THE POLITICAL SUBDIVISION EXEMPTION OF THE NATIONAL LABOR RELATIONS ACT AND THE BOARD'S DISCRETIONARY AUTHORITY

The collective bargaining rights set forth in the National Labor Relations Act (NLRA)[1] extend only to workers qualifying as "employees" within the meaning of the Act.[2] The definition of employee is limited to those individuals employed by an entity that meets the Act's definition of "employer."[3] Because section 2(2) of the Act specifies that states and political subdivisions are not "employers,"[4] employees of these entities receive none of the Act's protections. Thus, the threshold determination whether an entity is a political subdivision is of utmost importance to workers seeking the protection of the National Labor Relations Board (NLRB), the agency charged with the enforcement of the NLRA.[5]

Despite the far-reaching ramifications of the determination whether an entity is a political subdivision, Congress failed to define the term "political subdivision" in the NLRA. As a result, the task of defining the scope of the exemption has been left to the Board and the courts. Although it has not been difficult to make this determination in

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1. 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979).

2. The rights protected by the Act are set forth in section 7, which provides as follows:

> 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 . . . .

29 U.S.C. § 157 (1976). The means by which these rights may be violated by employers and labor organizations are set forth respectively in sections 8(a) and 8(b) of the Act. 29 U.S.C. § 158(a)-(b) (1976).

3. "Employee" is defined in section 2(3) of the Act as follows: "The term 'employee' . . . shall not include any individual employed . . . by any other person who is not an employer as herein provided." 29 U.S.C. § 152(3) (1976).

4. NLRA § 2(2), 29 U.S.C. § 152(2) (1976 & Supp. III 1979), states that "[t]he term 'employer' . . . shall not include . . . any state or political subdivision thereof."

5. The Board's primary responsibilities include conducting representation elections and certifying exclusive bargaining agents. *See* NLRA § 10, 29 U.S.C. § 159 (1976).

many cases,[6] the distinction between political subdivisions and private employers is frequently unclear.[7]

The Board's exercise of its discretion to decline jurisdiction[8] complicates further an analysis of the scope of the political subdivision exemption. The Board relies frequently on its discretionary authority to exempt from its jurisdiction employers that provide services to or on behalf of political subdivisions.[9] Thus, the political subdivision exemption of section 2(2) operates at two levels: first, it exempts entities that do not meet the statutory definition of employer because they are political subdivisions and second, it exempts entities that fall within the definition of employer, but are nonetheless granted a discretionary exemption by the Board.

This note addresses the problems that exist in the application of the political subdivision exemption. Part I discusses the evolution of the statutory exemption and the Board's development of the discretionary exemption. Part II analyzes several recent decisions issued by the Courts of Appeals for the Seventh and Tenth Circuits[10] and discusses those courts' misapplication of the exemption and their incursions upon the Board's discretionary authority. Part III of the note concludes that the Board's use of the discretionary exemption is unnecessary, and suggests that the Board might alleviate some of the difficulties created by the courts' misconstruction of the exemption by relying solely on the statutory criteria set forth by the Supreme Court.[11]

I. THE DEVELOPMENT OF THE POLITICAL SUBDIVISION EXEMPTION

A. *The Statutory Exemption*

During the early years of the NLRA, the Board had few occasions to apply the political subdivision exemption. Entities claiming the exemption clearly fell within the intended scope of the clause.[12] Conse-

6. *See infra* note 12 and accompanying text.

7. *See, e.g.*, Catholic Bishop of Chicago, A Corporation Sole (Chicago Youth Centers), 235 N.L.R.B. 776 (1978), *rev'd*, 616 F.2d 1028 (7th Cir. 1980). *See generally infra* notes 71-75 and accompanying text.

8. NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1)(1976). *See infra* text accompanying note 51 for the text of section 14(c)(1).

9. *See infra* notes 49-95 and accompanying text.

10. Board of Trustees v. NLRB, 624 F.2d 177 (10th Cir. 1980); NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980); Lutheran Welfare Serv. v. NLRB, 607 F.2d 777 (7th Cir. 1979). *See infra* notes 96-142 and accompanying text.

11. *See* NLRB v. Natural Gas Util. Dist., 402 U.S. 600 (1971). *See infra* notes 27-48 and accompanying text.

12. *See* New Jersey Turnpike Auth., 33 L.R.R.M. 1528 (1954) (exempting turnpike authority created by state legislature); City of Anchorage, 32 L.R.R.M. 1549 (1953) (exempting incorporated municipality); Oxnard Harbor Dist., 34 N.L.R.B. 1285 (1941) (exempting harbor district administered by elected officials); Mobile S.S. Ass'n, 8 N.L.R.B. 1297, 1318 (1938) (exempting Alabama State Docks Commission).

quently, the Board's perfunctory opinions included no meaningful analysis of the clause and failed to consider whether "political subdivision" should be defined in the context of state or federal law.[13]

The Board first considered whether state law should control the political subdivision determination in *New Bedford, Woods Hole, Martha's Vineyard & Nantucket Steamship Authority.*[14] The Board disregarded the need for uniform application of the clause and declared that state law would control its decision.[15] The Board then held that the Steamship Authority was a political subdivision, citing three factors: the Authority was created pursuant to a general enabling act of the state; its bonds were classified as those of the state; and it was performing "essential state functions."[16]

The Board's reliance on state law to make the political subdivision determination was short-lived. The Board overruled the *New Bedford* decision in *Randolph Electric Membership Corp.*[17] when it asserted jurisdiction over an electric cooperative despite a North Carolina statute declaring such corporations to be political subdivisions of the state. In *Randolph Electric*, the Board rejected the corporation's argument that state law was conclusive, and held that although the state's designation was a factor to be considered, it was not controlling.[18]

On appeal, the Court of Appeals for the Fourth Circuit enforced the Board's decision, rejecting the employer's contention that Congress intended state law declarations to control the political subdivision determination.[19] The court reasoned that such an interpretation would

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13. Due to the ease with which the early cases were decided, the intended scope of the political subdivision exemption was not addressed by Congress in the debates over proposed changes in the Act that eventually resulted in the Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 61 Stat. 136, 80th Cong., 1st Sess., 1947, and the Landrum-Griffin Amendments, Pub. L. No. 257, 73 Stat. 519, 86th Cong., 1st Sess., 1959.

14. 127 N.L.R.B. 1322 (1960).

15. *Id.* at 1324. Without uniform application of the political subdivision exemption, the coverage of the Act would vary greatly between states, in clear contravention of Congressional intent to provide for a national labor policy. *See* 29 U.S.C. § 151 (1976).

16. 127 N.L.R.B. at 1324-26.

17. 145 N.L.R.B. 158 (1963).

18. *Id.* at 161. The Board stated:

> This statutory designation as a public agency is, of course, a factor to be weighed carefully by the Board. We do not think, however, that this declaration should be controlling when, as here, the corporation sought to be exempt as a political subdivision of the States, is not created directly by the State, or administered by State-appointed or publicly elected individuals.

Id.

The Supreme Court later addressed the Board's implication that political subdivisions must be created by the state or administered by public officials in NLRB v. Natural Gas Util. Dist., 402 U.S. 600 (1971). *See infra* note 35 and accompanying text.

19. NLRB v. Randolph Elec. Membership Corp., 343 F.2d 60, 62 (4th Cir. 1965). The court concluded that the Board erred in *New Bedford* when it held that state law determined the defini-

frustrate congressional efforts to achieve a uniform national labor policy. The court stated that Congress does not, absent clear language to the contrary, intend to make the application of a federal statute dependent upon state law.[20]

Two years later, the Board relied on *Randolph Electric* when it held in *Natural Gas Utility District of Hawkins County, Tenn.*[21] that a utility district was not a political subdivision, despite a contrary determination by the Tennessee Supreme Court in an earlier case.[22] The Board held that several factors outweighed the Tennessee court's determination: the district was neither created by the state nor administered by state-appointed officials; its operations were not substantially different from those of a private utility; and it was free from state control in conducting its daily affairs.[23]

On appeal, however, the Court of Appeals for the Sixth Circuit held in *NLRB v. Natural Gas Utility District* that the Supreme Court of Tennessee's decision was conclusive and reversed the Board's hold-

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tion of "political subdivision." 343 F.2d at 63 n.6. In *New Bedford*, the Board relied on Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204 (1946), in which the Supreme Court held that courts should rely on state law to define ambiguous terms appearing in federal statutes. *Id.* at 210. The court of appeals distinguished *Beaver County* on the ground that the statute in question, the Reconstruction Finance Corporation Act, was not intended to receive uniform application, whereas Congress intended that the NLRA be applied uniformly. 343 F.2d at 63 n.6.

20. 343 F.2d at 62. The court of appeals recognized the potential for abuse if states were free to unilaterally exempt chosen entities from the jurisdiction of the Board:

> The fact that North Carolina sees fit to characterize such corporations as "political subdivisions" and to accord them certain benefits in respect to state taxation and otherwise . . . is not decisive of the question before us, since their relation to the state and their actual methods of operation do not fit the label given them.

343 F.2d at 64.

In deciding that the Board properly disregarded state law definitions of "political subdivision," the court relied on the Supreme Court's decision in NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944). In *Hearst*, the Supreme Court held that the Board had the authority to disregard state law definitions of "employer" and "employee." The Court in *Hearst* affirmed the Board's decision that independent contractors (newsboys) fell within the statutory definition of "employee." *Id.* at 132. Congress reacted to the Court's result by excluding independent contractors from the definition of "employee" when it enacted the Taft-Hartley Act, Pub. L. No. 101, 61 Stat. 136 (codified at 29 U.S.C. §§ 141-197 (1976)). Although Congress stated that the words of the Act were to be given their ordinary meaning, Congress did not conclude that state law provided these ordinary meanings. H.R. REP. No. 245, 80th Cong., 1st Sess. 18 (1947). Although the *Hearst* definition of "employee" was rejected by Congress, the court of appeals relied on the Supreme Court's dicta in *Hearst*, which gave the Board considerable latitude to define the terms used in the Act in accordance with the purposes of the Act; *see also* NLRB v. E.C. Atkins & Co., 331 U.S. 398, 414 (1947).

21. 167 N.L.R.B. 691 (1967).

22. In First Suburban Water Util. Dist. v. McCanless, 177 Tenn. 128, 146 S.W.2d 948 (1941), the Supreme Court of Tennessee held that all such utility districts were state instrumentalities. *Id.* at 133, 146 S.W.2d at 950.

23. 167 N.L.R.B. at 692.

ing.[24] The court distinguished the Fourth Circuit's decision in *Randolph Electric* on the ground that there was no determination by the state supreme court in that case;[25] however, the court failed to address the Fourth Circuit's contention that the need for national uniformity requires a federal law definition of the political subdivision exemption.[26]

The Supreme Court affirmed the Sixth Circuit's decision,[27] but rejected the lower court's conclusion that state law controls the political subdivision determination.[28] Instead, the Court agreed with the Board's conclusion that state law declarations and interpretations are relevant, but not controlling.[29] The Court examined the Board's construction of the exemption[30] and adopted what it found to be the Board's test: it limited the exemption to entities that were "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or the general electorate."[31] This statement of the test differed from the version set forth by the Board[32] in that the second part of the Court's test expanded the definition of a political subdivision to include entities administered by individuals responsible to public officials, and not merely entities administered by public officials themselves. This new formulation of the test encompassed the utility district in *Natural Gas* because the district was administered by commissioners appointed by an elected county official.[33]

Because the Court did not recognize that it had applied a different test, it concluded that the Board had simply misapplied its own test.[34]

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24. NLRB v. Natural Gas Util. Dist., 427 F.2d 312, 315 (6th Cir. 1970). After asserting jurisdiction, the Board ordered a representation election, and the union won. The political subdivision question arose on appeal when the employer refused to bargain. *Id.* at 313.

25. *Id.*

26. *See supra* notes 19-20 and accompanying text.

27. NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 609 (1971).

28. *Id.* at 602.

29. *Id.* The court stated that "[f]ederal, rather than state, law governs the determination, under § 2(2), whether an entity created under state law is a 'political subdivision' of the state and therefore not an 'employer' subject to the Act." *Id.* at 603.

30. Courts accord great weight to the Board's determination of its statutory authority. *See* NLRB v. E.C. Atkins & Co., 331 U.S. 398, 403 (1947).

31. 402 U.S. at 604-05.

32. *See* Hawkins County, 167 N.L.R.B. at 692. *See supra* text accompanying note 23. The change in the language apparently resulted from the Court's adoption of the language used in the Board's brief, but that language failed to explain the discrepancy. Brief for the National Labor Relations Board at 11, NLRB v. National Gas Util. Dist., 402 U.S. 600 (1971). *See Labor Law—Federal Law Controls Construction of Term "Political Subdivision" In National Labor Relations Act*, 37 MO. L. REV. 134, 142 (1972).

33. 402 U.S. at 605.

34. *Id.*

This conclusion obviated the need for the Court to decide whether an entity must satisfy one of the two parts of the *Natural Gas* test to qualify as a political subdivision.[35]

The *Natural Gas* decision failed to resolve two major problems, both of which have since been settled by the Board and the lower courts. First, the Supreme Court in *Natural Gas* did not indicate whether the political subdivision determination should be made exclusively under the Board's test as expressed in *Natural Gas* or by analysis of the "actual operations and characteristics" of the entity in question.[36] This ambiguity has been resolved by Board and lower court

35. The Court expressly rejected the opportunity to decide the scope of the Board's test: "This case does not however require that we decide whether the 'actual operations and characteristics' of an entity must necessarily feature one or the other of the Board's limitations to qualify an entity for the exemption." *Id.*

The Court implied, however, that satisfaction of the test might not conclusively establish political subdivision status. This implication may be drawn from the analysis undertaken by the Court after it concluded that the entity met the "administered" requirement of the test. *See supra* text accompanying note 31. The Court nonetheless went on to consider the " 'actual operations and characteristics' [of the utility district] under that administration." 402 U.S. at 605. After examining a number of the utility district's characteristics, 402 U.S. at 605-09, the Court was satisfied that political subdivision status existed: "[r]espondent [utility district] is therefore an entity 'administered' by individuals . . . who are responsible to public officials . . . and *this together with the other factors mentioned* satisfies us that its relationship to the State is such that respondent is a 'political subdivision' . . . ." 402 U.S. at 609 (emphasis added). Characteristics of the utility district that the Court examined included the following: the appointment and removal procedures for commissioners; a Tennessee statute granting utility districts all powers necessary to accomplish their purposes, including the power of eminent domain; a public records requirement imposed upon the district; a public hearing requirement when rate protests are filed; and the district's status as a political subdivision under federal income tax statutes and the Social Security Act. 402 U.S. at 606-09. The Court clearly did not intend that these characteristics be used to define further the "administered" requirement of the *Natural Gas* test because the only cited characteristics indicative of accountability to the public are the procedures for appointing and removing the district's commissioners.

The Court's reference to the "characteristics" of an entity obscures analysis under the two-part test without adding to the definition of "political subdivision." Although governmental entities frequently possess the characteristics mentioned by the Court, private sector entities are often subject to public disclosure and public hearing requirements as well and often possess many of the powers that the utility district possessed in *Natural Gas*. For example, private utilities sometimes possess the power of eminent domain, see Cline v. Kansas Gas & Elec. Co., 260 F.2d 271, 273-74 (10th Cir. 1958), and states have granted tax exempt status to private utilities. *See* Byrd v. Blue Ridge Elec. Coop., Inc., 215 F.2d 542, 543 (4th Cir. 1954), *cert. denied*, 348 U.S. 915 (1955). In addition, because dissimilar purposes are served by the various statutes, the district's status under federal tax laws or the Social Security Act should not be determinative of the application of federal labor laws. *See also Political Subdivision—Qualifications for Exclusion from the Labor-Management Relations Act*, 28 WASH. & LEE L. REV. 268, 284 n.101 (1971).

36. NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 605 (1971). The ambiguity resulted from the Court's extensive analysis of "other factors" after it declined to hold that the Board's test was determinative of political subdivision status.

decisions consistently holding that the two-part *Natural Gas* test is the primary determinant of political subdivision status.[37]

The second principal shortcoming of the *Natural Gas* decision was the Court's failure to define adequately the alternative components of the test: the requirement that, to be exempted, an entity must be either created by the state or administered by individuals responsible to public officials or the general electorate.[38] The first component of the test has not been overly troublesome because the Board and the lower courts have defined narrowly the requirement that the entities be created by the state to include only those entities that constitute departments or administrative arms of the political subdivision.[39]

The second component of the test presents the more difficult problem of determining when the individuals administering the entity in

37. The Board frequently terminates the political subdivision inquiry after applying the *Natural Gas* test, without considering any extraneous factors. *See* Northhampton Center for Children & Families, Inc., 257 N.L.R.B. No. 114 (1981); Community Health & Home Care, Inc., 251 N.L.R.B. 509 (1980); Museum of Fine Arts, 218 N.L.R.B. 715, 716 (1975); Minneapolis Soc'y of Fine Arts, 194 N.L.R.B. 371, 372 (1971). The "actual operations" that have been considered by the Board and the lower courts have generally been limited to those factors mentioned by the Supreme Court in *Natural Gas*. *See, e.g.*, Crilly v. Southeastern Pa. Transit Auth., 529 F.2d 1355, 1358 (3d Cir. 1976); Commissioners of the Rouse Estate, 225 N.L.R.B. 920 (1976); Electrical Dist. No. Two, 224 N.L.R.B. 904, 905 (1976). When the Board considers the "actual operations" of an entity it does so not as an alternative to the *Natural Gas* test, but to assist in the application of the test, *see* NLRB v. Highview, Inc., 590 F.2d 174 (5th Cir.), *modified*, 595 F.2d 339 (5th Cir. 1979); Camden-Clark Memorial Hosp., 221 N.L.R.B. 945, 945 (1975), and to lend additional support to the result yielded by application of the test. *See* Truman Medical Center, Inc. v. NLRB, 641 F.2d 570, 572 (8th Cir. 1981); City Pub. Serv. Bd., 197 N.L.R.B. 312, 314 (1972); Natchez Trace Elec. Power Ass'n, 193 N.L.R.B. 1098 (1971), *aff'd*, 476 F.2d 1042 (5th Cir. 1973). Finally, in no case was the result yielded by application of the *Natural Gas* test rejected in favor of a contrary result based upon an analysis of the "actual operations."

38. *See supra* text accompanying note 31.

39. For cases holding that the "created directly by the state" requirement was met, see Crilly v. Southeastern Pa. Transit Auth., 529 F.2d 1355, 1358 (3d Cir. 1976); Northhampton Center for Children & Families, Inc., 257 N.L.R.B. No. 114 (1981); New York Inst. for the Educ. of the Blind, 254 N.L.R.B. 664 (1981); Association for the Developmentally Disabled, 231 N.L.R.B. 784 (1977); City Pub. Serv. Bd., 197 N.L.R.B. 312 (1972).

In some cases, the courts found that the state created the entity, but denied the exemption because the state did not intend the entity to be a department or administrative arm of the state. *See* Truman Medical Center, Inc. v. NLRB, 641 F.2d 570 (8th Cir. 1981) (jurisdiction asserted over a hospital established by the Kansas City Department of Health); NLRB v. Austin Developmental Center, 606 F.2d 785 (7th Cir. 1979) (jurisdiction asserted over a counseling service founded and administered initially by the Illinois Department of Mental Health); Commissioners of the Rouse Estate, 225 N.L.R.B. 920 (1976) (jurisdiction asserted over nursing home established by bequest, though the state legislature passed an act providing that county commissioners would serve as commissioners of the nursing home).

For cases in which the Board rejected the employer's argument that it was created by the state, see Wayne County Neighborhood Legal Serv. Inc., 229 N.L.R.B. 1023 (1977); Morristown-Hamblen Hosp. Ass'n, 226 N.L.R.B. 76 (1976); Museum of Fine Arts, 218 N.L.R.B. 715 (1975); Natchez Trace Elec. Power Ass'n, 193 N.L.R.B. 1098 (1971), *enforced*, 476 F.2d 1042 (5th Cir. 1973).

question are responsible to public officials or the general electorate. When a statute establishes that the entity is to be directed by public officials or their appointees, as did the statute in *Natural Gas*,[40] the Board has acknowledged that the entity is a political subdivision over which it has no jurisdiction.[41] If no statute establishes conclusively that control of the entity rests with public officials, the Board must use an alternative approach. The Board analyzes the composition of an entity's directorate and determines whether a majority of the individuals comprising the directing body are acting as representatives of the government.[42] If a majority of the directors are responsible to elected public officials,[43] and are acting in their official capacity,[44] the Board has generally found that the entity satisfies the "administered" requirement and is a political subdivision in its own right.[45] When the individuals administering the entity are responsible to public officials only by vir-

40. 402 U.S. at 605.

41. *See, e.g.*, Northern Community Mental Health Center, Inc., 241 N.L.R.B. 323 (1979); Temple Univ., 194 N.L.R.B. 1160 (1972); City of Austell Natural Gas Sys., 186 N.L.R.B. 280 (1970).

42. For cases in which the Board analyzed the composition of an entity's board of directors, see Saratoga County Economic Opportunity Council Inc., 249 N.L.R.B. 453 (1980); Community Serv. Planning Council, 243 N.L.R.B. 798 (1979); Loma Prieta Regional Center, Inc., 241 N.L.R.B. 1071 (1979); Northern Community Mental Health Center, Inc., 241 N.L.R.B. 323 (1979); Truman Medical Center, Inc., 239 N.L.R.B. 1067 (1978), *enforced,* 641 F.2d 570 (8th Cir. 1981); Museum of Fine Arts, 218 N.L.R.B. 715 (1975); Minneapolis Soc'y of Fine Arts, 194 N.L.R.B. 371 (1971).

43. An entity's administrators may themselves be elected public officials, rather than individuals responsible to such officials. *See* Electrical Dist. No. Two, 224 N.L.R.B. 904 (1976). In several cases decided prior to *Natural Gas*, the Board considered whether the elected officials must be elected by the general electorate in order for the entity to qualify as a political subdivision. *See* Lewiston Orchards Irrigation Dist., 186 N.L.R.B. 827 (1970), *enforcement denied per curiam*, 469 F.2d 698 (9th Cir. 1972) (denying political subdivision status when only landowners, and not the general electorate, voted for elected officials); Truckee-Carson Irrigation Dist., 164 N.L.R.B. 1176 (1967). It appears, however, that the Board no longer requires the officials to be elected by the general electorate, as opposed to property owners, at least when the officials are subject to recall by the general electorate. *See* Electrical Dist. No. Two, 224 N.L.R.B. 904 (1976).

44. The Board has recognized that directors may be appointed by a public body and yet be independent of the public body. *See* Saratoga County Economic Opportunity Council, Inc., 249 N.L.R.B. 453 (1980).

45. *See, e.g.*, Northern Community Mental Health Center, Inc., 241 N.L.R.B. 323 (1979). *But see* Community Action Program, 251 N.L.R.B. 86, 86 n.4 (1980). In *Community Action Program* the Board asserted jurisdiction over an employer providing a variety of social services, even though one third of the employer's board of directors were appointed by the mayor of Oklahoma City and another third were elected by the voters in the target area of the employer's operations. The Board noted that the composition of the board of directors was mandated by the employer's bylaws and not by federal statute as the employer claimed, but did not address the significance of this finding. *Id.*

tue of a contractual arrangement, however, the Board has found the "administered" requirement is not satisfied.[46]

Both parts of the *Natural Gas* test focus on where ultimate control of the entity lies; when the state controls tlie entity, the entity is exempt from the Board's jurisdiction. For an entity to qualify as a political subdivision under the first part of the test, it must be a "department or administrative arm of the state,"[47] which implies state control. The second part of the test exempts entities that are administered by individuals responsible to public officials.[48] If the administrators of an entity are "responsible" to public officials, then the entity as a whole is controlled by the state. Thus, the determination whether an entity qualifies as a political subdivision and is exempt from the Board's jurisdiction depends upon whether the entity is controlled by the state.

B. *The "Discretionary" Exemption*

If an employing entity does not qualify as an "employer" under the definition set forth in section 2(2), the Board lacks statutory jurisdiction.[49] In discretionary exemption cases, however, the Board possesses statutory jurisdiction, but declines to exercise its authority over a particular class of employers.[50] Section 14(c)(1) of the Act, which confers upon the Board discretionary authority to disclaim its jurisdiction, provides that the Board may "decline to assert jurisdiction over any labor dispute."[51]

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46. *See, e.g.*, Ankh Servs., Inc., 243 N.L.R.B. 478 (1979); Grey Nuns of the Sacred Heart, 221 N.L.R.B. 1215 (1975).

47. *See supra* text accompanying note 31.

48. *Id.*

49. *See supra* notes 2-4 and accompanying text.

50. *See, e.g.*, Rural Fire Protection Co., 216 N.L.R.B. 584 (1975). The Board has exercised its discretionary authority and exempted employers from its jurisdiction for many reasons unrelated to the political subdivision exemption. For example, the Board previously exempted charitable organizations from its jurisdiction, *see* Ming Quong Children's Center, 210 N.L.R.B. 899 (1974) (overruled in Rhode Island Catholic Orphan Asylum, 224 N.L.R.B. 1344 (1976)), and will not assert its jurisdiction over employers whose revenues are less than the minimum amount established by the Board for that particular class of employers. N.L.R.B. JURISDICTIONAL GUIDE 4-7 (1973).

51. NLRA, § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976). Section 14(c)(1) provides that

> the Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.

Id.

The Board has wide latitude in exercising its discretionary power. *See* NLRB v. WGOK, Inc., 384 F.2d 500, 502 (5th Cir. 1967). Board decisions will withstand judicial scrutiny so long as similar situations are treated in similar ways. *See* Herbert Harvey, Inc. v. NLRB, 385 F.2d 684, 686 (D.C. Cir. 1967). The Board may even treat similar cases differently so long as it remains

The Board grants discretionary exemptions in the political subdivision context when a private employer is closely associated with an exempt political subdivision.[52] The Board has developed two tests to determine whether the private employer's relationship with the exempt entity is sufficiently close to justify an exemption from the Board's jurisdiction: the "intimate connection" test,[53] and its successor, the "right of control" test.[54] The granting of exemptions on the basis of tests that purport to measure the closeness of a business relationship, however, has resulted in numerous challenges to the Board's exercise of jurisdiction by employers claiming the exemption.[55] Such challenges increase the Board's case load, allow employers to delay representation elections, and increase the chances of frustrating union organization drives.[56]

1. *The Intimate Connection Test.* The Board in 1968 first proposed a test to determine whether an employer possessed a sufficiently close association with an exempt entity to justify a discretionary exemption for the employer when it set forth the "intimate connection" test in *Herbert Harvey, Inc.*[57] The employer in *Herbert Harvey* provided janitorial services for the building occupied by the World Bank and claimed that the Bank's exemption as a political subdivision extended to it.[58] Despite an earlier holding by the Court of Appeals for the District of Columbia Circuit that the employer and the World Bank were joint employers,[59] the Board decided that the employer exercised

within a "zone of reasonableness." Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 783 (D.C. Cir. 1969) (appeal after remand).

52. *See, e.g.*, Teledyne Economic Dev. Co., 223 N.L.R.B. 1040 (1976); ARA Serv., 221 N.L.R.B. 64 (1975); Rural Fire Protection Co., 216 N.L.R.B. 584 (1975); Current Constr. Corp., 209 N.L.R.B. 718 (1974).

53. *See infra* notes 57-75 and accompanying text.

54. *See infra* notes 76-95 and accompanying text.

55. *See, e.g.*, Golden Day Schools, Inc. v. NLRB, 644 F.2d 834 (9th Cir. 1981); Truman Medical Center, Inc. v. NLRB, 641 F.2d 570 (8th Cir. 1981); NLRB v. St. Louis Comprehensive Neighborhood Health Center, Inc., 633 F.2d 1268 (8th Cir. 1980), *cert. denied,* 102 S. Ct. 99 (1981); Board of Trustees of Memorial Hosp. v. NLRB, 624 F.2d 177 (10th Cir. 1980); NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980); NLRB v. Austin Developmental Center, Inc., 606 F.2d 785 (7th Cir. 1979).

56. For cases discussing these problems, see *supra* note 55.

57. 171 N.L.R.B. 238 (1968), *enforced*, 424 F.2d 770 (D.C. Cir. 1969). In several cases decided prior to *Herbert Harvey*, the Board applied the same analysis that was eventually incorporated into the intimate connection test, but the earlier cases do not appear to have been decided with the intention of establishing a definitive standard. *See* Horn & Hardart Co., 154 N.L.R.B. 1368 (1965); Prophet Co., 150 N.L.R.B. 1559 (1965); Crotty Bros., 146 N.L.R.B. 755 (1964).

58. Herbert Harvey, Inc., 159 N.L.R.B. 254 (1966).

59. Herbert Harvey, Inc. v. NLRB, 385 F.2d 684, 685-86 (D.C. Cir. 1967). Joint employers are two or more employers who exert significant control over the same employees. Lutheran Welfare Serv. v. NLRB, 607 F.2d 777 (7th Cir. 1979). *See infra* notes 100-21 and accompanying text.

sufficient control over the employment relationship to enable it to bargain with a union.[60] The Board rejected the employer's claim to exemption, stating:

> Where the services [provided by the contractor] are intimately connected with the exempted operations of the institution, the Board has found that the contractor shares the exemption; on the other hand, where the services are not essential to such operations the Board has found that the contractor is not exempt and asserts jurisdiction over the contractor's activities.[61]

The Board then asserted jurisdiction because the janitorial services were unrelated to the function of the World Bank as an "investment institution."[62]

Thus, when using the intimate connection test, the Board first asked whether an employer possessed sufficient control over the employment relationship to allow effective bargaining. When there was not sufficient control, the Board declined jurisdiction.[63] When the employer possessed sufficient control to enable it to bargain, however, the Board then considered whether the services provided by the employer were essential to the purpose for which the political subdivision was created.[64] If the Board deemed the services "essential," it granted the employer the exemption.

The intimate connection test was not a viable method for determining whether to grant a discretionary exemption, as demonstrated by the Board's inability to make consistent determinations regarding whether particular services are "essential" to the purpose of a political

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60. 171 N.L.R.B. at 239-41.

61. *Id.* at 240.

62. *Id.* at 240-41.

63. Herbert Harvey, Inc. v. NLRB, 385 F.2d 684, 685 (D.C. Cir. 1967). *See* Rural Fire Protection Co., 216 N.L.R.B. 584 (1975). The Board reached this result by reasoning that when an employer lacks sufficient control over the employment relationship, the political subdivision involved could frustrate bargaining efforts by refusing to approve an agreement negotiated by the employer and the bargaining representative. *See* Ohio Inns, Inc., 205 N.L.R.B. 528 (1973). The Board concluded that this potential problem should be avoided by declining jurisdiction because the Act does not require the employer to engage in an "exercise in futility." 385 F.2d at 686. The Board has noted that its exercise of jurisdiction in such situations could create an irresolvable conflict between state and federal authority. 205 N.L.R.B. at 529 n.3. The Board's concerns appear to ignore the effect of the supremacy clause, which may require political subdivisions to respect federal labor law and Board orders arising thereunder when private employers are involved. *See* Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, Div. 1287 v. Missouri, 374 U.S. 74 (1963). *See generally* Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337 (1972); Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

64. After the test was adopted, the Board held that the degree of control analysis did not have to be applied prior to the intimate connection analysis because either analysis provided sufficient grounds for declining jurisdiction. *See* Rural Fire Protection Co., 216 N.L.R.B. 584 (1975); Current Constr. Corp., 209 N.L.R.B. 718 (1974).

subdivision.[65] Moreover, none of the decisions applying the test explain why the nature of the service provided to a political subdivision

65. The other major difficulty with the intimate connection test was that it required the Board to determine whether the control retained by the employer was "sufficient" to allow effective bargaining to occur. The difficulties involved in making this determination continue to plague the Board. *See infra* notes 93-95 and accompanying text.

A series of cases involving private employers who provided food service to exempt educational institutions illustrate the inconsistencies that occurred when the Board attempted to identify whether a particular service was "essential." In Crotty Bros., 146 N.L.R.B. 755 (1964), and Slater Corp., 197 N.L.R.B. 1282 (1972), the Board held that the employers' provision of food services was intimately related to the purpose of the private colleges involved and granted an exemption to the employers. In a later case, the Board reversed its earlier position and refused to grant an exemption to an employer providing food service to an exempt school district. JA-CE Co., 205 N.L.R.B. 578 (1973). The employer in *JA-CE* provided food service to a public school district, rather than a college or university as in the earlier cases; this is not a significant distinction, however, because the provision of food service is no more essential to the purpose of a college than to the purpose of a high school or a grade school. Nonetheless, the Board relied on the intimate connection test to distinguish the cases.

The Board's application of the intimate connection test has produced inconsistent results in other areas. *Compare* Wackenhut Corp., 203 N.L.R.B. 86 (1973) (declining to assert jurisdiction over an employer providing guard service to a city college) *with* Atlas Guard Serv., 237 N.L.R.B. 1067 (1978) (asserting jurisdiction over an employer providing guard service to the General Services Administration); *compare* Rural Fire Protection Co., 216 N.L.R.B. 584 (1975) (declining to assert jurisdiction over an employer providing fire protection to a municipality) *with* Sis-Q Flying Serv., Inc., 197 N.L.R.B. 195 (1972) (asserting jurisdiction over an employer providing forest fire fighting assistance to various governmental forest services).

The following cases indicate services the Board has deemed "essential" to the purpose of various political subdivisions: R & E Transit, Inc., 229 N.L.R.B. 959 (1977) (school bus transportation); Camptown Bus Lines, Inc., 226 N.L.R.B. 4 (1976) (school bus transportation); Roesch Lines, 224 N.L.R.B. 203 (1976) (school bus transportation); ARA Servs. Inc., 221 N.L.R.B. 64 (1975) (auto-fleet maintenance); Rural Fire Protection Co., 216 N.L.R.B. 584 (1975) (fire protection); Current Constr. Co., 209 N.L.R.B. 718 (1974) (providing park maintenance); Wackenhut Corp., 203 N.L.R.B. 86 (1973) (guard service).

The following cases indicate services the Board has found nonessential to the purpose of the exempt entity: Highview, Inc., 231 N.L.R.B. 1251 (1977) (operation of government owned nursing homes), *aff'd in part, remanded in part*, 590 F.2d 174 (5th Cir. 1979); Nichols Sanitation, 230 N.L.R.B. 73 (1977) (providing trash removal to a municipality); California Inspection Rating Bureau, 215 N.L.R.B. 780 (1974) (performing statewide workmen's compensation insurance rating for a state commission), *enforced,* 591 F.2d 56 (9th Cir.), *cert. denied,* 442 U.S. 943 (1979); Trans-East Air, Inc., 189 N.L.R.B. 185 (1971) (operating an airport for a municipality); Richmond of N.J., Inc., 168 N.L.R.B. 820 (1967) (providing maintenance service to exempt hospital).

Although the Board's characterization of the services listed above as essential or nonessential may have been correct in any given case, its decisions, when considered collectively, provide no hint that the cases were decided under a single standard. For example, there is no readily identifiable logical process that leads to the conclusion that the provision of park maintenance is essential to the purpose of a municipality, but that the provision of health care is not. *Compare, e.g.*, Current Constr. Corp., 209 N.L.R.B. 718 (1974) (park maintenance) *with* Highview, Inc., 231 N.L.R.B. 1251 (1977), *aff'd in part, remanded in part*, 590 F.2d 174 (5th Cir. 1979) (health care). In response to the Board's assertion that the provision of nursing home care is not a traditional government function, and therefore not intimately related to the purpose of an exempt county, Judge Thornberry of the Fifth Circuit replied that

> [t]he care of the aged, the sick, and the indigent is a traditional function of government. As a matter of history, the Board's finding is incorrect since the breakdown of the ecclesiastical duty and the advent of the Old Poor Law (1601). Certainly, no one moderately

by a private employer is relevant to the determination of whether the affected employees should be afforded the benefits of the Act, when the Act makes no mention of this consideration.[66]

Acting Chairman Fanning first expressed disagreement with the theoretical basis of the intimate connection test in a dissent filed in *Rural Fire Protection Co.*.[67] Fanning stated that the relationship between the service provided by a private employer and an exempt entity's purpose was a consideration relevant only to determining the degree of control exercised by the exempt entity over the employer's labor relations.[68] According to Fanning, the degree of control exercised over the private employer's employment relationship was the essential element in establishing an "intimate connection" between the employer and the exempt entity.[69] In essence, Fanning argued that the "intimate connection" was a conclusory label that attached when the private employer possessed an insufficient amount of control for effective bargaining to occur.

Fanning's criticism of the intimate connection test slowly gained favor among other Board members. Member Jenkins, who voted with the majority in *Rural Fire Protection*, sided with Members Fanning and Murphy in *BDM Services Co.*,[70] a case in which the Board asserted

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aware of our history, our traditions, and our ideals can argue that this care is not a "traditional" function of government.

590 F.2d at 178. The court nevertheless upheld the Board's decision, because the Board had exercised its discretion consistently. *Id.* at 179.

66. *See* National Transp. Serv., Inc., 240 N.L.R.B. 565, 566 (1979). *See infra* note 79. The stated purpose of the Act is

> to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging . . . collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment.

NLRA § 1, 29 U.S.C. § 151 (1976). These goals cannot be met by a test that does not give express consideration to its impact upon the rights of employees, which the intimate connection test failed to do.

67. 216 N.L.R.B. 584 (1975) (Fanning, Acting Chairman, dissenting). For other expressions of Fanning's dissatisfaction with the intimate connection test, see Columbia Transit Corp., 226 N.L.R.B. 812 (1976) (Fanning, Member, dissenting); Teledyne Economic Dev. Co., 223 N.L.R.B. 1040 (1976) (Fanning, Member, dissenting); Grey Nuns of the Sacred Heart, 221 N.L.R.B. 1215, 1215 n.2 (1975).

68. 216 N.L.R.B. at 587.

69. *Id.*

70. 218 N.L.R.B. 1191 (1975). In *BDM*, the employer provided technical assistance to the Army under an award fee contract. The Army had the power to specify the "type of people to be employed, to inspect the credentials of the employees involved, and to determine the number of man-hours to be alloted the work." *Id.* at 1191. The majority held that because the Army had only limited control over the employer's labor relations, an intimate connection was not present. *Id.* at 1192. In fact, the majority applied the intimate connection test in the manner that Fanning

jurisdiction over an employer providing technical assistance to the Army.

Following the appointment of Member Truesdale, the Board decided several cases that placed the continuing validity of the intimate connection test in doubt.[71] In the leading case of *Chicago Youth Centers*[72] the Board asserted jurisdiction over a nonprofit corporation operating Headstart and other day-care programs pursuant to a contract negotiated with a city agency. The Board rejected the employer's contention that the intimate connection test was satisfied, holding that day-care was not an "essential municipal service that a city would normally be required to provide."[73] Although the majority's holding implied that the test had continuing validity, Member Truesdale indicated that he, like Chairman Fanning, did not adhere to the intimate connection test.[74] Significantly, no Board decisions following *Chicago Youth Centers* relied on the intimate connection test to exempt a private employer from the Board's jurisdiction.[75]

2. *The Right of Control Test.* The Board did not expressly overrule the intimate connection test until 1979, when it decided *National*

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had suggested in his dissent in Rural Fire Protection Co., 216 N.L.R.B. 584 (1975), examining the control exercised by the exempt entity to see if an intimate connection existed. The majority did not find, however, that the services provided by the private employer were not essential to the purpose of the Army, though such a finding would have been necessary for the Board to assert jurisdiction under the intimate connection test as set forth in *Rural Fire Protection*.

Member Murphy's position in *BDM* appeared to indicate her disagreement with the intimate connection test; however, she subsequently supported the test. *See* National Transp. Serv., Inc., 240 N.L.R.B. 565 (1979); Catholic Bishop of Chicago, 235 N.L.R.B. 776 (1978) *rev'd sub. nom.*, NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980); Lexington Taxi Corp., 224 N.L.R.B. 503 (1976); Roesch Lines, 224 N.L.R.B. 203 (1976).

The other Board members who clearly supported the use of the intimate connection test at the time *BDM* was decided were Members Kennedy and Pennello. 218 N.L.R.B. at 1193-95 (Pennello and Kennedy, Members, dissenting).

71. *See* Catholic Bishop of Chicago, 235 N.L.R.B. 776 (1978); Hull House Ass'n, 235 N.L.R.B. 797 (1978); Chase House, Inc., 235 N.L.R.B. 792 (1978); Young Women's Christian Ass'n, 235 N.L.R.B. 788 (1978); *consolidated & rev'd sub nom.*, NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980). The above cases each involved the same city agency providing funding to the various employers on the same terms.

72. 235 N.L.R.B. at 776. The Board's decision in *Catholic Bishop of Chicago* is referred to as *Chicago Youth Centers*, *see supra* note 70, which is the name of the case on appeal, *see supra* note 71, to distinguish the case from Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112 (1977), *aff'd*, 940 U.S. 490 (1978), which dealt with unrelated issues.

73. 235 N.L.R.B. at 779.

74. *Id.* at 779 n.14. ("Member Truesdale agrees that the Head Start and Day Care centers here are not intimately connected to the exempt operations of the City. In any event, however, like Chairman Fanning, Member Truesdale would not adhere to the intimate connection test.")

75. This is not to say that employers did not attempt to avoid the Board's jurisdiction by relying on the intimate connection test after *Chicago Youth Centers*. *See, e.g.*, Mon Valley United Health Serv., Inc., 238 N.L.R.B. 916 (1978); Mental Health Management, Inc., 237 N.L.R.B. 98 (1978); Alcoholism Servs. of Erie County, Inc., 236 N.L.R.B. 927 (1978).

Transportation Services, Inc.[76] In *National Transportation*, an employer that provided school bus transportation to public school systems argued that it should be granted a discretionary exemption.[77] Although prior Board decisions had held consistently that bus transportation for school children was intimately related to the purpose of school systems,[78] the Board refused to apply the intimate connection test.[79] Over the vigorous dissents of Members Murphy and Penello, the Board denounced the intimate connection test as vague and difficult to apply, and emphasized that the connection between the purpose of the entity and the service provided by the employer was unrelated to the "employer's ability to bargain effectively."[80] The Board replaced the intimate connection test with the "right of control" test.[81] This test requires the Board to "determine whether the employer itself meets the definition of 'employer' in Section 2(2) of the Act, and if so, determine

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76. 240 N.L.R.B. 565 (1979).

77. *Id.* at 565.

78. *See* R & E Transit, Inc., 229 N.L.R.B. 959 (1977); Camptown Bus Lines, 226 N.L.R.B. 4 (1976); Waukegan-North Chicago Transit Co., 225 N.L.R.B. 833 (1976); Roesch Lines, 224 N.L.R.B. 203 (1976).

In at least two cases in which the Board exempted employers providing school bus transportation, it reasoned that because the school districts were statutorily mandated to provide bus service, the school districts would themselves be obligated to perform the service if a private contractor were not hired. Therefore, the Board concluded that the contractor should be viewed as standing in the place of the exempt school districts. Columbia Transit Corp., 226 N.L.R.B. 812, 815 n.8 (1976). *Accord* Transit Systems, Inc., 221 N.L.R.B. 299 (1975). Under the reasoning of *Columbia Transit*, any private employer who provided a service to an exempt entity would be exempted from the Board's jurisdiction if the exempt entity was statutorily required to provide the particular service, even if the private employer had absolute control over the employment relationship and the service provided was one which the entity could easily perform itself, such as trash removal.

The Board contradicted the *Columbia Transit* holding in National Maritime Union of Am., 227 N.L.R.B. 20 (1976), in which the Board asserted jurisdiction over a corporation that provided transportation between the United States and Puerto Rico under an agreement with a Puerto Rican government agency that was statutorily required to provide such transportation. The Board expressly rejected the *Columbia Transit* rationale in California Inspection Rating Bureau, 231 N.L.R.B. 520 (1977). The Board denied ever having held that "because a function or service is mandated by state statutes or legislature the work in question per se becomes intimately connected with the State." *Id.* at 510.

The Board recognized the contradiction represented by these cases in National Transp. Serv., 240 N.L.R.B. 565, 566 n.7 (1979) (discussing both *National Maritime Union* and *Columbia Transit*).

79. National Transp. Serv., 240 N.L.R.B. 565, 566 (1979). The Board discussed briefly the legislative history of section 14(c)(1), which provides the basis for the Board's discretion to decline to assert its jurisdiction, noting: "nothing in the legislative history . . . indicates any congressional intent that the Board decline to assert jurisdiction over any employer solely because of the relationship between the services it provides to an exempt entity and the purposes of such entity." *Id.* at 565 (footnote omitted).

80. 240 N.L.R.B. at 566. The Board also noted that the test required a "meticulous and, in our view, superfluous analysis of the facts." *Id.*

81. *Id.*

whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative."[82] Applying the new standard to the facts in *National Transportation*, the Board found that the employer was not entitled to a discretionary exemption.[83] Although the exempt school districts controlled some aspects of the employment relationship, the bus company retained significant control over "hiring, firing, supervision, discipline, work assignments, . . . [and] the conferring of benefits."[84] Because the employer controlled these aspects of the employment relationship, the Board found that the employer retained sufficient control to bargain and therefore asserted jurisdiction.[85]

Although the right of control test is but a simplification of the intimate connection test, it substantially limits the occasions when the Board will grant the discretionary exemption and results in increased assertion of jurisdiction by the Board. The preliminary step of the right of control test, which requires the Board to determine whether the employer meets the statutory definition of "employer,"[86] serves only to establish the Board's statutory jurisdiction;[87] as such, it was implicit in the intimate connection test.[88] Both the old and new tests next ask whether the employer retains a sufficient degree of control over its employment relationship to bargain with a labor organization, and both tests grant an exemption to an employer who lacks such control.[89] If the employer possesses a sufficient degree of control to enable it to bargain, however, the tests may produce different results. Under the right of control test, if the employer exercises the requisite degree of control, the Board will assert jurisdiction. This was not necessarily the result under the intimate connection test; even if the employer retained sufficient control, the Board exempted an employer from its jurisdiction if the services provided to an exempt employer were "essential" to the entity's "purpose."[90] Thus, the right of control test narrows the occa-

82. *Id.* at 565.

83. The Board presumably reached this conclusion by applying the *Natural Gas* test. *See supra* text accompanying note 31.

84. 240 N.L.R.B. at 566.

85. *Id.*

86. *See supra* text accompanying note 82.

87. *See supra* notes 2-4 and accompanying text.

88. Application of a discretionary standard, whether it is the intimate connection test or the right of control test, is unnecessary unless the Board possesses statutory jurisdiction, which can be waived at its discretion. Thus, the Board must possess statutory jurisdiction to apply either discretionary test.

89. *See supra* text accompanying notes 81-82 for a formulation of the right of control test, and see *supra* text accompanying notes 63-64 for a formulation of the intimate connection test.

90. *See supra* text accompanying note 64.

sions in which a discretionary exemption will be granted because it omits the last step of the intimate connection test;[91] employers that would have been granted a discretionary exemption will instead be subject to the Board's jurisdiction.

The right of control test is clearly an improvement over the intimate connection test because it eliminates the need for the Board to engage in the unnecessary practice of determining whether a given service is "essential" to an entity's purpose.[92] The new test is not without problems, however. The Board still must determine whether an employer's control over its employment relationship is sufficient to enable it to bargain effectively with a labor organization.[93] To isolate a specific group of characteristics that constitute "control" is difficult. Factors such as the employer's control over hiring, firing, discipline, work assignments and the conferring of benefits are certainly relevant aspects of control,[94] but these factors should be considered in the context of the employer's entire operation. For example, a private employer operating a hospital for a political subdivision might be required by the operating agreement to hire only experienced nurses as a means of insuring quality patient care. Although the political subdivision may set such a hiring qualification, or insist on the discharge of a nurse who does not meet the qualification, it does not necessarily follow that the private employer lacks sufficient control over the employment relationship to enable it to bargain. The private employer still can decide who will be hired and define the terms of employment. Similarly, if the political subdivision imposes a limit on the amount of expenses it will reimburse, the private employer is necessarily limited in the range of benefits it can confer. Such limitations on expenditures, however, cannot be said to limit substantially the employer's control over the employment relationship; all enterprises face some economic restraints, and the private employer in the example can determine the benefits it will confer within its budgetary limits.

Thus, the right of control test is potentially as susceptible to inconsistent application as was the intimate connection test, for the Board can easily overemphasize those aspects of control that support its ultimate conclusion either to assert or decline jurisdiction. The sufficiency of control determination requires consideration of all aspects of the em-

91. This is the result Fanning urged in his dissent in *Rural Fire Protection*. *See supra* note 67 and accompanying text.

92. *See supra* notes 64-66 and accompanying text.

93. *See supra* text accompanying note 82.

94. *See, e.g.*, D. T. Watson Home for Crippled Children, 242 N.L.R.B. 1368 (1979); National Transp. Serv., Inc., 240 N.L.R.B. 565 (1979).

ployer's operations, so the Board must determine which factors are relevant to the issue of the employer's control. Because the test does not specify the choice or weight of the factors to be considered in the sufficiency of control determination, the Board must make a case by case analysis, which increases the probability of inconsistent decisions. The Board's application of the right of control test, however, may turn out to be much more consistent than its application of the intimate connection test, particularly if in close cases the Board continues to favor use of the statutory exemption of the *Natural Gas* test over granting discretionary exemptions.[95]

II. THE COURTS: EXPANDING THE POLITICAL SUBDIVISION EXEMPTION BY INFRINGING UPON THE BOARD'S DISCRETIONARY AUTHORITY

Since the Board's narrowing of the discretionary exemption, several of its decisions to assert jurisdiction have been overturned in the federal courts of appeals.[96] The cases reversing the Board indicate that some courts have confused the Board's statutory jurisdiction with its discretionary authority to assert or decline jurisdiction in cases in which statutory jurisdiction exists. As a result, the courts have mistakenly relied on the joint employer concept[97] and the presence of a prior approval clause[98] to reverse Board decisions under the guise of statutory interpretation, rather than giving deference to the Board's exercise of its discretion. The effect of these court decisions has been to preclude the Board from asserting jurisdiction, thereby extinguishing the rights otherwise afforded the affected employees by section 7 of the Act.[99]

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95. *See infra* note 145. Recent changes in the Board's membership may also affect the future application of the right of control test. *See* 107 LAB. REL. REP. (BNA) 319 (1981).

96. *See* NLRB v. Board of Trustees, 624 F.2d 177 (10th Cir. 1980); NLRB v. Chicago Youth Centers, 611 F.2d 1028 (7th Cir. 1980); Lutheran Welfare Serv. v. NLRB, 607 F.2d 777 (7th Cir. 1979).

The Board's narrowing of the discretionary exemption culminated when it adopted the right of control test to replace the intimate connection test, but the narrowing process began before the intimate connection test was expressly rejected. *See supra* notes 74-75 and accompanying text.

97. For a discussion of the joint employer concept see *infra* notes 100-21 and accompanying text.

98. For a discussion of the prior approval clause see *infra* notes 122-42 and accompanying text.

99. The rights afforded employees by section 7, 29 U.S.C. § 157 (1976), include the right to strike and the right to bargain collectively through representatives chosen by the employees. *See supra* note 2 for the text of section 7.

A. *The Joint Employer Problem.*

The courts have erroneously applied the joint employer concept to reverse Board decisions asserting jurisdiction over private employers.[100] A joint employer relationship exists when two or more employers exert significant control over the same group of employees.[101] When such a relationship exists between an employer and a political subdivision, the Board has usually exempted the employer from its jurisdiction.[102] The Board has reasoned that collective bargaining is not feasible in such a situation because any bargaining would directly affect the political subdivision, a result contrary to the policy of the Act.[103] The Board apparently felt that it would risk possible conflict with the authority of the political subdivision.[104]

In *Lutheran Welfare Services v. NLRB*,[105] the Court of Appeals for the Seventh Circuit reversed the Board's decision to assert jurisdiction over an employer that provided day-care services pursuant to a contract with a city agency. The court found that the employer and the city agency were joint employers and held that the Board lacked jurisdiction, stating: "The Board has . . . held that it has no jurisdiction over joint employers if one of the employers is exempt from the Act, since a collective bargaining agreement is not feasible in such circumstances."[106]

The Board's decisions involving its discretion, however, do not support the court's conclusion that the Board lacked jurisdiction over joint employers.[107] In none of the three cases cited by the court in *Lu-*

100. When the courts hold that the Board lacks statutory jurisdiction over an employing entity because the entity does not meet the definition of "employer" set forth in section 2(2) of the Act, 29 U.S.C. § 152(2) (1976 & Supp. III 1979), the employees of that entity receive none of the Act's protections. *See supra* notes 2-4 and accompanying text.

101. *See, e.g.*, NLRB v. Triumph Curing Center, 571 F.2d 462 (9th Cir. 1978); Transportation Lease Serv., Inc., 232 N.L.R.B. 95 (1977). A conflict exists concerning the appropriate test for determining joint employer status between two private employers. *See* Miscellaneous Drivers & Helpers Union, Local No. 610 v. NLRB, 624 F.2d 831 (8th Cir. 1980). In the context of the political subdivision exemption, the joint employer concept has been limited to analyzing only the control over a private employer's labor relations possessed by an exempt entity. See cases cited *infra* at note 102.

102. *See, e.g.*, ARA Serv., Inc., 221 N.L.R.B. 64 (1975); Ohio Inns, Inc., 205 N.L.R.B. 528 (1973). *But see* Vantage Petroleum Corp., 247 N.L.R.B. 1492 (1980); Buffalo Gen. Hosp., 218 N.L.R.B. 1090 (1975); JA-CE Co., 205 N.L.R.B. 578 (1973).

103. Because political subdivisions are expressly excluded from the Board's jurisdiction by section 2(2), direct Board involvement with a political subdivision through its relationship with a private employer is arguably contrary to the policy of the Act.

104. *See* Ohio Inns, Inc., 205 N.L.R.B. 528 (1973). *See supra* note 63.

105. 607 F.2d 777 (7th Cir. 1979).

106. *Id.* at 778.

107. The *Lutheran Welfare* court also failed to give due consideration to the legislative history of the political subdivision exemption and to the Supreme Court's interpretation of the exemption.

theran Welfare did the Board hold that it lacked jurisdiction.[108] In each case, the Board had instead declined to assert jurisdiction over private employers that had close relationships with political subdivisions,[109] a determination that could be made only if the Board possessed statutory jurisdiction initially.[110]

If the *Lutheran Welfare* court's holding that the Board lacks jurisdiction over joint employers is accepted, the Board's discretionary jurisdiction over employers who contract with political subdivisions will be seriously eroded.[111] The court declared that a joint employer rela-

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The scant legislative history does not suggest that Congress even considered the possibility that a private employer could qualify for the exemption. *See Hearings on Labor Disputes Act before the House Comm. on Labor*, 74th Cong., 1st Sess. 179 (1934) (address of Sen. Copeland); 93 CONG. REC. 6441 (1947) (consideration of the Labor-Management Relations Act, 1947) (statements of Sen. Taft). The legislative history makes clear that one reason Congress included the exemption was that public employees generally lacked the right to strike. *See* NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 604 (1971). Congress's recognition of this fact provides no basis for concluding that the statutory exemption should extend to private employers; if the Board asserts jurisdiction, the affected employees are guaranteed the right to strike by section 7 of the Act. 29 U.S.C. § 157 (1976). Thus, the right to strike flows from the Board's jurisdictional determination, and therefore cannot be considered a measure of the Board's jurisdiction. The legislative history also discloses that the present version of the exemption differs from that originally presented to the Senate, which exempted "any State, municipal corporation or other governmental instrumentality." *See* Labor Disputes Act, S. 2926, 74th Cong., 1st Sess. (1934). The present version's use of "political subdivision," 29 U.S.C. § 152 (1976), rather than "governmental instrumentalities" arguably reflects an intent to narrow the exemption. Such a construction is purely speculative, however, because there is no evidence that Congress was cognizant of the change. *See* NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 604 (1971).

The Supreme Court's interpretation of the political subdivision exemption in *Natural Gas* similarly provides no basis for extending the statutory exemption to private employers. The characteristics considered by the Court in addition to the "created by the state or administered by persons responsible to public officials" test are not characteristics typically possessed by a private employer.

108. Lutheran Welfare Serv. v. NLRB, 607 F.2d 777 (7th Cir. 1979). The cases cited by the court in support of its conclusion that the Board lacked jurisdiction over joint employers were Mississippi City Lines, 223 N.L.R.B. 11 (1976); Transit Systems, Inc., 221 N.L.R.B. 299 (1975) and Ohio Inns, Inc., 205 N.L.R.B. 528 (1973).

109. The Board relied expressly on the intimate connection test as the basis for exempting the employer in Mississippi City Lines, 223 N.L.R.B. at 300, and in Transit Systems, Inc., 221 N.L.R.B. at 11. In *Ohio Inns*, the Board found that the employer and the state were joint employers, and held that "[s]ince the state is exempt from the Board's jurisdiction under Section 2(2) of the Act, we find it would not effectuate the policies of the Act to assert jurisdiction herein." 205 N.L.R.B. at 528-29. Thus, in each of the cases cited by the *Lutheran Welfare* court, the Board explicitly declined to *assert* its jurisdiction, contrary to the courts' assertion that the Board had held that it *lacked* jurisdiction.

110. *See supra* note 50 and accompanying text.

111. The Board applied the intimate connection test when it asserted jurisdiction in Lutheran Welfare Serv., 236 N.L.R.B. 106 (1978), but the Seventh Circuit's rationale for reversing the Board applies equally to the discretionary right of control test. The court held that the employer was exempt because the Board lacks jurisdiction over an employer who is a joint employer with an exempt political subdivision, which the court held the employer to be in this case. 607 F.2d at 778. The court focused on the political subdivision's control over the employer's operations, which is

tionship exists when an exempt entity exercises significant control over a private employer's employees.[112] The right of control test, which is the accepted discretionary standard,[113] asks whether the private employer retains sufficient control over its employment relationship to enable it to bargain with a labor organization.[114] Therefore, both the joint employer analysis and the right of control test focus on control over the employment relationship. The only difference between the standards is that the right of control test examines the private employer's control while the joint employer standard considers the political subdivision's control.[115] Thus, if the joint employer standard measures the Board's statutory jurisdiction, it follows that the right of control test would also be a measure of statutory jurisdiction. This conclusion, however, would deprive the Board of all discretionary jurisdiction in the political subdivision context. Under the *Lutheran Welfare* court's rationale, if a political subdivision exercises the requisite control to establish a joint employer relationship, the Board lacks jurisdiction. Furthermore, if the employer retains sufficient control to avoid classification as a joint employer, the right of control test prescribes that the Board assert its jurisdiction.[116] The Board would therefore have no reason to exercise its discretionary authority to exempt employers from its jurisdiction, a result contrary to the grant of discretion of section 14(c)(1).[117]

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the common denominator between the right of control test and the intimate connection test. *See supra* notes 86-91 and accompanying text. Thus, the joint employer rationale for exempting the private employer applies in either situation.

The remaining portion of this note analyzes the impact of the joint employer rationale on the Board's discretionary jurisdiction as determined by the right of control test. For the reasons noted above, however, the discussion is equally applicable to the intimate connection test.

112. 607 F.2d at 778.

113. *See* National Transp. Serv., 240 N.L.R.B. 565, 566 n.9 (1979). *Accord* Truman Medical Center, Inc. v. NLRB, 641 F.2d 570 (8th Cir. 1981); NLRB v. Austin Developmental Center, Inc., 606 F.2d 785, 790 nn. 9 & 10 (7th Cir. 1979).

114. *See supra* text accompanying note 82.

115. By a tortuous construction of the language, one might contrast the "sufficient control" of the right of control test with the "significant control" of the joint employer standard and theorize that an employer might retain so little control that he is unable to bargain effectively, but still retain enough control that joint employer status does not exist. Conversely, one might envision a situation where enough control could be retained to enable the employer to bargain though the exempt entity possessed enough control to establish joint employer status. Such theoretical distinctions are of no practical value, however, because the principal difficulty with both standards is a lack of precision, and the defect is only magnified by injecting additional gradations into a scale measuring an nnquantifiable variable such as "control."

116. *See supra* text accompanying notes 81-85.

117. *See* 29 U.S.C. § 164(c)(1) (1976) ("The Board . . . may . . . decline to assert jurisdiction over any . . . class . . . of employers . . . ."). For the full text of section 14(c)(1), see *supra* note 51. Under the joint employer rationale, the Board retains a measure of discretion in exercising its jurisdiction—it could decline to assert jurisdiction over employers possessing any relationship

The *Lutheran Welfare* court's holding that the Board lacked statutory jurisdiction over the employer involved therein would have been correct as a matter of law had the employer qualified as a political subdivision.[118] The court admitted that the employer did not qualify independently as a political subdivision,[119] however, so the Board actually possessed statutory jurisdiction. Thus, the court should have determined only whether the Board acted within its discretionary authority. Had the court properly viewed the Board's decision as an exercise of discretion, the decision would not have been reversed, because the Board's action did not depart "substantially from that taken in seemingly like cases."[120] Thus, the court's use of the wrong standard of review resulted in an unwarranted expansion of the political subdivision

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with an exempt entity. Nevertheless, the joint employer rationale deprives the Board of its discretion to assert jurisdiction over employers in cases in which discretion is most needed: those cases in which employers are closely related to exempt entities and present a colorable claim for exemption. When employers in this position are involved, the Board needs the flexibility to decide whether a claim is valid in a particular case. The joint employer rationale destroys this flexibility by preventing the Board from exercising discretion.

118. *See* NLRB v. Natural Gas Util. Dist., 402 U.S. 600 (1971). *See supra* notes 2-4 and accompanying text.

119. The employer did not qualify as a political subdivision under the *Natural Gas* test because it was neither created by the state nor administered by individuals responsible to elected public officials. *See Lutheran Welfare*, 607 F.2d at 778. *See supra* text accompanying note 31.

120. *See* Herbert Harvey, Inc. v. NLRB, 424 F.2d 770, 780 (D.C. Cir. 1969). The standard of review for cases in which the Board has exercised its discretionary authority has also been phrased as whether the Board treated "similar situations in dissimilar ways." Herbert Harvey, Inc. v. NLRB, 385 F.2d 684, 686 (D.C. Cir. 1967) (janitorial services). *Accord* NLRB v. Highview, Inc., 590 F.2d 174, 178 (5th Cir.), *modified on other grounds*, 595 F.2d 339 (5th Cir. 1979) (nursing homes). *See supra* note 51.

The court of appeals in *Lutheran Welfare* could not have found that the Board treated similar situations dissimilarly or that its action departed substantially from that taken in seemingly like cases. 607 F.2d at 777. When the Board decided the *Lutheran Welfare* case, it had already decided several cases involving government-funded day-care centers operated by private employers. *See Chicago Youth Centers*, 235 N.L.R.B. 776 (1978); Hull House Ass'n., 235 N.L.R.B. 797 (1978); Chase House, Inc., 235 N.L.R.B. 797 (1978); Young Women's Christian Ass'n, 235 N.L.R.B. 788 (1978), *consolidated & rev'd sub nom.* NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980). The Seventh Circuit heard the *Lutheran Welfare* case before the *Chicago Youth Centers* case, and relied on *Lutheran Welfare* as precedent when it reversed the Board in *Chicago Youth Centers*. In the *Chicago Youth Centers* cases, the Board had asserted jurisdiction over the employers, who had contracted with the same city agency that was involved in *Lutheran Welfare*. 235 N.L.R.B. 797. The Board treated the employer in *Lutheran Welfare* in the same manner as it had the similarly situated employers in *Chicago Youth Centers*. Hence, the reviewing court in *Lutheran Welfare* could not have held that the Board abused its discretion by treating similar cases in a dissimilar manner. Moreover, even if the Board had previously exempted private employers operating government-funded day-care centers, the Board could have legitimately reversed its prior position and asserted jurisdiction, as long as subsequent cases were treated in a similar fashion. *See* NLRB v. Weingarten, Inc., 420 U.S. 251, 264 (1975) (Board decisions to exercise jurisdiction where previously declined is appropriate in light of the Board's responsibility to constantly reform its standards on the basis of accumulated experience).

exemption at the expense of employees entitled to the protection of the Act.[121]

B. *The "Prior Approval" Clause.*

A problem closely related to the joint employer issue arises when an employer and a political subdivision execute a contract providing that the employer will secure prior approval of any collective bargaining agreement it negotiates. In several cases decided prior to the Board's clash with the Seventh Circuit over joint employers,[122] the Board exempted from its jurisdiction employers whose contracts required prior approval of collective bargaining agreements.[123] The nature of this determination would be altered, however, by the adoption of the Seventh Circuit's interpretation of the joint employer standard as a statutory test.[124] If a political subdivision had the right to disapprove a collective bargaining agreement negotiated by a private employer, the employer and the political subdivision would clearly qualify as joint employers because the political subdivision would possess a significant amount of control over the employer's operations.[125] Applying the reasoning of the court in *Lutheran Welfare*, the Board would lack statutory jurisdiction, and would therefore lack discretion to exercise jurisdiction when employers attempt to circumvent the Board's authority.

The Tenth Circuit's decision in *Board of Trustees v. NLRB*[126] illustrates the potential for abuse fostered by such reasoning. The *Board of Trustees* case involved a private, nonprofit employer that contracted with the Board of Trustees of a county-owned hospital to operate the hospital independently.[127] Following the Board's certification of a bar-

121. Once the Board declines to assert jurisdiction over an employer, the employer's employees are not granted the protections of the Act; the employees' rights are governed by applicable state law. *See* NLRA § 14(c)(2), 29 U.S.C. § 164(c)(2) (1976) ("Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction.").

122. *See supra* note 106 and accompanying text; *see also supra* note 120 for the cases in which the Seventh Circuit relied on the joint employer rationale to reverse the Board.

123. *See* MTL, Inc., 223 N.L.R.B. 1071 (1976); Ohio Inns, Inc., 205 N.L.R.B. 528 (1973).

124. *See supra* notes 105-21 and accompanying text.

125. The joint employer rationale, as set forth in Lutheran Welfare Serv. v. N.L.R.B., 607 F.2d 777 (7th Cir. 1979), considers whether the exempt entity exercises significant control over the private employer's operations. A collective bargaining agreement may have a pervasive impact on an employer's operations; thus, if an exempt entity has the right of prior approval over any collective bargaining agreement the employer negotiates, the exempt entity exercises significant control over the employer's operations.

126. 624 F.2d 177 (10th Cir. 1980).

127. *See* Bishop Randall Hosp., 217 N.L.R.B. 1129 (1975), *rev'd sub nom.* Board of Trustees v. NLRB, 624 F.2d 177 (10th Cir. 1980). The Board of Trustees, appointed by the county commissioners, was found to be a political subdivision. Bishop Randall Hosp., 233 N.L.R.B. 441, 443 (1977). The Board's latter *Bishop Randall* decision involved unfair labor practice proceedings.

gaining agent for the private employer's employees, the trustees met with the employer and amended the contract to provide that the employer would not enter into a collective bargaining agreement without the prior approval of the trustees.[128] In an unfair labor practice proceeding resulting from the employer's alleged refusal to bargain after the amendments were executed, the Board rejected the employer's contention that the amendments established the trustees as the true employer of the hospital employees.[129] The Board held that the amendments should be given no effect.[130]

On the employer's petition to set aside a Board bargaining order, the Court of Appeals for the Tenth Circuit reversed the Board's decision.[131] The court concluded that the amendments were valid and that the Board had erred by not giving them full effect.[132] The court also held that the effect of the amendments was to make the employer and the Board of Trustees joint employers, and that the employer was therefore exempt from the Board's jurisdiction by the reasoning of the Seventh Circuit's *Lutheran Welfare* decision.[133]

By upholding the validity of the amendments executed by the employer and the trustees, the Tenth Circuit created a means by which employers can avoid the Board's jurisdiction. If an agreement vesting the right of prior approval of collective bargaining agreements in an exempt entity is all that is required for an employer to gain exemption from the Board's jurisdiction, this provision will probably become a standard clause in contracts between a private employer and a political subdivision. This result is clearly contrary to the purpose of the Act because it enables employers to escape the Board's jurisdiction.[134]

128. 233 N.L.R.B. at 445. The significant portion of the prior approval amendment stated that the employer would continue to operate the hospital "subject to the control reserved to the lessor [trustees]" and that the employer "could not enter into any . . . collective agreement without the express written consent of the lessor." *Id.* At the same time the amendments were executed the Trustees adopted a resolution ordering the employer to refrain from bargaining with the newly certified union. *Id.* at 446.

129. 233 N.L.R.B. 441, 446 (1977).

130. *Id.* at 446. The Board stated that an employer "may not circumvent the issuance of an order designed to remedy its conduct violative of the Act by interposing a contract it has entered." *Id.*

131. Board of Trustees v. NLRB, 624 F.2d 177 (10th Cir. 1980).

132. *Id.* at 184.

133. *Id.* at 189.

134. Section 1 of the Act, 29 U.S.C. § 151 (1976), states its underlying policies and recognizes that "[t]he denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes . . . which have the . . . effect of burdening or obstructing commerce." The Act goes on to state that it is the policy of the United States to eliminate these obstructions by "encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." Such goals clearly can-

Although the *Board of Trustees* court relied in part on the joint employer rationale of *Lutheran Welfare* to conclude that the Board lacked jurisdiction,[135] the difficulties created by a prior approval clause can arise even if a court properly applies the joint employer standard as a discretionary standard.[136] Enforcing a prior approval clause grants control to an exempt entity such that the right of control test requires the Board to decline to assert jurisdiction.[137] Thus, the assertion of discretionary jurisdiction turns on whether the prior approval clause is given effect.

If a prior approval clause may be given effect at all,[138] the decision to do so is properly within the Board's discretion, not the discretion of the courts of appeals. Assuming that the Board possesses statutory jurisdiction over an employer,[139] the decision to assert that jurisdiction is

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not be realized if the employer has the option of subjecting himself to the Board's jurisdiction or avoiding it; few employers would voluntarily submit themselves to the jurisdiction of the NLRB.

135. Board of Trustees v. NLRB, 624 F.2d 177, 184 (10th Cir. 1980); *see* Lutheran Welfare Serv. v. NLRB, 607 F.2d 777 (7th Cir. 1979). The court also cited NLRB v. Chicago Youth Centers, 616 F.2d 1028 (7th Cir. 1980), and Ohio Inns, Inc., 205 N.L.R.B. 528 (1973), to support its contention that the Board has no jurisdiction over an employer that is a joint employer with a political subdivision. 624 F.2d at 189. The fallacies underlying this conclusion are discussed *supra* at notes 107-21 and accompanying text.

According to the court of appeals in *Board of Trustees*, the principal ground for reversing the Board was that the Board erred in holding that the employer retained control over the employment relationship. 624 F.2d at 189. Because the court concluded that the amendments established conclusively that substantial control was vested in the Trustees, it held that the Board's decision to the contrary was not supported by the record. *Id.* This result follows from the court's conclusion that the Board's ruling that the amendments were invalid was "not supported by substantial evidence in the record as a whole," *id.* at 188, which is the standard imposed by the Act for reversing the Board's findings of fact. *See* NLRA § 10(e), 29 U.S.C. § 160(e) (1976). The court erred by reversing the Board on this ground because the Board's ultimate decision to assert jurisdiction was within its discretion: the outcome-determinative issue of the amendment's validity was necessarily a discretionary determination by the Board, rather than a finding of fact. Thus, the proper inquiry for the court was whether the Board treated similar cases differently. *See supra* note 120 and accompanying text.

136. The reasons that the joint employer rationale is properly considered to be a discretionary standard are set forth at *supra* notes 107-17 and accompanying text.

Because the court used the joint employer concept as an alternative rationale, the problems created by giving effect to a prior approval clause can arise without resort to the joint employer rationale.

137. If the joint employer analysis dictates that the Board decline to assert jurisdiction, the right of control test will necessarily yield the same conclusion. *See supra* text accompanying notes 116-17.

138. Because this note argues that the statutory *Natural Gas* test, rather than the discretionary exemption, should be used in the political subdivision context, only those entities that qualify independently as political subdivisions would be exempt from the Board's jurisdiction. Thus, the existence of a prior approval clause would be immaterial.

139. This assumption is based on an interpretation of section 2(2), 29 U.S.C. § 152(2) (1976), as depriving the Board of jurisdiction only if the employing entity is expressly exempt. See *supra* note 4 for the text of section 2(2). Because a private employer cannot meet the *Natural Gas* test to

necessarily within the Board's discretion.[140] When a court holds that the Board must give deference to a prior approval clause by declining to exercise its jurisdiction, the court effectively substitutes its discretion for the Board's discretion. This result is inconsistent with the grant of jurisdictional discretion given the Board by section 14(c)(1) of the Act.[141] Moreover, the Board must retain the power to prevent wholesale avoidance of its jurisdiction by employers that would include such a clause in all contracts with political subdivisions.[142] If the Board's jurisdiction can be manipulated by employers, the Board cannot effectively protect the rights of private sector employees.

III. CONCLUSION

Recent court decisions indicate that the courts have ignored the Board's discretionary authority in political subdivision cases. In *Lutheran Welfare*, the Board's decision to assert jurisdiction was disregarded completely in decisions by the Court of Appeals for the Seventh Circuit holding that the employer was exempt from the Board's jurisdiction even though the employer did not qualify as a political subdivision under either component of the *Natural Gas* test.[143] In *Board of Trustees*, the Court of Appeals for the Tenth Circuit held that a prior approval clause in the contract between an employer and a political subdivision precluded the Board from asserting jurisdiction despite the fact that the decision to give effect to the clause was properly within the Board's discretion.[144]

The magnitude of the courts' errors is illustrated by the fact that the Board has not granted a discretionary exemption under the right of control test to any employer within its statutory jurisdiction under the *Natural Gas* test.[145] Thus, the effect of the courts' decisions has been to

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qualify as a political subdivision, the employer cannot be statutorily exempt from the Board's jurisdiction.

140. *See supra* text accompanying notes 49-51.

141. 29 U.S.C. § 164(c)(1) (1976). For the text of section 14(c)(1) of the NLRA, see *supra* note 51.

142. If a prior approval clause is all that is required to prevent the Board from exercising its jurisdiction, then those employers who contract with political subdivisions will have a powerful anti-union weapon not available to employers who operate solely in the private sector.

143. *See supra* text accompanying note 31.

144. *See supra* text accompanying notes 139-40.

145. In those cases in which the Board found that the political subdivision completely controlled the employing entity, the Board held that the employing entity qualified as a political subdivision under the *Natural Gas* test. *See* Northhampton Center for Children & Families, Inc., 257 N.L.R.B. No. 114 (1981); New York Inst. for the Educ. of the Blind, 254 N.L.R.B. 664 (1981); Madison County Mental Health Center, Inc., 253 N.L.R.B. 258 (1980); Community Health & Home Care, Inc., 251 N.L.R.B. 509 (1980); Northern Community Mental Health Center, Inc., 241 N.L.R.B. 323 (1979).

deny the protections of the Act to employees of employers over which the Board asserted its discretionary jurisdiction after determining that the employer was within its statutory jurisdiction.[146]

The obvious solution to this problem is for the courts to yield to the Board's legitimate exercise of its discretion and determine only whether the Board exceeded the bounds of its statutory jurisdiction, as determined by the *Natural Gas* test.[147] The Board could help alleviate the confusion in the federal courts of appeals by relying solely on the *Natural Gas* test and asserting jurisdiction in political subdivision cases over all employers that fall within its statutory jurisdiction. Because the discretionary right of control test is substantially encompassed by the statutory *Natural Gas* test,[148] the Board could simply discard the right of control test. The Board's results would not be altered by taking this step, as evidenced by the complete absence of cases in which the Board has granted a discretionary exemption after applying the right of control test and by the Board's exclusive use of the *Natural Gas* test to exempt entities since the adoption of the right of control test.[149] If the Board should expressly discard the discretionary exemption in political subdivision cases, the courts might of course continue to misconstrue the scope of the Board's statutory jurisdiction; however, the courts would at least have to give greater consideration to the result the Board reached under the Supreme Court's *Natural Gas* test, and the courts might then conclude that the Board properly exercised its statutory jurisdiction.

M. Edward Taylor

146. *See* Board of Trustees v. N.L.R.B., 624 F.2d 177 (10th Cir. 1980); Chicago Youth Centers v. N.L.R.B., 616 F.2d 1028 (7th Cir. 1980); Lutheran Welfare Serv. v. N.L.R.B., 607 F.2d 777 (7th Cir. 1979).

147. The courts would also determine whether the Board exercised its discretionary authority in an arbitrary and capricious manner. *See supra* note 120 and accompanying text.

148. A factor considered by both the "administered" portion of the statutory *Natural Gas* test and the discretionary right of control test in determining whether an entity may properly claim political subdivision status is the degree of control the state possesses over the entity. *See supra* notes 47-48 and text accompanying note 82.

149. *See supra* note 145 and accompanying text. If an employer does not otherwise qualify as a political subdivision under the *Natural Gas* test, *see supra* text accompanying note 31, then joint employer status or a prior approval clause does not alter this result. *See supra* notes 105-19 and 122-25 and accompanying text. Because joint employer status and prior approval clauses do not affect the outcome under the *Natural Gas* analysis, employers would have no incentive to alter their contracts with political subdivisions in an attempt to avoid the Board's jnrisdiction. *Cf.* Board of Trustees v. NLRB, 624 F.2d 177 (10th Cir. 1980).