CASE COMMENTS

NLRB HAS NO JURISDICTION OVER LAY TEACHERS IN PAROCHIAL SCHOOLS

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

In *NLRB v. Catholic Bishop of Chicago*[1] the Supreme Court evaded a first amendment challenge to the National Labor Relations Act (NLRA)[2] as applied to lay faculty members employed by church-operated schools.

The National Labor Relations Board (NLRB), after ordering representation elections[3] for lay teachers at two Catholic high schools in Chicago[4] and five secondary schools in the Diocese of Fort Wayne-South Bend,[5] certified two union organizations as the teachers' exclusive bargaining agents.[6] The schools refused to recognize the unions, and the unions filed unfair labor practice complaints with the NLRB.[7]

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

2. 29 U.S.C. §§ 151-168 (1976).

3. The Catholic Bishop of Chicago, A Corporation Sole, 220 N.L.R.B. 359, 90 L.R.R.M. 1225 (1975). Section 9 of the NLRA describes the Board's authority:

> (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section. . . .
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 U.S.C. § 159(c)(1) (1976).

4. The two high schools in Chicago, Quigley North and Quigley South, employed 46 teachers. Petitioner's Brief for Certiorari at 6 n.2, NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

5. South Bend St. Joseph High School, Mishawaka Marian High School, Fort Wayne Bishop Luers High School, Fort Wayne Bishop Dwenger High School, and Huntington Catholic High School employed 182 lay teachers. *Id.*

6. In the Board supervised election at the Quigley schools, the Quigley Education Alliance, a union affiliated with the Illinois Education Association, prevailed and was certified as the exclusive bargaining representative. In the Diocese of Fort Wayne-South Bend, the Community Alliance for Teachers of Catholic High Schools, a similar union organization, prevailed and was certified. 440 U.S. at 494.

7. The unions alleged two unfair labor practices. NLRA § 8 (a)(1), 29 U.S.C. § 158(a)(1) (1976), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce

The Board ordered the schools to cease their unfair labor practices and to bargain collectively with the unions.[8] On petition of the schools, the Seventh Circuit Court of Appeals held that the NLRB's assertion of jurisdiction over the religiously affiliated schools violated the first amendment religion clauses, and denied the Board's cross-petition for enforcement of its orders.[9] The Supreme Court affirmed the Seventh Circuit's refusal to enforce the Board's orders and *held*: In the absence of a clear expression by Congress of its intent to include lay teachers at church-operated schools within the scope of the NLRA, the NLRB lacks jurisdiction over religiously affiliated schools and the Court will decline to resolve the first amendment issues arising out of the exercise of such jurisdiction.[10]

When confronted with a challenge to a statute's constitutionality, a court "will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."[11] To construe a statute against its validity, the court must find that Congress clearly expressed an affirmative intention in favor of that construction.[12] Courts, however, may not "substitute amendment for construction" merely to save a law from conflict with a constitutional limitation,[13] nor press the

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employees in the exercise of [their guaranteed] rights." NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1976), makes it unlawful for an employer "to refuse to bargain collectively with the representatives of his employees."

8. Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 92 L.R.R.M. 1550 (1976); The Catholic Bishop of Chicago, A Corporation Sole, 224 N.L.R.B. 1221, 92 L.R.R.M. 1553 (1976).

9. The Catholic Bishop of Chicago, A Corporation Sole v. NLRB, 559 F.2d 1112 (7th Cir. 1977).

10. 440 U.S. at 507.

11. "When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." Crowell v. Benson, 285 U.S. 22, 62 (1932). *See* Lorilland v. Pons, 434 U.S. 575, 577 (1978); Swain v. Pressley, 430 U.S. 372, 378 (1977); Parker v. Levy, 417 U.S. 733, 760 (1974); Pernell v. Southall Realty, 416 U.S. 363, 365 (1974); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916).

12. Benz v. Compania Naviera Hidalgo, 353 U.S. 138, 147 (1957); *accord,* McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963).

13. Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926).

> [I]t is the duty of a court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. But it is very clear that amendment may not be substituted for construction and that a court may not exercise legislative functions to save the law from conflict with constitutional limitation.

Id. *See* Aptheker v. Secretary of State, 378 U.S. 500, 515 (1964); Jay v. Boyd, 351 U.S. 345, 357

principle to a point of "disingenuous evasion."[14]

The brevity of the first amendment's religion clauses and the absolute terms in which the amendment was cast have provided the courts with a continuing source of difficulty in evaluating the constitutional validity of legislation and governmental activity affecting religion.[15] The first amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[16] Carried to their logical extreme, the establishment[17] and free exercise[18] clauses often overlap and conflict in their application to

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n.21 (1956); Shapiro v. United States, 335 U.S. 1, 31 (1948); United States v. Sullivan, 332 U.S. 689, 693 (1948); Hopkins Savings Ass'n v. Cleary, 296 U.S. 315, 335 (1935).

14. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. . . ." But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intention of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered.

Moore Ice Cream Co. v. Rose, 289 U.S. 373, 379 (1933) (citation omitted).

15. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 848-94 (1978).

16. U.S. CONST. amend. I.

17. The establishment clause proscribes governmental action that either advances or inhibits religion or religious institutions. In its struggle to articulate precise standards for anlayzing establishment clause challenges, the Supreme Court has formulated a three-prong test. First, the governmental activity must have a legitimate secular purpose. *See* Wolman v. Walter, 433 U.S. 229, 236 (1977); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963). Second, the direct and immediate effect of the governmental activity must be secular and neither advance nor inhibit religion. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (direct and immediate effect); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (principle or primary effect). Third, the activity must not foster excessive governmental entanglement with religion. *See* Wolman v. Walter, 433 U.S. 229, 236 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976).

18. The free exercise clause protects the individual from governmental interference with his religious beliefs or practices. Religious freedom consists of "freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." Cantwell v. Connecticut, 310 U.S. 292, 303-04 (1940); *accord,* Braunfeld v. Brown, 366 U.S. 599, 603-04 (1961). The belief-conduct distinction is troublesome, yet necessary. Carried to its logical extreme, government could prohibit all exercises of religion on the ground that it was regulating conduct, not belief; on the other hand, the distinction must be recognized to balance the state's interest in controlling antisocial conduct against the individual's interest in freedom of worship. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 15, at 871-85. To resolve this dilemma, the Court apparently will hold valid a regulation only when the government demonstrates it to be both necessary to the promotion of a compelling state interest, *see, e.g.,* Wisconsin v. Yoder, 406 U.S. 205, 215 (1972) ("only those interests . . . not otherwise served . . . can overbalance" interest in religious freedom), and the least burdensome alternative to accomplishing the legislative goal, *see, e.g.,* Sherbert v. Verner, 374 U.S. 398, 407 (1963) (state must "demonstrate that no alternative forms of regulation" would curb abuses of unemployment benefits "without infringing First Amendment rights").

the facts and circumstances of any given case.[19] To further complicate freedom-of-religion analysis, the Supreme Court has reviewed claims under the two clauses on independent bases and developed separate tests for determining whether a governmental activity violates either clause.[20]

The NLRB until recently was able "to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses"[21] by declining to exercise jurisdiction over nonprofit educational institutions. Although authorized to exercise jurisdiction to the fullest extent constitutionally permissible under the commerce clause,[22] the Board in *Trustees of Columbia University*[23] refused to assert jurisdiction over Columbia University, a nonprofit educational institution, because to do so would not "effectuate the policies of the Act."[24] Even

19. "There is a natural antagonism between a command not to establish a religion and a command not to inhibit its practice. This tension between the clauses often leaves the Court with having to choose between competing values in religion cases." J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 15, at 849. *See generally* Meiklejohn, *Religion in the Burger Court: The Heritage of Mr. Justice Black*, 10 IND. L. REV. 645 (1977).

20. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 15, at 849.

21. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977) (Sprecher, J., concurring). *See generally* Batress, *Government Regulation and the First Amendment Religion Clauses—An Analysis of the NLRB's Jurisdiction Over Parochial Schools and Their Teachers*, 17 DUQ. L. REV. 291 (1978); Note, *The Religion Clauses and NLRB Jurisdiction Over Parochial Schools*, 54 NOTRE DAME LAW. 263 (1978); Comment, *The Free Exercise Clause, the NLRA, and Parochial School Teachers*, 126 U. PA. L. REV. 631 (1978); 9 SETON HALL L. REV. 333 (1978); 24 WAYNE L. REV. 1439 (1978); 1978 WIS. L. REV. 927 (1978).

22. "While the pending bill of course does not intend to go beyond the constitutional power of Congress, as that power may be marked out by the courts, it seeks the full limit of that power to prevent these unfair labor practices." 79 CONG. REC. 7572 (1935) (remarks of Sen. Wagner). *Accord,* NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963) ("Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause") (emphasis in original); Polish Nat'l Alliance v. NLRB, 322 U.S. 643, 648 (1944); NLRB v. Fainblatt, 306 U.S. 602, 607 (1939); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30-31 (1937). The *Fainblatt* Court elaborated:

> The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis*.

306 U.S. at 607.

23. 97 N.L.R.B. 424, 29 L.R.R.M. 1098 (1951).

24. *Id.* at 425, 29 L.R.R.M. at 1099.

though the University's activities satisfied the jurisdictional amount standards established by the Board to invoke its jurisdiction,[25] the NLRB reasoned that these activities were not "commercial in the generally accepted sense."[26]

In 1970, however, the NLRB reversed its position in *Cornell University*,[27] declaring that the increased involvement in commerce by educational institutions warranted the Board's scrutiny.[28] A year later the

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25. The Board enunciated the need for jurisdictional amount standards in Hollow Tree Lumber Co., 91 N.L.R.B. 635, 26 L.R.R.M. 1543 (1950):

> The Board has long been of the opinion that it would better effectuate the purposes of the Act, and promote the prompt handling of major cases, not to exercise its jurisdiction to the fullest extent possible under the authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have or at which labor would have, a pronounced impact upon the flow of interstate commerce . . . .

Id. at 636, 26 L.R.R.M. at 1543. The Board established the following minimum dollar standards: direct inflow $500,000 (Federal Dairy Co., Inc., 91 N.L.R.B. 638, 26 L.R.R.M. 1538 (1950)); indirect inflow $1 million (Dorn's House of Miracles, Inc., 91 N.L.R.B. 632, 26 L.R.R.M. 1545 (1950)); direct outflow $25,000 (Stanislaus Implement and Hardware Co., 91 N.L.R.B. 618, 26 L.R.R.M. 1548 (1950)); indirect outflow $50,000 (Hollow Tree Lumber Co., 91 N.L.R.B. 635, 26 L.R.R.M. 1543 (1950)). Satisfying any one of these requirements suffices to bring the employer under Board jurisdiction. Trustees of Columbia University, 97 N.L.R.B. 424, 425 n.2, 29 L.R.R.M. 1098, 1098 n.2 (1951). These minimum dollar requirements are presently codified in 29 C.F.R. § 103.1 (1979).

26. 97 N.L.R.B. at 425, 29 L.R.R.M. at 1098. The National Labor Relations Board, citing the growth of the commerce power, does not exempt organizations from the operation of the Act "where the particular activities involved have been commercial in the generally accepted sense." *Id.* The Board's approach to nonprofit organizations is particularly enlightening. *See, e.g.,* Sunday School Board of the Southern Baptist Convention, 92 N.L.R.B. 801, 27 L.R.R.M. 1153 (1951) (corporation publishing religious literature); Port Arthur College, 92 N.L.R.B. 152, 27 L.R.R.M. 1055 (1950) (college operating a commercial radio station); Illinois Inst. of Technology, 81 N.L.R.B. 201, 23 L.R.R.M. 1312 (1949) (college and affiliated foundations performing industrial research sponsored by business concerns); Association Canado-Americaine, 72 N.L.R.B. 520, 19 L.R.R.M. 1196 (1947) (organization in insurance business); Henry Ford Trade School, 63 N.L.R.B. 1134, 17 L.R.R.M. 55 (1945), 58 N.L.R.B. 1535, 15 L.R.R.M. 126 (1944) (vocational program for industry); American Medical Assoc., 39 N.L.R.B. 385, 10 L.R.R.M. 15 (1942) (publishing medical journals, pamphlets, and magazines).

27. 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970).

28. In particular, the Board noted that Cornell University was the largest employer in Tompkins County, New York. *Id.* at 330, 74 L.R.R.M. at 1271.

The Board's change in attitude is due, in part, to its interpretation of Congress' response to the Supreme Court's decision in Guss v. Utah Labor Board, 353 U.S. 1 (1957). In *Guss* the Court disallowed state legislation covering an area under the NLRB's statutory jurisdiction even though the Board had declined to assert jurisdiction over that area. 353 U.S. at 6-10. Concerned with this potentially ungoverned area, Congress in 1959 passed an amendment granting the Board discretion to "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." 29 U.S.C. § 164 (c)(1)(1976). The Board interpreted § 14(c)(1) in *Cornell University* to "impliedly [confirm] the Board's author-

Board first asserted jurisdiction over a nonprofit secondary school that met the jurisdictional amount requirements,[29] but not until 1974 did the NLRB exercise jurisdiction over a religiously affiliated private school.[30]

During the interim, the Board declined to assert jurisdiction over two church-operated schools,[31] but insisted that the religious component of the schools was not the determinative factor; rather, the schools had only a minimal impact on commerce.[32] In 1975, however, the Board announced in *Roman Catholic Archdiocese of Baltimore*[33] that it would not assert jurisdiction over "completely religious," as distinguished from "just religiously associated," nonprofit educational institutions.[34]

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ity to expand its jurisdiction to any class of employers whose operations substantially affect commerce." 183 N.L.R.B. at 331, 74 L.R.R.M. at 1272. The Board saw § 14(c) as "manifest[ing] a congressional policy favoring such assertion where the Board finds that the operations of a class of employers exercise a substantial effect on commerce." *Id.* at 332, 74 L.R.R.M. at 1272. Thus, the Board found cause for reversing the *Columbia* decision. *Id.* at 334, 74 L.R.R.M. at 1275. *See also* Hotel Employees Local 225 v. NLRB, 358 U.S. 99 (1958) (per curiam) (Board's refusal to exercise jurisdiction over hotel industry runs contrary to congressional intent); Office Employees International Union, Local 11 v. NLRB, 353 U.S. 313 (1957) (Board's refusal to assert jurisdiction over unions acting as employers contravenes congressional intent).

29. Shattuck School, 189 N.L.R.B. 886, 77 L.R.R.M. 1164 (1971) (gross revenue of $1,174,000 amounted to substantial impact on commerce). *See also* Judson School, 209 N.L.R.B. 677, 86 L.R.R.M. 1248 (1974).

30. *See* Henry M. Hald High School Assoc., 213 N.L.R.B. 415, 87 L.R.R.M. 1403 (1974). Responding to the argument that NLRB jurisdiction over church-operated schools would violate the first amendment, the Board affirmed the Administrative Law Judge's statement that: "Any entanglement between the [religious insititution] and the government which is manifested in this case was caused by the [religious institution] when it hired lay teachers and, as an employer within the meaning of the Act, brought itself under the jurisdiction of the Act." *Id.* at 418 n.7. *Accord,* King's Garden, Inc. v. FCC, 498 F.2d 51, 60 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974) (when religiously affiliated organization chooses to engage in enterprise that affects commerce, it must accept same obligation to respect laws imposed on similar enterprises not having a religious affiliation.); Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966) (religious group awarded FCC radio station license is no different from any other group; must take its franchise "burdened by enforceable public obligations.").

31. Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053, 86 L.R.R.M. 1249 (1974) (jurisdiction over religious school declined because after-school, supplementary character of activity had little impact on interstate commerce); Board of Jewish Educ. of Greater Washington, D.C., 210 N.L.R.B. 1037, 86 L.R.R.M. 1253 (1974) (jurisdiction over religious organization engaged in supplemental education with no facilities of its own declined because its activities were noncommercial in nature).

32. Association of Hebrew Teachers of Metropolitan Detroit, 210 N.L.R.B. 1053, 1058, 86 L.R.R.M. 1249, 1251 (1974).

33. 216 N.L.R.B. 249, 88 L.R.R.M. 1169 (1975).

34. *Id.* at 250, 88 L.R.R.M. at 1171. Applying this standard to the five Baltimore-area Catholic high schools, the Board concluded that religious secondary schools teaching secular subjects

In *NLRB v. Catholic Bishop of Chicago*[35] Chief Justice Burger, on behalf of the majority, could "see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow."[36] Although the majority did not determine whether the Board's assertion of jurisdiction in this case did, in fact, infringe upon the first amendment, the majority reasoned that the circumstances presented a "significant risk" of excessive governmental entanglement.[37] "The critical and unique role of the teacher in fulfilling the mission of a church-operated school" created a danger that religious doctrine would become intertwined with secular education.[38] The NLRB's inquiry into unfair labor practice charges and its determination of the mandatory subjects of bargaining might also impinge upon rights guaranteed by religion clauses.[39] Thus, under the canon of statutory construction laid down in *Benz v. Compania Naviera Hidalgo*[40] and *McCulloch v. Sociedad Nacionale Marineros de Honduras*,[41] the

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fall within the category of "just religiously associated" institutions. *Id. Cf.* Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1119 (7th Cir. 1977) (all distinctions, including those made by Board, are unworkable because any secular activity renders group "merely religiously associated"). *See also* First Church of Christ, Scientist, 194 N.L.R.B. 1006, 79 L.R.R.M. 1135 (1972); Sunday School Bd. Southern Baptist, 92 N.L.R.B. 801, 27 L.R.R.M. 1153 (1950); Note, *Establishment Clause Analysis of Legislative and Adminstrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1182-83 (1974) (analysis of Supreme Court decisions indicates tripartite division: pervasively religious (churches and seminaries); materially religious (most parochial schools); and substantially secular (church-affiliated colleges)).

35. 440 U.S. 490 (1979).

36. *Id.* at 504.

37. *Id.* at 502.

38. *Id.* at 501. "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Id.* (quoting Meek v. Pittenger, 421 U.S. 349, 370 (1975)). *Accord,* Lemon v. Kurtzman, 403 U.S. 602 (1971):

> In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

Id. at 617.

39. 440 U.S. at 502. The NLRB argued that excessive entanglement could be avoided because it would resolve only factual issues such as whether the employer acted out of anti-union animus. *Id.* The Court, however, rejected this view, arguing that resolution of many unfair labor practice charges would require the Board to inquire into "the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission." *Id.*

40. 353 U.S. 183 (1957).

41. 372 U.S. 10 (1963).

Court would resolve the first amendment issues only if the "affirmative intention of the Congress clearly expressed" mandated the conclusion that Congress intended to bring church-operated schools within the purview of the NLRA.[42]

Although conceding that Congress defined the NLRB's jurisdiction in broad terms, the majority stressed that the NLRA's language offered "no clear expression of an affirmative intention of Congress" that the NLRB exercise jurisdiction over teachers in church-operated schools.[43]

The Court also turned to the legislative history of the NLRA to determine Congress' intention. Chief Justice Burger first noted that in enacting the National Labor Relations Act of 1935, Congress focused on employment in private industry and gave no consideration to religiously affiliated schools.[44] The Chief Justice also observed that the leg-

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42. 440 U.S. at 504. In its brief, respondent argued precisely for this approach. Brief for Respondent at 39-42, NLRB v. Catholic Bishop, 440 U.S. 490 (1979). The majority, in fact, incorporated verbatim into its opinion certain parts of respondent's brief arguing for resolution of the case through statutory construction rather than first amendment analysis.

"Affirmative intention of Congress clearly expressed" first emerged as a canon of statutory construction for determining the NLRB's jurisdiction in *Benz* and received additional support in *McCulloch*. Because the Board's assertion of jurisdiction over foreign seamen implicated sensitive issues concerning the power of the Executive over relations with foreign nations, the Court declined to interpret the NLRA to grant jurisdiction in the absence of an "affirmative intention of Congress clearly expressed." 372 U.S. at 21-22; 353 U.S. at 144. Chief Justice Burger found this canon binding on the Court in *Catholic Bishop* because of the equally sensitive nature of religious freedom. 440 U.S. at 500.

43. 440 U.S. at 504.

44. *Id. See, e.g.*, 79 CONG. REC. 7573 (1935) (remarks of Sen. Wagner). The majority added: "It is not without significance, however, that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations *not* covered by the Act." 440 U.S. at 504-05 (emphasis in original). *See* S. REP. No. 573, 74th Cong., 1st Sess. 7 (1935):

> The term "labor dispute" includes cases where the disputants do not stand in the proximate relation of employer and employee . . . . This definition does not mean that the Government could intervene in a "dispute" between an employer and, let us say, a critical college professor; for jurisdiction under this bill depends upon the charge of an unfair labor practice affecting commerce, and there could be no such practice involving the employer and the college professor. But unfair labor practices may, by promoting a sympathetic strike, for example, create a dispute affecting commerce between an employer and employees between whom there is no proximate relationship. Liberal courts and Congress have already recognized that employers and employees not in proximate relationship may be drawn into common controversies by economic forces. There is no reason why this bill should adopt a narrower view, or prevent action by the government when such a controversy occurs.

The majority clearly misread this example to buttress its view. The report refers to a college professor who complains to an employer with whom he does not stand in the proximate relationship of employer and employee. Because the *Catholic Bishop* case involves a proximate employ-

islative history of the Labor Management Relations Act of 1947 (Taft-Hartley),[45] Congress' next major consideration of the Board's jurisdiction, demonstrated a consensus that "nonprofit institutions in general did not fall within the Board's jurisdiction because they did not affect commerce."[46] Finally, the majority asserted that the National Labor Relations Act Amendments of 1974,[47] which removed the exemption enacted in 1947 for nonprofit hospitals evidenced no affirmative congressional intention that the NLRB extend its jurisdiction to religiously affiliated schools.[48] Because the Board first asserted jurisdiction over nonprofit church-operated schools only after the 1974 amendment, the repeal of the nonprofit hospital exemption could not reflect tacit congressional approval of the Board's actions.[49]

Justice Brennan, writing for the four-member dissent, accused the majority of inventing a canon of statutory construction for the purpose of deciding this case.[50] The majority incorrectly used *Benz* and *McCulloch* to require an "affirmative intention of Congress clearly expressed" to find jurisdiction in the Board, because these cases turned in part on legislative history indicating that Congress did not intend the NLRA to encompass foreign seamen.[51] The Court needed to find clear congressional expression in these cases to counteract the contrary legislative history. Absent negative expressions, however,[52] the Court need only determine whether a construction of the statute is "fairly possible" by which the constitutional issue may be avoided, rather than require a clear congressional expression in favor of that construction.

Justice Brennan also suggested that "clear expression of an affirmative intention of Congress" is the canon of judicial construction applied in those cases in which the constitutionality of the Board's jursidiction is clear and the only question is whether Congress intended to grant

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ment relationship, the committee's example is irrelevant to the NLRA's applicability to lay teachers employed by church-operated schools.

45. 29 U.S.C. §§ 141-191 (1976).

46. 440 U.S. at 505.

47. Pub. L. No. 93-360, 88 Stat. 395 (1974) (amending 29 U.S.C. § 152(2) (1970)).

48. 440 U.S. at 505.

49. *Id.* at 505-06.

50. *Id.* at 508 (Brennan, J., dissenting). Justices White, Marshall, and Blackmun joined Justice Brennan in dissent.

51. *Id.* at 509-10 n.1. *See* note 42 *supra*.

52. "As the Court today admits, there is no such contrary legislative history or precedent with respect to jurisdiction over church-operated schools." 440 U.S. at 510 n.1.

such jursidiction.[53] When the constitutionality of the Board's assertion of jurisdiction is itself in question, the proper canon calls for the Court to determine whether a construction of the statute is "fairly possible" by which the constitutional question may be avoided.[54]

In looking at the language of the Act, the dissent argued that the majority's construction of the NLRA to exclude lay teachers employed by church-related schools from the NLRB's jurisdiction was not "fairly possible,"[55] and, in fact, "plainly wrong."[56] Justice Brennan first noted that the NLRA defines "employer" as *any* person not within one of the eight express exceptions.[57] Thus, the manner in which Congress formulated the definition does not allow for judicial contruction of "one more exception—for church-operated schools."[58] Furthermore, construction of another exception would not comport with those provisions of the Act which have been interpreted to make the Board's jurisdiction coextensive with Congress' jurisdictional breadth under the commerce clause.[59]

The dissent further maintained that the majority incorrectly interpreted the NLRA's legislative history. The Hartley bill, which passed the House in 1947, would have provided an exemption for nonprofit organizations, including religious associations.[60] The Senate, however, proposed to limit the nonprofit exemption to hospitals,[61] and the House

53. *Id.*

54. *Id. See* note 11 *supra* and accompanying text.

55. 440 U.S. at 511 (Brennan, J., dissenting).

56. *Id.* at 508.

57. *Id.* at 511 (Brennan, J., dissenting). NLRA § 2(2), 29 U.S.C. § 152(2) (1976), provides:

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

58. 440 U.S. at 511 (Brennan, J., dissenting).

59. *See* notes 22 *supra*, 75 *infra* and accompanying text.

60. Section 2(2) of the Hartley bill stated:

> The term "employer" . . . shall not include . . . any corporation, community chest, fund, or foundation organized exclusively for *religious*, charitable, scientific, literary, or *educational* purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual . . . .

H. REP. NO. 3020, 80th Cong., 1st Sess., *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 161-62 (1947) (emphasis added).

61. Senator Tydings offered, and the Senate agreed to, an amendment excluding from the definition of employer "any corporation or association operating a hospital, if no part of the net earnings inure to the benefit of any private shareholder or individual." S. 1126, 80th Cong., 1st

accepted the Senate version in conference committee.[62] Thus, the dissent concluded, Congress explicitly rejected the exception that the majority would read into the Act.[63] Justice Brennan also pointed to Congress' repeal of the nonprofit hospital exemption in 1974,[64] which the dissent interpreted to confirm the view that Congress intended the NLRA to cover all employers not expressly excluded from its provisions.[65] Moreover, when Congress repealed the nonprofit hospital exemption in 1974, the Senate expressly rejected an attempt to leave intact the exemption for hospitals operated by religious organizations.[66]

Sess. § 2(2), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 99, 102 (1947).

62. 29 U.S.C. § 152(2) (1970) (amended 1974).

63. 440 U.S. at 515. The inference to be drawn from the House's acceptance of the Senate's limitation of the exemption to nonprofit hospitals is less clear than the dissent characterizes it. The conference committee report expounded:

> The conference agreement follows the provisions of the House Bill in the matter of agents of an employer, and follows the Senate amendment in the matter of exclusion of nonprofit corporations and associations operating hospitals. The other nonprofit organizations excluded under the House Bill are not specifically excluded in the conference agreement, for only in exceptional circumstances and in connection with purely commercial activities of such organizations have any of the activities of such organizations or of their employees been considered as affecting commerce so as to bring them within the scope of the National Labor Relations Act.

H. REP. NO. 510, 80th Cong., 1st Sess. 32 (1947). Two commentators, however, explain:

> The supposed Board practice of taking jurisdiction "only in exceptional circumstances and in connection with purely commercial activities" appears to have first been verbalized, with neither approval nor criticism, in the House minority report and was later adoped by the House conferees as a tactical attempt to portray the decision to recede to the narrow senate exemption as a concession without consequence.

Sherman & Black, *The Labor Board and the Private Nonprofit Employer: A Critical Examination of the Board's Worthy Cause Exemption*, 83 HARV. L. REV. 1323, 1336 (1970). The authors thus conclude:

> The much relied upon conference report, then, may be seen as, at best, a statement of some members of the House as to their understanding of the NLRB's jurisdiction under the commerce clause in May of 1947 and, at worst, a totally inaccurate representation of supposed NLRB policy prior to that date.

Id. at 1336. This conclusion also comports with the NLRB's contemporaneous construction of the 1947 amendment that Congress intended to exempt only nonprofit hospitals. *See, e.g.,* Sunday School Bd. of the Southern Baptist Convention, 92 N.L.R.B. 801, 802, 27 L.R.R.M. 1153, 1154 (1950) (immaterial that nonprofit organization engaged in purely religious activities). *See also* 440 U.S. at 514 n.6 (Brennan, J., dissenting).

64. National Labor Relations Act Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (amending 29 U.S.C. § 152(2) (1970)).

65. 440 U.S. at 514 (Brennan, J., dissenting).

66. *Id.* Senator Cranston, floor manager of the Senate bill, stated:

> [A]n exception for religiously affiliated hospitals would seriously erode the existing national policy which holds religiously affiliated institutions generally such as proprietary nursing homes, residential communities, and educational facilities to the same standards as their nonsectarian counterparts.

Finally, the dissent accused the majority of being disloyal to its own precedents. In particular, Justice Brennan cited *Associated Press v. NLRB*,[67] in which the Court held that the first amendment posed no barrier to the application of the NLRA to editorial employees of a non-profit news-gathering organization.[68] The dissent contended that the risk of infringing first amendment guarantees in *Associated Press* was no less than in the present case, yet the Court did not resort to statutory construction to limit the NLRB's jurisidiction and thus avoid the first amendment issue.[69] Furthermore, the majority's holding did not square with the Court's consistent declarations that "in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause."[70]

The general principle of construing statutes to avoid unnecessy constitutional decisions is well settled, but the majority's canon for effectuating that principle is clearly incorrect. An "affirmative intention of Congress clearly expressed" for a particular statutory construction, as the dissent properly pointed out,[71] is both inapplicable under the rationales of *Benz* and *McCulloch* and reserved for cases in which the constitutionality of the Board's assertion of jurisdiction is conceded and the sole issue is whether Congress intended to empower the Board to act under the particular circumstances. In *Catholic Bishop* the constitutionality of the Board's exercise of jursidiction was itself in contention; thus, the majority should have limited itself to ascertaining whether a construction of the NLRA was "fairly possible" by which the first amendment issues could be avoided. The difference in canons is real. The majority's canon, in effect, permits the Court to limit the application of a congressional enactment whenever Congress fails to make ex-

120 CONG. REC. 12957 (1974), *reprinted in* LEGISLATIVE HISTORY OF THE COVERAGE OF NONPROFIT HOSPITALS UNDER THE NATIONAL LABOR RELATIONS ACT, 1974, at 137 (1974).

67. 301 U.S. 103 (1937).

68. *Id.* at 130.

69. 440 U.S. at 517 n.10 (Brennan, J., dissenting). The dissent also argued that the majority's resort to statutory construction to avoid the first amendment issues was fruitless. Because the majority limited the jurisdictional exemption to church-operated schools rather than to all nonprofit educational institutions, it accorded special treatment to religiously affiliated schools. Thus, the majority evasion of the free exercise clause issue resulted in an equally difficult establishment clause problem. *Id.* at 518 n.11. *See* text accompanying notes 15-20 *supra*.

70. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963). *See* note 22 *supra* and accompanying text.

71. *See* notes 53-54 *supra* and accompanying text.

plicit expressions on the scope of the statute in relation to the facts of a particular case. Such expressions of congressional intent are not commonplace—or even reasonably feasible—in broadly inclusive regulatory statutes. The dissent's canon, in contrast, allows the Court to narrow the jursidiction of a regulatory body only when no construction is "fairly possible" by which exercise of that jurisdiction would violate a constitutional provision. The burden is not on Congress to make clear that it *did* intend to grant jurisdiction in a situation that implicates a constitutional question; rather, the burden is on the Court to determine that Congress *did not*, by any reasonable construction of the statute, intend to empower the regulatory body to act in that situation.[72]

The dissent also marshalled the more persuasive legislative history in its behalf. Although the majority is correct that Congress, when it enacted the NLRA in 1935, focused its attention exclusively on private industry, the dissent makes the more significant point that Congress intended the NLRB to exercise jurisdiction over any industry "affecting commerce."[73] That religious schools, therefore, had no impact on commerce in 1935—and thus did not draw congressional attention at that time—does not evince a congressional intent to exclude church-operated schools from the purview of the Act today in light of the substantial growth of these institutions[74] and the significant expansion of the commerce power.[75]

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72. In the words of the dissent:

> This limitation to constructions that are "fairly possible" and "reasonable" . . . acts as a brake against wholesale dismemberment of congressional enactments. It confines the judiciary to its proper role in construing statutes, which is to interpret them so as to give effect to congressional intention. The Court's new "affirmative expression" rule releases that brake.

440 U.S. at 510-11 (Brennan, J., dissenting).

73. During debate on the original NLRA in 1935, the following interchange occurred between Senator Wagner, the bill's sponsor, and Senator Costigan:

> Mr. Costigan. Is it proper to say that the [NLRA] is designed to apply to all industries which affect commerce?
>
> Mr. Wagner. That is the intent.

79 CONG. REC. 7573 (1935). Section 5(1) of the Act defines "industry affecting commerce" as "any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or the free flow of commerce." 29 U.S.C. § 155(1) (1976).

74. *See* note 28 *supra* and accompanying text.

75. "Legislation enacted under this constitutional grant has been interpreted in accordance with evolving standards of congressional power rather than by reference to the historical state of the law at the time of passage of each particular act." *See, e.g.,* Perez v. United States, 402 U.S. 146 (1971) (Consumer Credit Protection Act applies to purely local loan shark operation because of nexus between organized crime and interstate commerce even though defendant was not personally associated with organized crime); Katzenbach v. McClung, 379 U.S. 294 (1964) (civil

Similarly, the majority's reliance on the 1947 amendments to the NLRA is misplaced. Whatever "consensus" the majority found in the legislative history that "nonprofit institutions in general did not fall within the Board's jursidiction because they did not affect commerce" must give way to the dissent's point that the Board's jurisdiction is defined in accordance with the evolving commerce power rather than by reference to the state of the law at the time of the NLRA's enactment.[76] Furthermore, this consensus is highly questionable in light of Congress' explicit rejection in 1947 of an exemption for religious employers and its analogous rejection in 1974 of an amendment to exclude church-operated hospitals from the Board's jurisdiction.[77]

Finally, the majority's analysis of *Associated Press* is incomplete. Chief Justice Burger stated that nothing in the case suggested that application of the NLRA to the Associated Press would infringe upon the first amendment guarantees of freedom of the press.[78] He thus distinguished *Catholic Bishop* on the ground that "the record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses."[79] The majority's reexplanation of *Associated Press*, however, is unsatisfactory. Why the majority saw no risk of constitutional infirmity in the Board's exercise of jurisdiction over a news organization is not clear. Presumably, the NLRB concerns itself with the same aspects of an employment relationship whether that relationship exists between a publisher and its reporter or between church-operated schools and its teachers. Yet, the majority failed to explain how the Board's "entanglement" with religion would be any greater than its interference with freedom of the press.[80]

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rights act applies to small local restaurant far from interstate highway because restaurant purchased 46% of its meat from local supplier who procured meat from outside the state); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (commerce power reaches motel, readily accessible from the interstate highway, that solicits interstate patrons); Wickard v. Filburn, 317 U.S. 111 (1942) (Agricultural Adjustment Act of 1938 applies to exclusively local activity and private consumption of farmer harvesting 239 bushels of wheat over his quota).

76. *See* notes 22, 75 *supra* and accompanying text.

77. *See* notes 60-66 *supra* and accompanying text.

78. 440 U.S. at 507.

79. *Id.*

80. If the majority meant to distinguish *Catholic Bishop* by relying on the Court's holding in *Associated Press*—that the Board's exercise of jurisdiction would not constitute an impermissible infringement of the first amendment—then its analysis is flawed. As the majority stated at the outset of its opinion, it is the risk of infringement, not its actual existence, that triggers the Court's

The Supreme Court went to great lengths in *NLRB v. Catholic Bishop* to avoid meeting the first amendment challenge to the NLRA's application to lay teachers in church-operated schools. To do so, the majority was unfaithful not only to the statute's language and legislative history, but also to the Court's own precedents. Most importantly, however, the majority applied a canon of statutory construction that, if invoked in other contexts, may again lead to undesirable judicial exercises of the legislative function.

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attempt to avoid the constitutional issues through statutory construction. *See* note 37 *supra* and accompanying text.