at 998.

351. *See* Polaroid Corp., 328 N.L.R.B. 424, 424 (1999).

352. *Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 15 (1935), reprinted in 2 LEGISLATIVE HISTORY, *supra* note 332, at 2489.

353. *Electromation*, 309 N.L.R.B. at 997 n.27.

354. In unionized workplaces, joint labor-management committees are permissible, but they must be negotiated by the employer and the union. *See* Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation*, 69 WASH. L. REV. 331, 355-56 (1994) (describing common features of such agreements among major U.S. companies).

will believe employers when they falsely present joint committees or employer-controlled employee organizations as vehicles for addressing employee concerns through bilateral discussion and interchange.

Section 8(a)(2) has become increasingly controversial in recent decades, and many scholars are calling for its repeal or modification. These scholars are concerned that section 8(a)(2) cannot be reconciled with many of the new programs for employee participation that have become popular in the contemporary American workplace. These employee participation programs include a range of different types of organizations, including quality of work life programs, quality control circles, self-directing work teams, job enrichment programs, and other types of programs designed to increase worker participation and involvement in decision making and operations.³⁵⁵ Those who support these programs point to numerous benefits associated with greater worker involvement in the workplace. Worker involvement can help American companies meet the challenges of increasing global competition by improving productivity, efficiency and product quality.³⁵⁶ Employee involvement programs can also increase labor-management cooperation, which not only improves the competitiveness of U.S. companies,³⁵⁷ but also decreases adversarialism and conflicts between management and workers.³⁵⁸ Increased employee involvement will also enhance worker satisfaction and morale³⁵⁹ and, thus, the contributions of employees to the company.³⁶⁰ In addition, employee involvement has been defended as a vehicle for affording employees greater dignity.³⁶¹

Supporters of these programs tend to be very critical of section 8(a)(2) because they correctly observe that many employee participation programs violate the Act. Employee involvement programs are often initiated by employers, and, once formed, employee committees are rarely independent of management. Many committees also address working conditions and other section 2(5) subjects. Where such programs also in-

355. For a discussion of the types of worker participation programs commonly used in American companies, see Kohler, *supra* note 330, at 505-10.

356. See PAUL C. WEILER, *GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW* 192 (1990); William B. Gould IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 CREIGHTON L. REV. 3, 7 (1996); Kohler, *supra* note 330, at 499, 504.

357. See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 110-11 (1993); Moberly, *supra* note 354, at 332; Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-first Century*, 3 U. PA. J. LAB. & EMP. L. 177, 198 (2001).

358. See GOULD, *supra* note 357, at 110; WEILER, *supra* note 356, at 192; Michael H. LeRoy, *Employee Participation in the New Millennium: Redefining a Labor Organization Under Section 8(a)(2) of the NLRA*, 72 S. CAL. L. REV. 1651, 1663-64 (1999).

359. See WEILER, *supra* note 356, at 192.

360. See Kohler, *supra* note 330, at 504; Moberly, *supra* note 354, at 331.

361. See Kohler, *supra* note 330, at 505.

volve bilateral interchange between employees and management, as they often do, they run afoul of section 8(a)(2).

Scholars who advocate greater employee involvement and cooperativeness in the workplace have made a wide range of proposals for amending or repealing section 8(a)(2). Some favor a broad scope for experimentation with employee committees. For example, scholars have argued that employee groups which deal with management on working conditions and other matters should be lawful as long as employers do not represent or otherwise suggest that these programs are functioning as independent bargaining agents of employees.³⁶² Others have argued that employers should be allowed to form and oversee employee participation programs as long as they do not attempt to interfere with employee choice should employees desire to unionize.³⁶³ A similar proposal is to permit employee involvement programs except where employers initiate them in order to defeat a union organizing drive.³⁶⁴ Other proposals to modify section 8(a)(2) are much more modest. For example, former NLRB Chairman William Gould favors relaxing the Board's standard for domination and allowing employers to initiate employee committees as long as these committees remain truly independent and are not designed to thwart unionism.³⁶⁵ By contrast, Paul Weiler has made a far-reaching pro-

362. See Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 127, 150 (1994); see also Weiler, *supra* note 357, at 200 ("We should roll back section 8(a)(2) so that it bans only company-dominated unions that collectively bargain—not just deal—with the employer.").

The Teamwork for Employees and Managers Act (the "TEAM Act"), which was introduced into Congress twice and vetoed by President Clinton, takes this approach. The first version of the TEAM Act passed by Congress in 1996 would permit employers to establish employee committees that address any matters of mutual concern as long as these committees do not "have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization." H.R. 743, 104th Cong. (1995). Clinton vetoed this version of Act, and it was reintroduced into Congress in 1997. The second version of the Act included an additional requirement that employees participate "to at least the same extent practicable as representatives of management participate." H.R. 743, 105th Cong. (1997). This second version was never passed.

Michael LeRoy favors a similar rule allowing employers to form committees to discuss working conditions or other matters of mutual interest as long as these committees do not purport to be collective bargaining agents and employees participate to the same extent possible as management. See LeRoy, *supra* note 358, at 1660, 1708-09.

363. See Charles C. Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809, 836, 838-39 (1977).

364. See WEILER, *supra* note 356, at 214.

365. See Keeler Brass Auto. Group, 317 N.L.R.B. 1110, 1117-19 (1995); GOULD, *supra* note 357, at 140-41. Gould also supports the Seventh Circuit's standard in *Chicago Rawhide Manufacturing Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955). See Keeler, 317 N.L.R.B. at 1117. The Seventh Circuit requires actual, rather than

posal to repeal section 8(a)(2) and require all employers above a certain size to have independent employee committees based on the model of German works councils.³⁶⁶

Critics of section 8(a)(2) dispute the assumptions underlying the Act. Conditions in American industry, they argue, are different today than they were in the 1930s.³⁶⁷ We need not distrust all employers. Many American companies are establishing employee participation programs for legitimate reasons, such as to meet pressing economic challenges in a global market, to increase worker satisfaction and to reduce conflict, rather than to manipulate workers.³⁶⁸ Nor do workers need the paternalism of the Act.³⁶⁹ Workers will be able to detect when an employer has established a program in bad faith, and disgruntled workers can vote for an independent union if they wish.³⁷⁰ Indeed, the threat that disgruntled workers will decide to unionize should provide employers with a significant incentive to establish programs that are genuinely responsive to worker input and concerns, rather than merely tools of management to unilaterally control outcomes.³⁷¹ Employer-initiated committees that fail to live up to employer promises make unionization more likely.³⁷²

Moreover, scholars observe that the number of workers who have chosen unionization has declined dramatically in recent decades, and, thus, section 8(a)(2) has the effect of denying workers who do not want to join an independent union any mechanism for dealing with management on working conditions.³⁷³ For some scholars, the underlying purpose of the Act to protect employee choice requires giving employees the option of

merely potential, control or domination for finding a violation of section 8(a)(2), and control and domination are considered from the subjective viewpoint of the employees. *Id.* at 1117-18 (discussing *Chicago Rawhide*).

366. See Paul C. Weiler, *Governing the Workplace: Employee Representation in the Eyes of the Law*, in *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* 81, 97-98 (Bruce Kaufman & Morris Kleiner eds., 1993); see also WEILER, *supra* note 356, at 282-95. These committees would have a right to be consulted regarding material changes in workplace conditions and would administer state regulatory programs for the workplace. See Weiler, *supra*, at 98-99.

367. See GOULD, *supra* note 357, at 136; Estreicher, *supra* note 362, at 134; Jackson, *supra* note 363, at 823; LeRoy, *supra* note 358, at 1659.

368. See GOULD, *supra* note 357, at 110; WEILER, *supra* note 356, at 214; LeRoy, *supra* note 358, at 1663-64, 1659; Weiler, *supra* note 366, at 92.

369. See Estreicher, *supra* note 362, at 128; Jackson, *supra* note 363, at 823, 839.

370. See Estreicher, *supra* note 362, at 149, 154; Jackson, *supra* note 363, at 839, 844-45; LeRoy, *supra* note 358, at 1659-60 (drawing on Canadian experience with company unions).

371. See Jackson, *supra* note 363, at 845.

372. See Estreicher, *supra* note 362, at 154; Jackson, *supra* note 363, at 845; LeRoy, *supra* note 358, at 1659.

373. See Estreicher, *supra* note 362, at 126, 135. According to former NLRB Chairman Gould: "Employers ought to be able to promote the creation of and to subsidize employee groups. In the real world that is what is happening anyway. With workers unrepresented by unions in 85 percent of the workforce, how else can such systems flourish?" Gould, *supra* note 356, at 11.

choosing management-initiated employee involvement programs over independent unions if they so wish.³⁷⁴

There are, to be sure, many defenders of section 8(a)(2). These scholars do not believe that the assumptions underlying section 8(a)(2) are outdated, and they tend to manifest the same distrust of employers and employer-initiated committees as the drafters of the Act did.³⁷⁵ Supporters of section 8(a)(2) also argue that the provision leaves much room for employee involvement programs.³⁷⁶ Programs initiated by management do not violate the Act if they address efficiency, productivity or quality issues or other subjects that are not covered under section 2(5).³⁷⁷ Nor does the Act prohibit managers from soliciting employee ideas through a suggestion box mechanism or gathering information about employee wishes through brainstorming groups and other committees that do not make proposals to management.³⁷⁸

When section 8(a)(2) is considered in light of the Church's social teaching, it is clear that the assumptions and restrictions in the Act reflect and promote a very different vision for labor-management relations than the Church teaches. When section 8(a)(2) pushes employers and employees apart and restricts them to different sides of the bargaining table, it severely limits the type of collaboration that can take place with respect to working conditions and other section 2(5) subjects. The Church envisions business enterprises as "communit[ies] of persons,"³⁷⁹ "true human fellowship[s]"³⁸⁰ where participants work together harmoniously in a spirit of "mutual respect, esteem, and good will."³⁸¹ Rather than distrusting employers, the Church expects and demands that both employers and employees try to put themselves in the other's shoes and solve problems through reasoned discussion motivated by the desire for reconciliation and the spirit of charity. Thus, rather than placing employees and employers on the opposite sides of a bargaining table, the Church would envision both parties as sitting together on the same side of the table or at least frequently switching places in order to better see each other's point of view. Moreover, for the Church, unity and togetherness are two of the

374. See Jackson, *supra* note 363, at 826 ("Consistent with employee free choice, then, employees should be free, if they wish, to select a weak employees' committee instead of a strong national union.").

375. See Michael C. Harper, *The Continuing Relevance of Section 8(a)(2) to the Contemporary Workplace*, 96 MICH. L. REV. 2322, 2337-39, 2375-76 (1998); Kohler, *supra* note 330, at 549-50; see also Moberly, *supra* note 354, at 333, 357 (repeal or amendment of section 8(a)(2) would allow management to establish employee participation programs as "union-busting mechanisms").

376. See Harper, *supra* note 375, at 2334; Moberly, *supra* note 354, at 344, 352, 357.

377. See Moberly, *supra* note 354, at 352, 357.

378. See *id.* at 353.

379. CENTESIMUS ANNUS, *supra* note 148, at 52.

380. MATER ET MAGISTRA, *supra* note 165, at 99.

381. *Id.*

fundamental principles that should ground all human relations. To force parties apart, place them on opposing sides and prevent them from working too closely together is to foster division, not unity.

For the Church, employee participation and partnership in the operation and management of productive enterprises are also requirements of human dignity. To deny workers who do not choose an independent union a chance to participate in decisions over working conditions and other section 2(5) matters restricts their exercise of responsibility in the workplace and, thus, strips them of their dignity as "true sharer[s] in the work [they] do [] with others."³⁸² Brainstorming groups or suggestion box procedures do offer avenues of communication between employer and employees, but they do not offer the possibility of direct involvement in the formation of decisions or the opportunity to participate in a true give-and-take with management.

Consistent with the principles expressed in Papal encyclicals and the social teachings of Vatican II, the U.S. Bishops have strongly supported greater cooperation and partnership between workers and management in the American workplace, including greater opportunities for employee participation in determining working conditions.³⁸³ While the Bishops have cautioned that both labor and management must have "real freedom and power to influence decisions" and that partnership must be a "two-way street, with creative initiative and a willingness to cooperate on all sides,"³⁸⁴ the Bishops do not believe that this requires strict separation of labor and management. Rather, the Bishops have called for continued research and experimentation along the lines of the employee participation programs discussed above.³⁸⁵ According to the Bishops, labor unions can, and should, play an important role in helping to ensure that partnerships between management and labor are genuine and fair to employees,³⁸⁶ but unions themselves should also "seek new ways of doing business."³⁸⁷ Rather than seeking only the narrow economic interests of their members, unions must operate more cooperatively and with a view to the larger common good: "The purpose of unions is not simply to defend the existing wages and prerogatives of the fraction of workers who belong to them, but also to enable workers to make positive and creative contributions to the firm, the community, and the larger society in an organized and cooperative way."³⁸⁸

Thus, Church teachings echo and reach beyond the familiar calls of scholars to increase employee involvement and labor-management cooperation. For the Church, greater worker involvement and increased coop-

382. *POPULORUM PROGRESSIO*, *supra* note 168, at 246.

383. *See ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 114.

384. *Id.* at 115.

385. *See id.* at 114-15.

386. *See id.* at 115.

387. *Id.* at 116.

388. *Id.*

eration are not just a means to achieve greater productivity, nor even just a means for enhancing worker morale and satisfaction. Rather, they are requirements of human dignity and fulfillment and essential conditions for the social renewal that the Church envisions. As John Paul II wrote on the hundredth anniversary of *Rerum Novarum*, “[a] society is alienated if its forms of social organization, production and consumption make it more difficult [for persons] to offer th[e] gift of self and to establish . . . solidarity between people.”³⁸⁹ When section 8(a)(2) pushes employers and employees apart, places them on opposite sides of a bargaining table and expects each to seek its own good rather than the interests of others, it is the very type of alienating influence that the Church condemns.

The application of section 8(a)(2) to Church institutions would be especially destructive to the Church’s ability to live and model its vision for social relations. By channeling relations between Church employers and employees into arms-length dealings, section 8(a)(2) will severely limit their ability to work closely together in joint labor-management groups and other settings that assume and foster mutual respect and concern. Instead, Church institutions will be forced to pattern their relations with their workers on secular standards that reflect distrust of human motivations and disbelief in genuinely caring employment relationships. Instead of engaging one another as close friends, and even brothers and sisters, Catholic employers and employees will have to keep their distance and face each other as potential enemies.

In his influential article on the intellectual origins of the NLRA, Mark Barenberg has argued that Senator Wagner and the other leading proponents of section 8(a)(2) did not intend the prohibition against company unions to produce an adversarial relationship between workers and management.³⁹⁰ By equalizing bargaining power between employers and employees and ensuring that workers speak through independent organizations, the Act was designed to foster genuine cooperation and mutual trust.³⁹¹ In Wagner’s view, such trust and cooperation will only be possible for parties who have equal power to defend their own interests.³⁹² History has proven Wagner’s predictions to be wrong. Barenberg notes that by the 1960s, and even much before, an adversarial mode of unionism

389. CENTESIMUS ANNUS, *supra* note 148, at 61.

390. See Barenberg, *supra* note 330, at 1388, 1390.

391. While some scholars share Barenberg’s view that the system of collective bargaining under the NLRA was designed to be cooperative rather than adversarial, see, e.g., Moberly, *supra* note 354, at 333, many others continue to hold the traditional view that the NLRA’s model for labor-management relations is, indeed, adversarial. See Keeler Brass Auto. Group, 317 N.L.R.B. 1110, 1117 (1995) (Gould, Chairman, concurring); WEILER, *supra* note 356, at 192-93; William B. Gould IV, *Reflections on Workers’ Participation, Influence and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 383 (1989); Kohler, *supra* note 330, at 515.

392. See Barenberg, *supra* note 330, at 1427-28, 1441, 1462, 1467, 1471, 1482-83.

had become the norm in American industry.³⁹³ Rather than a basis for mutual trust and cooperation, the equalization of bargaining power under the NLRA and the prohibition against company unions served to support the “‘area of labor combat’”³⁹⁴ that the Supreme Court has recognized as part and parcel of the system established by the NLRA.

For the Church, the failure of Wagner’s vision is not surprising. Decades before the passage of the Act, the Church had taught that the only sure foundation for peace is mutual trust and a desire for reconciliation, and the only sure foundation for justice is love. To prevent the Church from living these principles in its internal life would be a significant infringement on her religious freedom. There is, perhaps, little that is more destructive to the Church’s vision than sowing the seeds of distrust and division where she seeks to build love and unity.

C. *Additional Problems with Mandatory Collective Bargaining*

The foregoing discussion demonstrates that the First Amendment problems with applying state and federal labor laws to religious organizations go deeper than courts and scholars recognize. I began the third section of this Article with a question. Why would Catholic employers resist collective bargaining under state and federal labor laws when the Church has long supported the rights of workers to unionize? Part of the answer to this question is that the Church’s vision for collective bargaining is shaped by religious principles and values that are very different than the assumptions and principles underlying secular labor statutes. For the Church, collective bargaining is a concept suffused with religious content and meaning, and the Church seeks a cooperative relationship based on love, togetherness and reconciliation. By contrast, the NLRA and state labor statutes that resemble the NLRA³⁹⁵ are premised upon much more

393. *See id.* at 1492-93.

394. *Lodge 76, Int’l Ass’n of Machinists and Aerospace Workers v. Wis. Employment Relations Comm’n*, 427 U.S. 132, 146 (1976) (citing *Garner v. Teamsters Union*, 346 U.S. 485, 500 (1953)).

395. The first state labor statutes were modeled after the NLRA as originally adopted in 1935. *See* CHARLES C. KILLINGSWORTH, *STATE LABOR RELATIONS ACTS: A STUDY OF PUBLIC POLICY* 1-2 (1948). The original version of the NLRA is commonly referred to as the Wagner Act, and these first state statutes are known as “little” or “baby” Wagner Acts. *See* SANFORD COHEN, *STATE LABOR LEGISLATION 1937-47: A STUDY OF STATE LAWS AFFECTING THE CONDUCT AND ORGANIZATION OF LABOR UNIONS* 4 (1948). Later state statutes anticipated the amendments to the Wagner Act in the Taft-Hartley Act of 1947 and helped to shape these changes. *See* KILLINGSWORTH, *supra*, at 2-5. For the mutual influence of state and federal labor statutes upon one another, *see* KILLINGSWORTH, *supra*. The New York State Labor Relations Act, which was at issue in *Culvert* and *Christ the King*, is a “baby” Wagner Act. *See* KILLINGSWORTH, *supra*, at 2; *see also* *Catholic High Sch. Ass’n of the Archdiocese of N.Y. v. Culvert*, 753 F.2d 1161, 1165 n.3 (2d Cir. 1985) (noting that the New York statute is “patterned after the NLRA”). In *Hill-Murray Federation of Teachers v. Hill-Murray High School*, 487 N.W.2d 857 (Minn. 1992), the Minnesota Supreme Court also noted the similarity of the Minnesota Labor Relations Act to the NLRA. *See id.* at 861.

pessimistic assumptions about human nature and a much more adversarial vision for labor-management relations. The consequences of applying secular labor statutes to Church employers would, therefore, be to place a maximum burden on the Church. It would prevent the Church from structuring its own internal human relationships according to its religious vision for human fulfillment and social life.

Moreover, the discussion above also demonstrates that for Catholic institutions, it is simply not possible to neatly separate religious matters from the secular aspects of the employment relationship. The Church's vision for labor-management relations extends to every aspect of the employer-employee relationship. While there are matters such as hours and wages that seem strictly secular, interactions between employers and employees regarding these and other issues are not. Lower courts that have argued that it is possible to avoid entanglement and interference with religious matters by restricting the scope of collective bargaining and the remedial powers of the state are wrong. The entire process of collective bargaining has a religious dimension for the Church, and, thus, there is nothing that does not implicate religious beliefs and doctrine.

It is also not possible to distinguish Catholic organizations whose purpose is to propagate religious faith from those that perform essentially secular social services functions as federal circuit courts have tried to do. For the Church, reaching out to others in self-giving is just as much a religious act as teaching Church doctrine, and, indeed, it is quintessentially religious activity. Responding to God's love with caring and service for others is at the heart of the Christian message about human fulfillment and human freedom: "According to the Christian message, . . . man's relationship to his neighbor is bound up with his relationship to God; his response to the love of God, saving us through Christ, is shown to be effective in his love and service of men."³⁹⁶ Moreover, social services programs run by Church organizations should function, like other aspects of the Church community, as models of unity and love among people. Thus, while they may appear to be operating just like secular social services agencies, the charitable activities of the Church are motivated by a radical spirit of love and mutual concern and their function, as well as their purpose, is in all respects a religious one. Furthermore, there is no authority in the Church's teaching for applying a different set of principles for labor relations to social services programs than other types of Church institutions. The Church clearly envisions all of its programs to be an integral part of its mission, and similar religious principles for social relations should govern all Church organizations. Indeed, the Church views its principles for social life as a leaven that should not only guide internal Church structures but also the social renewal of the entire world.

In reply, some readers may argue that all I have done is to make the case that Catholic employers should be exempted from coverage under

396. JUSTICE IN THE WORLD, *supra* note 168, at 293.

state and federal labor laws, not that all religious organizations should. For some religious organizations it may be possible to separate religious and secular aspects of the employment relationship, and unionization under secular statutes will not necessarily conflict with the religious principles and values of every denomination. However, an examination of the relationship between Church doctrine and the claims made by Catholic employers in litigation will demonstrate that infringements on First Amendment freedoms are threatened even where religious organizations do not appear to have a religious vision of collective bargaining that conflicts with the model in secular statutes.

A quick look back at the cases discussed in Part II will remind the reader that none of the Catholic employers in those cases made the type of arguments against mandatory collective bargaining that I have outlined above. To the contrary, the *Culvert* and *St. Teresa* decisions suggest that Catholic organizations are an exemplary case of religious groups that can separate religious from secular matters and bargain under state law without interference with religious principles. For example, in *Culvert*, Catholic school employers in the New York Archdiocese had voluntarily bargained with lay teachers under the New York State Labor Relations Act for a decade before objecting to jurisdiction on First Amendment grounds.³⁹⁷ When litigating their First Amendment claim, they never claimed that collective bargaining under the state law had conflicted with the Church's vision for labor relations.³⁹⁸ In *St. Teresa*, the Diocese of Camden also voluntarily bargained with its high school teachers.³⁹⁹ In both cases, the agreements that resulted from negotiations were expressly limited to secular issues and schools retained authority over religious matters.⁴⁰⁰ Thus, these Catholic employers believed that it was possible to separate the religious from the secular aspects of the employment relationship.

However, when one goes beyond these two cases, one discovers that Catholic attitudes toward collective bargaining under secular labor statutes are not uniform, nor are they static. Catholic school employers have often voiced objections to collective bargaining on the grounds that it is too adversarial even if they have generally not raised these arguments in the courts.⁴⁰¹ Indeed, it should not be surprising that arguments focusing on the inconsistency between the Catholic vision for collective bargaining and secular models are not raised in litigation. After the Supreme Court's de-

397. See *Culvert*, 753 F.2d at 1163.

398. See *id.* at 1163-64.

399. See *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 716 (N.J. 1997).

400. See *id.* at 716-17; *Culvert*, 753 F.2d at 1163.

401. In a March 1987 statement, the National Association of Catholic School Teachers recognized that school officials often object to collective bargaining because of "what they claim is the adversary approach taken by teacher organizations." Nat'l Ass'n of Catholic Sch. Teachers, *supra* note 70, at 52.

cision in *Catholic Bishop*, most religious employers who object to mandatory collective bargaining under state laws will naturally focus on the same type of entanglement and autonomy arguments that the Court raised there. These were winning arguments before the Supreme Court, and litigants understandably will rely on them. The fact that Catholic employers have not drawn upon the Church's tradition regarding labor relations and the differences between Catholic and secular visions for collective bargaining may indicate nothing more than a strategic decision by their litigators.

However, there is another explanation for why arguments emphasizing the inconsistency between Catholic and secular views of labor-management relations do not appear in court. In many cases, Catholic employers may simply not have given the relationship between Catholic and secular views of collective bargaining the extended thought and treatment that I have here. There are, to be sure, Catholics and Catholic employers who genuinely believe that collective bargaining under state and federal laws is compatible with the Church's vision for labor-management relations.⁴⁰² However, many others have not fully developed or articulated a position on the issue.

Nevertheless, while many Catholic employers may not have given extended consideration to the relationship between the Catholic understanding of collective bargaining and the model in state and federal statutes, Catholic employers have repeatedly bumped up against the differences between them even when they have not grasped the full significance of their experiences. For example, in several cases decided by the NLRB prior to the Supreme Court's decision in *Catholic Bishop*, Catholic school employers reacted very negatively to union drives that took a divisive or confrontational form. In *Diocese of Fort Wayne-South Bend*, the Board linked the diocese's hostility to unionization to the concern that union activities were a "divisive force" in the schools,⁴⁰³ and the diocese discharged several teachers for conduct that undermined "peace and harmony and cooperation."⁴⁰⁴ In *St. Joseph's High School*, a Catholic high school dismissed a teacher for "undermin[ing]" the school by mailing a negative report about the school's labor relations to the accrediting body that was evaluating the school.⁴⁰⁵ In this case, as well, the school was reacting against a power play that it probably viewed as inconsistent with a spirit of cooperation and the common good. In both cases, the Board asserted jurisdiction and found that the employers had unlawfully discharged the teachers.⁴⁰⁶

402. For Catholic scholarship taking this position, see Gregory, *supra* note 21, at 67; David L. Gregory & Charles J. Russo, *Overcoming NLRB v. Yeshiva University by the Implementation of Catholic Labor Theory*, 41 LAB. L.J. 55, 63 (1990).

403. *Diocese of Fort Wayne-South Bend, Inc.*, 230 N.L.R.B. 267, 272 (1977) (affirming rulings, findings and conclusions of administrative law judge).

404. *Id.* at 272-73.

405. *St. Joseph's High Sch.*, 236 N.L.R.B. 1623, 1624 (1978) (affirming rulings, findings and conclusions of administrative law judge).

406. See *St. Joseph's*, 236 N.L.R.B. at 1625; *Fort Wayne*, 230 N.L.R.B. at 273.

In *Andrew G. Grutka, Bishop of the Roman Catholic Diocese of Gary, Indiana*,⁴⁰⁷ the differences between the Church's approach to labor relations and the model underlying the NLRA are demonstrated even more vividly. The dispute in *Grutka* arose when teachers at one of the high schools in the Diocese of Gary sought to organize a local chapter of the American Federation of Teachers (AFT).⁴⁰⁸ The Diocese of Gary did not refuse to bargain collectively with its employees but insisted that the employees choose a representative that was not affiliated with AFT.⁴⁰⁹ According to the diocese, it could not bargain with AFT because AFT's policy of opposing state aid to nonpublic schools made it a declared enemy of the Catholic Church.⁴¹⁰ Despite the diocese's resistance, the teachers requested recognition and bargaining as an affiliate of AFT.⁴¹¹ The diocese refused, and Robert Madsen, the leading organizer of the union drive, sent a letter to a local newspaper describing Bishop Grutka's past support for labor unions as a "masquerade" and "sham."⁴¹² The newspaper printed the letter, and Madsen was discharged for making personal attacks on the spiritual leader of the diocese.⁴¹³

After Madsen's discharge, Bishop Grutka and other diocesan officials continued to meet with Madsen and other representatives of the union to discuss their differences.⁴¹⁴ During the course of one of these meetings, diocesan officials read a prayer and Bible passage calling for a spirit of humility and reconciliation based upon self-giving rather than conflict and confrontation.⁴¹⁵ During the same meeting, the diocese offered office space and other assistance to the union if the teachers would disaffiliate with AFT.⁴¹⁶ The diocese also indicated that it would reinstate Madsen if a decision in favor of disaffiliation were made.⁴¹⁷

Union organizers did not reply to the diocese's request for disaffiliation immediately, and after several months had passed, a member of the Diocesan School Commission telephoned one of the union officers to determine if a decision had been reached on disaffiliation.⁴¹⁸ When the union officer replied that the union was still considering the matter, the diocesan representative declared: "Well, you know, the Bishop is going to take this thing to the Supreme Court. Good grief . . . there are jobs on the

407. Andrew G. Grutka, Bishop of the Roman Catholic Diocese of Gary, Indiana, 238 N.L.R.B. 1643 (1978) (affirming rulings, findings, recommendations and conclusions of administrative law judge).

408. *See id.* at 1646-47.

409. *See id.* at 1647.

410. *See id.*

411. *See id.*

412. *Id.* at 1648.

413. *See id.* at 1648, 1652.

414. *See id.* at 1648.

415. *See id.*

416. *See id.* at 1649.

417. *See id.*

418. *See id.*

line here.”⁴¹⁹ When asked about the meaning of “jobs on the line,” the diocesan representative replied: “[Y]ou know what I mean, you know what the Bishop is like. This is going to end up in the Supreme Court. Do you want that? Why are you doing that? Why are you doing this to our school system?”⁴²⁰

For the Board, the diocese’s conduct in this case was a series of flagrant unfair labor practices. The diocese had interfered with the teachers’ right to select the representative of their own choosing in numerous ways. The diocese violated section 8(a)(1) when it made promises of benefits to union organizers if they disaffiliated with AFT.⁴²¹ These promises included office space and other assistance as well as the suggestion that Madsen would be reinstated if a decision in favor of disaffiliation was made.⁴²² The diocese also violated section 8(a)(1) by engaging in coercive interrogation,⁴²³ and by threatening teachers with job terminations and other economic harm if they did not disaffiliate with AFT.⁴²⁴ In addition, the Board found that the diocese had violated section 8(a)(3) when it terminated Madsen. According to the Board, the diocese’s claim that Madsen’s termination was the result of his insulting remarks about the Bishop, not antiunion reasons, was pretextual.⁴²⁵ While the Board did not discuss the issue, the diocese’s offer to provide office space and other assistance to the union might also have violated section 8(a)(2) if the employees had accepted.⁴²⁶

Bishop Grutka and other diocesan officials were probably quite surprised to learn that their conduct during this case amounted to a series of unlawful practices in violation of the Act. When viewed from the perspective of the Church’s teaching on labor and other social issues, the diocese’s conduct was not only understandable but also clearly suffused with moral and religious content. When the diocese insisted that the union

419. *Id.* at 1650.

420. *Id.*

421. *See id.* at 1650-51.

422. *See id.*

423. *See id.* at 1651.

424. *See id.*

425. *See id.* at 1651-52.

426. When an employer provides a union with office space or other use of company time or property, this assistance does not usually violate section 8(a)(2). *See* BASF Wyandotte Corp., 274 N.L.R.B. 978, 980 (1985), *enforced*, 798 F.2d 849 (5th Cir. 1986). Indeed, the Board has stated that where the union is the lawfully recognized collective bargaining agent of the company’s employees, “the use of company time and property, in the absence of deeper employer involvement or intrusion in union affairs” is regarded as “merely ‘friendly cooperation growing out of an amicable labor-management relationship.’” *Id.* (quoting Duquesne Univ. of the Holy Ghost, 198 N.L.R.B. 891, 891 (1972)). In *Grutka*, however, the union had not been lawfully established as the collective bargaining agent of the teachers, and the diocese offered office space and other assistance precisely in order to interfere with union affairs. 238 N.L.R.B. at 1651. The offer of office space was expressly intended to induce the union to disaffiliate with AFT. *See id.*

disaffiliate from an organization that it perceived to be a declared enemy of the Catholic Church, it was insisting that the teachers consider the larger interests of the Catholic community when selecting their agent. Furthermore, when the diocese terminated Madsen for publicly accusing Bishop Grutka of deception, it was responding reasonably to conduct that was, from a Catholic perspective, extremely disrespectful and the antithesis of love. To offer to reinstate Madsen if the union disaffiliated with AFT was essentially a gesture of reconciliation as was the offer of office space and other assistance. The exasperated exclamation by the representative of the Diocesan School Commission, "Why are you doing this to our school system?" was as much a plea for mutual understanding as it was coercive interrogation. When diocesan officials called in prayer for an attitude of humility, self-giving and reconciliation, rather than confrontation, they were expressing the essence of Catholic social thought.

The effect of the Board's assertion of jurisdiction in *Grutka* was clearly to place a model of labor-model relations on religious schools that undermined the Church's vision for social life. The Board's decision turned the religious conduct of diocesan officials into a series of unfair labor practices. What for the Church was a reflection of Catholic principles of cooperation, mutual understanding and reconciliation was, for the Board, a violation of the Act.

The lessons from *Grutka* go beyond merely demonstrating the deep inconsistency between the Catholic vision for labor relations and the model of secular statutes. What is most significant about this case is that this inconsistency only became apparent to the diocese as its dispute with the union organizers gradually unfolded over time. The diocese seems to have begun with little understanding of the nature of collective bargaining under federal law as it blithely walked into numerous legal land mines under the Act. However, when the conflict was over, the diocese had learned well that actions that it had taken for essentially religious reasons were a violation of the provisions, and principles, of the NLRA.

The danger of applying secular labor laws to religious institutions is that similar dramas might unfold in other religious contexts. Religious employers who initially believe that collective bargaining under state or federal law is consistent with their religious principles may over time discover that there are more conflicts than they initially thought. A religious employer may want to reach out with a promise or grant of benefit as a gesture of reconciliation and find that it has committed an unfair labor practice. Religious employers may want to sit down at the same side of the negotiating table with their employees as part of a single labor-management committee and find that they have violated section 8(a)(2). A religious employer may punish an employee for divisiveness or combative conduct inconsistent with religious doctrine and find that the employee's actions were protected conduct under the Act.

As these discoveries are made, the religious organization may eventually decide that it cannot continue to bargain under secular laws and remain faithful to its religious mission. When it reaches that point, the organization's past bargaining history with its employees will probably make it difficult for the group to successfully make its case before the labor board or reviewing court. There will certainly be controversy between employer and employees, and the employer's past assent to unionization may be turned against it. In the litigation that ensues, there is considerable danger that reviewing boards and courts will second-guess the reasons for the employer's change of position and, in so doing, entangle themselves in religious questions and interfere with the development of religious principles and doctrine.

Thus, one of the dangers with asserting jurisdiction over religious organizations that do not perceive any incompatibility between their religious principles and bargaining under secular labor laws is that these principles, or the group's understanding of them, may change over time. For example, Catholic employers who do not currently see any significant differences between collective bargaining under state and federal laws and the Church's vision for labor relations may change their mind in light of new experiences. Those who may have intuitively grasped that there are fundamental differences may, in turn, further develop these intuitions into new positions that can become the basis for a First Amendment claim in the future. Where such changes occur, religious and secular matters that seemed separable in the past will no longer be, and secular statutes that seemed compatible with Church principles will now burden the Church's religious mission. Which religious organizations are likely to undergo similar changes is impossible to predict, nor can one predict which denominations these groups are likely to be affiliated with. However, one thing is certain: where religious organizations are currently bargaining under state or federal law, it will be difficult to change the status quo. The fact that labor boards have asserted jurisdiction and a bargaining relationship is already in place will hinder the ability of these organizations to tailor future acts according to new views. For an organization like the Catholic Church, the Church's rich tradition on social issues will almost certainly inspire a continual process of development and discovery as circumstances change and different individuals and groups interact with these circumstances in new ways. It is important that the First Amendment protects the freedom of this process and similar developments in other religious traditions to continue unrestricted by state interference.

Even if it were possible to identify a subset of religious organizations whose religious principles will never conflict with the model of collective bargaining in state and federal law, the application of these laws will interfere with and retard the change and development of religious principles in other ways. As discussed above, lower courts believe that they can address any potential infringements on First Amendment liberties by restricting the scope of collective bargaining to secular subjects and prohibiting

reviewing boards and courts from addressing religious questions. While such adjustments to labor statutes may provide strong protection for current religious doctrines and practices, they cannot adequately account for new developments.

For example, by restricting the scope of mandatory bargaining to secular issues and deferring to religious organizations on what subjects have a religious dimension, labor boards and courts may well be able to ensure that the bargaining process steers clear of matters that the group identifies as religious when the process begins. However, over time a religious organization may change its views about what subjects have a religious significance, and matters that appeared purely secular in the past may take on a religious dimension and vice versa. While, in theory, labor boards and courts should defer to the religious group when such developments occur, in practice the outcome will be much more difficult to predict. As soon as the employer refuses to bargain about a matter that had previously been subject to negotiation, employees can be expected to complain and litigation may well result. If litigation does result, employees will claim that the employer has acted in bad faith, and courts will be called upon to determine whether the group's views have genuinely changed or whether their new position is an excuse for trying to escape the burdens of collective bargaining. The fact that the group has bargained on the issue in the past will support the position of employees that the group is trying to avoid mandatory negotiations rather than acting from truly religious concerns. Unless the reviewing board or court simply defers to the religious organization whenever it claims that a subject has acquired religious significance, the reviewer will become embroiled in religious questions.

For instance, the religious organization will surely present evidence that its views have, in fact, changed, and much of the evidence will have a religious character. The group may present evidence of new pronouncements by religious officials, meetings or other activities related to the issue, or religious writings supporting the new interpretation that it advances. The union may, in turn, counter with evidence of a similar type supporting the opposite conclusion. The result will be that labor boards and courts will find it difficult to avoid second-guessing religious organizations about their beliefs, and if they do, there is a significant danger that the organization's control over religious matters will be undermined and the free growth and development of religious principles inhibited.

Similar dangers may arise where a religious organization is charged with discharging or otherwise discriminating against an employee in violation of section 8(a)(3) and the organization raises a religious defense. In Part II, I suggested that First Amendment problems can be avoided if reviewing boards and courts accept the existence and validity of the organization's religious justifications and focus instead on whether these justifications were, in fact, the cause for the employer's action.⁴²⁷ If re-

427. See *supra* pp. 93-97.

viewers focus solely on the question of causation and restrict their inquiry to secular factors, there should be no entanglement or free exercise problems. Secular factors that are commonly considered in section 8(a)(3) cases include the disparate treatment of employees involved in union activity, the timing of the discharge if it corresponds with union activity, the failure of the employer to give any warning before taking disciplinary action or to investigate the incident, the failure to give a reason for the discipline at the time it occurred and shifting or inconsistent justifications for the action. All of these factors tend to break the causal connection between the employer's religious defense and its conduct without embroiling reviewers in questions of religious doctrine.

The problem with this approach, however, is that it may give false readings of unlawful conduct where religious beliefs and views are undergoing a process of change. For example, take a case where an employer raises a religious defense to a discriminatory discharge claim, and the reviewing court finds that the religious justifications given by the employer were not the cause of the discharge because the employer had never disciplined other workers in similar circumstances. Such disparate treatment may, in fact, indicate that antiunion animus was the real cause for the employer's actions, but it may also reflect the fact that the group is developing new interpretations of its religious doctrines and principles. Actions that would not have violated church doctrine in the past are now viewed as inconsistent with the group's religious beliefs. Similarly, a religious organization may delay giving an explanation for its action because its views regarding the employee's behavior have not yet been clearly formulated. The organization may intuitively know that the employee's actions offend religious beliefs, but it may not be able to immediately identify the principles or rationale that best explains its intuitive reaction. A more precise understanding and explication of what the employee has done wrong may take time to fully develop and articulate. Where an employer gives shifting or inconsistent justifications for its action, these too may reflect the development or formulation of views rather than bad faith or antiunion animus. Thus, while adjustments to the powers of reviewing boards and courts in section 8(a)(3) cases may hold promise for addressing First Amendment problems if religion were a static phenomenon, these adjustments do not provide sufficient protection against government interference with religion when religious beliefs are changing.

IV. THE IMPORTANCE OF PROTECTING RELIGIOUS ORGANIZATIONS FROM GOVERNMENT INTERFERENCE

In the foregoing section, I have answered the question that I concluded with in Part II. If neither entanglement nor interference with religious matters is threatened by the application of state and federal labor laws to religious organizations, why should these groups receive a special exemption from these statutes? By examining the Catholic Church's

teaching on labor and other social issues and the relationship between this teaching and the claims of Catholic employers, I have demonstrated that the First Amendment problems with mandatory collective bargaining are more far-ranging and complex than courts and scholars realize, and there is much more at stake than is commonly recognized. For religious groups like the Catholic Church, it is impossible to separate the secular from the religious aspects of the employment relationship, and the application of secular collective bargaining regimes to Church institutions will severely restrict the Church's ability to structure its labor-management relations according to its own religious vision for social life. While there may be some groups for whom such a separation is possible and for whom religious principles are not inconsistent with the secular models for collective bargaining, all religious groups undergo change, and over time these groups may develop new positions that are incompatible with secular laws. If such change occurs and bargaining has been underway for several years, it will be difficult for the group to successfully make the case for an exemption. Furthermore, the adjustments to collective bargaining regimes that have been advanced by lower courts do not eliminate all of the First Amendment problems with mandatory collective bargaining because they do not adequately account for the process of change and development in religious beliefs.

In this section, I will demonstrate why protecting religious organizations from interference by the state is so important. Throughout this Article, I have assumed that the state should not interfere with the autonomy of religious groups over religious matters. Religious employers should be free to follow their own visions for labor-management relations when these visions conflict with secular labor statutes, and collective bargaining regimes must not interfere with religious doctrine and practice. These assumptions are consistent with Supreme Court precedent. As discussed in Part II, the Court in *Catholic Bishop* found that government entanglement with religious doctrine and practice raises serious constitutional questions as does state interference with the autonomy of religious groups over internal affairs.⁴²⁸ In case law addressing intra-faith disputes over property and ecclesiastical governance, the Court has firmly held that reviewing courts may not become entangled with ecclesiastical questions.⁴²⁹ In addition, the state may not infringe upon the right of individuals to form religious organizations and establish internal structures for resolving questions of church governance, leadership, discipline, faith and doc-

428. See *supra* text accompanying notes 32-40.

429. See *Serbian E. Orthodox Diocese for the United States and Canada v. Milivojevich*, 426 U.S. 696, 708-10 (1976); see also *Jones v. Wolf*, 443 U.S. 595, 602-03 (1979); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969).

trine.⁴³⁰ Courts must respect the freedom of religious groups to “decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁴³¹ While the Court’s intra-faith dispute decisions have never directly addressed whether the autonomy of religious groups over internal affairs extends to secular as well as religious matters,⁴³² these decisions strongly support organizational autonomy over matters involving religious doctrine and practice.⁴³³

A number of leading scholars of the religion clauses share this position. In their view, government interference with religious organizations, as with religious beliefs and practices more generally, must be kept to a

430. See *Milivojevich*, 426 U.S. at 724-25; *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church in N. Am.*, 344 U.S. 94, 114-16 (1952); see also *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1872).

431. *Kedroff*, 344 U.S. at 116.

432. See *supra* text accompanying note 147.

433. The Supreme Court’s most recent decision addressing an intra-faith dispute, *Jones v. Wolf*, did not diminish these protections for religious groups. Prior to *Wolf*, where an intra-faith dispute involved a hierarchical religious polity, the Court deferred to the decision of the highest church tribunal. See *Milivojevich*, 426 U.S. at 724-25; *Kedroff*, 344 U.S. at 114-16; *Watson*, 80 U.S. at 727, 728-29. Such deference continues to be necessary where the dispute turns on a religious question. See *Wolf*, 443 U.S. at 604; *Milivojevich*, 426 U.S. at 709. However, in *Wolf*, the Court also permitted courts to use “neutral principles of law” to resolve controversies according to secular principles of trust and property law. 443 U.S. at 602-03. The neutral principles approach has been criticized as inconsistent with the Court’s traditional deference to the highest religious authority in hierarchical polities as well as the free exercise rights of groups to establish their own procedures and tribunals for resolving internal disputes. See *id.* at 610-11, 613-14, 616-18 (Powell, J., dissenting). The Court has disagreed. According to the Court, free exercise rights are protected under the neutral principles approach because religious groups remain free to provide for any outcomes they wish by embodying their preferences in a “legally cognizable form.” *Id.* at 603-04, 605-06.

The Supreme Court’s 1990 decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), also did not curtail the protections that the First Amendment affords religious organizations. In *Smith*, the Court held that the Free Exercise Clause does not relieve individual believers from the obligation to comply with neutral laws of general applicability. *Id.* at 878-79. The Court did not discuss claims made by religious groups for protection from state interference in internal affairs. In recent cases, federal circuit courts have held that the protections for religious organizations articulated in the Court’s intra-faith dispute cases survive *Smith*. See *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299, 1302-04 (11th Cir. 2000); *EEOC v. Roman Catholic Archdiocese of Raleigh*, 213 F.3d 795, 800 n.* (4th Cir. 2000); *Combs v. Cent. Tex. Annual Conference of the United Methodist Church*, 173 F.3d 343, 347-50 (5th Cir. 1999); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996).

minimum.⁴³⁴ Religion and religious organizations should be “let alone.”⁴³⁵

However, increasingly scholars are challenging the assumption that religious organizations should be free from state interference. There have always been scholars who have expressed concern that exempting religious organizations from burdensome state regulations hinders the ability of the state to achieve the public policies underlying these regulations.⁴³⁶ Scholars have also voiced concerns about potential abuses associated with unregulated religious groups.⁴³⁷ In recent years, these concerns have been amplified by scholars who view religious organizations and other voluntary associations as important mechanisms for teaching civic virtue and other norms and practices necessary for democratic self-government. Religious organizations are among the “mediating structures”⁴³⁸ or institutions of “civil society”⁴³⁹ that stand between the individual and the state, and as such, they play a critical role in fostering public virtue and civic engagement. Because of this important role in supporting democratic government, the state has a strong interest in molding civil society institutions according to public values.⁴⁴⁰

434. See, e.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-based Social Service Providers*, 46 EMORY L.J. 1, 26 (1997); Esbeck, *supra* note 129, at 316; Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001-02 (1990); Douglas Laycock, *The Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 69 (1997); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 169 (1992) [hereinafter McConnell, *Religious Freedom at a Crossroads*]; Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3, 11-12, 38 (2000) [hereinafter McConnell, *Singling Out Religion*].

435. See, e.g., Esbeck, *supra* note 128, at 83 (arguing that when ecclesiastical endeavors are at issue, government should “leave[] the church where the government found it”); Laycock, *supra* note 119, at 1376 (stating that religious organizations have a right “to be left alone”); McConnell, *Singling Out Religion*, *supra* note 434, at 11 (arguing that unifying principle of religion clauses is “let it [religion] alone”).

436. See, e.g., Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 403 (1987); Marshall & Blomgren, *supra* note 127, at 321.

437. See Lupu, *supra* note 436, at 403; Marshall & Blomgren, *supra* note 127, at 316-20.

438. This term has become popularized by PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* 158 (Michael Novak ed., 2d ed. 1996). Berger and Neuhaus give an influential account of how religious organizations and other voluntary associations serve as mediating structures between the individual and the modern state. They do not advocate a role for the state in molding these institutions according to prevailing public values as many later scholars have done.

439. See Linda C. McLain & James E. Fleming, *Foreword: Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289, 289 (2000).

440. See, e.g., STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* 108 (2000); Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417, 451 (2000) [hereinafter Macedo, *Constituting Civil Society*]; Ste-

Stephen Macedo is one of the most well-known exponents of this position, and in his view, the state may, and should, “colonize”⁴⁴¹ the private realm of voluntary associations and “shape”⁴⁴² and “constitute”⁴⁴³ them in the image of fundamental democratic norms and structures. Indeed, for Macedo, sustaining our shared democratic order means that “we must maintain political institutions and practices that work to transform the whole of the moral world in the image of our most basic political values.”⁴⁴⁴

For all of these scholars, government cannot leave religious organizations alone because even the internal practices of religious groups affect the larger society. For Macedo and others who envision religious organizations as educative institutions with an important role in fostering civic virtue and democratic norms, religious organizations and other civil society institutions must be tamed and transformed in the image of public values so that they encourage, not undermine, these values. While the tools of transformation that they advocate are generally noncoercive ones,⁴⁴⁵ a coercive approach may be necessary where the activities of civil society institutions threaten essential public norms.⁴⁴⁶ Likewise, scholars who oppose strong protections for religious groups on the grounds that exemptions from burdensome laws will hinder the state’s ability to achieve public policy goals also believe that a policy of noninterference will have significant costs for the larger society. For example, Evelyn Tenenbaum has argued that the exemption of religious schools from labor statutes creates an atmosphere of labor strife that harms children by subjecting them

phen Macedo, *The Constitution, Civic Virtue, and Civil Society: Social Capital as Substantive Morality*, 69 FORDHAM L. REV. 1573, 1573-74 (2001) [hereinafter Macedo, *The Constitution, Civic Virtue, and Civil Society*]; see also Joshua Cohen & Joel Rogers, *Secondary Associations and Democratic Governance*, 20 POL. & SOC’Y 393, 394-95 (1992); Amy Gutmann, *Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3, 18 (Amy Gutmann ed., 1998). For discussions of scholarship advocating this position, see NANCY L. ROSENBLUM, MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA 36-41 (1998), and Yael Tamir, *Revisiting the Civic Sphere*, in FREEDOM OF ASSOCIATION, *supra*, at 214, 220-22. Both Rosenblum and Tamir disagree with those who favor using the power of the state to achieve a congruence between the internal values of groups and public values. See ROSENBLUM, *supra*, at 47-65, 349-50; Tamir, *supra*, at 215, 222-26.

441. Macedo, *Constituting Civil Society*, *supra* note 440, at 441.

442. MACEDO, *supra* note 440, at 108, 135; Macedo, *The Constitution, Civic Virtue, and Civil Society*, *supra* note 440, at 1574.

443. Macedo, *Constituting Civil Society*, *supra* note 440, at 451.

444. MACEDO, *supra* note 440, at 151.

445. See Macedo, *Constituting Civil Society*, *supra* note 440, at 424.

446. See MACEDO, *supra* note 440, at 147. According to Macedo:

[W]e cannot give carte blanche to everything that claims the cover of religious freedom. Some religious beliefs are at odds with liberalism itself. We should tolerate the intolerant, as long as they do not genuinely threaten the survival of free institutions, but we need not bend over backwards to make life easy for them.

Id. at 147.

to conflict and division.⁴⁴⁷ Similar arguments have been made where other public policies are at stake.⁴⁴⁸

Many of the lower courts that have examined the constitutionality of applying state and federal labor laws to religious organizations have also been quick to find countervailing public policies that outweigh the First Amendment interests of religious groups. Even where lower courts have found that mandatory collective bargaining does infringe upon First Amendment freedoms, these courts have routinely held that this interference is minimal and outweighed by the government's compelling interest in preserving labor peace and protecting worker rights to unionize.⁴⁴⁹ The fact that the NLRB only began asserting jurisdiction over nonprofit organizations during the 1970s⁴⁵⁰ and that exemptions would be limited to religious groups has not been persuasive. Labor peace and worker rights are viewed as such important public values that they outweigh religious liberty interests even when these values are formulated at a very general level.⁴⁵¹ The Minnesota Supreme Court has given a particularly colorful illustration of this point in *Hill-Murray*. Collective bargaining rights under labor statutes are so important because they "allow[] the individual 'David' to negotiate against the employer 'Goliath.'"⁴⁵² The voluntary grievance procedure that the Hill-Murray High School had adopted was not sufficient to give workers the collective strength that they can exert under labor statutes.⁴⁵³ Equality of bargaining power between

447. See Evelyn M. Tenenbaum, *The Application of Labor Relations and Discrimination Statutes to Lay Teachers at Religious Schools: The Establishment Clause and the Pretext Inquiry*, 64 ALB. L. REV. 629, 671, 674 (2000).

448. For instance, Jane Rutherford has argued that permitting religious organizations to discriminate in employment based on race or gender reinforces a "culture of subordination" that affects members and nonmembers alike. Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1114, 1123 (1996); see also Lupu, *supra* note 436, at 408-09. William Marshall and Douglas Blomgren have argued that deregulating the fundraising activities of religious groups threatens the public interest in combating fraud. See Marshall & Blomgren, *supra* note 127, at 319. The list goes on.

449. See cases cited *supra* notes 48-49, 77-78.

450. See e.g., Cornell Univ., 183 N.L.R.B. 329 (1970) (extending jurisdiction to colleges and universities); Shattuck Sch., 189 N.L.R.B. 886 (1971) (exercising jurisdiction over secondary schools). It was not until the NLRB's decision in *Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 N.L.R.B. 1344 (1976), that the Board used the same jurisdictional standards for nonprofit and for-profit organizations. See *id.* at 1345.

451. Douglas Laycock has observed that the Second Circuit in *Culvert* "assert[ed] the state's interest at the highest level of generality; the court did not explain why the state had any interest at all in industrial peace or economic order inside a religious institution." Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 436 (1986).

452. *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 867 (Minn. 1992).

453. See *id.*

workers and management trumps First Amendment protections for religious groups.

Scholars who have advocated strong protections for religious groups from government interference have offered numerous reasons for their position. Scholars have noted that religion receives special treatment in the First Amendment.⁴⁵⁴ They have also echoed arguments raised in the founding era. For example, scholars have argued that the protection of religion from government interference is necessary because religious claims have a special authority for the believer that takes priority over civil laws.⁴⁵⁵ For the believer, religious obligations are backed by a transcendent command. In James Madison's words, they are a "duty towards the Creator [which is] precedent, both in order of time and in degree of obligation, to the claims of Civil Society."⁴⁵⁶

Noninterference with religious groups is also defended on the grounds that these organizations address spiritual matters that are beyond the government's competence. The state is limited to the temporal and material. Its jurisdiction does not extend to the transcendent or the sacred.⁴⁵⁷ Roger Williams's metaphor of the church as a garden which must be separated and protected from the wilderness of the world and civil state expresses this argument well.⁴⁵⁸ John Locke's division between the spiritual and temporal spheres does as well; according to Locke, salvation of souls is the business of religion, and temporal matters belong to civil gov-

454. See, e.g., Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 16; McConnell, *Singling Out Religion*, *supra* note 434, at 9, 14-15. According to Laycock:

Religion is unlike other human activities, or at least the founders thought so. The proper relation between religion and government was a subject of great debate in the founding generation, and the Constitution includes two clauses that apply to religion and do not apply to anything else. This debate and these clauses presuppose that religion is in some way a special human activity, requiring special rules applicable only to it.

Laycock, *supra*, at 16.

455. See McConnell, *Singling Out Religion*, *supra* note 434, at 28-29; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 692 (1992) [hereinafter McConnell, *An Update and a Response*]; Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 15-16, 26 [hereinafter McConnell, *Accommodation of Religion*].

456. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 295, 299 (Robert A. Rutland & William M.E. Rachal eds., 1973).

457. See Gerard V. Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1084-87 (1989); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 84, 92 (2002); Steven D. Smith, *Separation and the "Secular": Reconstructing the Disestablishment Decision*, 67 TEX. L. REV. 955, 1017-18 (1989).

458. See ROGER WILLIAMS, THE BLOODY TENENT OF PERSECUTION (1644), *reprinted in* 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 1, 94-95, 415 (Samuel L. Caldwell ed., 1963).

ernment.⁴⁵⁹ Thus, noninterference reflects an essential separation between what is temporal and what is extratemporal.

Arguments based on the transcendent authority of religious commitments and the special spiritual character of religious activity may have limited appeal to those without religious convictions, but scholars have reformulated both of these arguments for broader audiences. For example, Douglas Laycock argues that because religious beliefs are of extraordinary importance to individuals and relatively little importance to the state, religion should be left to those who care about it most.⁴⁶⁰ When the state interferes with religious belief and practice, the result is conflict and human suffering.⁴⁶¹ According to Michael McConnell, one does not need to believe in God to respect the special authority that religious commands have for those who do.⁴⁶² McConnell has also argued that protecting religious groups from interference by the state preserves the ability of individuals to choose and pursue their own vision for the good life, which is a fundamental value in liberal societies.⁴⁶³ A democratic society can afford to “let a thousand flowers bloom.”⁴⁶⁴

All of these arguments emphasize the value *for religion* when government refrains from interfering with religious matters. Scholars have also defended the autonomy of religious groups on instrumental grounds. For example, as discussed above, many scholars are currently giving renewed attention to the value of religious groups and other mediating structures as sources of civic virtue and public values as well as practice grounds for civic discourse and engagement. Voluntary associations are “seedbeds of

459. JOHN LOCKE, A LETTER CONCERNING TOLERATION 17, 27 (Bobbs-Merrill 1955) (1689).

460. See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 317, 325-26 (1996). Laycock does not argue that religious beliefs are of no importance to government. He recognizes that some religious beliefs may foster the type of public culture and behaviors that support good government. *Id.* at 317. However, religious beliefs will always be more important to the individual than to the state, and history demonstrates that government interference in religious matters is not an effective mechanism for fostering religious faith. *Id.* at 317-18.

461. See *id.* at 317; see also McConnell, *Accommodation of Religion*, *supra* note 455, at 16 (arguing that protecting religion from state intrusion preserves harmony among citizens).

462. See McConnell, *Singling Out Religion*, *supra* note 434, at 30.

463. See Michael W. McConnell, *Old Liberalism, New Liberalism, and People of Faith*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 5, 14 (Michael W. McConnell et al. eds., 2001); Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1251-52 (2000); see also Gedicks, *supra* note 124, at 116, 158 (stating that religious groups provide contexts for “personal expression, development, and fulfillment” and for the “development of individual personality and identity”).

464. Michael W. McConnell, *Education Disestablishment: Why Democratic Values Are Ill-Served by Democratic Control of Schooling*, in MORAL AND POLITICAL EDUCATION: NOMOS XLIII, at 87, 103 (Stephen Macedo & Yael Tamir eds., 2002).

civic virtue⁴⁶⁵ or “schools for democracy.”⁴⁶⁶ For some, this role means that government must mold and shape religious groups and other civil society institutions so that they reflect shared democratic norms. However, others have argued that state interference with religious groups and other voluntary associations will impede the production of civic virtue, not enhance it.⁴⁶⁷ Thus, preserving the ability of religious organizations to generate and nurture civic virtue requires strong protections from state control.⁴⁶⁸ Michael McConnell has gone even further and disputed the assumption that Americans share a common civic culture or morality that can serve as the basis for state intervention.⁴⁶⁹ According to McConnell, democratic government does require public virtue, but virtue is fostered best by a diversity of religious groups and civil society institutions that all teach public values and morality from their own point of view.⁴⁷⁰

Other scholars have emphasized the value of religious groups as a check against overweening state power. Protecting religious groups from state interference helps to safeguard citizens against a totalitarian state.⁴⁷¹ Religious organizations are a “buffer” between the individual and the state,⁴⁷² and vehicles for resisting government encroachment on individ-

465. MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 109 (1991); see also SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY (Mary Ann Glendon & David Blankenhorn eds., 1995).

466. BERGER & NEUHAUS, *supra* note 438, at 194.

467. See Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 121, 123-25, 131-33 (1992); see also Thomas C. Berg, *Civility, Politics, and Civil Society: Response to Anthony Kronman*, 26 CUMB. L. REV. 871, 878-79, 882 (1995-96).

468. Hall, *supra* note 467, at 121, 123-25, 131-33. Unions have also been described as seedbeds of civic virtue and engagement. See Thomas C. Kohler, *Civic Virtue at Work: Unions as Seedbeds of the Civic Virtues*, 36 B.C. L. REV. 279, 281, 297-301 (1995); Kohler, *supra* note 330, at 550-51; see also Cynthia L. Estlund, *The Changing Workplace as a Locus of Integration in a Diverse Society*, 2000 COLUM. BUS. L. REV. 331, 360 (stating that unions “actively cultivate solidarity and egalitarian and democratic values and practices”). However, unlike religious organizations, unions that are established under federal and state law are heavily regulated by government. Thus, unions cannot play the same prophetic role in society that religious organizations freed from state interference can play. For a discussion of this prophetic role, see *infra* pp. 156-58. While excluding religious organizations from coverage under labor statutes may mean that these groups will choose not to recognize or engage worker associations, it also frees them to play an important role in fostering new visions for labor-management relations and new types of worker organizations.

469. See McConnell, *supra* note 464, at 96, 101, 106; Michael W. McConnell, *Multiculturalism, Majoritarianism, and Educational Choice: What Does Our Constitutional Tradition Have to Say?*, 1991 U. CHI. LEGAL F. 123, 133.

470. See McConnell, *supra* note 464, at 124-25, 134; Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453, 475 (2000).

471. See Lupu & Tuttle, *supra* note 457, at 40, 84.

472. Esbeck, *supra* note 128, at 53, 67-68.

ual freedom.⁴⁷³ Strong protections for religious groups also foster religious pluralism, which reduces the threat of religious absolutism or tyranny.⁴⁷⁴

All of these scholars give important reasons for protecting religious organizations from state interference. However, the discussion of Catholic social teaching above and the relationship of this teaching to secular models for collective bargaining reveal that these scholars have overlooked something that is also critical for appreciating the full value of religious groups. When the Catholic Church teaches that labor relations, like other social relations, should be based upon mutual concern, cooperation and willingness to forgive and seek reconciliation, the Church challenges the assumptions and expectations underlying federal and state labor laws. Rather than assuming distrust and conflicts of interest, the Church builds her approach to labor relations upon hope and the expectation that employers and employees can work together to see each others' concerns and pursue the common good. Indeed, human fulfillment and social renewal require such self-giving. Thus, the Church rejects an essentially adversarial understanding of labor-management relations and a model for labor peace that is built upon the balance of power rather than a spirit of unity. The Church also envisions its own institutions as a model for this unity. The Church wants to be a witness and leaven in society for the broader transformation of human relations.

Protecting Church institutions from outside interference by the state is, therefore, critical for preserving the alternate vision for labor relations that the Church desires to offer to society. What the Church and other religious groups can offer to society is a prophetic voice, a new understanding of social life. Religious institutions are not only seedbeds of civic virtue; they can also be seeds for the renewal of the social, political and legal order. Religious groups, Catholic and non-Catholic alike, offer the possibility of counter-cultural visions that challenge and push the larger community in progressive directions unimagined by prevailing beliefs. For example, instead of teaching that the worker "David" must be fitted with new powers so that he can "negotiate *against* the employer 'Goliath,'"⁴⁷⁵ the Church proclaims a new message that encourages David and Goliath to give up their weapons and sit down together at the same table and talk over their differences in a spirit of mutual love and concern. When the Minnesota Supreme Court required the Hill-Murray High School to bargain under the state's labor statute, it stifled the Church's ability to present this radically new model for labor relations.

473. See Gedicks, *supra* note 124, at 158; see also Esbeck, *supra* note 128, at 67-68.

474. See Bagni, *supra* note 142, at 1540; McConnell, *Accommodation of Religion*, *supra* note 455, at 19.

475. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 867 (Minn. 1992) (emphasis added).

Scholars who study the religion clauses tend to view the quintessential free exercise plaintiff as an individual or group seeking freedom from state regulation in order to pursue its own affairs according to religious principles. The quintessential plaintiff is the individual who desires to follow the command of God over the demands of the state, or the group that seeks to preserve their internal spiritual life free from government encroachment. This picture does, in fact, describe many plaintiffs. The Amish parents in *Wisconsin v. Yoder*⁴⁷⁶ are a familiar example. When these parents sought an exemption from Wisconsin's compulsory education laws so that they could withdraw their children from school after the eighth grade,⁴⁷⁷ what they wanted was to be left alone, free to pursue their religious beliefs and practices unimpeded by the state. For many religious groups today, freedom from state interference is understood in the same way. For example, for many conservative Christian groups, Roger Williams's metaphor of the garden and the wilderness is as true today as it was in the seventeenth century. The purpose of the church is to save people out of the world into the Kingdom of God, not to transform the wilderness of the world, much less confuse progress in the world with the coming of the Kingdom. For these groups, freedom from state interference is just that: it is freedom *from* outside control. It is the freedom to build the garden of the Church as a sphere that is radically distinct from the wilderness of the world.

The Catholic Church, by contrast, has never envisioned a sharp divide between the Church and the world, the spiritual and the temporal, or religion and politics. For the Church, the internal spiritual life of its members and institutions must always move outwards as a sign and instrument for the transformation of the larger society. The Church does not confuse the renewal of the social order with the Kingdom of God, but the former should reflect and foreshadow the latter. Thus, the Church wants something more than merely to be left alone by the state. For the Church, freedom from state interference is essential so that religious groups can exert a transformative power on the larger world. The Church wants to offer her solutions for pressing social questions;⁴⁷⁸ she wants to be the "mother and teacher of nations."⁴⁷⁹ She believes that her tradition of social teaching can be a "living, growing resource that can inspire hope and help shape the future" for all.⁴⁸⁰ She wants freedom *from* outside interference so that she can be free *for* the world that she desires to serve. Not all religious organizations seek to be a transformative force in the larger community. However, even insular religious communities can present an important example for nonmembers.

476. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

477. *See id.* at 207.

478. *See CENTESIMUS ANNUS*, *supra* note 148, at 14.

479. *MATER ET MAGISTRA*, *supra* note 165, at 84.

480. *ECONOMIC JUSTICE FOR ALL*, *supra* note 20, at 27.

For Macedo and other scholars who would like to see all institutions of civil society teach common democratic norms and values, alternative visions for social life are to be distrusted. The world of democratic political institutions and values is the garden that must tame the wilderness of deviant religious groups and voluntary associations. However, the discussion of Catholic social thought above illustrates vividly that difference can be a powerful force for social good. One need not agree with the Church's vision for social relations to see that the Church offers an important voice that should be heard and carefully considered. Much will be lost if the Church cannot offer a model for labor relations built on love, cooperation and reconciliation rather than conflict, division, distrust and battle. Thus, protecting religious groups benefits not only the church but the world as well. Among religious groups are many flowers that can offer new possibilities for the field of the world.

There are probably many readers who view the Church's teaching regarding labor relations as too idealistic and not sufficiently reflective of the limitations that human self-interest and weakness place upon workplace relations. Perhaps, for example, readers are willing to concede that promises and grants of benefits in the religious workplace may be a gesture of reconciliation but are unwilling to extend such an assumption to the commercial sector where the opportunities and incentives for abuse are greater. Likewise, there may be readers who can envision religious employers and employees successfully sitting around the same table and addressing working conditions together but, nevertheless, fear the dangers of exploitation in a commercial setting. For these readers, exemptions for religious organizations from labor statutes may be appropriate, but the Church's ideals have little value for the larger world.

There may, indeed, be elements of the Church's teaching that are not sufficiently realistic for commercial settings, and it is almost certainly true that any ideals for economic and social life will have to undergo some adjustments as they are applied to the realities of the world. However, regardless of their limitations, the ideals of religious communities are still an important leaven in society, and they remain valuable elements in public conversations about social and legal norms. Even if they are not wholly accepted, religious ideals for social life can contribute to a larger collective conversation among Americans about how to structure legal norms, and, together, all these participants can fashion solutions that draw from many different insights.

For example, if they are freed from mandatory collective bargaining under federal and state labor statutes and permitted to model a more cooperative vision for labor relations, Catholic organizations can provide important contributions to the current debates over section 8(a)(2). Employee participation programs that currently violate section 8(a)(2) could be tried in the Church context, and if they are successful, the Church can offer them as a model for other workplaces. To be sure, work-

ers may need more protections in secular workplaces than in religious ones, and there will be voices urging the need for greater caution in the commercial setting. However, here too the Church may have something instructive to say. The Church has never denied the power of sin in the world. Indeed, the U.S. Bishops have suggested that programs designed to increase cooperation and employee involvement in the workplace should be used in conjunction with independent unions in order to provide the greatest protection for workers. Thus, the best approach may be to permit employers to experiment with a wide range of endeavors to increase participation and labor-management cooperation, but retain strong protections for worker rights to unionize should employers act in bad faith or otherwise fail to live up to their representations. If employers do initiate employee participation programs in bad faith, employees who are the victims of manipulative practices can unionize, and employee participation programs that are smokescreens for employer domination will almost surely increase the incentives for unionization. On the other hand, employers who honestly desire to increase worker responsibility and a cooperative workplace environment will be able to do so, and the Church can play an important role as a model of what employers and employees can achieve if they choose to try to work together in a spirit of unity rather than distrust. In this way, the law would leave open the possibility of labor relations built upon cooperation and mutual concern but also have protections in place for situations that fail to achieve this vision.

Other readers may object to my defense of religious group protections on the grounds that not all religious groups are beneficial influences on the larger society. While there may be flowers among religious organizations, there are many weeds as well, and even organizations with valuable visions for social relations may not live up to their ideals. It is certainly true that not all religious groups will offer positive alternatives for social relations, and many others will fail to live up to the visions they promote. The Church itself has recognized that its clergy and lay members have not always been faithful to the Church's message,⁴⁸¹ and given the weaknesses of human nature, this should not be surprising. Indeed, the history of labor relations in the American Church contains examples of Catholic employers who have failed to model the Church's vision for labor-management interaction. In 1949, a bitter fight between the Archdiocese of New York and striking cemetery workers led Dorothy Day to write the following in a letter addressed to New York's Cardinal Spellman:

I'm writing to you, because the strike, though small, is a terribly significant one in a way. Instead of people being able to say of us "see how they love one another," and "behold, how good and pleasant it is for brethren to dwell together in unity," now "we

481. See *GAUDIUM ET SPES*, *supra* note 148, at 193.

have become a reproach to our neighbors, an object of derision and mockery to those about us."⁴⁸²

Dorothy Day's letter describes labor-management relations within the Church that not only fail to meet the ideals of love and cooperation but also give the world an unfortunate example of fighting and division.

The events in *Christ the King* provide a similar example. The litigation in *Christ the King* arose out of a bitter strike by lay teachers at Christ the King Regional High School in Queens, New York.⁴⁸³ The strike began in September of 1981 and continued for several months until school administrators fired the striking teachers, hired replacements and ended negotiations.⁴⁸⁴ During the strike, recriminations and animosity on both sides ran high,⁴⁸⁵ and after the teachers were dismissed, the long-running battle continued in the courts for sixteen years.⁴⁸⁶ The school did not resume negotiations or reinstate striking workers until 1997 when the Court of Appeals of New York upheld the authority of a state labor board decision ordering the school to do so.⁴⁸⁷ Both sides in this battle provided a poor example of the Church's teaching regarding cooperation, reconciliation and forgiveness.

Scholars and commentators have also criticized the contemporary American Church for failing to develop structures and procedures to implement the U.S. Bishops' promise of union rights for Church employees.⁴⁸⁸ For these critics, the fact that only twenty-three percent of Catholic schools report representation for lay teachers means that the Church has not done enough to make its teaching a reality within Catholic organizations.⁴⁸⁹

Thus, the Church has, and will again, fail to live up to its vision for social life, and other religious organizations will make mistakes as well. However, the proper response is not to cut off the possibility of prophetic examples by regulating religious organizations according to secular stan-

482. Letter from Dorothy Day to Francis Cardinal Spellman, Archbishop of New York (Mar. 4, 1949), *quoted in* David L. Gregory, *Dorothy Day, Workers' Rights and Catholic Authenticity*, 26 FORDHAM URB. L.J. 1371, 1379 (1999).

483. *See* N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 963 (N.Y. 1997); Damon Stetson, *Sides Called "Deadlocked" in Lay Teachers' Strike*, N.Y. TIMES, Nov. 8, 1981, § 1, at 47.

484. *See Christ the King*, 682 N.E.2d at 963; Cerrise Anderson, *Judge Backs Rehiring of Fired Lay Teachers; Judge Rejects Catholic School's First Amendment Claim*, N.Y.L.J., Sept. 8, 1992, at 1; Beth Holland, *Judge Tells School to Rehire Teachers*, NEWSDAY, Oct. 4, 1989, News, at 31.

485. *See* Stetson, *supra* note 483.

486. *See* Charlie LeDuff, *Sixteen Years Later, Catholic School Is Told to Rehire Teachers*, N.Y. TIMES, July 13, 1997, § 13, at 7.

487. *See Christ the King*, 682 N.E.2d at 963, 966-67; LeDuff, *supra* note 486; William Murphy, *School Loses Union Battle; Ordered to Rehire Teachers Fired in 81*, NEWSDAY, June 14, 1997, News, at A25.

488. *See* David L. Gregory & Charles J. Russo, *The First Amendment and the Labor Relations of Religiously-Affiliated Employers*, 8 B.U. PUB. INT. L.J. 449, 456-57 (1999).

489. *See id.* at 457-58 & n.43.

dards. Rather, it is important to preserve the freedom of religious organizations to formulate new ideals and endeavor to live according to these visions. The ability of religious organizations to generate and present these ideals is a valuable resource for the entire community, and the larger society will be impoverished if religious organizations are not free to pursue their distinctive ways of life. Leaving space for religious groups to develop their ideals and play a prophetic role in society necessarily means accepting the risk that some groups will fail to live up to their principles or even take a path that is more regressive than progressive. However, the benefits to society are worth these risks. Without such a space for experimentation, the larger community will be deprived of the value as well as the costs that new possibilities may present.

In the labor area, in particular, the risks associated with strong protections for religious groups are not very high. Because religious organizations are only a small fraction of employers, employees will have opportunities to leave and seek other employment if they are not treated fairly. Religious groups also have incentives to treat employees well. It will be difficult for religious groups to raise money from donors if they have a reputation for exploiting their employees. Moreover, it is the religious employer who will suffer the most from failures or abuses. The Church has recognized that when religious leaders and members do not live up to the Church's message, "they inflict harm on the spread of the Gospel."⁴⁹⁰ The more successfully religious groups model their ideals, the more effective they will be at fostering broader social renewal.

In rare cases, limitations on the freedom of religious organizations may be necessary. For example, if a religious group experiments with practices that endanger the lives of its employees or threaten them with serious bodily injury, interference may be justified. Recent cases involving clergy who have sexually abused minors raise the question of whether state interference is appropriate where church disciplinary procedures or oversight mechanisms fail to protect children from serious emotional injury. When the practices of religious groups harm outsiders to the organization, there is also a role for government regulation.⁴⁹¹ In any of these cases, however, state interference should be permitted only where truly compelling government interests are at stake. When a government interest becomes sufficiently compelling to justify intrusion into religious group affairs and how state interests should be balanced against the rights of religious organizations is a complex matter that is beyond the scope of this Article. However, if religious group freedom is of critical importance for both religious groups and the larger society, restrictions on this freedom should be both narrow and infrequent. Certainly, state interests do not

490. GAUDIUM ET SPES, *supra* note 148, at 193; cf. JUSTICE IN THE WORLD, *supra* note 168, at 295 (stating that "everyone who ventures to speak to people about justice must first be just in their eyes").

491. Douglas Laycock discusses the necessity of some limitations on religious group autonomy in Laycock, *supra* note 119, at 1402-09.

justify requiring religious organizations to bargain collectively under federal or state law. As discussed above, the risks associated with excluding religious groups from coverage under labor statutes are not high. Lower courts that have upheld labor board jurisdiction in cases involving religious organizations commonly refer to the state's interest in protecting worker rights and fostering labor peace.⁴⁹² However, employment with a religious organization is a voluntary choice by an adult, and the employees of religious organizations can leave and seek employment elsewhere if they are mistreated. The state's interest in promoting labor peace is also weak where religious groups compose only a small fraction of all employers.

Other readers may object to special protections for religious groups on the grounds that religious voices are not the only prophetic voices in society, nor are religious groups the only sources for alternative models of social relations. There are secular flowers as well whose ideals can benefit the larger community. A number of scholars have made this argument that it would be unfair to give religious groups protections from state interference that secular groups do not also receive.⁴⁹³ One response to this objection is that the religion clauses themselves treat religious groups differently, and, consequently, there is constitutional authority for giving religious groups special protections that nonreligious groups do not have.⁴⁹⁴ Even more importantly, however, if differential treatment is problematic, the appropriate approach is to increase protections for nonreligious groups, not eliminate protections for religious groups.⁴⁹⁵ In my view, secular nonprofit groups and voluntary organizations can, indeed, be important sources for social renewal just as religious groups can. They should, therefore, receive greater protection from government interference than they do under current legislation and constitutional interpretation. Both types of groups should be protected, not neither.

In the labor field, there is precedent for giving nonprofit groups, religious and nonreligious alike, protection from state interference. Prior to 1976, the NLRB routinely declined jurisdiction over many types of charitable nonprofit entities on the grounds that the purposes of the Act would not be served by asserting jurisdiction.⁴⁹⁶ This exclusion applied regard-

492. See *supra* note 449 and accompanying text.

493. See, e.g., Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1262-66 (1994); Lupu, *supra* note 436, at 401-03; Marshall & Blomgren, *supra* note 127, at 309, 321.

494. For scholars making this argument, see Laycock, *supra* note 460, at 314; Laycock, *supra* note 454, at 16; McConnell, *Singling Out Religion*, *supra* note 434, at 9; McConnell, *An Update and a Response*, *supra* note 455, at 717.

495. Michael McConnell has made a similar argument. See McConnell, *Singling Out Religion*, *supra* note 434, at 23, 46-47.

496. See, e.g., Ming Quong Children's Ctr., 210 N.L.R.B. 899, 901 (1974) ("[W]e conclude that it would not effectuate the policies of the Act for the Board to assert its jurisdiction over this type of nonprofit institution whose activities are

less of whether the entity was religious or nonreligious. In *Rhode Island Catholic Orphan Asylum, a/k/a St. Aloysius Home*, the Board changed its policy and began to assert jurisdiction over nonprofit charitable entities on the same basis as for-profit groups.⁴⁹⁷ The Board might return to its former position to allow for greater diversity and experimentation in the nonprofit world as well as to equalize the treatment of religious and nonreligious groups. At the constitutional level, further Supreme Court expansion of the freedom of association under the First Amendment would also give nonreligious groups greater protections from state interference. Currently the protections from state interference under the Court's freedom of association decisions are more limited than the protections that religious groups receive under the religion clauses, but the Court's recent decision in *Boy Scouts of America v. Dale*⁴⁹⁸ has signaled the Court's willingness to interpret associational freedoms more broadly in the future.⁴⁹⁹

Still other readers may object to my defense of religious group rights on the grounds that it assumes and envisions too great a role for religious groups in public political life. John Rawls and scholars who have embraced his "political liberalism"⁵⁰⁰ argue that fundamental political principles in a liberal democratic society must be based upon reasons that can be accepted by all reasonable citizens.⁵⁰¹ In public discussion and formulation of these principles, citizens must use what Rawls has called "public reason."⁵⁰² Citizens engage in public reason when they give justifications for political outcomes that others who do not share the same religious, moral and philosophical commitments can be reasonably expected to understand and endorse.⁵⁰³ For example, such reasons may include arguments from common sense and common experience, widely accepted

noncommercial in nature and are intimately connected with the charitable purposes of the institution.").

497. See *R.I. Catholic Orphan Asylum, a/k/a St. Aloysius Home*, 224 N.L.R.B. 1344, 1345 (1976).

498. 530 U.S. 640 (2000).

499. For discussion of the significance of *Dale*, see, for example, Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483 (2001); Steffen N. Johnson, *Expressive Association and Organizational Autonomy*, 85 MINN. L. REV. 1639 (2001). For additional discussion, see David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121 (2001).

500. The term "political liberalism" derives from the title of John Rawls's influential book, *POLITICAL LIBERALISM* (1993).

501. See AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* 13-14, 52-53 (1996); MACEDO, *supra* note 440, at 169-70, 174; RAWLS, *supra* note 500, at 137.

502. For Rawls's understanding of "public reason," see Lecture VI in RAWLS, *supra* note 500, and John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997). Rawls and other scholars have also used the term "reciprocity." See GUTMANN & THOMPSON, *supra* note 501, at 14, 52-53, 55-56; Rawls, *supra*, at 767.

503. See GUTMANN & THOMPSON, *supra* note 501, at 14, 25, 52-53; MACEDO, *supra* note 440, at 169-74; RAWLS, *supra* note 500, at 137, 217, 225, 243; Rawls, *supra* note 502, at 770-71, 773.

forms of reasoning and generally accepted empirical conclusions and methodologies.⁵⁰⁴ Appeals to comprehensive moral, religious or philosophical ideas about truth as a whole do not meet the requirements of public reason.⁵⁰⁵ Disagreement about such comprehensive doctrines is persistent and permanent, and, thus, these ideals cannot ground legitimate political principles.⁵⁰⁶ Rawls would permit comprehensive religious and moral doctrines to be introduced into public discourse about fundamental political principles provided that those who make these arguments also give public reasons to support their position.⁵⁰⁷ Others would allow citizens to introduce comprehensive doctrines into public discussion where these doctrines are translatable into mutually accessible reasons.⁵⁰⁸ However, religious experiences or arguments that are not generally accessible to all citizens, including citizens of different faiths, have no place in political debate and decision making.⁵⁰⁹

For these scholars, the alternative visions for social life that religious groups present are not necessarily valuable resources for public life. My defense of strong protections for religious groups proceeds from the erroneous assumption (in their view) that the ideals modeled by religious groups are best understood as prophetic voices that can push society in a progressive direction. Some may be, but religious visions for social life that cannot be supported by reasons accessible to all are not legitimate sources for public political values and institutions. Thus, there is a danger when the Catholic Church claims that she is “mother and teacher of nations” or when she promotes her religious vision for human relations as the basis for renewing the social order and solving pressing social problems. Religious insights that can be expressed in terms of public reasons can be shared with others in political discussion and decision making, but the Church violates the requirements of public reason when she challenges society with something new that is not comprehensible to all. The Church also violates public reason when she promotes her comprehensive religious vision for human life as the proper foundation for the whole social and political order. In Rawls’s words, “[t]he zeal to embody the

504. See GUTMANN & THOMPSON, *supra* note 501, at 55-56; MACEDO, *supra* note 440, at 170; RAWLS, *supra* note 500, at 67, 162, 224.

505. See MACEDO, *supra* note 440, at 170, 168; RAWLS, *supra* note 500, at 224-25.

506. See GUTMANN & THOMPSON, *supra* note 501, at 25, 92; MACEDO, *supra* note 440, at 166-74; RAWLS, *supra* note 500, at 38-43, 60-63, 134, 224-25, 243; Rawls, *supra* note 502, at 766-67.

507. See Rawls, *supra* note 502, at 776.

508. See Amy Gutmann, *Religious Freedom and Civic Responsibility*, 56 WASH. & LEE L. REV. 907, 909 (1999).

509. See GUTMANN & THOMPSON, *supra* note 501, at 56-57; MACEDO, *supra* note 440, at 172; RAWLS, *supra* note 500, at 224-25.

whole truth in politics is incompatible with an idea of public reason that belongs with democratic citizenship.”⁵¹⁰

My defense of religious group protections does, indeed, challenge the idea of public reason. Supporters of public reason would limit political values to norms that can be understood and accepted by all while I celebrate new visions for social life that challenge prevailing orthodoxies. In my view, supporters of public reason lose much when they exclude from political life religious ideas that are not grounded in shared beliefs or reasoning processes. The requirement of public reason stifles change by circumscribing political discussion to what is, or can be, commonly agreed upon. There is no room for new or creative influences that transform widely accepted norms of reasoning and beliefs or change our current understandings of human experience.

Catholic social teaching contains vivid illustrations of what would be lost. When the Church teaches that mutual love and self-giving are the path to true human fulfillment and the proper basis for human relations, she is advocating something quite radical. The weaknesses of human nature are plain facts for all to see, and peace through a balance of power among competing interests is a concept readily accessible to common sense. However, hope in the capacity of human beings to seek each others' good and to sustain a political order based upon the values of love and forgiveness requires a certain leap beyond the familiar. Such a vision may, indeed, speak to the modern heart, but it is not because it can be constructed from reasons acceptable to all. It is, rather, as the Church teaches, a divine gift that transcends human experience at the same time that it explains and fulfills that experience. Supporters of public reason cut themselves off from such gifts as well as other radically new visions for public life that religious groups may offer. Without such prophetic voices, it will be difficult to challenge accepted norms and push beyond them. Political life will become stagnant, and public conversations will end where they began.

Those who embrace the idea of public reason fear a religious zeal to dominate the political order with a single controversial vision for human life as a whole. However, such a prospect is unlikely in a pluralistic democracy. When the Church claims to be “mother and teacher of nations,” she speaks as one voice among many, and political outcomes will necessarily

510. Rawls, *supra* note 502, at 767; see also RAWLS, *supra* note 500, at 243 (stating that “politics in a democratic society can never be guided by what we see as the whole truth”). Amy Gutmann and Dennis Thompson make a similar point: “In a pluralist society comprehensive moral conceptions neither can nor should win the assent of reasonable citizens. A deliberative perspective for such societies must reject the unqualified quest for agreement because it must renounce the claim to comprehensiveness.” GUTMANN & THOMPSON, *supra* note 501, at 92. Macedo echoes Rawls and Gutmann and Thompson: “Comprehensive moral ideals—including apparently liberal ones such as critical moral autonomy—claim more than we should want to claim on behalf of our political order.” MACEDO, *supra* note 440, at 167.

reflect numerous different insights and visions. Indeed, the great value of political discourse and debate that includes comprehensive religious and moral visions is that these visions can help shape outcomes that blend different ideas and reach towards solutions that go beyond the insights offered by any single contributor. When public reason requires participants to give reasons that all reasonable people can be expected to understand and accept, it loses the benefits of political debates among comprehensive belief systems and cuts off political discussion from some of its most valuable sources and resources. Political debate among comprehensive religious views is not something to be avoided; it is something to be embraced.

Indeed, most conversations about fundamental political values in America have, in fact, been discussions among comprehensive religious, moral and philosophical perspectives. From its founding, the American political system has been the product of such conversations about our deepest beliefs. American liberal democracy was constructed in the founding era from enlightenment and religious sources that situated political questions within larger understandings of human life and ends. The moral crusades that have since shaped and forged out political identity, such as the abolitionist movement and the civil rights movement, have drawn heavily upon prophetic religious and moral voices that have challenged and transformed the political foundations of the nation.⁵¹¹ Public reason may be appropriate for polite society at cocktail parties, but it cannot sustain the vibrant and innovative political life that has been part and parcel of American history.

Supporters of political liberalism and public reason also emphasize the “irreducibl[e]”⁵¹² and “implacable”⁵¹³ conflict among moral and religious ideas. However, religious and moral disagreement is not something to be feared or avoided in public life. Rather, it is a rich source of insight for public life that can push the political order in directions that no one individual or group can imagine. To be sure, the existence of religious and moral disagreement may yield sharp divisions on public questions and sometimes even divisive conflict. However, conflict need not be implacable, and it need not destroy the political community. In my view, beneath our disagreements about social and political life are truths about human nature that we all draw from, but that no one individual or group completely understands. While we will never completely, or perhaps even substantially, agree upon what these foundations are, as long as we learn to listen to each other, there is much we can learn from one another as we seek to understand these foundations better. We would lose something of profound value if we no longer viewed our public political discussions as part of a joint effort to uncover the true foundations for political life.

511. See John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567, 579-80 (1992).

512. GUTMANN & THOMPSON, *supra* note 501, at 25.

513. MACEDO, *supra* note 440, at 167.

Only a collective quest for the truth can inspire the prophetic visions that can shake our complacency and renew our society. Protecting religious groups as important participants in this quest goes beyond merely protecting the individual religious conscience or the internal spiritual life of religious communities from outside interference. It also goes beyond recognizing the value of religious organizations as seedbeds of virtue or buffers against overweening state power. Protecting the freedom of religious groups *from* state interference is, at the same time, crucial for preserving new visions of social life *for* us all.

