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Labor Law - National Labor Relations Act - NLRB Jurisdiction - Lay Teachers in Church Operated Schools

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Recent Decisions

LABOR LAW—NATIONAL LABOR RELATIONS ACT—NLRB JURISDICTION—LAY TEACHERS IN CHURCH OPERATED SCHOOLS—The Supreme Court of the United States has ruled that the National Labor Relations Act does not authorize the NLRB to exercise jurisdiction over the lay faculty members at church-operated schools.

NLRB v. Catholic Bishop of Chicago, 99 S. Ct. 1313 (1979).

In 1974 and 1975 union organizations¹ seeking to represent lay teachers² of the parochial schools operated by the Catholic Bishop of Chicago and the Diocese of Fort Wayne-South Bend³ filed separate representation petitions with the National Labor Relations Board (NLRB or Board). All of the secondary schools⁴ involved in the unions' recognition campaigns provided religious instruction as part of their curriculum,⁵ but otherwise the academic programs were similar to

1. The Quigley Education Alliance, affiliated with the Illinois Education Association, sought representation for the teaching employees at the schools operated by the Catholic Bishop of Chicago. *NLRB v. Catholic Bishop of Chicago*, 99 S. Ct. 1313, 1315 (1979). The Community Alliance for Teachers of Catholic High Schools organized the teachers in the schools operated by the Diocese of Fort Wayne-South Bend. *Id.*

2. The certification order covered only full time and regular part-time lay teachers, including physical education teachers. *Id.* at 1315 n.5. The parochial schools involved in the controversy before the Supreme Court raised no objection to the National Labor Relations Board's assertion of jurisdiction over janitorial or similar employees. However, they did object to the exercise of jurisdiction over lay teachers, claiming that they were the vehicles through which the religious doctrines of the church were promulgated. Respondent's Opposition to Certiorari at 5-6.

3. *Id.* at 1315.

4. The Illinois schools operated by the Catholic Bishop of Chicago were Quigley North and Quigley South. 99 S.Ct. at 1314. The Catholic Bishop operated other schools in the Chicago area, but only the Quigley schools were involved in this controversy. *Id.* at 1314 n.1. The Diocese of Fort Wayne operated five secondary schools which were involved in the union campaigns. *Id.* at 1315. The Diocese also operated forty-seven elementary schools in the state of Indiana which were not involved in the proceedings before the Board. *Id.* at 1315 n.3.

5. Potential students in the schools operated by the Catholic Bishop of Chicago were required to submit a recommendation from their parish priest as a prerequisite for admission, since the schools provided special religious training not offered in most Catholic secondary schools. *Id.* at 1315. At one time, only students manifesting a firm desire to become priests were admitted to the Quigley schools. As a result, these schools were termed "minor seminaries." However, in 1970, the admission requirement that prospective students manifest a positive desire for the priesthood was eliminated. *Id.* at 1314-15. The five secondary schools operated by the Diocese of Fort Wayne did not require any special recommendations as a condition for admission. *Id.* at 1315.

those offered by public secondary schools.⁶ In addition, the parochial schools were inspected and evaluated by state education authorities and accredited by a regional education association.⁷ Both the Catholic Bishop and Fort Wayne schools challenged the Board's jurisdiction, claiming that since they operated completely religious institutions,⁸ they were beyond the discretionary jurisdiction⁹ of the Board.¹⁰ The Board rejected these contentions, finding that the institutions were primarily college preparatory schools and, therefore, not completely religious in character.¹¹ The NLRB then asserted jurisdiction over each group of schools and ordered elections.¹² The unions prevailed in these elections and were certified by the Board as the teachers' exclusive bargaining representatives.¹³

Despite the Board certifications, both the Catholic Bishop and Fort Wayne schools refused to recognize or bargain with the unions. During the unfair labor practice proceedings¹⁴ which followed, the employers again contended that the Board's exercise of jurisdiction over religious schools violated the first amendment of the United States Constitution.¹⁵ The Board held that since these same arguments had

6. Catholic Bishop of Chicago, 220 N.L.R.B. 359, 359 (1975).

7. 99 S. Ct. at 1315 nn.2 & 4.

8. The Board's policy distinguished educational institutions as either "completely religious" or "merely religiously associated." The former were considered by the NLRB to be outside its jurisdiction while the latter were not. If an institution was not "completely religious" the Board was of the opinion that it was not protected under the religion clauses of the first amendment. This distinction was used to avoid the entanglement of church and state. Roman Catholic Archdiocese of Baltimore, 216 N.L.R.B. 249, 250 (1975).

9. Under the NLRA § 10(a), 29 U.S.C. § 160(a) (1976), the Board is vested with jurisdiction which is coextensive with the commerce power of Congress. *See* NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963); NLRB v. Fainblatt, 306 U.S. 601, 607 (1939). However, NLRA § 14(c)(1), 29 U.S.C. § 164(c)(1) (1976) provides that the Board may decline to assert jurisdiction when the activity in question does not substantially affect commerce, even though an impact upon commerce is ascertainable. Because of this flexibility the Board's jurisdiction is often referred to as discretionary.

10. 99 S. Ct. at 1315. The schools also claimed the protection of the religion clauses of the first amendment. *Id.* *See* note 8 *supra*.

11. 220 N.L.R.B. at 359; *see* note 8 *supra*.

12. 220 N.L.R.B. at 359-60. *See also* Diocese of Fort Wayne-South Bend, 230 N.L.R.B. 267 (1977).

13. 99 S. Ct. at 1315.

14. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce his employees in the exercise of their rights guaranteed under the NLRA. It is also an unfair labor practice for an employer to refuse to bargain collectively with his employees' exclusive bargaining representatives. *Id.* § 8(a)(5), 29 U.S.C. § 158(a)(5).

15. U.S. CONST. amend. I, provides in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." *See also* note 8 *supra*.

been raised at the representation hearings, the parties would not be permitted to relitigate the issues.¹⁶ Consequently, the schools were ordered to cease and desist their unfair labor practices and to bargain collectively with the unions.¹⁷

On appeal,¹⁸ the United States Court of Appeals for the Seventh Circuit set aside the Board's order.¹⁹ The court found that the "completely religious—merely religiously associated" standard²⁰ established by the Board in prior cases was an unworkable guide for the exercise of its discretionary jurisdiction.²¹ According to the court, once it was established that secular subjects were taught in a school, it would be impossible under the Board's approach to establish that the educational institutions were anything other than "merely religiously associated."²² The court of appeals reasoned that the purpose of parochial schools was to carry out the religious mission of the Catholic Church and the mere fact that these schools provided secular as well as religious training did not detract from their religious character.²³

The Seventh Circuit noted that enforcement of the Board's orders could be denied solely because the Board had abused its discretion in asserting jurisdiction over church operated schools.²⁴ The NLRB had insisted that if it could not utilize its "degree of religion" test it would be necessary to exert jurisdiction over all religious schools because its jurisdictional mandate under the National Labor Relations Act (NLRA)²⁵ was coextensive with the federal commerce power.²⁶ This all or nothing position taken by the Board compelled the lower court to reach the constitutional issue of whether the Board could assert its

16. 99 S. Ct. at 1316. The Board entered a summary judgment against the employer. *Id.*

17. *Id.*

18. NLRA § 10, 29 U.S.C. § 160 (1976) provides for judicial appeal to an appropriate court of appeals after a final order has been entered by the Board. However, a certification proceeding is not considered a final order. An employer must commit an unfair labor practice and be subsequently prosecuted by the NLRB to secure a final order from which he can seek appellate review. This process is known as the "exhaustion doctrine" because the exhaustion of all administrative appeals is generally required before any court can review Board proceedings. C. MORRIS, *THE DEVELOPING LABOR LAW* 470 (1971 & Cum. Supp. 1971-75).

19. *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1131 (7th Cir. 1977).

20. *See* note 8 *supra*.

21. 559 F.2d at 1118; *see* note 9 *supra*.

22. 559 F.2d at 1119.

23. *Id.* at 1122.

24. *Id.* at 1123.

25. 29 U.S.C. §§ 151-168 (1976).

26. 559 F.2d at 1123; *see* note 9 *supra*.

jurisdiction over church-operated schools without offending the religion clauses of the United States Constitution.²⁷ In analyzing the constitutional question, the court found that in order to initially certify a union for lay teachers, the Board would be required to make factual inquiries so that it could separate the secular from the religious training. Such governmental intrusion would infringe upon the freedom of church authorities to shape and direct teaching in accord with the requirements of their religion.²⁸ The court of appeals thus held that the Board's standard for asserting jurisdiction over parochial schools violated both the establishment and free exercise clauses of the first amendment.²⁹ The United States Supreme Court granted certiorari³⁰ to decide whether teachers in church-operated schools, which provide both religious and secular training, were within the jurisdiction of the NLRA and if so, whether the exercise of such jurisdiction would violate the guarantees of the religion clauses of the first amendment.³¹ The Court held that jurisdiction over church-operated schools was not within the Board's grant of power and affirmed the decision of the court of appeals without deciding the constitutional issue.³²

Chief Justice Burger, speaking for the majority, first reviewed the Board's prior decisions in which jurisdiction over private educational institutions was at issue. He noted that it was not until 1974 that the Board first exercised jurisdiction over private secondary schools without regard to the secular or religious character of the institutions.³³

27. 559 F.2d at 1118.

28. *Id.*

29. *Id.* at 1131. The court of appeals did not distinguish between violations of the establishment and free exercise clauses of the first amendment. Instead, the court dealt with the religion clauses jointly, stating only that there was sufficient evidence to establish a violation of both clauses. *Id.* For a discussion of the different standards which are used to analyze potential violations of the two religion clauses, see Bastress, *Government Regulation and the First Amendment Religion Clauses—An Analysis of the NLRB Jurisdiction Over Parochial Schools and Their Teachers*, 17 DUQ. L. REV. 291, 298-315 (1979).

30. 434 U.S. 1061 (1978).

31. 99 S. Ct. at 1314.

32. *Id.* at 1322. The Court was divided five to four. Justices Brennan, White, Marshall, and Blackmun dissented.

33. *Id.* at 1317. In *Trustees of Columbia Univ.*, 97 N.L.R.B. 424 (1951), the Board originally indicated that it would not assert jurisdiction over nonprofit educational institutions because to do so would not effectuate the policies of the NLRA. The Board subsequently reversed this position, finding that nonprofit educational institutions began to have a greater impact upon commerce since they engaged in a variety of commercial activities to support their educational functions. *Cornell Univ.*, 183 N.L.R.B. 329 (1970). In 1970, the Board issued a jurisdictional standard for colleges and universities requiring an annual gross revenue of not less than one million dollars before such institutions would fall within the discretionary jurisdiction of the Board. 35 Fed. Reg. 18,370 (1970); see 29

The Court recognized that the Board had consistently dismissed claims of first amendment protection raised by church-operated schools³⁴ on the theory that by teaching secular subjects and retaining lay teachers, the schools had entangled themselves in the secular world.³⁵ The majority, however, reasoned that the very existence of the Board's "completely religious—merely religiously associated" standard was itself recognition by the Board of potential constitutional problems resulting from NLRB jurisdiction over lay teachers in religious schools.³⁶ To bolster this conclusion of potential unconstitutionality, the majority relied upon the Court's recent decisions dealing with governmental aid to parochial schools³⁷ which had emphasized that religious authority pervades such educational institutions.³⁸ Since teachers play a key role in parochial school systems, any governmental influence or intervention in the teacher's functions necessarily raises serious first amendment questions.³⁹

After concluding that the Board's assertion of jurisdiction was constitutionally questionable, the majority examined the provisions and legislative history of the NLRA to decide whether the Act conferred jurisdiction over church-operated schools, for this would necessitate a decision on the first amendment issue.⁴⁰ The Court initially decided that if the congressional intent was not clearly expressed in the Act, the Court would refuse to construe the NLRA to have conferred such a questionable power.⁴¹ Relying primarily upon the history of the 1947 Amendments⁴² to the NLRA, the Court held that there was no affirma-

Č.F.R. § 103.1 (1978). In *Shattuck School*, 189 N.L.R.B. 886 (1971), the Board extended the scope of the jurisdictional standard to include private secondary schools even though secondary schools were not within the literal scope of the standard. The Board expanded its jurisdiction over nonprofit educational institutions until, at the time of the Court's consideration of *Catholic Bishop*, the Board asserted jurisdiction over all institutions meeting its monetary requirements regardless of religious or secular orientation. 99 S. Ct. at 1317.

34. See *Archdiocese of Los Angeles*, 223 N.L.R.B. 1218 (1976); *Roman Catholic Archdiocese of Baltimore*, 216 N.L.R.B. 249 (1975); *Henry M. Hald High School Ass'n*, 213 N.L.R.B. 415 (1974).

35. 99 S. Ct. at 1318.

36. *Id.* See also note 8 *supra*.

37. 99 S. Ct. at 1319. The Court relied upon *Wolman v. Walter*, 433 U.S. 229 (1977), *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Lemon v. Kurtzman*, 403 U.S. 602 (1971) to illustrate the important role which lay teachers play in parochial schools. See also text accompanying notes 95-99 and note 99 *infra*.

38. 99 S. Ct. at 1319.

39. *Id.* at 1319-20.

40. *Id.* at 1320-22.

41. *Id.* at 1318-19.

42. Labor Management Relations Act, 29 U.S.C. §§ 141-67, 171-97 (1947) (amended 1974). The majority emphasized H.R. REP. NO. 3020, 80th Cong., 1st Sess. (1947), *reprinted*

tive intention of Congress to include church-operated schools within the jurisdiction of the Board.⁴³ The majority found evidence in the legislative history⁴⁴ indicating that Congress did not believe such non-profit institutions were to be within the Board's jurisdiction⁴⁵ since they did not affect commerce and thus, were beyond the commerce power⁴⁶ of Congress.⁴⁷

Chief Justice Burger next rejected the Board's argument that the 1974 Amendments⁴⁸ to the NLRA were a congressional ratification⁴⁹ of Board jurisdiction over church-operated schools. The Court emphasized that the Board had not asserted its jurisdiction over such schools until after the 1974 Amendments.⁵⁰ Thus, nothing in those amendments could indicate congressional approval of the Board's action.⁵¹ Since there was neither an affirmative intention of Congress to grant the questionable jurisdiction over parochial schools nor a tacit approval of the Board's activities, it was unnecessary for the Court to reach the sensitive constitutional issues.⁵² Consequently, the Court affirmed the court of appeals decision that the NLRB had no jurisdiction over lay teachers in church-operated schools.⁵³

in I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 34, 160-61 (1948) which excluded from the definition of "employer" all religious, charitable, scientific, and educational organizations not operated for profit. The majority also relied upon H.R. REP. NO. 510, 80th Cong., 1st Sess. 5, *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 505, 535-36 (1948) since the conference report did not adopt the exclusion for nonprofit, religious, and educational institutions believing they generally did not affect commerce.

43. 99 S. Ct. at 1320-21.

44. See note 42 *supra*.

45. 99 S. Ct. at 1321. See also note 89 *infra*.

46. U.S. CONST. art. I, § 8, cl. 3.

47. 99 S. Ct. at 1321.

48. Section 1 of the NLRA Amendments of 1974, 29 U.S.C. § 152 (1976), placed non-profit hospitals within the scope of NLRB jurisdiction.

49. A court may accord great weight to the longstanding interpretation given a statute by an agency charged with its administration. This is especially so where Congress has reenacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the agency interpretation is the one intended by Congress. NLRB v. Bell Aerospace, 416 U.S. 267, 274-75 (1975). See text accompanying notes 85-86 *infra*.

50. 99 S. Ct. at 1321.

51. *Id.* The Court has not consistently required a showing that Congress gave express consideration to a particular subject before it will be deemed to have ratified prior administrative action. Compare NLRB v. Gullet Gin Co., 340 U.S. 361, 366 (1951) (ratification expressed in failure to amend provisions after extensive debate) with Norwegian Nitrogen Prod. Co., 288 U.S. 294, 313 (1933) (acquiescence by Congress in administrative practice inferred from silence over a period of years).

52. 99 S. Ct. at 1322.

53. *Id.*

Justice Brennan, speaking for the dissenters, criticized the majority's construction of the NLRA.⁵⁴ He argued that a settled canon of statutory construction is to interpret the statute in a manner which will avoid constitutional issues only if it is fairly possible to do so given the language of the statute.⁵⁵ Justice Brennan stated that the majority's requirement of a clear expression of an affirmative intention of Congress resulted in evasion, not avoidance, of the constitutional issues.⁵⁶ The dissenters firmly asserted that the majority's interpretation of the NLRA was not fairly possible.⁵⁷ Justice Brennan reasoned that since the Board's jurisdiction was coextensive with the congressional commerce power, and since these schools were within that power, the Board's jurisdiction was clearly established.⁵⁸

The dissenters further contended that the legislative history of the NLRA did not support the majority's interpretation of the Act. Since a proposed exception for nonprofit, religious, and educational institutions⁵⁹ was rejected in 1947 by the full Congress, Justice Brennan argued that the enacted exception for nonprofit hospitals⁶⁰ was the exclusive exception to Board jurisdiction which was intended by Congress. Since the exemption for church-operated schools mandated by the majority opinion was contrary to congressional intent,⁶¹ the dissenters believed that the case could not properly be decided without reaching the first amendment issue.⁶²

NLRB v. Catholic Bishop of Chicago radically alters the Board's established policy of asserting jurisdiction over church-operated schools. The Board's initial exercise of such jurisdiction occurred in 1974 when, in *Henry M. Hald High School Association*,⁶³ the NLRB asserted jurisdiction over high schools organized and operated by a Roman Catholic diocese. However, the line of cases involving religiously affiliated educational institutions beginning with *Hald High School*

54. *Id.* at 1323-24 (Brennan, J., dissenting).

55. *Id.* at 1324 (Brennan, J., dissenting).

56. *Id.* at 1327-28 (Brennan, J., dissenting).

57. *Id.* at 1324 (Brennan, J., dissenting).

58. *Id.* at 1327 (Brennan, J., dissenting).

59. *See* note 42 *supra*.

60. Labor Management Relations Act Amendments to the NLRA, Pub. L. No. 101, 61 Stat. 136 (1947) (amended 1974).

61. 99 S. Ct. at 1325-26 (Brennan, J., dissenting). A similar exemption appeared in H.R. REP. NO. 3020, 80th Cong., 1st Sess. (1947) but it was never adopted by the full Congress. *Id.* *See also* note 42 *supra*.

62. 99 S. Ct. at 1327 (Brennan, J., dissenting). The dissent expressed no opinion as to the outcome of the case had the constitutional issues been properly considered. *Id.*

63. 213 N.L.R.B. 415 (1974).

was predicated upon Board precedent first enunciated in 1939.⁶⁴ Therefore, although the *Catholic Bishop* majority was accurate in finding that the Board did not assert jurisdiction over Catholic secondary schools until 1974, that conclusion alone is not dispositive of the jurisdictional question or the intent of Congress.

The NLRB decisions asserting jurisdiction over church-operated businesses⁶⁵ consistently illustrate that certain activities of the employer would cause the Board to intervene in labor disputes involving such businesses. In each case, the employing organizations had engaged in a variety of secular activities, such as the publication and distribution of religious literature in order to propagate their religious beliefs.⁶⁶ Consequently, the Board seized upon these commercial activities to justify its jurisdiction over the church-associated employers.⁶⁷ If the commercial activities of the religious employer were similar to other nonreligious operations, the Board virtually ignored the fact that the employer was church-related.⁶⁸ Only if the Board considered the employer's impact upon commerce to be negligible would it refuse to assert jurisdiction,⁶⁹ relying upon its discretionary powers⁷⁰ rather than the employer's religious affiliations. Thus, prior to 1974, the NLRB had clearly developed a jurisdictional test based upon the religious

64. *Christian Bd. of Publication*, 13 N.L.R.B. 534 (1939), *enforced*, 113 F.2d 678 (8th Cir. 1940). The employer was a nonprofit organization incorporated as a charitable, religious organization. 13 N.L.R.B. at 537. The employer also did a small amount of non-religious work in publishing medical books and journals. *Id.*

65. *First Church of Christ, Scientist*, 194 N.L.R.B. 1006 (1972) (employer operated a publishing enterprise to print various religious materials as required under its church by-laws); *First Congregational Church of Los Angeles*, 189 N.L.R.B. 911 (1971) (jurisdiction exerted over cemetery maintenance employees employed by the church); *Sunday School Bd. of the Southern Baptist Convention*, 92 N.L.R.B. 801 (1950) (Board held the employer was within its jurisdiction even though the employer was under the management and control of a Southern Baptist religious denomination). *See also* note 64 *supra*.

66. The publication and distribution of religious literature through commercial channels was involved in *First Church of Christ, Scientist*, 194 N.L.R.B. 1006 (1972); *Sunday School Bd. of the Southern Baptist Convention*, 92 N.L.R.B. 801 (1950); and *Christian Bd. of Publication*, 13 N.L.R.B. 534 (1939). The church in *First Congregational Church of Los Angeles*, 189 N.L.R.B. 911 (1971), operated a cemetery.

67. *First Church of Christ, Scientist*, 194 N.L.R.B. 1006 (1972). The Board held that it was immaterial that the employer's activities were motivated by other than commercial considerations. *Id.* at 1008.

68. *First Congregational Church of Los Angeles*, 189 N.L.R.B. 911 (1971). Interstate commercial activity is essential, since Board jurisdiction is based on the commerce clause of Article I of the United States Constitution; *see* note 9 *supra*.

69. *See, e.g., Lutheran Church*, 109 N.L.R.B. 859 (1954); *Board of Jewish Educ.*, 210 N.L.R.B. 1037 (1974); *Association of Hebrew Teachers*, 210 N.L.R.B. 132 (1974).

70. *See* note 9 *supra*.

employer's effect upon commerce regardless of its church affiliation or orientation.⁷¹

This commercial standard was subsequently used by the Board in determining the propriety of asserting jurisdiction over church-operated secondary schools. Although the various church groups sought to advance their beliefs through secular and sectarian instruction at private educational facilities,⁷² they also engaged in commerce as evidenced by their interstate purchases⁷³ and the hiring of lay teachers.⁷⁴ The assertion of jurisdiction over church-operated schools was, therefore, only a logical extension of the jurisdiction previously asserted over other religious organizations engaged in the propagation of their faith through interstate commerce.⁷⁵

Although the early NLRB religious affiliation decisions⁷⁶ did not involve teacher-employees, the Board promulgated regulations and established administrative precedent which, if viewed collectively, present clear evidence that, prior to 1974, the Board had interpreted its jurisdiction as extending to that class of employees. In announcing that its jurisdictional standard for colleges and universities⁷⁷ would be based upon the level of the employer's involvement in interstate commerce, the Board made no distinction between secular and sectarian institutions.⁷⁸ Soon after the regulation was promulgated, the Board, in *Shattuck School*,⁷⁹ determined that the similarity of private secondary schools to collegiate schools justified the assertion of jurisdiction over each type of institution under the same jurisdictional standard. Since *Shattuck School* extended the jurisdictional standard which treated sectarian and secular institutions equally, it was implicit after 1971 that the Board could assert its jurisdiction whether or not the educational institution was church-operated. This position was clearly taken when the Board asserted jurisdiction over both the religious⁸⁰ and lay

71. See note 33 *supra*.

72. Catholic Bishop of Chicago v. NLRB, 559 F.2d at 1118.

73. Catholic Bishop of Chicago, 220 N.L.R.B. at 359. The schools operated by the Catholic Bishop had annual interstate purchases exceeding \$65,000. *Id.*

74. Henry M. Hald High School Ass'n, 213 N.L.R.B. at 418 n.7.

75. See note 65 *supra*.

76. See notes 64 & 65 *supra*.

77. See note 33 *supra*.

78. 29 C.F.R. § 103.1 (1978).

79. 189 N.L.R.B. 886 (1971).

80. The Board separated the bargaining units of the religious and lay faculty holding that the two groups lacked a common community of interest. Seton Hill College, 201 N.L.R.B. 1026, 1027 (1973). Subsequently, it was held that the Board had acted arbitrarily in excluding religious faculty from the same bargaining unit as the lay faculty. Niagara

faculty of *Seton Hill College*.⁸¹ The 1973 decision in *Seton Hill* explicitly announced that the NLRB would exert jurisdiction over teachers in church-operated educational institutions which fell within its jurisdictional standard. Because the Board asserted jurisdiction over colleges and secondary schools under the same regulations,⁸² the exercise of jurisdiction over the faculty of the religious college in *Seton Hill* indisputably established that the Board would assert its jurisdiction over teachers in church-operated secondary schools.

With this history of Board activity clearly discernible, Congress enacted the 1974 Amendments⁸³ to the NLRA which specifically extended the coverage of that statute to nonprofit hospitals.⁸⁴ There was no attempt to alter the Board's practice of asserting jurisdiction over teachers in religious educational institutions even though that pattern of activity was clear. The Supreme Court has long held that Congress is presumed to legislate with knowledge of established administrative practice.⁸⁵ The Court has also held that an administrative agency's interpretation of its own enabling legislation must be deemed to have received implied legislative approval by reenactment of the statutory provision without pertinent modification.⁸⁶ The Board policy of asserting jurisdiction over church-operated enterprises, based upon their effect on interstate commerce, was plainly applied to parochial schools prior to 1974. Therefore, a clear and consistent interpretation by the Board of its jurisdiction over religious educational institutions confronted Congress when it passed the jurisdictional amendments in that year. Under these circumstances, congressional failure to revise the agency's practice is persuasive evidence of Congress' acceptance of the Board's interpretation of its jurisdiction.⁸⁷ Thus, the *Catholic Bishop Court's*

Univ. v. NLRB, 558 F.2d 1116 (2d Cir. 1977); NLRB v. Saint Francis College, 562 F.2d 246 (3d Cir. 1977).

81. 201 N.L.R.B. at 1026. The college was owned and operated by the Order of Sisters of Charity of Seton Hill. Over one-half of the college faculty were members of this religious group. Each member of the Order took vows of poverty and obedience to the Mother General of the Order. *Id.*

82. See note 33 and text accompanying note 79 *supra*.

83. NLRA Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified at 29 U.S.C. §§ 152, 158, 169 (1976)).

84. The exemption for nonprofit hospitals was originally created by the Labor Management Relations Act, 29 U.S.C. § 152(2) (1970 ed.), as amended by NLRA Amendments of 1974, Pub. L. No. 93-360, 88 Stat. 395.

85. National Lead Co. v. United States, 252 U.S. 140, 146 (1920).

86. United States v. Dakota-Montana Oil Co., 288 U.S. 459, 466 (1933).

87. NLRB v. Bell Aerospace, 416 U.S. 267, 274-75 (1974). Moreover, in considering the 1974 amendments, which extended coverage of the NLRA to nonprofit health care institutions, the Senate specifically rejected an amendment that would have exempted nonprofit

holding that Congress did not ratify the NLRB's action⁸⁸ appears to be erroneous. Since evidence indicating a congressional ratification of the Board's past exercise of jurisdiction was readily available, the Court could have decided the merits of the respondent's claim of first amendment protection, rather than basing its decision upon a strained construction of the NLRA.⁸⁹

Since the *Catholic Bishop* majority refused to construe the NLRA as granting the Board jurisdiction over church-operated schools, the decision radically affects the ability of the Board to intervene in labor disputes in those institutions. There can no longer be any doubt that jurisdiction over lay teachers in church-operated elementary and secondary schools is impermissible.⁹⁰ However, the Board also asserts

hospitals operated by religious groups. 120 Cong. Rec. 12,968 (1974). Senator Cranston, floor manager of the Senate Committee Bill, opposed the proposed exemption for religious hospitals, stating that "such an exemption 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." *Id.* at 12,957. Senator Cranston expressed concern that an exemption for religious hospitals would result in requests for religious exemptions "in other areas of activity." *Id.* at 12,968. This legislative history indicates that not only did Congress, in 1974, fail to alter the Board's jurisdictional standards and policies for religious institutions, but that the Senate expressly recognized and approved those prior Board rulings by rejecting an exemption for religiously affiliated hospitals.

88. 99 S. Ct. at 1321.

89. The *Catholic Bishop* Court based its decision upon construction of the legislative histories of the NLRA. 99 S. Ct. at 1321-22; see note 42 and accompanying text *supra*. Nevertheless, the same legislative histories of the 1947 Amendments utilized by the *Catholic Bishop* majority were previously used in a similar factual situation to produce a contrary result. In *NLRB v. Wentworth Inst.*, 515 F.2d 550, 554-56 (1st Cir. 1975), the court found that since the full Congress ultimately rejected the exclusion proposed by the House for nonprofit, religious and educational institutions, those institutions were meant to be included within the realm of Board jurisdiction. See also Pollitt & Thompson, *Collective Bargaining on Campus: A Survey Five Years After Cornell*, 1 INDUS. REL. L.J. 191, 205-06 (1976-77); Comment, *The Free Exercise Clause, the NLRA, and Parochial School Teachers*, 126 U. PA. L. REV. 631, 638-40 (1978). Both the *Catholic Bishop* and *Wentworth* interpretations seem plausible, yet each is at odds with the other. Because these legislative histories are open to different but equally persuasive interpretations, one could question the propriety of the Supreme Court's usage of one interpretation to the exclusion of the others. Such questions become particularly significant where, as in *Catholic Bishop*, the decision involves potential constitutional issues. See also note 29 *supra* and note 99 *infra*. The fact that the Supreme Court virtually ignored other interpretations in a case dealing with constitutional questions adds credence to Justice Brennan's statement that the majority in *Catholic Bishop* was evading and not merely avoiding constitutional issues. See text accompanying note 56 *supra*.

90. See *Bishop of Gary*, 238 N.L.R.B. No. 216, 101 L.R.R.M. 1349 (1979) (holding that the assertion of NLRB jurisdiction over lay teachers in parochial schools is impermissible

jurisdiction over church-operated colleges under the auspices of the same jurisdictional standard used in the religious secondary school situation.⁹¹ The question remains as to whether such jurisdiction is permissible under the doctrine of *Catholic Bishop*.

It is particularly relevant that the *Catholic Bishop* Court did not distinguish between secondary schools and colleges in its decision.⁹² However, the Court emphasized the important role which the lay teachers occupied in the religious mission of the church-operated schools.⁹³ In developing this analysis, the Court relied upon its first amendment decisions dealing with government aid to elementary and secondary parochial schools.⁹⁴ These decisions characterized such schools as pervasively religious in nature⁹⁵ and primarily devoted to the teaching of religious beliefs.⁹⁶ Furthermore, the cases involving aid to parochial schools stressed the paramount role which the teachers played in instilling religious values in students.⁹⁷ This religious permeation of primary and secondary parochial schools is a constitutional obstacle to government aid. The funding would result in excessive government entanglement in Church operations because of the surveillance necessary to ensure proper spending of funds.⁹⁸ The Court's analogy in *Catholic Bishop* based upon this line of cases indicates that the same factors which stood as obstacles to government aid to parochial schools also stand as obstacles to federal labor regulation in church-operated secondary schools.⁹⁹

in light of *Catholic Bishop*). The Board has indicated that it will take a narrow view of the term "church-operated" when deciding whether to assert jurisdiction over parochial schools. See Roman Catholic Diocese of Brooklyn, 243 N.L.R.B. No. 24, 101 L.R.R.M. 1436 (1979) (holding that a church affiliated secondary school that is governed by an independent, lay board of trustees over which church diocese has no control, is not a "church-operated" school within the meaning of the *Catholic Bishop* decision).

91. See note 33 and text accompanying note 79 *supra*.

92. In framing the issue to be resolved in *Catholic Bishop*, the Court spoke only of "schools operated by a church." 99 S. Ct. at 1314. Throughout its opinion the Court made no distinction between church-operated secondary or collegiate schools. *Id.* at 1313-22.

93. *Id.* at 1319.

94. See note 37 and accompanying text *supra*.

95. *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971).

96. *Meek v. Pittenger*, 421 U.S. 349, 366 (1975).

97. 403 U.S. at 617.

98. 421 U.S. at 372.

99. The Court's analogy to the aid to parochial school cases signals the potential unconstitutionality of Board jurisdiction over lay teachers in parochial schools. In *Lemon v. Kurtzman* the Court invalidated a state law supplementing the incomes of private school teachers, including lay teachers in parochial schools, because of the excessive government entanglement in the affairs of the church. Since the schools involved in the *Lemon v. Kurtzman* controversy were pervasively religious, the supplemental aid program would

In sharp contrast to the elementary and secondary parochial school decisions are the Supreme Court decisions dealing with church-operated colleges and universities. In *Tilton v. Richardson*,¹⁰⁰ the Court decided that the Higher Education Facilities Act of 1963,¹⁰¹ which provided financial aid to church-operated colleges for the construction of academic facilities, was constitutional. The Court rejected the view that sectarian education so permeated these colleges that their religious and secular functions were inseparable.¹⁰² The Court noted that substantial differences exist between church-operated colleges and secondary schools. Since college students are less impressionable than their secondary school counterparts, they are less susceptible to religious indoctrination.¹⁰³ In addition, the very nature of college and post-graduate courses tends to limit the opportunities for sectarian influence.¹⁰⁴ Finally, the predominant function of such religious colleges is secular education, not religious inculcation.¹⁰⁵ These differences mandated the conclusion that aid to such colleges was less likely to benefit religious activities, thereby reducing the need for the intensive government surveillance which normally raises entanglement problems.¹⁰⁶ The different character of these religious colleges and universities was responsible for the approval of government aid to such institutions.¹⁰⁷

require a continuing surveillance of the teachers to insure that they did not teach religious courses. Such a level of surveillance would itself result in excessive entanglement. *Id.* at 619. There are many parallels that can be drawn to the unconstitutional surveillance in *Lemon v. Kurtzman* and Board jurisdiction over the lay teachers in *Catholic Bishop*. The religious orientation of the schools' environment was virtually identical and the teachers in both cases occupied similar positions. The supervision over lay teachers by the NLRB begins with the representation petition and continues indefinitely because of the Board's authority to adjudicate unfair labor practices pursuant to NLRA § 10(a), 29 U.S.C. § 160(a) (1976). The Board also has the authority to examine the church-school's finances to determine its jurisdictional status. NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (1976). In addition, the Board has been granted broad investigative powers which guarantee access to any evidence relating to the matter under investigation. NLRA § 11, 29 U.S.C. § 161 (1976). These broad powers of the Board and its continuing regulatory presence are analagous to the constitutional entanglement questions presented in the cases involving aid to parochial schools.

100. 403 U.S. 672 (1971).

101. 20 U.S.C. §§ 701, 711-721, 731-733, 741-744, 751-757 (1976).

102. 403 U.S. at 680-81.

103. *Id.* at 686.

104. *Id.*

105. *Id.* at 687.

106. *Id.*

107. The same rationale was used by the Court to decide that state aid to church-operated colleges was constitutional. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976); *Hunt v. McNair*, 413 U.S. 734 (1973).

The important distinctions which the Court has perceived between church-operated colleges and parochial secondary schools were ignored by the *Catholic Bishop* Court.¹⁰⁸ The probable reason for the Court's overly-broad ruling was its refusal to reach the constitutional question.¹⁰⁹ Since the rule of *Catholic Bishop* was derived from a construction of the NLRA, the Court could not rely upon its constitutional decisions dealing with church-operated schools in the government aid situation because those decisions were based upon first amendment considerations.¹¹⁰ However, since the *Catholic Bishop* ruling was based, in part, upon the Court's finding that the Board did not exercise jurisdiction over secondary schools prior to 1974, and therefore Congress could not ratify such a practice in the passage of the 1974 Amendments,¹¹¹ it is significant to note that the NLRB did assert jurisdiction over religious colleges at least a full year before the 1974 Amendments to the NLRA.¹¹² Since that amendment dealt specifically with the scope of Board jurisdiction, but did not alter or remove the continued potential for jurisdiction over church-operated colleges, the clear indication is that the assertion of jurisdiction by the Board was intended by Congress. Thus, the interpretive technique used by the *Catholic Bishop* majority to find an absence of congressional intent to endow the Board with jurisdiction over religious secondary schools¹¹³ should not be applied to Board jurisdiction over religious colleges and universities.

A complete analysis of the NLRB's decisions should have resulted in a conclusion by the *Catholic Bishop* Court that the Board possessed jurisdiction over church-related employers under the NLRA when their activities involved meaningful participation in interstate commerce. The evidence of statutory authority was persuasive since the Board's well established commerce test eventually led to the assertion of jurisdiction over the teaching faculty at religious colleges¹¹⁴ under the same jurisdictional standard which it had previously applied to secondary schools. Because these Board activities antedated the 1974 Amendments to the NLRA, the passage of those amendments expressed

108. See note 92 *supra*.

109. 99 S. Ct. at 1322.

110. Meek v. Pittenger, 421 U.S. 349 (1975); Levitt v. Committee for Public Educ. & Religious Liberty, 413 U.S. 472 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971). The common question in each case was whether state legislative programs which provided benefits to religious educational institutions violated the establishment clause.

111. 99 S. Ct. at 1321.

112. Seton Hill College, 201 N.L.R.B. 1026 (1973). See also note 81 and accompanying text *supra*.

113. 99 S. Ct. at 1320-21.

114. Seton Hill College, 201 N.L.R.B. 1026 (1973).

congressional approval of Board jurisdiction under the doctrine of congressional ratification by amendment. Thus, the Court should have addressed the constitutional question of first amendment religious protection presented in *NLRB v. Catholic Bishop of Chicago*. Because the Court refused to address these constitutional claims, it could not apply the critical distinction between secondary and post-secondary educational institutions established in its government aid to parochial school cases. The result was a confusingly broad ruling encompassing all church-operated schools which, if read literally, could obliterate the distinctions which the Court so recently established. The Court's silence concerning these distinctions will unfortunately necessitate further litigation on the issue of NLRB jurisdiction over church-operated colleges and universities.¹¹⁵

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115. At least some indication of the position that may be taken by the Board when deciding whether to assert jurisdiction over religious colleges and universities can be gleaned from the Board's narrow reading of the *Catholic Bishop* decision in Roman Catholic Diocese of Brooklyn, 243 N.L.R.B. No. 24, 101 L.R.R.M. 1436 (1979). In that case, the Board asserted jurisdiction over a Catholic high school which was governed by an independent lay board of trustees on which the Catholic diocese had no members and over which the diocese exerted no control. The Board refused to equate "church-operated" with "church-affiliated," ruling that absent evidence of the church's exercise of control or influence over the operation of an educational institution, that institution is beyond the definition of "church-operated" and is not affected by the Supreme Court's *Catholic Bishop* holding. *Id.* at 1437-38.

