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# Keeping the Camel's Nose Out of the Tent: The Constitutionality of N.L.R.B. Jurisdiction Over Employees of Religious Institutions

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# COMMENT

## Keeping the Camel's Nose Out of the Tent<sup>1</sup>: The Constitutionality of N.L.R.B. Jurisdiction Over Employees of Religious Institutions

### INTRODUCTION

There is little dispute that contacts between church and state are on the rise.<sup>2</sup> As religious institutions extend their participation into traditionally secular areas such as politics, health care and business, the church becomes more susceptible to government regulation. The regulation of religious organizations raises serious first amendment questions. Although the Supreme Court has thus far sidestepped these constitutional issues, it has, in dicta, attempted to answer them by developing a different type of establishment clause analysis.<sup>3</sup> The essential element of this analysis is an examination of government entanglement with the religious institutions to be regulated.

An area in which the theory of regulatory entanglement has received much attention concerns the assertion of jurisdiction by the National Labor Relations Board (NLRB) over lay employees of religious institutions, particularly over lay teachers at parochial schools.<sup>4</sup> The purpose of this Note is to examine the theory of regulatory entanglement in this context, as it has been set forth in *NLRB v. Catholic Bishop of Chicago*.<sup>5</sup> This Note will conclude that it is incorrect for the Court to use the entanglement test under the establishment clause to determine the constitutionality of NLRB jurisdiction in these cases. These issues are better resolved under the free exercise clause because its balancing test is more appropriate in these instances.

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1. *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985).

2. The rising number of church and state clashes is due to the diversity of religious groups in the United States and their intermingling religious with business and social welfare activities. Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 365-67 (1984).

3. Marshall & Blomgren, *Regulating Religious Organizations Under the Establishment Clause*, 47 OHIO ST. L.J. 293, 294-95 (1986).

4. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Culvert*, 753 F.2d 1161.

5. 440 U.S. 490.

The free exercise clause dictates that the government may not force an individual to choose between religious beliefs and adherence to the law. Such a choice arises when a government regulation burdens religiously dictated behavior, either directly or indirectly, or requires action proscribed by religious belief.<sup>6</sup> However, the right to free exercise of religion, like all other constitutional guarantees, is not absolute.<sup>7</sup> The Supreme Court has developed a balancing test which it employs when governmental regulation and religious choice come into conflict. The claimant must make an initial showing that her religious beliefs are sincere and that the challenged regulation impinges upon the practice of those beliefs.<sup>8</sup> The burden of proof then shifts to the government, which must show that its interference with religious freedom is justified by a compelling interest and that the least restrictive means have been used to achieve that interest.<sup>9</sup>

When a religious organization claims that government action violates its first amendment freedoms it usually does so under the free exercise clause.<sup>10</sup> However, a religious organization may also use the establishment clause as a means of fending off government intrusion.<sup>11</sup> Under the establishment clause the government must show that its regulation has a secular purpose and a secular effect, and that no excessive entanglement with the religious institution will result from the questioned governmental action.<sup>12</sup> A religious group litigating under the establishment clause will assert that regulation of its activities fosters excessive entanglement and, therefore, an exemption from the burden should be created. Such cases are classified as regulatory entanglement claims.<sup>13</sup>

The Supreme Court has not yet utilized the theory of regulatory entanglement to invalidate government regulation of a religious group.<sup>14</sup> However, in several cases the Court has recognized that regulatory entanglement may in the future play a large role in creating religion based exemptions from government intrusion.<sup>15</sup>

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6. G. GUNTHER, CONSTITUTIONAL LAW 1510 (11th ed. 1985).

7. See *United States v. Lee*, 455 U.S. 252 (1982).

8. *Thomas v. Review Bd.*, 450 U.S. 707, 716-18 (1981).

9. *Id.* at 718. See also *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972), where the Court stated that "only those interests of the highest order . . . can overbalance claims to the free exercise of religion."

10. *Marshall & Blomgren*, *supra* note 3, at 295.

11. L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 14-11, at 1230 (2d ed. 1988).

12. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

13. L. TRIBE, *supra* note 11, § 14-11, at 1230.

14. *Id.*

15. In *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1978) the Court stated that "[d]etermining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. . . . Elimination of exemption would tend to expand the involvement of government. . . ." See also *Catholic*

When analyzing a claim under the theory of regulatory entanglement the Court has indicated that several factors must be taken into consideration. First, it must be shown that a particular government action poses a serious risk of first amendment infringement.<sup>16</sup> Next, the courts should examine the religious nature of the institution to be regulated, the extent of the government intrusion and, finally, the resulting relationship between the religious institution and the government.<sup>17</sup>

## I. THE NATIONAL LABOR RELATIONS ACT AND PAROCHIAL SCHOOLS

In 1926, Congress enacted the Railway Labor Act.<sup>18</sup> The terms of this Act were agreed upon privately by the railroads and the unions prior to its passage. The purpose of the Railway Labor Act was to facilitate the peaceful settlement of labor disputes. Eventually the Act's flaws became apparent and the need for a more comprehensive plan was recognized in response to rapidly growing union membership.<sup>19</sup>

In 1935, Congress passed the National Labor Relations Act (Wagner Act), supporting unionization and collective bargaining.<sup>20</sup> The Wagner Act provided employees with the legally protected right to unionize and to have their own representatives bargain collectively.<sup>21</sup> The National Labor Relations Board was created by Congress, using its powers under the commerce clause, to enforce the Act.<sup>22</sup> There were immediate constitutional challenges to the Wagner Act, and the Supreme Court was quick to respond by upholding the constitutionality of the Act and the establishment of the NLRB as a valid exercise of Congress' powers under the commerce clause.<sup>23</sup>

The Wagner Act did not exclude parochial schools from its coverage.<sup>24</sup> In fact, all private nonprofit organizations were subject to the Act.<sup>25</sup> It is

*Bishop*, 440 U.S. at 502 (where the Court stated that "[g]ood intentions by government . . . can surely no more avoid entanglement with the religious mission of the school . . .," and thus implied that NLRB regulation of parochial school teachers would violate the entanglement prong of the establishment clause.)

16. *Catholic Bishop*, 440 U.S. at 502.

17. Esbeck, *supra* note 2, at 352.

18. D. BOK, A. COX & R. GORMAN, *CASES AND MATERIALS ON LABOR LAW* 79 (10th ed. 1986) [hereinafter *LABOR LAW*].

19. *Id.* at 79-82.

20. National Labor Relations (Wagner) Act of 1935, Pub. L. No. 198, 49 Stat. 449 (1935).

21. *LABOR LAW*, *supra* note 18, at 83. Section 7 of the Wagner Act provides that "[e]mployees 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 concerted activities for the purpose of collectively bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982).

22. *LABOR LAW*, *supra* note 18, at 84.

23. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

24. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 511 (1979) (Brennan, J., dissenting).

25. *Id.* at 512.

important to note that the Act was specific in its definition of an employer and those who were exempt from such classification.<sup>26</sup> However, even though the NLRB had jurisdiction over parochial schools in 1935, there was no real reason for it to assert that jurisdiction. Such schools had little impact on interstate commerce and eighty-eight percent of those teaching in these institutions were nuns or priests, not members of the secular work force.<sup>27</sup>

National labor policy continued to be governed by the Wagner Act until 1947. During that time the unions grew rapidly and became very powerful.<sup>28</sup> That the unions had become so powerful so quickly began to cause concern among the public, and an anti-union attitude developed. In response to this shift in public sentiment, Congress passed the Labor Management Relations Act of 1947 (Taft-Hartley Act).<sup>29</sup> Organized labor was vehemently opposed to the passage of this statute, which reflected a retraction of the government's union support. The Taft-Hartley Act extended the role of the law in resolving labor disputes.<sup>30</sup>

The Taft-Hartley Act, like the Wagner Act, did not specifically exempt parochial schools from its coverage. In fact, an exemption for religious and educational institutions was considered but never adopted.<sup>31</sup> However, an exemption from NLRB jurisdiction was created for nonprofit hospitals.<sup>32</sup> The passage of such a limited exception to NLRB jurisdiction seems to reflect an intent by Congress to subject all other nonprofit employers to the Act, perhaps in response to their increased involvement in interstate commerce.

The NLRB continued to have jurisdiction over nonprofit educational institutions, but it apparently did not exercise that jurisdiction. Then, in 1951, the Board stated that it would not exercise its jurisdiction over these

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26. The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but *shall not include* the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, . . . as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

National Labor Relations Act, 29 U.S.C. § 152(2) (1982) (original version at 49 Stat. 449 (1935)) (emphasis added).

27. Comment, *Labor Relations in Parochial Schools: Should Lay Teachers Be Denied Protection of the General Laws?*, 17 SAN DIEGO L. REV. 1093, 1096-97 (1980).

28. See LABOR LAW, *supra* note 18, at 90.

29. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 61 Stat. 136 (1947).

30. LABOR LAW, *supra* note 18, at 89-92.

31. The original House version of the Taft-Hartley Act would have provided that the "term 'employer' . . . shall not include . . . any . . . foundation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes." H.R. 3020, 80th Cong., 1st Sess. § 2(2) (1947), *reprinted in* NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 158, 160-61 (1948).

32. H.R. 3020, 80th Cong., 1st Sess. § 2(2) (1947), *reprinted in* NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, at 226, 229 (1948).

schools.<sup>33</sup> The decision to exempt these schools from the Act's coverage was declared an exercise of the Board's discretion. The NLRB wanted no confusion as to the fact that a parochial school's conducting of business was subject to the Act. But at that particular time the Board felt it was inappropriate to exercise jurisdiction.<sup>34</sup> It is interesting to note that the NLRB soon cautiously extended this exemption to secondary parochial schools. It seems as if the Board was aware that it might be treading on thin entanglement ice, especially since these institutions now had a growing impact on interstate commerce.

As time passed more lay teachers joined the parochial school work force.<sup>35</sup> This influx of lay teachers into the parochial school system also had the effect of further increasing these institutions' roles in interstate commerce.<sup>36</sup> In response to this intrusion into the commercial realm, the NLRB overruled *Trustees of Columbia University in Cornell University*.<sup>37</sup> The Board decided that it would exercise its jurisdiction over private, nonprofit secondary schools.<sup>38</sup> The NLRB felt that these schools had chosen to enmesh themselves with the secular world when they hired lay teachers, and therefore, they should be subject to the same regulation as their secular counterparts.<sup>39</sup> Without statutory protections, lay teachers would remain at the mercy of these underfunded schools and would not be able to assert their right to unionization and collective bargaining.<sup>40</sup>

It appears that the NLRB was aware that it would be involved with church affairs. In fact, the Board acknowledged the potential for entanglement. In *Cardinal Timothy Manning, Roman Catholic Archbishop of the Archdiocese of Los Angeles v. NLRB*,<sup>41</sup> the Board stated that the "[r]egulation of labor relations does not violate the first amendment when it involves a *minimal intrusion* on religious conduct and is necessary to obtain [the Act's] objective."<sup>42</sup> It appears that the NLRB, by placing the Act's objectives before implicated first amendment interests, felt that it had resolved the constitutional question which continues to plague the courts today—are Congress' interests under the commerce clause more important than the first amendment claims asserted by religious institutions opposed to NLRB regulation? Indeed, it was this question which the Supreme Court hoped to put to rest with its decision in *Catholic Bishop*. However, instead of resolving

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33. *Trustees of Columbia Univ.*, 97 N.L.R.B. 424 (1951).

34. *Id.* at 425.

35. See Comment, *supra* note 27, at 1097.

36. See *Catholic Bishop*, 440 U.S. at 497.

37. 183 N.L.R.B. 329 (1970).

38. *Id.* at 331.

39. See *Catholic Bishop*, 440 U.S. at 498.

40. See Comment, *supra* note 27, at 1107.

41. 223 N.L.R.B. 1218 (1976).

42. *Id.* at 1218 (emphasis added).

the issue, the Court only added to already overwhelming uncertainty.

## II. *NLRB v. CATHOLIC BISHOP OF CHICAGO*<sup>43</sup>

In 1979, the Supreme Court attempted to reconcile the competing constitutional interests of Congress, acting through its agent the NLRB, and the Church.<sup>44</sup> Although the Court never officially reached the constitutional issue, Chief Justice Burger's opinion for the majority made it clear that in the future the Court would be willing to subordinate Congress' interests in regulating labor under the commerce clause.<sup>45</sup> The imposition of NLRB regulation over collective bargaining at parochial schools would impinge upon these schools' first amendment freedoms. The Court, in dicta, used the theory of regulatory entanglement to reach the conclusion that interests protected by the first amendment should prevail. This analysis, however, was simply a means for the Court to balance the competing interests of government against those of the private sector. Such a balancing test is utilized when examining free exercise claims.<sup>46</sup>

The case involved two Catholic high schools in Chicago, Quigley Preparatory Seminaries North and South, which were run by the Catholic Bishop of Chicago. Five high schools operated by the Diocese of Fort Wayne-South Bend, Inc. were also involved in the litigation.<sup>47</sup> The Chicago schools trained students to become members of the clergy. Their enrollment was limited to those students who, according to recommendations by their parish priests, had the potential to complete the necessary training to become a priest or nun.<sup>48</sup> These schools provided highly specialized religious instruction in addition to teaching secular college preparatory courses. The schools operated by the Diocese of Fort Wayne-South Bend, Inc., however, only sought to provide their students with a secular education which included religious training and teaching adherence to the tenets of the Catholic Church.<sup>49</sup>

In 1974 and 1975 lay teachers from both school systems sought union representation. The NLRB ordered representation elections.<sup>50</sup> Despite complaints by school officials that their first amendment rights were being

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43. 440 U.S. 490 (1979).

44. *Id.*

45. *Id.* at 499.

46. See *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981).

47. Both school systems operated with the approval of their respective states, Illinois and Indiana. *Catholic Bishop*, 440 U.S. at 492-93.

48. *Id.* at 492.

49. *Id.* at 493.

50. *Catholic Bishop of Chicago*, 220 N.L.R.B. 359, 360 (1975), *rev'd*, 559 F.2d 1112, *aff'd* 440 U.S. 490 (1979). It is important to note that the petitions asked for representation of only lay teachers and excluded all other employees of these schools.

violated, representatives were elected and the Board certified them to act as exclusive bargaining agents for the teachers.<sup>51</sup> In response to the Board's rejection of their first amendment claims, the schools refused to bargain with the union.<sup>52</sup> The union filed unfair labor practice complaints with the NLRB and moved for summary judgment. Their motion was granted over continuing assertions by the schools that the first amendment protected them from the imposition of Board jurisdiction.<sup>53</sup> The Board ordered that bargaining commence immediately.

The schools continued to ignore the Board's order and filed with the Seventh Circuit Court of Appeals for review of the Board's decision.<sup>54</sup> The schools were successful in arguing their first amendment claims and the court of appeals denied enforcement of the Board's orders. The court of appeals recognized that church schools were employers as contemplated by the Wagner Act, but declared that the Board's assertion of jurisdiction over these schools was unconstitutional.<sup>55</sup> The NLRB's actions were found to violate the establishment clause because they would foster excessive entanglement.

The court of appeals did not accept the NLRB's contentions that it could avoid entanglement by resolving only factual issues, such as the motivations behind the firing of a teacher. The Board conceded this could involve some inquiry as to whether the school's motivations were religiously dictated. But the Board argued that after making a motivational determination, it would only decide cases where the commission of unfair labor practices was for nonreligious reasons.<sup>56</sup> The Board said it would not question the validity or propriety of a religiously dictated dismissal. The NLRB seemed to be saying that it recognized that its assertion of jurisdiction would affect the operation of these schools, but that a determination of the constitutionality of the exercise of this jurisdiction and the extent of the entanglement caused should be decided on a case by case basis.

Judge Pell, writing for the court of appeals, disagreed and found that the NLRB's assertion of jurisdiction was unconstitutional per se. He stated that "[T]he whole tenor of the Religion Clauses cases involving state aid

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51. The NLRB stated that it was exercising its discretionary powers in determining that it had jurisdiction to order the elections and to certify the representatives. The Board asserted that none of the schools was completely religious in nature; therefore, the Board's exercise of jurisdiction did not violate their first amendment rights. Pfeffer, *Unionization of Parochial School Teachers*, 24 St. Louis U.L.J. 273, 275-76 (1980).

52. See *Catholic Bishop*, 440 U.S. at 494.

53. *Id.*

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

55. *Id.* at 1115, 1123.

56. *Id.* at 1125. It is also important to note that once the NLRB finds the existence of an unfair labor practice, it simply orders the parties to the bargaining table; it cannot compel them to agree. *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161, 1167 (2d Cir. 1985).



to schools is that there does not have to be an actual trial run . . . but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists. "[w]e cannot ignore here the danger that pervasive modern governmental power will . . . conflict with the Religion Clauses."<sup>57</sup> The NLRB appealed and the Supreme Court granted certiorari.

The Supreme Court avoided the constitutional issue which the court of appeals had so zealously pursued. Instead, the Court focused on the construction of the Wagner Act.<sup>58</sup> The issue, the Court stated, was whether there was a clear expression by Congress of an affirmative intention to include parochial schools within the Board's jurisdiction as dictated by the Act.<sup>59</sup> Only after resolving this problem could the constitutional question be reached. Chief Justice Burger, writing for the Court, found that there was no such affirmative intention expressed by Congress. The Chief Justice looked to the language and legislative history of the Wagner Act and concluded that since there was no specific language designating parochial schools as employers under the Act, these institutions were not within the NLRB's jurisdiction.<sup>60</sup> In resolving the jurisdictional argument in this manner the Court admittedly took the easy way out.<sup>61</sup>

A close examination of the Court's opinion, however, reveals that it misinterpreted the legislative history of the Act.<sup>62</sup> Dissenting Justice Brennan attacked the majority's analysis in a terse and condescending opinion. It was not Congress' explicit intent to *include* parochial schools within the definition of employer under the Act that mattered, but rather the legislature's intent to specifically *exclude* these institutions from Board jurisdiction that counted.<sup>63</sup> The Act's definition was meant to be general, and where Congress saw fit to exclude a specific employer from the Act's coverage, it did so.<sup>64</sup> Had Congress felt the need to exclude parochial schools from Board jurisdiction it could have passed any one of the proposed amendments to do so.<sup>65</sup> Therefore, according to the dissent, the Court should have decided the constitutional issue.

Although the Court overruled the Seventh Circuit on statutory grounds, the majority, in dicta, did agree with the court of appeals' entanglement

57. *Catholic Bishop*, 559 F.2d at 1126 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971)).

58. See *Catholic Bishop*, 440 U.S. at 490.

59. *Id.* at 491.

60. *Id.* at 505.

61. The Court stated that "[w]e decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses." *Id.* at 507.

62. See *supra* notes 18-40 and accompanying text, See also *Catholic Bishop*, 440 U.S. at 511-18 (Brennan, J., dissenting).

63. See Pfeffer, *supra* note 51, at 277.

64. See *supra* note 26 and accompanying text.

65. See *supra* note 31 and accompanying text.

analysis.<sup>66</sup> It distilled the court of appeals' decision and came up with a test which it would use in the future to determine whether there was sufficient regulatory entanglement to render government actions unconstitutional. After making an initial determination that NLRB regulation would foster a serious risk of first amendment infringement, the Court looked to the nature of the schools involved in the litigation.<sup>67</sup> The majority found that the management of the schools was dictated by religious creed, and that it was virtually impossible to separate the teaching of religious doctrine from secular instruction.<sup>68</sup> The reason for this was that the teachers at these institutions had a unique role. These instructors, aware of the school's objectives, subjectively conveyed information to the students, thus making the separation of the religious from the secular very difficult.

An examination of the regulatory action to be taken by the NLRB followed. After the Board certified the elected bargaining agents, it was within its powers to resolve unfair labor disputes brought to its attention. Once a claim is filed with the Board, an investigation into the facts surrounding the claim is conducted. Many of these factual investigations would center on the issue of whether a teacher was discharged for violating the religious creed of a school or for anti-union reasons.<sup>69</sup>

It was this type of investigation which bothered the Court the most. The majority was unable to see how the NLRB could avoid excessive entanglement in these situations. An inquiry into the reasons behind a discharge would require the Board to ascertain whether or not there was a good faith basis behind a school's religiously dictated dismissal.<sup>70</sup> Taking the analysis even further, the Court found that the actual process of electing and certifying the bargaining agents would violate the school's first amendment freedoms. As the Court stated, "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by Religion Clauses, but also the very process of inquiry leading to findings and conclusions."<sup>71</sup>

Thus, by determining that the nature of the NLRB regulation was unacceptable, the Court, in dicta, also concluded that the resulting relationship between the church-operated schools and the Board could not be tolerated under the first amendment. In light of the special nature of the church-teacher relationship at these schools, any NLRB regulation would

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66. "We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in Church operated schools and the consequent serious First Amendment questions that would follow." *Catholic Bishop*, 440 U.S. at 504.

67. See *supra* notes 47-49 and accompanying text.

68. See *Catholic Bishop*, 440 U.S. at 501.

69. See Pfeffer, *supra* note 51, at 290.

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

71. *Id.* at 502 (footnote omitted).

result in the Board's stifling the objectives of the schools' management.<sup>72</sup> The Board, by asserting its jurisdiction, would be opening a Pandora's box of conflicts between itself and the clergy/administrators.

Thus, the Supreme Court, by not deciding but discussing the constitutional issue, structured a test for regulatory entanglement which lower courts have used as a not-so-helpful guide for resolving similar cases.<sup>73</sup> These courts seem to recognize the inherent flaw in the Court's entanglement analysis: that the balancing test of the free exercise clause is much better suited to handle cases concerning government regulation of religious institutions. Lower courts also seem to realize what is really at stake in these cases are two competing constitutional interests, and this is why they prefer a free exercise interest balancing analysis.

### III. WHY THE REGULATORY ENTANGLEMENT ANALYSIS IS INAPPROPRIATE

The *Catholic Bishop* Court, instead of looking for potential entanglement, should have balanced the Board's interest in regulating commerce through uniformly applied labor laws against the parochial schools' interest in autonomy.<sup>74</sup> When conducting this free exercise inquiry the Court should have considered whether a religious exemption from NLRB regulation would hinder the Board's goal. If the Court had reached the constitutional issue and utilized the free exercise analysis, the Justices could have ruled that the exercise of such jurisdiction was constitutional.

An example of the free exercise analysis which the *Catholic Bishop* Court should have used is found in *United States v. Lee*.<sup>75</sup> In this case the Supreme Court rejected a claim by the Amish that they should be exempt from the payment of Social Security taxes. The Court emphasized the fact that not all burdens on religion are unconstitutional,<sup>76</sup> and set out what it felt was a proper analysis. First, a court should inquire into whether a government regulation would burden the free exercise right of the complaining party.<sup>77</sup> Next, it must be determined whether the state has shown that its interest in regulating the religious institution is compelling enough to overcome the free exercise claim.<sup>78</sup> And finally, the court must ask whether the creation of an exemption for this religious entity would interfere with the stated governmental interest.<sup>79</sup>

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72. *Id.* at 504.

73. See Marshall & Blomgren, *supra* note 3, at 303.

74. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

75. 455 U.S. 252 (1982).

76. *Id.* at 257.

77. *Id.* at 256-57.

78. *Id.* at 257-58.

79. *Id.* at 259.

In *Lee* the Court emphasized the importance of the Social Security program as a whole and the necessity for uniform participation in that program. The government's compelling interest in collecting taxes was stressed. The Court concluded that the government's interest in collecting taxes was superior to the Amish interests in exemption.<sup>80</sup> According to the Court, the entire Social Security program would have been jeopardized had the Court permitted an accommodation for the Amish. By permitting an exception for the Amish the Court would have opened the floodgates to similar claims and accommodations.

The facts of *Catholic Bishop* present similar concerns. The Board's interest in providing employees with a uniformly applied labor policy, giving them the right to reap the benefits of collective bargaining, should override the parochial schools' interests in autonomy. The Board's uniform regulation of labor solves a national problem, just as uniform participation in the Social Security program does. Without NLRB regulation employees would be at the mercy of their employers. The government would like to avoid this scenario because the goal of the NLRA is to promote nationwide industrial peace. That a religious institution should be able to overcome such a compelling national interest by claiming that it may be somewhat burdened seems extreme. The NLRB has made efforts to tailor its regulation so as to burden the schools' management as little as possible.<sup>81</sup> These efforts should have been taken more seriously by the *Catholic Bishop* Court.

The *Lee* Court combined a broadly defined compelling state interest with a least restrictive means test and came up with the result that should have been reached by the Court in *Catholic Bishop*. There is a need for accommodation, but this need must be tempered by a "more focused and less restrictive inquiry than *Lemon's* . . . ."<sup>82</sup> Part of the reason a more directed analysis is necessary in these cases centers around the word "establishment" itself. The word connotes support of religion.<sup>83</sup> Actions by the government which aid or benefit religion are considered subject to establishment clause limitations.<sup>84</sup> Regulation, however, implies restriction, and government actions which restrict the activity of a religious entity are deemed subject to a free exercise inquiry.<sup>85</sup> When the government seeks to regulate a religious institution, its goal is not to promote that group over a secular entity providing the same services. Nor does the government intend to inhibit that group's religious practices, although that may be one of the effects of such

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80. *Id.* at 260.

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

82. *Developments in the Law: Religion and the State*, 100 HARV. L. REV. 1606, 1732 (1987).

83. Marshall & Blomgren, *supra* note 3, at 306.

84. See *id.* at 306-07.

85. *Id.*

restrictions. To take an issue best resolved under the free exercise clause and subject it to regulatory entanglement criteria is illogical. The *Lemon* test would have to be changed drastically in order to accommodate regulatory entanglement.<sup>86</sup>

Another reason why the regulatory entanglement theory is inappropriate concerns the expansiveness of corporate religion today. Religious institutions have expanded their roles as spiritual advisors and educators to that of business executives. These entities now handle the same services in church-operated facilities that are provided by state health and social service agencies.<sup>87</sup> The financial and commercial growth of religious groups should not be allowed to run unchecked, and employees of these institutions should also be protected. Religious institutions have chosen to integrate themselves into the commercial world and should be made to face up to the consequences of their actions.<sup>88</sup> Fairness to their secular counterparts dictates such a conclusion. The regulatory establishment theory places an almost insurmountable burden on the government which it must overcome before the regulation of a religious entity will be sustained. To tailor a regulation so that a government agency's contact with a religious group is virtually nonexistent is impossible. Even if it could be done, the effect of the regulation would be greatly diminished because the government's ability to enforce its terms will have been taken away. A free exercise analysis, on the other hand, tends to even the field. By balancing the interests of the government against the interests of religious groups, it prevents a religious group from turning every regulation, no matter how tailored and unobtrusive, into a constitutional battle.<sup>89</sup>

The use of regulatory entanglement also gives rise to a true establishment clause concern regarding favoritism. By enforcing the theory of regulatory entanglement and thus creating religious exemptions, the Court would be warranting the promotion of religious over secular institutions engaged in the same practices.<sup>90</sup> This is exactly the effect that Congress wanted to avoid. Thus, it never explicitly exempted religious institutions from the NLRA's definition of employer.<sup>91</sup> It is ironic that by intending to avoid establishment clause concerns the theory of regulatory entanglement actually fosters them.

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86. See generally Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U.L. REV. 391 (1987).

87. See Marshall & Blomgren, *supra* note 3, at 317.

88. See *Catholic Bishop*, 440 U.S. at 498, for support of this conclusion.

89. See Marshall & Blomgren, *supra* note 3, at 321. The authors state that "[t]he establishment clause represents one of the few areas of constitutional litigation in which a challenged regulation cannot be upheld even if supported by a compelling state interest. . . . [T]o conclude that a government regulation implicates establishment clause concerns renders it per se unconstitutional." *Id.*

90. *Id.* at 324.

91. See *supra* notes 26 & 31 and accompanying text.

A final problem with the regulatory entanglement theory is that it provides for a blanket exemption where one is not necessary. NLRB jurisdiction over employees of parochial schools should not be unconstitutional per se. The constitutionality of Board action should be considered on a case by case basis, because this is the only way to determine if a constitutional issue really exists.

*Catholic High School Association v. Culvert*<sup>92</sup> supports the idea that the free exercise clause is the appropriate basis for the constitutional inquiry into the validity of NLRB actions. It also exemplifies the tendency of the lower courts to distinguish away the *Catholic Bishop* dicta on regulatory entanglement.

The facts of *Culvert* are almost identical to those in *Catholic Bishop*. The New York State Labor Relations Board (N.Y.S.L.R.B.) administers the New York State Labor Relations Act.<sup>93</sup> The Act specifically subjects the employees of religious institutions to the jurisdiction of the N.Y.S.L.R.B.<sup>94</sup> In 1969, the Catholic High School Association assisted the Union in electing bargaining representatives for the lay teachers. Both parties agreed that the schools covered by the Act were church operated.<sup>95</sup> For the next ten years the Association and the Union bargained collectively, but specifically excluded religious faculty from the process.<sup>96</sup> During this time the Association never challenged the N.Y.S.L.R.B.'s jurisdiction.

In 1980, a new contract was negotiated and 226 teachers were suspended for protesting a new substitution policy.<sup>97</sup> The Union filed unfair labor practice petitions. The N.Y.S.L.R.B. investigated and issued a formal complaint. The Association claimed that the N.Y.S.L.R.B.'s actions violated its first amendment freedoms and filed with the district court a motion for summary judgment.<sup>98</sup> The motion was granted on establishment clause grounds and the N.Y.S.L.R.B. appealed.<sup>99</sup>

The Court of Appeals for the Second Circuit reversed, holding that the first amendment did not preclude the N.Y.S.L.R.B. from exercising its jurisdiction. The court followed the entanglement analysis and came to the conclusion that excessive entanglement does not arise out of the duty to

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92. 753 F.2d 1161 (2d Cir. 1985).

93. *Id.* at 1163.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 1164.

99. In an opinion written by Judge Lasker, the district court found a clear intent to subject the Association to the N.Y.S.L.R.B.'s jurisdiction. It then determined that the application of the New York State Labor Relations Act to lay teachers was violative of the establishment clause "because it 'threatens to produce excessive entanglement between church and state.'" *Id.* (quoting *Catholic High School Ass'n v. Culvert*, 573 F. Supp. 1550, 1556 (S.D.N.Y. 1983)).

bargain.<sup>100</sup> Instead, it held that the existence of establishment clause violations should be determined on a case by case basis, and that to rule that an exercise of the N.Y.S.L.R.B.'s jurisdiction was unconstitutional per se would be jumping the gun.<sup>101</sup> Courts should not speculate, but should wait until the issue is ripe for resolution.

The court found that the N.Y.S.L.R.B.'s means of inquiry into labor disputes at parochial schools were well-tailored and fostered only a minimal burden on religion. The N.Y.S.L.R.B.'s use of a dual motive analysis in determining whether it would look further into a questionable discharge proved helpful.<sup>102</sup> The N.Y.S.L.R.B. would inquire whether a teacher would have been fired but for religious reasons; if the answer was no, the investigation would cease.<sup>103</sup>

The court of appeals, in constructing its decision, relied upon the balancing test set forth in *Lee*, using free exercise analysis rather than regulatory entanglement.<sup>104</sup> The appellate court found that the burden was on the Association to overcome the compelling state interest in preserving industrial peace and economic order.<sup>105</sup> Since the Catholic Church did not argue that collective bargaining was contrary to its beliefs, the burden placed upon these schools was minimal in comparison to the magnitude of the state interest.<sup>106</sup> It also appears that the court of appeals was reluctant to grant the Association a religious exemption because it had bargained with the Union for ten years without a complaint.<sup>107</sup> To permit the Association to say that its first amendment rights were being infringed upon when it had remained silent for so long would be unjust. The Association should not be allowed to take advantage of the benefits provided by collective bargaining and the terms of the N.Y.S.L.R.A. and then have the Board's actions declared unconstitutional simply for the sake of convenience.

### CONCLUSION

Protection for religious institutions from NLRB regulation should not be found in the establishment clause. The decision in *Catholic Bishop* was an "unwarranted extension of the entanglement concern of parochial school aid cases."<sup>108</sup> Cases involving NLRB regulation of parochial schools are

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100. *Id.* at 1168.

101. *Id.* at 1169.

102. *Id.*

103. *Id.*

104. *See supra* text accompanying note 78.

105. *See Culvert*, 753 F.2d at 1169.

106. *Id.* at 1171.

107. The court, in its discussion of the facts, notes that "[f]rom 1969 to 1980 the Union and the Association entered into a series of collective bargaining agreements" and that "until now it has never challenged the Board's jurisdiction." *Id.* at 1163.

108. Lupu, *supra* note 86, at 412.

limited to particular transactions.<sup>109</sup> In these cases, NLRB action is aimed at restricting these schools' activities, not promoting one religion's parochial school over another secular or sectarian one. Thus, the regulatory entanglement-establishment clause analysis utilized by the Supreme Court in the *Catholic Bishop* case was inappropriate. To regulate is not to establish.

Limitations on government regulation of religious institutions are found in the free exercise clause. The balancing test dictated by this free exercise clause is comparatively free from the doctrinal confusion that surrounds the theory of regulatory entanglement.<sup>110</sup> Instead of requiring a blanket exemption, a free exercise analysis permits a court to inquire into the means by which a regulatory agency hopes to achieve its goals. The test recognizes that some inquiry by the NLRB into the motivations behind a religious entity's decisions regarding its employees is necessary. This burden on the religious institution is not unconstitutional entanglement, but rather a means by which an agency hopes to avoid a constitutional clash.<sup>111</sup> The free exercise standard is fact specific, and this type of analysis is needed in order to satisfactorily resolve situations similar to those in *Catholic Bishop* and *Culvert*.

The problems surrounding the theory of regulatory entanglement cannot begin to be solved until the Supreme Court officially recognizes that its dicta in *Catholic Bishop* was confusing and avoided the real issue. Once the Court recognizes that what is at stake in these cases are *two competing* constitutional interests, it will be well on its way to formulating a more functional and circumscribed test. Decisions like those in *Lee* and *Culvert* should be used as models for the Court when it is presented with a case concerning an issue such as NLRB regulation of parochial schools.

It is obvious that the Court will not have to search for opportunities to address this problem in the future. One can only hope that when the Court is presented with such an issue it will not, as it did in *Catholic Bishop*, "decline to construe" the matter in a way "that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the first amendment religion clauses."<sup>112</sup>

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109. *Id.* at 413.

110. *See* Marshall & Blomgren, *supra* note 3, at 326.

111. *Id.* at 327.

112. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 507 (1979).



