CATHOLIC BISHOP REVISITED: RESOLVING THE PROBLEM OF LABOR BOARD JURISDICTION OVER RELIGIOUS SCHOOLS

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The First Amendment's Free Exercise Clause forbids the government from creating laws that prohibit the free exercise of religion, and its Establishment Clause prohibits laws that respect an establishment of religion. Thus far, judicial attempts to interpret the meaning and scope of the twin Religion Clauses have resulted in an inconsistent and confused body of law. This note argues that the Supreme Court decision in NLRB v. Catholic Bishop of Chicago *furthered this confusion by avoiding the issue of whether labor relations statutes, namely the National Labor Relations Act (NLRA), may be constitutionally applied to religious schools so as to require collective bargaining between the school and its lay faculty. Disposing this case on statutory interpretation grounds, the Court sidestepped the constitutional question and approached the issue in a manner that has proved problematic for the lower courts. Furthermore, the constitutional doctrines that underlay the Court's decision have been altered by subsequent cases.*

The Catholic Bishop *problem implicates the freedom of association rights of lay teachers, the freedom of religious exercise rights of schools, and the prohibition of laws that establish religion. Because the courts' approaches to reconciling these interests have been varied and oftentimes flawed, congressional action is the most appropriate resolution. The author therefore proposes an NLRA amendment that fully addresses the various contours of the* Catholic Bishop *problem and vindicates both the association rights of lay teachers and the free exercise rights of schools.*

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I. INTRODUCTION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .[1]

Despite their apparent simplicity, the First Amendment's twin Religion Clauses have spawned a case law remarkable for its facility to foment scholarly disapproval. Commentators have variously described freedom of religion jurisprudence as inconsistent,[2] incoherent,[3] and "in shambles."[4] To a significant extent, this doctrinal confusion arose because, over the last half century, the Supreme Court has held that the Free Exercise Clause sometimes requires the government to exempt religious adherents from otherwise valid laws.[5] At other times, however, the Court has held that the Constitution does not mandate a religious exemption.[6] And, at still other times, the Court has cautioned that crafting such exemptions may foster religion in violation of the Establishment Clause.[7]

The critical din is especially strident when jurists address whether the Religion Clauses compel the government to exempt church-operated schools from bargaining collectively with their lay faculty pursuant to a labor relations statute.[8] When presented with this question in *NLRB v.*

1. U.S. CONST. amend. I.

2. For instance, when discussing the Court's controversial holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), Bernard Roberts "wonder[ed] if there is a construction of the [Free Exercise] Clause more consistent with constitutional precedent and principle." Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211, 211 (1991); *see also* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (criticizing *Smith*).

3. *See*, *e.g.*, Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1335 (1995) ("It seems incredible, but the Supreme Court has yet to develop a coherent and consistent approach to the application of . . . [the] apparently simple [Religion C]lauses.").

4. Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1246 (1994) (stating that even prior to *Smith*, First Amendment doctrine "governing religious exemptions was in shambles").

5. Religious exemptions became a hot-button issue when, in *Sherbert v. Verner*, the Court held that the South Carolina employment commission infringed the free exercise rights of a Seventh-Day Adventist when the commission denied her unemployment benefits because she was terminated for refusing to work on Saturday, her faith's day of rest. 374 U.S. 398, 410 (1963); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (creating a religious exemption from a law requiring all children to pursue a state-recognized program of education); *infra* Part II.A.2.a (discussing *Sherbert* in detail).

6. *See*, *e.g.*, *Smith*, 494 U.S. at 890 (holding that members of the Native American Church do not have a constitutional right to practice their religion by ingesting peyote); Reynolds v. United States, 98 U.S. 145 (1878) (rejecting a Mormon's claim that the Religion Clauses guaranteed a constitutional right to polygamy).

7. *See*, *e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334–35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'" (quoting Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 145 (1987))).

8. *See*, *e.g.*, David L. Gregory & Charles J. Russo, *The First Amendment and Labor Relations of Religiously-Affiliated Schools*, 8 B.U. PUB. INT. L.J. 449, 453 (1999) (calling *Catholic Bishop* "problematic"); Evelyn M. Tenenbaum, *The Application of Labor Relations and Discrimination Statutes to Lay Teachers at Religious Schools: The Establishment Clause and the Pretext Inquiry*, 64 ALB. L. REV. 629, 629 (2000) ("The courts have not dealt consistently with the First Amendment excessive entanglement

Catholic Bishop of Chicago (1979), the Supreme Court refused to touch the First Amendment hot potato with both hands.[9] In *Catholic Bishop*, lay educators filed representation petitions with the National Labor Relations Board (NLRB) in hopes of organizing a teachers' union at several Catholic high schools located in Chicago and northern Indiana.[10] The schools claimed that the Religion Clauses barred NLRB jurisdiction over religiously affiliated secondary schools.[11] Rather than deciding this substantive constitutional issue, the Court disposed of the case on statutory interpretation grounds. Invoking the clear statement canon, the Court said that it would not reach the question of whether NLRB jurisdiction violated the Religion Clauses unless it first identified an affirmative congressional intent to sanction such jurisdiction.[12] After finding that the National Labor Relations Act's text and legislative history indicated that Congress "simply gave no consideration to church-operated schools," the Court held that the NLRB lacked jurisdiction over such institutions.[13]

This note addresses the central issue that, by requiring a clear congressional mandate of jurisdiction, *Catholic Bishop* sidestepped: whether the government constitutionally may apply labor relations statutes to religious elementary and secondary schools, thereby requiring them to bargain collectively with their lay faculty. Though the Supreme Court did not squarely confront this issue, I nonetheless will refer to it as the *Catholic Bishop* problem.

Revisiting *Catholic Bishop* and its progeny is especially apt at this time for three overarching reasons. First, parochial education is a sizeable industry that plays a significant role in the nation's economy and culture.[14] According to the most recent data made available by the National Center for Education Statistics, in 2003–2004, religiously affiliated elementary and secondary schools enrolled over 4.2 million students and employed over 315,000 lay teachers.[15] These figures indicate that paro-

concerns that arise when lay teachers at religious elementary and secondary schools are covered by a state labor relations act or an anti-discrimination statute."). *But see* Kenneth W. Brothers, Note, *Church-Affiliated Universities and Labor Board Jurisdiction: An Unholy Union Between Church and State?*, 56 GEO. WASH. L. REV. 558, 560 (1988) (arguing that "the Free Exercise Clause prohibits a labor board from ordering collective bargaining at church-affiliated universities").

9. 440 U.S. 490 (1979).

10. *Id*. at 493.

11. *Id*.

12. *Id*. at 500–01 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)).

13. *Id.* at 504.

14. *See*, *e.g.*, Catholic Bishop of Chi. v. NLRB (*Catholic Bishop I*), 559 F.2d 1112, 1130 (7th Cir. 1977) (noting that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience").

15. *See* STEPHEN P. BROUGHMAN & NANCY L. SWAIN, NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2003–2004 PRIVATE SCHOOL UNIVERSE SURVEY 15, 24 (2006), *available at* http://nces.ed.gov/pubs2006/2006319.pdf. By comparison, during 2003–2004, private nonsectarian school enrollment was approximately 922,000, *id*. at 15, and public school enrollment was 47.6 million, *id*. at 2 n.3. Thus, religiously affiliated

chial education enjoyed a modest revival during the 1990s.[16] The nation's revitalized interest in parochial education calls for revisiting the *Catholic Bishop* problem.

The second reason to reexamine *Catholic Bishop* is that, from the outset, it was of limited precedential reach. Rather than rendering a constitutional holding, the Supreme Court based its decision on a rule of statutory construction. Because many jurisdictions simply cannot apply the Supreme Court's clear statement approach, the post–*Catholic Bishop* case law is at odds with itself.[17]

The final reason for revisiting *Catholic Bishop* is the most important, for it entails analyzing the meaning and scope of the Religion Clauses. *Catholic Bishop* needs to be reassessed in light of both recent developments in the Court's First Amendment jurisprudence and the criticisms of that jurisprudence voiced by many jurists. Since deciding *Catholic Bishop* in 1979, the Supreme Court has substantially altered the constitutional doctrines that underwrote its decision to disallow NLRB jurisdiction.[18] These doctrinal changes are significant because the *Catholic Bishop* majority summoned the clear statement rule precisely because they anxiously foresaw that "serious First Amendment questions" would flow from "the Board's exercise of jurisdiction over teachers in church-operated schools."[19] Given that the doctrinal ground underneath *Catholic Bishop* has shifted, the viability of its holding is now seriously questionable.

But rather than constituting cause for concern, *Catholic Bishop*'s doctrinal insecurity may very well precipitate a fortunate fall. This note argues that the Supreme Court miscalculated when it declined to resolve the substantive constitutional question presented in *Catholic Bishop*. As a practical matter, the Court's holding exacerbated the inconsistencies

schools enrolled almost eight percent of all kindergarten through twelfth-grade students during 2003–2004.

16. By comparison, during 1993–1994, church-operated schools enrolled about 4.1 million students and employed 292,000 teachers. *See* STEPHEN BROUGHMAN, NAT'L CTR. FOR EDUC. STATISTICS, PRIVATE SCHOOL UNIVERSE SURVEY, 1993–94, at 17, 18 (1996), *available at* http://nces.ed.gov/pubs/96143.pdf. *But see Catholic School Enrollment Drops*, N.Y. TIMES, Mar. 30, 2005, at A13 ("Enrollment in Roman Catholic schools dropped 2.6 percent this school year, to 2.4 million, continuing a decline from 2.6 million in 2000 . . . ."). Nonetheless, the decline in Catholic school enrollment probably does not forecast diminishing interest in parochial education in general, as the number of non-Catholic religious schools has grown steadily since the early 1990s even as the number of Catholic schools has declined. Between 1994 and 2004, the number of Catholic schools dropped from 8331 to 7919, while the number of non-Catholic religious schools increased from 12,222 to 13,659. *Compare* BROUGHMAN & SWAIN, *supra* note 15, at 7, *with* BROUGHMAN, *supra*, at 18. For a discussion of the causes of the recent downturn in Catholic school enrollment, see Sam Dillon, *Catholic School Enrollments Fall, but Finances, Not Fear, Are Blamed*, N.Y. TIMES, Jan. 22, 2003, at B8 ("Catholic education officials attributed [declining enrollment] to tighter family budgeting in the recession, competition from charter schools and the migration of families out of inner cities . . . .").

17. *See infra* notes 124–37 and accompanying text.

18. *See* McCoy, *supra* note 3, at 1335–36 (describing the Court's sometimes uneven development and application of its establishment and free exercise jurisprudence).

19. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504 (1979).

and incoherencies already characterizing freedom of religion jurisprudence. As a normative matter, *Catholic Bishop* overemphasized parochial schools' First Amendment religious rights while concomitantly undervaluing lay teachers' First Amendment associational rights.

Part II of this note lays the groundwork for understanding the *Catholic Bishop* problem by tracing the development of the Court's establishment and free exercise doctrines. This Part also examines the purpose of the National Labor Relations Act (NLRA or the Act) and briefly traces the advent of teachers' unions at parochial schools. Part III analyzes the three primary ways that courts and commentators have approached the *Catholic Bishop* problem. In doing so, Part III assesses the arguments for and against permitting NLRB jurisdiction over church-operated schools. Part IV recommends that Congress incorporate into the NLRA a framework that effectively balances parochial schools' religious liberty and lay teachers' collective bargaining rights. Such an accommodation is preferable to the per se approach of exempting parochial schools from NLRB jurisdiction because it vindicates lay teachers' First Amendment associational rights without unduly burdening church-affiliated schools' free exercise rights. Part V concludes.

II. BACKGROUND

An understanding of the Religion Clauses, the NLRA, and the history of teachers' unions at religious schools is necessary to appreciate the peculiar features and high stakes of the *Catholic Bishop* problem. Section A of this Part outlines the evolution of the Supreme Court's establishment and free exercise doctrines. Section B sets forth the NLRA's policy objectives and recounts the NLRB's history of asserting jurisdiction over nonprofit educational institutions. Section C traces the emergence of teachers' unions at parochial schools, focusing primarily on the rise of collective bargaining at Catholic elementary and secondary schools in the 1960s and 1970s. Together, these three Sections describe how sweeping social changes pressed the Supreme Court to modify its Religion Clauses jurisprudence and impelled the NLRB to expand its jurisdiction to cover religiously affiliated schools. This confluence of momentous social and legal developments in turn precipitated the *Catholic Bishop* problem.

A. The Religion Clauses of the First Amendment

The First Amendment of the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[20] Although the First Amendment itself inhibits only Congress's power to legislate on religious subjects, the

20. U.S. CONST. amend. I.

Supreme Court incorporated the First Amendment's Religion Clauses into the Due Process Clause of the Fourteenth Amendment in 1940.[21] In light of the Religion Clauses' prime position in the Bill of Rights as well as their applicability to the states, there can be little doubt that "[t]he values enshrined in the First Amendment [Religion Clauses] plainly rank high in the scale of our national values."[22] Yet, despite the privileged position that freedom of religion unmistakably occupies in the United States' constitutional system, jurists and commentators invariably lament the current state of Religion Clauses jurisprudence.[23] Indeed, on numerous occasions, the Court itself has acknowledged its difficulty in fashioning a lucid freedom of religion analysis.[24]

To a certain extent, the Court's difficulties stem from the existence of *two* Religion Clauses, each of which places conflicting demands on the government.[25] On one hand, the Court has stated that, at the very least, the Establishment Clause prohibits the government from enacting laws that "aid one religion, aid all religions, or prefer one religion over another."[26] On the other hand, the Court has recognized repeatedly that, by its very terms, the Free Exercise Clause "gives special protection to the exercise of religion."[27] Hence, if the Establishment Clause requires government neutrality on religious subjects, the Free Exercise Clause defies that requirement insofar as it expressly privileges religion-based claims of conscience over comparably held moral convictions that happen not to be rooted in religion.[28] The Court's well-known inability to formulate a satisfactory doctrinal framework is partially attributable to a

21. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact [laws respecting an establishment of religion or prohibiting the free exercise thereof].").

22. *Catholic Bishop*, 440 U.S. at 501 (internal quotation marks omitted).

23. *See*, *e.g.*, McCoy, *supra* note 3, at 1335.

24. For example, when the Court held the Religious Land Use and Institutionalized Persons Act of 2000 a permissible accommodation of religious belief not barred by the Establishment Clause, it noted that "the two Clauses . . . often exert conflicting pressures." Cutter v. Wilkinson, 544 U.S. 709, 719 (2005) (citations omitted); *see also* Walz v. Tax Comm'n, 397 U.S. 664, 668–69 (1970) ("The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other.").

25. *See*, *e.g.*, Locke v. Davey, 540 U.S. 712, 718 (2004) ("These two Clauses . . . are frequently in tension."). Furthermore, on other occasions, the Court has acknowledged that the Religion Clauses threaten to blur into one another. *See*, *e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (stating that the Court "can only dimly perceive the lines of demarcation" between the Establishment and Free Exercise Clauses).

26. Everson v. Bd. of Educ., 330 U.S. 1, 15 (1947).

27. Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 713 (1981).

28. *See* Marsh v. Chambers, 463 U.S. 783, 812 (1983) (Brennan, J., dissenting) ("[I]n one important respect, the Constitution is *not* neutral on the subject of religion: under the Free Exercise Clause, religiously motivated claims of conscience may give rise to constitutional rights that other strongly held beliefs do not.").

fundamental and perhaps insoluble tension between the two Religion Clauses themselves.[29]

The Court's difficulty in fashioning a coherent freedom of religion analysis is nonetheless also rooted in factors independent of the Constitution's text. Over the course of the twentieth century, large-scale social transformations inexorably complicated the task of interpreting the Religion Clauses. Although the United States has always been a religiously pluralistic society,[30] its religious diversity increased markedly as the number of immigrants professing non-Western faiths swelled during the last century.[31] If Religion Clauses jurisprudence was once coherent, this characterization might simply reflect the fact that the Court's conception of religion was once insular—and thus flawed in a more troubling regard than it is today. Meanwhile, as the American populace grew more spiritually diverse, the rise of the welfare state increased the likelihood that government would take actions that burdened individual religious practice.[32] By the 1940s, the nation's ever-increasing religious heterogeneity and the rise of the welfare state combined to bring freedom of religion questions to the legal forefront.

1. The Establishment Clause

The Establishment Clause originated in the Framers'—and in particular James Madison's—dislike for official denominational preferences, which were common in both colonial America and the newly independent United States.[33] As the Supreme Court has noted on multiple occasions, the Framers came to view these establishments of religion as an injurious vestige of European rule.[34] During the 1780s, the principles of denominational neutrality and disestablishment emerged, culminating in

29. For two divergent attempts to rescue the Constitution from this double bind, see generally Eisgruber & Sager, *supra* note 4, and Andrew Koppelman, *Is it Fair to Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571.

30. *See* LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6, at 1179 (2d ed. 1988).

31. Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 253 nn.111–12 (1989); *see also* Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (stating that "we are a cosmopolitan nation made up of people of almost every conceivable religious preference").

32. Justice Frankfurter made this very point in *McGowan v. Maryland*:

> As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities. Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict.

366 U.S. 420, 461–62 (1961); *see also* Ingber, *supra* note 31, at 253–54.

33. *See* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1086 (1995) ("[A]t the time of the Founding, the vast majority of state governments supported and encouraged religious exercise in one form or another."); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 410–14 (1986) (recounting the First Amendment's politico-historical origins).

34. *See* Larson v. Valente, 456 U.S. 228, 244–45 (1982); Engel v. Vitale, 370 U.S. 421, 428 (1962).

the Framers' decision to include the Establishment Clause in the Bill of Rights.[35]

Prior to the incorporation of the Religion Clauses in 1940,[36] some state and municipal political bodies had laws that purposefully promoted certain religions.[37] Such laws of course ran counter to what is now universally acknowledged as the Establishment Clause's clear command "that one religious denomination cannot be officially preferred over another."[38] But, as the judiciary applied the Establishment Clause to the states during the second half of the twentieth century, overt government endorsement of specific religious sects was no longer a major concern.[39] Instead, much thornier establishment questions emerged around a familiar triad of hot-button issues: (1) school prayer,[40] (2) Sunday closing laws,[41] and (3) financial aid to religious organizations.[42]

Appreciating how the Supreme Court has approached this third class of Establishment Clause cases is essential to understanding the *Catholic Bishop* problem, because many courts and commentators have treated *Catholic Bishop* as presenting a subspecies of the financial aid establishment issue.[43] The question usually posed in financial aid cases is

35. *Larson*, 456 U.S. at 244–45.

36. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). In *Cantwell*, the Court incorporated both Religion Clauses, but *Cantwell* itself was essentially a free exercise case. The Supreme Court would not apply the Establishment Clause to a state enactment until the landmark case of *Everson v. Board of Education*, 330 U.S. 1 (1947), which upheld a program that provided for state-funded buses to transport students to both public and parochial schools.

37. Indeed, American Catholic education originated as a response to the openly sectarian character of antebellum public schools, which were often run by Protestant clergy. *See* Jim Dwyer, *Once Mighty, Catholic Schools Find Status is Diminished*, N.Y. TIMES, Feb. 13, 2005, § 1, at 37.

38. *Larson*, 456 U.S. at 244. For a thorough account of the eventual ascendancy of the Madisonian notion of disestablishment, see generally, *supra* note 33.

39. For instance, in the school prayer cases that began reaching the Court in the early 1960s, the focus shifted away from official sectarian preference and towards direct government encouragement of religious exercise in general. *See Engel*, 370 U.S. at 430 (striking down New York's state prayer program on the basis that it "officially establishes the religious beliefs embodied in the Regents' prayer"). Indeed, in *Engel*, the Court expressly rejected New York's argument that its prayer program did not offend the Establishment Clause because it was nondenominational. *Id*.

40. *See*, *e.g.*, *id.*

41. *See* McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617 (1961). The Court upheld the Sunday closing laws at issue in these cases, concluding that the laws served the secular goal of providing a "general day of rest." *Braunfeld*, 366 U.S. at 608.

42. Although *Bradfield v. Roberts*, 175 U.S. 291 (1899) (upholding federal payments to a Catholic hospital for the care of indigents), preceded it by almost a half-century, *Everson v. Board of Education*, 330 U.S. 1 (1947), is regarded as the landmark financial aid establishment case. *Everson* narrowly upheld a state-sponsored busing program that serviced students at religious as well as public schools. *Id.* at 18. The *Everson* dissenters, however, argued that the program subsidized religious education, thereby violating the Establishment Clause. *Id*. at 24 (Jackson, J., dissenting).

43. *See*, *e.g.*, Catholic Bishop v. NLRB (*Catholic Bishop I*), 559 F.2d 1112, 1130–31 (7th Cir. 1977) (conflating discussion of "excessive entanglement" under the Establishment Clause with its analysis of the "burden" that collective bargaining imposes on free exercise rights); John J. Durso & Roger T. Brice, *NLRB v. The Catholic Bishop of Chicago: Government Regulation Versus First Amendment Religious Freedoms*, 24 ST. LOUIS U. L.J. 295, 298–99 (1980) (contending that the Establishment Clause doctrine of "excessive entanglement" prohibits NLRB regulation of church schools).

whether government action that indirectly promotes religion violates the Establishment Clause. The classic establishment case of this sort arises when a general tax exemption for nonprofit organizations happens to confer a financial benefit on religious groups.[44] An acute Religion Clauses dilemma arises in these cases. If, in the name of the Establishment Clause, the state refused to aid religious organizations in any way, this refusal surely would violate the Free Exercise Clause, which stands for the proposition that the government cannot single out religion for disfavored treatment. Since 1971, courts have tried to escape this double bind by applying the three-part test the Supreme Court set forth in *Lemon v. Kurtzman*.[45] To pass Establishment Clause muster, the government action at issue must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive entanglement between government and religion.[46]

For those who view labor board jurisdiction over parochial schools as raising an Establishment Clause issue, the third prong of the *Lemon* test is the crucial part of the constitutional inquiry.[47] This focus on *Lemon*'s third prong may seem curious because, in the *Catholic Bishop* scenario, the government action at issue clearly does not promote religion. Instead, the religious entity is seeking to use the Establishment Clause as a shield to fend off government involvement in its putatively internal affairs. The court asks whether the challenged government action fosters an excessive entanglement between government and religion, thereby breaching the wall separating church and state.[48] Justice Harlan articulated the rationale for avoiding excessive church-state entangle-

As I shall discuss later, others have contended (convincingly to my mind) that *Catholic Bishop* does not raise an establishment issue because the Establishment Clause proscribes official government promotion of—not interference with—religion. *See infra* text accompanying notes 166–75; *see also* Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1378–85 (1981). Instead, Professor Laycock argues that the proper issue to consider is whether NLRB jurisdiction violates the Free Exercise Clause by encroaching on church autonomy. *See id*.

44. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668–69, 680 (1970) (holding that granting property tax exemptions to religious organizations for religious properties used solely for religious worship did not violate the Establishment Clause).

45. 403 U.S. 602 (1971).

46. *Id*. at 612–13.

47. *See* Marisela Pena, Comment, *The "Catholic Union" Dichotomy: Are the Catholic Church's First Amendment Rights and the Collective Bargaining Rights of Catholic Church Employees Mutually Exclusive?*, 42 HOUS. L. REV. 165, 188 (2005) (noting that "any violation of the First Amendment that the NLRA might cause is likely to occur with respect to [*Lemon*'s excessive entanglement] factor"). *Lemon*'s first prong is satisfied because the legislature's purpose in enacting the NLRA was secular—to foster the free flow of interstate commerce by promoting peaceful labor relations. *See* Part II.B.2 (discussing the NLRA's policy goals). *Lemon*'s second prong is met because the NLRA's primary effect is to regulate labor relations, not to advance or inhibit religion. *See infra* Part II.B.1 (discussing the operation of the NLRA) and text accompanying note 151.

48. The Supreme Court has frequently noted that the proverbial wall separating church from state is neither an accurate description nor a desirable vision of American society. For instance, in the very act of formulating the *Lemon* test, the Court acknowledged that "total separation" was not possible and the wall of separation was at best a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614.

ment when he observed that government involvement in religious operations

> may be so direct or in such degree as to engender a risk of politicizing religion. . . . [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena . . . . Yet history cautions that political fragmentation on sectarian lines must be guarded against. . . . [G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation.[49]

As we shall see, some courts and commentators have resolved the *Catholic Bishop* problem by concluding that requiring church-operated schools to bargain collectively with their lay teachers pursuant to a labor relations statute violates the *Lemon* test's excessive entanglement prong. Whether this approach to the *Catholic Bishop* problem is tenable is a matter addressed later as well.

2. The Free Exercise Clause

The widespread social developments that forced the Supreme Court to formulate *Lemon*'s excessive entanglement inquiry played an even more instrumental role in the evolution of the Supreme Court's free exercise jurisprudence. Indeed, it was probably no coincidence that the Supreme Court announced a new, more robust free exercise test in *Sherbert v. Verner*,[50] a case brought by a member of a nonmainstream religion who invoked the First Amendment to retain her eligibility for state unemployment benefits. Prior to *Sherbert*, the Free Exercise Clause stood for a number of more or less uncontroversial propositions. For instance, the government may not compel individuals to affirm beliefs repugnant to their religious faith or lack thereof.[51] Likewise, the state cannot discriminate against individuals or groups on account of their religious convictions.[52] The Free Exercise Clause also prevents the government from discriminatorily employing the taxing power to impede the dissemination of certain religious views.[53]

49. *Walz*, 397 U.S. at 695 (Harlan, J., concurring) (citing Paul A. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969)).

50. 374 U.S. 398 (1963).

51. Torcaso v. Watkins, 367 U.S. 488 (1961) (holding that Maryland's Declaration of Rights, which required persons to proclaim their belief in God's existence to qualify for state office, violated the free exercise guarantee).

52. Fowler v. Rhode Island, 345 U.S. 67, 70 (1953) ("[It is not] in the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings.").

53. Follett v. McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

a. *Sherbert v. Verner*

Sherbert v. Verner, however, addressed the much knottier free exercise issue that arises when a facially neutral law happens to burden religiously motivated conduct. Previously, the Court disposed of this question by invoking a rather crude belief-action distinction.[54] According to this doctrine, the Free Exercise Clause proscribed government regulation of individual religious beliefs but enforced no special check on the state's ability to regulate religiously motivated conduct.

Sherbert rejected the overly simplistic belief-conduct dichotomy. Ms. Sherbert was a member of the Seventh-Day Adventist Church who was discharged by her employer for refusing to work on Saturdays, her faith's designated Sabbath day.[55] Unable to find alternate work due to her religious beliefs, she filed for unemployment benefits under the South Carolina Unemployment Compensation Act, which provided that individuals were ineligible for such benefits if they failed to accept available, suitable work "without good cause."[56] South Carolina's Employment Security Commission ruled that Ms. Sherbert's refusal to work on Saturdays disqualified her from receiving unemployment benefits because her religious scruples did not constitute good cause.[57] The South Carolina Supreme Court upheld the Commission's ruling.[58] Reversing, the U.S. Supreme Court reasoned that forcing the appellant to choose between her religious precepts and her economic well-being put "the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."[59] The Court in turn held that laws forcing such hard choices on religious adherents had to be justified by a compelling state interest to pass constitutional muster.[60] *Sherbert* thus considerably augmented the Free Exercise Clause's cogency by signaling that the First Amendment sometimes requires the government to exempt a religious devotee from a facially neutral, otherwise valid law.

b. *Employment Division v. Smith*

The judiciary applied *Sherbert*'s balancing test to evaluate laws burdening religious exercise for over a quarter century. In 1990, however,

54. *See* Minersville Sch. Dist. Bd. of Educ. v. Gobitis, 310 U.S. 586, 594–95 (1940) ("Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs."); Reynolds v. United States, 98 U.S. 145 (1878) (applying the belief-action distinction to reject a Mormon's claim that the Religion Clauses guaranteed a constitutional right to polygamy).

55. *Sherbert*, 374 U.S. at 399.

56. *Id*. at 399–401.

57. *Id*. at 401.

58. *Id*.

59. *Id*. at 404.

60. *Id*. at 403.

the Supreme Court dramatically altered the free exercise analysis when it handed down *Employment Division v. Smith*.[61] This oft-criticized case[62] threw into doubt the force of *Sherbert*'s compelling state interest test. In *Smith*, a private drug rehabilitation organization terminated two individuals for using peyote, which, as members of the Native American Church, they ingested for sacramental purposes.[63] When the discharged individuals applied for unemployment compensation under Oregon law, the state's Employment Division ruled them ineligible for benefits because they had been terminated for work-related "misconduct."[64] The Oregon Supreme Court applied *Sherbert* to hold that the discharged individuals were entitled to unemployment benefits on account of their free exercise rights.[65] Nevertheless, the Supreme Court reversed, holding that a facially neutral, generally applicable, and otherwise valid regulatory law that only incidentally burdens religious practice does not violate the Free Exercise Clause.[66] *Smith* therefore seemed to reinstitute the bright-line belief-action binary that *Sherbert* had abrogated.

But *Smith*'s doctrinal transparency is deceptive; in actuality, *Smith* muddled the Court's free exercise analysis. This confusion emanates chiefly from the fact that *Smith* did not overrule *Sherbert*. Rather, *Smith* limited *Sherbert* to its facts, with the Court noting that the only governmental action it had invalidated on the basis of the *Sherbert* test was the denial of unemployment compensation benefits.[67] Writing for the majority, Justice Scalia offered several different grounds for distinguishing and thereby cabining *Sherbert*. First, the Court distinguished those cases where it had held that the Free Exercise Clause required a religious exemption by characterizing them as "hybrid" cases. By "hybrid," Justice Scalia meant that these cases involved a free exercise claim connected with other constitutional protections, such as freedom of speech or parental rights.[68] Matters were complicated further when Justice Scalia distinguished *Smith* on another ground. He stated that "constitutional tradition and common sense" required a more deferential test when the

61. 494 U.S. 872 (1990). For a general discussion of *Smith*'s radical character, see McConnell, *supra* note 2.

62. *See* McConnell, *supra* note 2 (presenting a thorough and vigorous critique of *Smith*).

63. *Smith*, 494 U.S. at 874.

64. *Id*.

65. Smith v. Employment Div., Dept. of Human Res., 721 P.2d 445, 449–50 (Or. 1986).

66. *Smith*, 494 U.S. at 878. It bears noting that *Smith* proved a political bombshell. Congress tried to reinstate the *Sherbert* standard by passing the Religious Freedom Restoration Act of 1993 (RFRA), which required a state to (1) demonstrate a compelling governmental interest and (2) show that the challenged law is the least restrictive means of furthering that interest. Religious Freedom Restoration Act (RFRA) of 1993 § 3, 42 U.S.C. § 2000bb-1 (2000). However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that the RFRA exceeded Congress's constitutional powers insofar as the law applies to the states. *See id.* at 535–36.

67. *Smith*, 494 U.S. at 883.

68. *Id*. at 881–82 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943) (free exercise claim conjoined with free speech claim); Wisconsin v. Yoder, 406 U.S. 205 (1972) (free exercise claim connected with parental rights claim)).

issue was whether a generally applicable *criminal* law unconstitutionally burdened religious behavior.[69] This dimension of the Court's holding suggests that, at a minimum, *Smith* stands for the proposition that a facially neutral, generally applicable criminal law is constitutional insofar as it pertains to the Free Exercise Clause.

Of course, this presumably settled proposition does not help resolve the *Catholic Bishop* problem. For here the free exercise question is whether a generally applicable *non*criminal statute that clashes with religiously motivated conduct violates the Free Exercise Clause. In the wake of *Smith*, the resolution of this question likely turns on whether the religiously affiliated school successfully states a hybrid claim that implicates a constitutional guarantee in addition to the petitioner's free exercise rights. As we shall see, church-operated schools have a compelling argument that permitting the NLRB to exert jurisdiction over their labor relations with their lay teachers implicates other constitutional guarantees.[70]

B. Collective Bargaining Rights Under the NLRA

If *Smith* complicated the general free exercise inquiry, the *Catholic Bishop* problem adds another variable to the constitutional calculus. The *Catholic Bishop* scenario presents an especially complex constitutional question because lay teachers' right to bargain collectively implicates their First Amendment right to freedom of association. To understand this facet of the *Catholic Bishop* problem, it is necessary to examine the NLRB's role in implementing the NLRA, the policy rationales animating the NLRA, and the NLRB's history of applying the NLRA to nonprofit educational institutions. Although this Section focuses exclusively on the NLRA, the NLRA is a useful proxy for state labor relations acts because these enactments provide comparable protection of employees' collective bargaining rights and, in fact, are usually modeled after the NLRA.[71]

1. Implementing the NLRA's Collective Bargaining Provision

The NLRA obliges employers to bargain collectively with their employees.[72] The NLRA's collective bargaining provision operates in the following way. An employer falls within NLRB jurisdiction only if its business operations sufficiently impact interstate commerce under the U.S. Constitution's Commerce Clause.[73] When employees of NLRB-

69. *Id*. at 885.

70. *See infra* Part III.C.2.a.

71. *See*, *e.g.*, Bisogno v. State Bd. of Labor Relations, 164 A.2d 166, 169 (Conn. Super. Ct. 1960) (noting that Connecticut's State Labor Relations Act, CONN. GEN. STAT. § 31-101 (2004), "is modeled closely after the National Labor Relations Act").

72. National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (2000).

73. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 36 (1937) ("The congressional authority to protect interstate commerce from burdens and obstructions is not limited to transactions

covered enterprises unionize, the employer must bargain in good faith with that union.[74] If a covered employer refuses to bargain in good faith, the union may file an unfair labor practice charge with the NLRB.[75] The Board, in turn, may order the employer to return to the bargaining table, but its order is not self-enforcing. Instead, the NLRB must petition a federal appellate court for an order of enforcement.[76]

2. The NLRA's Policy Rationale

Originally enacted in the midst of the Great Depression, the NLRA imposes the obligation to bargain in good faith because Congress determined that employers' refusal to do so causes strikes and "other forms of industrial strife."[77] Congress found that legal protection of employees' collective bargaining rights "safeguards commerce from injury . . . by encouraging . . . the friendly adjustment of industrial disputes . . . and by restoring equality of bargaining power between employers and employees."[78] Hence, the NLRA's primary policy goal is to foster the free flow of interstate commerce by promoting peaceful labor relations.[79]

3. The NLRB's Jurisdiction over Nonprofit Educational Institutions

Despite its ostensibly broad mandate to promote labor peace in the name of the federal commerce power, the NLRB declined to assert jurisdiction over nonprofit educational institutions during the first thirty-five years that the NLRA was in effect.[80] The NLRB premised this judgment on two main considerations. First, when Congress amended the NLRA in 1947, the conference committee report indicated that the NLRB should continue its policy of asserting jurisdiction over nonprofit organizations "only in exceptional circumstances and in connection with purely commercial activities of such organizations."[81] Second, the NLRB chose not to exercise the full extent of its discretionary authority even though

which can be deemed to be an essential part of a 'flow' of interstate or foreign commerce. Burdens and obstructions may be due to injurious action springing from other sources.").

74. 29 U.S.C. § 158(a)(5), (d).

75. *Id*. § 160(b).

76. *Id*. § 160(e) (providing that the Board must petition a federal court to enforce the Board's collective-bargaining order). For an overview of the NLRB's process of resolving unfair labor practice charges, see ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 97–104 (14th ed. 2006).

77. 29 U.S.C. § 151.

78. *Id*.

79. *See*, *e.g.*, St. Elizabeth Cmty. Hosp. v. NLRB, 708 F.2d 1436, 1441 (9th Cir. 1983) ("The purpose of the National Labor Relations Act is . . . to minimize industrial strife burdening interstate commerce by protecting employees' rights to organize and bargain collectively." (citing NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42–43 (1937))).

80. *See* Cornell Univ., 183 N.L.R.B. 329, 331 (1970) (deciding to assert jurisdiction over nonprofit university).

81. Trs. of Columbia Univ., 97 N.L.R.B. 424, 427 (1951) (quoting H. REP. NO. 80-510, at 32 (1947)).

the NLRA provided that its jurisdictional grasp was coterminous with the scope of the federal commerce power.[82] In other words, the NLRB's early unwillingness to assert jurisdiction reflected a conscious policy choice, not an inherent limit on its jurisdiction.

Given the discretionary nature of this policy, the NLRB's attempt to assert jurisdiction over private educational institutions was probably inevitable. When in 1970 the NLRB first exercised jurisdiction over a nonprofit educational institution, it justified this policy change by appealing to the NLRA's legislative history.[83] The NLRB reasoned that Congress chose not to create an express nonprofit exemption precisely because it "was content to leave to the Board's informed discretion . . . whether and when to assert jurisdiction over nonprofit organizations whose operations had a substantial impact upon interstate commerce."[84] This policy change more closely aligned the NLRB's jurisdictional reach with the Supreme Court's increasingly expansive conception of Congress's authority under the Commerce Clause.[85]

4. The NLRA and Employees' Freedom of Association

Although Congress based its authority to mandate collective bargaining on the Commerce Clause, the NLRA has the ancillary effect of promoting employees' freedom of association.[86] Congress made clear that its desire to foster workers' associational rights was an integral part of the NLRA's general regulatory scheme. In the NLRA's statement of findings, Congress asserted that mandating collective bargaining rights was necessary to restore equality of bargaining power because employers have the advantage of "corporate and other forms of ownership association."[87] This finding reflects Congress's conclusion that when a corporate employer refuses to bargain with a labor union, the employees are left with only two choices: strike as an organization or bargain on an individual basis. Congress found either of these outcomes unsatisfactory because both impair the free flow of commerce. Whereas striking restrains the flow of goods into the stream of commerce, forcing employees to

82. For example, in *Trustees of Columbia University*, the Board stated that even though "the activities of Columbia University affect commerce sufficiently to satisfy the requirements of the statute and the standards established by the Board for the normal exercise of its jurisdiction, we do not believe that it would effectuate the policies of the Act for the Board to assert jurisdiction here." *Id.* at 425.

83. *See Cornell Univ.*, 183 N.L.R.B. at 331.

84. *Id*.

85. *See*, *e.g.*, Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (finding that racial discrimination by the operator of a local restaurant sufficiently impacted interstate commerce to warrant federal regulation under the Commerce Clause).

86. NLRA, 29 U.S.C. § 151 (2000) ("It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by protecting the exercise by workers of full freedom of association."); *see also* Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 362 (1940) (reciting the NLRA's announced policy objectives).

87. 29 U.S.C. § 151.

bargain as individuals diminishes wages in "such volume as substantially to . . . disrupt the market for goods flowing from . . . the channels of commerce."[88]

Thus, NLRA-mandated collective bargaining protects employees' freedom of association for the purpose of equalizing bargaining power.[89] And because a level playing field minimizes the likelihood of labor strife, protecting workers' freedom of association rights furthers the free flow of commerce. As I shall contend later, understanding how and why the NLRA promotes the associational rights of employees should be a key component of the *Catholic Bishop* analysis.

C. The Rise of Teachers' Unions at Religious Schools

Prompted by the spread of collective bargaining in public schools, teachers at religiously affiliated schools began to unionize in the 1960s.[90] Lay faculty at Catholic schools in the Northeast and Midwest spearheaded the unionization movement. Three factors primarily contributed to the emergence of lay teachers' unions at Catholic schools in the 1960s. First, the size and organizational structure of the Catholic school system made unionization practicable, as Catholic lay teachers were employed by the largest and most structured group of church-run schools in the United States.[91] The second and probably most imperative factor was the precipitous decline in the number of Catholics entering the Church's assorted religious orders.[92] Without a large pool of nuns, brothers, and priests willing to teach at minimal cost, Catholic schools came to rely increasingly on lay faculty over the 1960s and 1970s.[93] These educators demanded higher wages and better benefits than their ordained colleagues,[94] so labor disputes between the Church and its lay faculty inevitably ensued. It was only a matter of time before the ever-growing number of Catholic lay teachers would organize to promote their interests. The third key factor in the rise of lay teachers' unions was the Catholic Church's longstanding support of labor rights. This advocacy dates back at least to Pope Leo XIII's 1891 encyclical *On Capital and Labor*, which championed unions as a means to remedy "the misery and wretchedness

88. *Id*.

89. This was how the Supreme Court described the NLRA's operation when it upheld the Act in the historic case of *NLRB v. Jones & Laughlin Steel Corp*. 301 U.S. 1, 33 (1937) ("[T]he statute goes no further than to safeguard the right of employees to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer.").

90. *See* Gregory & Russo, *supra* note 8, at 453.

91. *See id*. at 453–54.

92. Robert J. Pushaw, Note, *Labor Relations Board Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, 97 YALE L.J. 135, 144 (1988); *see also* Dwyer, *supra* note 37, at 37 ("In the 1960's, the number of women and men going into religious life dwindled.").

93. Pushaw, *supra* note 92, at 144; *see also* Dwyer, *supra* note 37, at 37 (quoting a Catholic school administrator as saying that in the 1960s ordained educators were "practicing evangelical poverty").

94. Dwyer, *supra* note 37, at 37.

pressing so unjustly on the majority of the working class."[95] The Church's historical advocacy of workers' rights mixed with the social justice ethos of the Second Vatican Council (1962–1965) to spur lay faculty unionization.[96]

Notwithstanding the Church's avowed pro-labor stance, many Catholic schools resisted lay teachers' efforts to unionize. On April 17, 1967, the first teachers' strike in U.S. Catholic school history lasted for twenty minutes in Philadelphia.[97] More ominously, in May of that same year, the Archdiocese of Chicago terminated twenty-three striking teachers at one of its schools.[98] Despite such antiunion conduct, lay faculty at Catholic schools proceeded to unionize at a modest rate over the ensuing decade.[99] And many Catholic schools accepted (some more begrudgingly than others) the new reality of lay teacher organization: according to a 1973 National Catholic Education Association survey, 29 of 145 dioceses reported that they had recognized teachers' unions.[100]

The stakes of lay teacher unionization changed dramatically, however, when in 1975 the NLRB exercised jurisdiction over labor-organizing activities at Catholic schools in the Chicago[101] and Fort Wayne-South Bend[102] dioceses. Although many Catholic schools had voluntarily agreed to deal with lay teacher organizations, a government order to do so raised new and more profound questions. When the dioceses refused to comply with the NLRB's collective bargaining order, the stage was set for *NLRB v. Catholic Bishop*.

III. ANALYSIS: THREE APPROACHES TO THE *CATHOLIC BISHOP* PROBLEM

As Part II suggests, the stakes of the *Catholic Bishop* problem are high because this issue implicates both Religion Clauses, the federal government's most important labor relations statute,[103] and the livelihoods of the millions of Americans who attend or teach at parochial schools. Considering the complexity of the issues raised, one might have expected courts to circumvent this legal thicket in the same way the Supreme

95. Pope Leo XIII, *Rerum Novarum* [*On Capital and Labor*] para. 3 (May 15, 1891), *available at* http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

96. *See* Pushaw, *supra* note 92, at 143–44.

97. *See* Gregory & Russo, *supra* note 8, at 454.

98. *Id*.

99. *See id*. at 455.

100. *Id*.

101. *See* NLRB v. Catholic Bishop of Chi., 224 N.L.R.B. 1221 (1976).

102. *See* Diocese of Ft. Wayne-South Bend, Inc., 224 N.L.R.B. 1226 (1976).

103. For instance, a group of commentators has called the NLRA "the touchstone for United States labor relations" because it "gives unions a statutory right to participate actively in managerial decisionmaking." David H. Brody et al., *Alternatives to the United States System of Labor Relations: A Comparative Analysis of the Labor Relations Systems in the Federal Republic of Germany, Japan, and Sweden*, 41 VAND. L. REV. 627, 628 (1988).

Court did—by simply invoking the clear statement rule. Instead, due to the intrinsic limitations of the *Catholic Bishop* holding and important subsequent doctrinal developments, courts and scholars have approached the *Catholic Bishop* question in several, oftentimes incompatible, ways.

Three main approaches to this issue have emerged. First, a few courts have chosen to follow faithfully in the Supreme Court's footsteps by applying the clear statement canon. Second, some courts have held that the Religion Clauses bar NLRB jurisdiction over the labor relations between sectarian schools and their lay teachers. Courts and commentators adopting this approach typically have treated the *Catholic Bishop* problem as an Establishment Clause question, especially after *Smith* substantially weakened the cogency of the Free Exercise Clause. Third, others have concluded that the NLRB's assertion of jurisdiction over church-operated schools violates neither the Establishment Clause nor the Free Exercise Clause. The coexistence of these three approaches points to the muddled state of Religion Clauses jurisprudence. Indeed, as we shall see, significant doctrinal discrepancies are evident even within each approach, particularly the religious exemption approach. The remainder of Part III explores the rationales for, and weaknesses of, each of these approaches, in hopes of identifying a more satisfying way of resolving the *Catholic Bishop* problem.

A. The Clear Statement Approach

Given the difficult constitutional and public policy issues that the *Catholic Bishop* problem broaches, it is not surprising that some courts have chosen to follow the Supreme Court's lead on this question. Yet, even though the clear statement approach bears the imprimatur of the highest court in the land, courts have disregarded the Supreme Court's lead more often than they have followed it.[104] After showing how two courts have applied the clear statement canon, this Section highlights the many shortfalls of that approach, in the process revealing why *Catholic Bishop* has been relegated to the minority rule.

1. Applying the Clear Statement Approach

When judges have applied the clear statement approach, they have stressed the excessive entanglement concerns that underwrote *Catholic Bishop*, but, like the Supreme Court, they have not held that NLRB jurisdiction violates either the Establishment Clause or the Free Exercise Clause. *NLRB v. Bishop Ford Central Catholic High School* is especially illuminating in this regard.[105] This case arose when, almost immediately after *Catholic Bishop* was decided, the NLRB tested the scope of that

104. *See infra* Part III.C.
105. 623 F.2d 818, 819 n.1 (2d Cir. 1980).

decision by asserting jurisdiction over Brooklyn's Bishop Ford Central High School.[106] The NLRB argued that, notwithstanding *Catholic Bishop*, Bishop Ford fell within Board jurisdiction "because [the school had] severed its relationship with the [Roman Catholic] Diocese [of Brooklyn]."[107] Refusing to construe *Catholic Bishop* in such narrow terms, the Second Circuit concluded that severance from diocesan management did not strip the school of its "church-operated" character.[108] In doing so, the court emphasized the dual role that lay faculty at parochial schools play as both teachers of secular subjects and inculcators of religious tenets. Because infusing "students with the religious values of a religious creed" was an essential part of the lay faculty's job description,[109] the Second Circuit held that, as a matter of statutory interpretation, excessive entanglement considerations precluded it from construing the NLRA as granting NLRB jurisdiction over the school.[110]

Whereas *Bishop Ford* reveals the Second Circuit applying *Catholic Bishop* in a straightforward manner, *Michigan Education Association v. Christian Brothers Institute of Michigan*[111] raises questions about the wisdom of applying the clear statement approach, particularly in state law cases.[112] *Christian Brothers* arose after the Michigan Employment Relations Commission (MERC) granted the Michigan Education Association (MEA) the right to hold an election among the faculty of Brother Rice High School, an all-boys Roman Catholic school located in suburban Detroit.[113] Although the school expressly strives to inculcate the teachings of Edmund Rice, neither its faculty nor its student body is comprised entirely of Catholics, and the school advertises itself as a college preparatory institution.[114] Before the MEA petitioned MERC for exclusive collective bargaining rights, an unofficial union of Brother Rice's teachers represented its lay faculty in labor negotiations.[115] After MERC authorized the faculty to decide whether the MEA would be certified as their collective bargaining representative, the Michigan Court of Appeals granted immediate appeal, staying the election order.[116] On appeal, Brother Rice invoked *Catholic Bishop* to contend that Michigan's Labor Mediation Act (LMA) did not grant the MERC jurisdiction over religiously affiliated schools.[117] In a brief per curiam opinion, the Court of Appeals vacated the MERC's election directive, holding that, absent a

106. *Id*. at 819.
107. *Id*. at 821.
108. *Id*.
109. *Id*. at 823.
110. *Id*. at 821.
111. 706 N.W.2d 423 (Mich. Ct. App. 2005).
112. *See infra* text accompanying notes 138–40.
113. *Christian Brothers*, 706 N.W.2d at 424.
114. *Id*.; *see also* Brother Rice High School, http://www.brrice.edu (last visited Apr. 10, 2007).
115. *Christian Brothers*, 706 N.W.2d at 424.
116. *Id*.
117. *Id*. at 424–25.

clear legislative intent to the contrary, it would not construe the LMA to authorize jurisdiction over church-run schools such as Brother Rice.[118] In doing so, *Christian Brothers* closely tracked the excessive entanglement logic of *Catholic Bishop*.[119]

2. Problems with the Clear Statement Solution

Notwithstanding *Bishop Ford* and *Christian Brothers*, the clear statement approach has proven an insufficient solution to the *Catholic Bishop* question for a variety of reasons. Any critique of the clear statement approach must begin with Justice Brennan's vigorous dissent in *Catholic Bishop*.[120] Joined by three others, Justice Brennan rebuked the majority for inventing a canon of statutory construction that in effect amended the NLRA.[121] He contended that the NLRA's text and legislative history demonstrated Congress's desire to protect the collective bargaining rights of parochial school teachers: the NLRA's plain text covered "all employers" except those in eight specified categories,[122] and in 1947 Congress had rejected an amendment to exempt religious employers.[123] Thus, as a matter of statutory construction, *Catholic Bishop* rendered a dubious holding.

Aside from Justice Brennan's concerns, the foremost problem with the *Catholic Bishop* approach is that, from the outset, its applicability in many jurisdictions was uncertain at best. Because many states have their own rules of statutory construction, some courts simply cannot apply the clear statement approach. For instance, when the Minnesota Supreme Court addressed the *Catholic Bishop* problem in *Federation of Teachers v. Hill-Murray High School*,[124] it was precluded from following the clear statement canon by a state statute providing that "[e]xceptions expressed in a law shall be construed to exclude all others."[125] This rule of construction barred the *Hill-Murray* court from interpreting the Minnesota Labor Relations Act as not covering employees of religiously affiliated schools because the Act expressly exempted from its definition of "employee" only those engaged in agricultural, parental, spousal, or domestic labor.[126] In other words, this statute prohibits Minnesota courts from engaging in the kind of judicial activism that Justice Brennan censured in his *Catholic Bishop* dissent.

118. *Id*. at 426.
119. *See id*. at 425–26.
120. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 508 (1979) (Brennan, J., dissenting).
121. *Id*. at 508–10 (citing Int'l Ass'n of Machinists v. Street, 367 U.S. 740, 749–50 (1961) (construing a statute to avoid unnecessary constitutional decisions is appropriate only where such construction is a "fairly possible" interpretation of the statute) (emphasis omitted)).
122. *Id*. at 511.
123. *Id*. at 512–13.
124. 487 N.W.2d 857 (Minn. 1992).
125. *Id*. at 862 (discussing MINN. STAT. § 645.19 (1990)).
126. *Id*.

The fact that many states have their own labor relations acts[127] likewise has exposed *Catholic Bishop*'s limited precedential reach, as some states' acts explicitly cover religiously affiliated schools. For example, in *Catholic High School Association v. Culvert*,[128] handed down just six years after *Catholic Bishop*, the Second Circuit was forced to decide the constitutional question that the Supreme Court had sidestepped. *Catholic Bishop* was not binding authority because at issue in *Culvert* was whether New York's State Labor Relations Board (SLRB) could exercise jurisdiction over the labor relations between parochial schools and their lay teachers.[129] When New York originally enacted its State Labor Relations Act in 1937, its provisions did not apply to employees of religious associations.[130] In 1968, however, the state legislature amended the Act to bring such employees within its scope.[131] Unable to avoid the substantive constitutional question, the Second Circuit held that neither of the Religion Clauses barred the SLRB from asserting jurisdiction.[132] Given that the Second Circuit had dutifully applied *Catholic Bishop* in *Bishop Ford*, the court's contrary decision in *Culvert* highlights yet again the narrow applicability of the clear statement approach.

Other factors have further restricted the reach of the Supreme Court's clear statement approach. *Catholic Bishop* always carried significantly less precedential weight in states whose constitutions expressly grant public and private workers a constitutional right to organize.[133] Because one of the factors in the free exercise calculus is the compellingness of the state's interest in regulating labor relations,[134] where a state constitutionally protects employees' right to unionize, the court must factor in state constitutional concerns that the Supreme Court did not have to consider in *Catholic Bishop*. For instance, in *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*,[135] the New Jersey Supreme Court concluded that requiring a parochial school to bargain collectively with its lay teachers pursuant to the state's constitution did not violate the school's federal

127. *See*, *e.g.*, Labor Relations Act, CONN. GEN. STAT. ANN. §§ 31-101 to -111 (West 2003 & Supp. 2006); MICH. COMP. LAWS ANN. §§ 423.1–512 (West 2001 & Supp. 2006); New Jersey Employer-Employee Relations Act, N.J. STAT. ANN. §§ 34:13A-1 to -39 (West 2000 & Supp. 2006); Pennsylvania Labor Relations Act, 43 PA. CONS. STAT. ANN. §§ 211.1–.13 (West 1992 & Supp. 2006); Rhode Island State Labor Relations Act, R.I. GEN. LAWS §§ 28-7-1 to -48 (2003 & Supp. 2006); WIS. STAT. ANN. §§ 111.01–.94 (West 2002 & Supp. 2006).

128. 753 F.2d 1161 (2d Cir. 1985).

129. *Id*. at 1163.

130. *Id*.

131. *Id*.

132. *Id*. at 1168, 1171.

133. *See*, *e.g.*, N.J. CONST. art. 1, § 19; N.Y. CONST. art. 1, § 17.

134. *See*, *e.g.*, *Culvert*, 753 F.2d at 1171 (stating that "[t]here is a compelling public interest in finding that all unions and employers have a duty to bargain collectively and in good faith").

135. 696 A.2d 709 (N.J. 1997).

rights under the Religion Clauses.[136] The *St. Teresa* court rested this holding in part on the fact that the New Jersey Constitution contains a provision protecting workers' collective bargaining rights.[137] In states like New Jersey, then, the *Catholic Bishop* problem is exacerbated because each side of the controversy is asking the court to vindicate a constitutional right. Adjudicating *Catholic Bishop* cases in such states is a zero-sum game: courts that safeguard parochial schools' religious liberty under the U.S. Constitution by invoking the clear statement canon can only do so at the cost of disregarding lay teachers' constitutional right to bargain collectively under the state's constitution. The clear statement approach plainly is an inadequate method of resolving this clash of constitutional guarantees.

Catholic Bishop's clear statement approach is also infirm on federalism grounds. This shortcoming is displayed in the Michigan Court of Appeals's misplaced reliance on *Catholic Bishop* in *Christian Brothers*.[138] Although the court applied the clear statement rule to hold that the MERC lacked jurisdiction over religiously affiliated schools, it could have reached the same result by rendering a state constitutional holding. In fact, the court acknowledged that applying the clear statement rule was even more appropriate in *Christian Brothers* than in *Catholic Bishop* because the Michigan Constitution's freedom of religion provision is more robust than that contained in the First Amendment of the U.S. Constitution.[139] When a state court relies heavily on a nonconstitutional Supreme Court holding to dispose of what is essentially a state constitutional question, this reliance raises serious federalism concerns. Such misplaced reliance hampers the development of the state's freedom of religion jurisprudence.[140]

136. *Id*. at 724 (holding that "requiring defendants to bargain collectively with plaintiff pursuant to Article I, Paragraph 19 of the New Jersey Constitution over the terms and conditions of employment set forth in this opinion does not violate the Religion Clauses of the United States Constitution").

137. *Id*.

138. Mich. Educ. Ass'n v. Christian Bros. Inst. of Mich., 706 N.W.2d 423 (Mich. Ct. App. 2005).

139. The *Christian Brothers* court found that "MERC's role in the negotiation of employment contracts would present more of a 'significant risk' of entanglement proscribed by the Michigan Constitution than the risk found by the Supreme Court in *Catholic Bishop*." *Id.* at 426. The relevant section of the Michigan Constitution provides:

> Every person shall be at liberty to worship God according to the dictates of his own conscience. No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose. The civil and political rights, privileges and capacities of no person shall be diminished or enlarged on account of his religious belief.

MICH. CONST. art. I, § 4.

140. Responding to the Burger Court's narrow interpretation of the protections afforded by the federal Bill of Rights, Justice Brennan was the first to champion the notion that state constitutions should become a "font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and*

Furthermore, the successful application of *Catholic Bishop* in the state labor law context may ultimately prove a Pyrrhic victory for church-operated schools such as Brother Rice. Because the Michigan Court of Appeals declined to render a substantive constitutional holding in *Christian Brothers*, the religious liberties that the court sought to safeguard are perhaps less safe now than they were previously. After all, cases like *Christian Brothers* may prompt state legislatures to amend their labor relations acts to explicitly cover sectarian schools.

B. The Religious Exemption Approach

As the previous Section illustrates, some courts have invoked the clear statement canon to avoid touching the Religion Clauses hot potato. But, notwithstanding *Catholic Bishop*, this approach is the minority rule. Likewise, very few courts have held that the Religion Clauses actually forbid labor board jurisdiction. This result is perhaps surprising given that the *Catholic Bishop* majority seemed to indicate that excessive entanglement concerns would have precluded NLRB jurisdiction if the Court had reached the underlying constitutional question.[141] This Section demonstrates that the scarcity of cases adopting the religious exemption approach reflects not the enduring force of *Catholic Bishop*'s clear statement rule but rather fundamental weaknesses in the Court's excessive entanglement justification for invoking that rule.

1. Catholic Bishop I *Revisited*

The most important case to adopt the religious exemption approach was *Catholic Bishop of Chicago v. NLRB* (*Catholic Bishop I*),[142] which of course the Supreme Court would ultimately affirm on other grounds. The NLRB appealed *Catholic Bishop I* to the Supreme Court after the Seventh Circuit decided the substantive constitutional question in the school's favor, holding that NLRA-mandated collective bargaining would infringe the freedom of religion guarantees enshrined in the First

the Protection of Individual Rights, 90 HARV. L. REV. 489, 491 (1977). In addition, Justice Brennan pointed out that Supreme Court decisions "are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law." *Id*. at 502 (footnote omitted). While arguing for the value of developing state constitutional jurisprudence, Justice Brennan admonished state court judges and practitioners not to mechanically apply Supreme Court decisions to state constitutional issues. *Id*.; *see also* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983) (discussing the value of developing a "jurisprudence of state constitutional law"). Because Justice Brennan's argument accords with principles of federalism, his conservative colleagues readily acknowledged state courts' power to liberally construe state constitutional guarantees. *See, e.g.*, PruneYard Shopping Ctr. v. Robbins, 447 U.S. 74, 81 (1980) (Rehnquist, J.) (noting that states are at liberty "to adopt in [their] own [c]onstitution[s] individual liberties more expansive than those conferred by the Federal Constitution").

141. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 504 (1979) ("We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.").

142. 559 F.2d 1112 (7th Cir. 1977).

Amendment.[143] The NLRB claimed unsuccessfully that NLRB jurisdiction over religiously associated schools was proper where such schools provided a general education, meaning an education based on religious principles but not limited to religious subjects.[144]

a. The Fairness Concern

The Seventh Circuit rejected this argument for two main reasons. The first was premised on plain fairness. The court reasoned that, because the Supreme Court had interpreted the Establishment Clause to prohibit church-operated schools from receiving direct state aid, they should be "equally freed of the obviously inhibiting effect" that the NLRA would impose on their educational mission,[145] which was inextricably spiritual in nature. For good reason, the court found it demonstrably unfair for the government to exclude religion when dispensing secular benefits to the general public but to include it when imposing regulatory burdens on the secular aspects of religious schools' enterprise.

This rationale for disallowing NLRB jurisdiction was rooted in the Free Exercise Clause, and the Seventh Circuit was correct to consider the two Religion Clauses in light of one another. Nevertheless, the fairness concern is no longer a sound basis for blocking NLRB jurisdiction because the Supreme Court has moved away from the strict separationist theory of the Establishment Clause that was at its high-water mark when the Seventh Circuit decided *Catholic Bishop I*.[146] In a line of school aid cases beginning in 1981 with *Widmar v. Vincent*,[147] the Court by and large has displaced the separationist principle with the proposition that the government does not violate the Establishment Clause when it distributes public benefits according to religiously neutral criteria.[148] Indeed, even before the Supreme Court began reformulating this facet of Establishment Clause doctrine, the Seventh Circuit's fairness rationale was problematic in that it overstated the degree to which prior decisions had barred state funding of religious schools.[149]

143. *Id*. at 1131.

144. *Id*. at 1116. The NLRB first refined its jurisdictional criteria to cover such schools in *Roman Catholic Archdiocese of Baltimore, Archdiocesan High Sch.*, 216 N.L.R.B. 249 (1975).

145. *Catholic Bishop I*, 559 F.2d at 1130.

146. *See* Steven K. Green, *Of (Un)equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality & Separationism*, 43 B.C. L. REV. 1111, 1120 (2002) (describing 1970–1978 as "the high-water years of separationism").

147. 454 U.S. 263 (1981).

148. *See* Mitchell v. Helms, 530 U.S. 793 (2000); Bowen v. Kendrick, 487 U.S. 589, 608–09 (1988); Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481, 490–91 (1986) (Powell, J., concurring) ("State programs that are wholly neutral in offering educational assistance to a class defined without reference to religion do not violate [the Establishment Clause]."); Green, *supra* note 146, at 1115–16.

149. *See* Green, *supra* note 146, at 1120 (asserting that the theory of no-aid separationism was always a "mirage" because "numerous forms of public aid to parochial schools passed under—or more correctly, through—the separationist radar screen"). Ironically but perhaps not coincidentally, the most quoted endorsement of the strict separationist view of the Establishment Clause appears in a case that upheld a New Jersey program that reimbursed parents for the money they expended to bus

b. Excessive Entanglement and the Chilling Effect Problem

By comparison, the Seventh Circuit's second reason for barring NLRB jurisdiction remains at least tenable. The court concluded that the Establishment Clause doctrine of excessive entanglement precluded NLRB supervision of labor relations at parochial schools. To survive Establishment Clause scrutiny under *Lemon*, the government action at issue must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive entanglement between government and religion.[150] NLRB jurisdiction passed *Lemon*'s first and second prongs because the NLRA's objective of facilitating labor peace is clearly secular, and the Act's primary effect of requiring employers to collectively bargain with their employees neither advances nor inhibits religion.[151] However, the Seventh Circuit concluded that *Lemon*'s excessive entanglement prong disqualified NLRB jurisdiction over church-operated schools.[152] At the crux of the court's excessive entanglement rationale was its fear that the mere prospect of NLRB oversight would "chill" the school's capacity to manage ecclesiastical functions that clearly were beyond the secular government's competence:

> The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishop's control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the bishop tailor his conduct and decisions to "steer far wider of the unlawful zone" of impermissible conduct.[153]

Originally formulated in the free speech context, the chilling effect principle safeguards the First Amendment right to free expression by curtailing the ex ante deterrent effect that government regulation inescapably exerts on protected expression.[154]

Likewise, in the *Catholic Bishop* context, the chilling effect principle prevents the government from impinging parochial schools' religious lib-

children to and from parochial as well as public schools. *See* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'").

150. Lemon v. Kurtzman, 403 U.S. 601, 612–13 (1971).

151. NLRA, 29 U.S.C. § 151 (2000).

152. *See* Catholic Bishop of Chi. v. NLRB (*Catholic Bishop I*), 559 F.2d 1112, 1124–26 (7th Cir. 1977). Although the Seventh Circuit at times referred to Board jurisdiction as inhibiting the schools' religious liberty, *id.* at 1123, it is nonetheless clear that the court analyzed the case under the excessive entanglement doctrine. *Id.* at 1126 ("The whole tenor of the Religion Clauses cases involving state aid to schools is that there does not have to be an actual trial run to determine whether the aid can be segregated, received and retained as to secular activities only but it is sufficient to strike the aid down that a reasonable likelihood or possibility of entanglement exists."); *id.* ("The certitude of entanglement with doctrinal matters in our opinion is much greater in the present case than the possibilities involved in *Walz*."); *see also supra* note 43 and accompanying text (discussing how the *Catholic Bishop* problem has been treated as a subspecies of the financial aid establishment issue).

153. *Id*. at 1124 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

154. *See*, *e.g.*, *Speiser*, 357 U.S. at 526.

erty by minimizing the deterrent effect prospective government regulation inexorably exerts on individual behavior.[155] The Seventh Circuit described how this chilling effect might play out when Judge Pell depicted a scenario in which a Catholic school official terminates a teacher who previously advocated for both unionization and abortion rights.[156] Judge Pell found that the threat of NLRB intervention and attendant litigation costs might deter the school administrator from making an employment decision based on a legitimate, nonjusticiable religious concern (advocacy for abortion rights in contravention of Catholic doctrine) where that decision might also be mistaken for the kind of antiunion conduct proscribed by the NLRA.[157] The Seventh Circuit's chilling effect rationale is the strongest argument for completely barring labor board jurisdiction over church-operated schools.

c. Flaws in the Chilling Effect Rationale

Nonetheless, the chilling effect argument is flawed in three crucial respects. Its first shortcoming lies in the fact that exempting religious schools from NLRA jurisdiction avoids the excessive entanglement problem only at the cost of creating even more intractable establishment issues.[158] When a court grants a religious exemption on the basis of excessive entanglement concerns, this would seem to violate *Lemon*'s second prong, which precludes the government from taking actions that have a primary effect of advancing religion.[159] The chief consequence of creating such an exemption would be to promote religion. Moreover, because the court would be exempting church-operated schools from NLRA coverage precisely on account of their religious character, fashioning this exemption may also violate *Lemon*'s first prong, which forbids government actions that have nonsecular purposes.

These establishment concerns intensify when one considers that the NLRA continues to apply to nonreligious private schools. Not only is the appearance of government favoritism of religion inescapable, but the financial burden of such favoritism surely falls on nonsectarian private schools. These types of educational institutions must compete with pub-

155. My description of the chilling effect rationale is informed by Michael W. McConnell and Richard A. Posner's economic analysis of religious freedom. *See generally* Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1 (1989).

156. *Catholic Bishop I*, 559 F.2d at 1124.

157. *Id*.

158. While criticizing the majority's clear statement approach in his *Catholic Bishop* dissent, Justice Brennan made this same point, arguing that fashioning a special exemption for church-operated schools generated a more compelling Establishment Clause question than the one the majority felt obliged to avoid. NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 518 n.11 (1979); *see also* Robert J. Warner, *NLRB Jurisdiction over Parochial Schools:* Catholic Bishop of Chicago v. NLRB, 73 NW. U.L. REV. 463, 482–84 (1978) (exempting parochial schools from jurisdiction creates a "special privilege" forbidden by the Establishment Clause).

159. Lemon v. Kurtzman, 403 U.S. 601, 612–13 (1971).

lic schools, which enjoy virtually unconstrained access to the public fisc, and religious schools, which enjoy various exemptions from regulatory laws that apply to their nonsectarian competitors. In this regard, carving out an exemption for parochial schools is tantamount to granting a government subsidy of religious education.[160] This subsidy effect raises undeniable establishment concerns.[161]

The second flaw in the Seventh Circuit's chilling effect argument is equally pressing. *Catholic Bishop I*'s holding was premised on its determination that the schools in question were so pervasively religious[162] that it would be impossible, without excessively entangling church and state, for courts to verify if the bishop was making a decision motivated by unlawful antiunion animus. Yet this concern is belied by the fact that, in other contexts, courts routinely inquire into the sincerity of litigants' religious beliefs. Most telling perhaps is the landmark case of *United States v. Seeger*,[163] in which the Court assessed the sincerity of a conscientious objector's religious beliefs to determine if the Free Exercise Clause entitled him to a draft exemption. If courts are competent to determine whether a conscientious objector's religious faith is genuine, it follows that they are also competent to determine whether administrators at a parochial school decided to terminate a teacher for bona fide spiritual reasons. In *Seeger*, the Court acknowledged that its ruling was based primarily on the conscientious objector's bald declaration of his religious beliefs.[164] By their very nature, conscientious objector cases place the trier of fact in this predicament.[165]

In the *Catholic Bishop* context, by contrast, courts can rely with relative ease on third-party witnesses and other forms of extrinsic, objective evidence. Such evidence will help a court determine, for instance, whether a terminated Catholic teacher in fact campaigned for abortion rights. In short, the judiciary is better equipped to decide a labor relations dispute involving a church-operated school than it is to decide a conscientious objector case. The Seventh Circuit therefore overstated

160. *See* McConnell & Posner, *supra* note 155, at 7–8 (discussing the subsidy effect inherent in fashioning religious exemptions to regulatory laws).

161. The Supreme Court noted the establishment problem created by the subsidy effect in *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334–35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'"). *See generally* Diana B. Henriques, *Religion Trumps Regulation as Legal Exemptions Grow*, N.Y. TIMES, Oct. 8, 2006, § 1, at 1 (discussing the "abundance of exemptions from regulations and taxes" that religious organizations enjoy).

162. For a useful discussion of what the Supreme Court means by the phrase "pervasively religious," see *Meek v. Pittenger*, 421 U.S. 349, 366 (1975).

163. 380 U.S. 163 (1965).

164. *See id.* at 184 ("[I]t must be remembered that in resolving these exemption problems one deals with the beliefs of different individuals who will articulate them in a multitude of ways. In such an intensely personal area, of course, the claim of the registrant that his belief is an essential part of a religious faith must be given great weight.").

165. *See id*.

the risk that the judiciary would prove an unsuitable arbiter of the *Catholic Bishop* problem.

The third infirmity in the Seventh Circuit's chilling effect argument is that it is premised on a confused conception of both the Free Exercise Clause and the Establishment Clause.[166] This is less a criticism of *Catholic Bishop I* than it is of the state of the Supreme Court's Establishment Clause jurisprudence circa 1977. As the Seventh Circuit pointed out in *Catholic Bishop I*,[167] when the Court formulated the *Lemon* test, it blurred the boundaries distinguishing the two Religion Clauses.[168] Several scholars have argued convincingly that the *Lemon* test's second and third prongs tend to import free exercise concepts into the Establishment Clause analysis.[169] This doctrinal amalgamation is evident in the Seventh Circuit's application of the excessive entanglement doctrine in *Catholic Bishop I*. The court's concern was not that NLRB supervision might lead to impermissible state sponsorship of the Catholic religion, but rather that such supervision would undermine the bishop's spiritual authority over his diocese.[170] In short, *Catholic Bishop* did not raise an establishment issue because the Establishment Clause proscribes support of, not interference with, religion.[171]

Although it is accurate to view the clauses as complementing one another, there are compelling reasons to keep their doctrinal frameworks distinct. Closer scrutiny of *Catholic Bishop I*'s chilling effect rationale exposes one such reason. To state a claim under the Free Exercise Clause, believers and churches must prove that the government action at issue demonstrably burdened their exercise of religious liberty.[172] To

166. *See* Catholic Bishop of Chi. v. NLRB (*Catholic Bishop I*), 559 F.2d 1112, 1131 (7th Cir. 1977) ("[W]e have generally in this opinion referred to the Religion Clauses rather than dwelling on the differentiations between the dual aspects of the Religion Clauses of 'establishment' and 'free exercise' of religion. Our treatment of the Religion Clauses jointly has been because of our belief that there has been some blurring of sharply honed differentiations.").

167. *Id*.

168. *See* Lemon v. Kurtzman, 403 U.S. 602, 619 (1971) ("The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid.").

169. Several scholars have critiqued the *Lemon* test in general and the entanglement doctrine in particular. *See*, *e.g.*, Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681–85 (1980); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 826–27, 829–31 (1984). In *Agostini v. Felton*, 521 U.S. 203 (1997), the Court itself appeared to acknowledge this problem with *Lemon*'s entanglement prong when it essentially folded it into the second prong. *See id.* at 233 ("[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect."). Above all, *Agostini* shows that the entanglement prong has lost much, if not all, of the sway it exerted when *Catholic Bishop* was handed down.

170. The court stated that "the very threshold act of certification of the union necessarily alters and impinges upon the religious character of all parochial schools. No longer would the bishop be the sole repository of authority as required by church law." *Catholic Bishop I*, 559 F.2d at 1123.

171. Laycock, *supra* note 43, at 1416.

172. *See*, *e.g.*, Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 348 (1987) (O'Connor, J., concurring) (stating that "there must in fact be an identifiable burden *on the exercise of religion*").

show an Establishment Clause violation, conversely, the quantum of proof is decidedly lower because that clause proscribes state action merely "respecting" an establishment of religion.[173] The word "respecting" creates a lower evidentiary hurdle because a law need not actually establish an official religion to run afoul of the Establishment Clause.

The problem with *Catholic Bishop I*'s chilling effect argument, then, was that it applied the lower Establishment Clause standard of proof to what was really a free exercise question. The mere possibility that the NLRB might chill the bishop's exercise of his spiritual authority was not a sufficient basis to hold that permitting NLRB jurisdiction violated the Free Exercise Clause. This is especially true given that it is not unreasonable to view the complete exemption that the Seventh Circuit fashioned as a law "respecting an establishment of religion."[174] Indeed, this is precisely why proving a Free Exercise Clause violation should be more difficult than proving an Establishment Clause violation: the act of exempting a religious adherent or entity from a generally applicable, otherwise valid law raises a compelling establishment question.

The Seventh Circuit's chilling effect argument thus founders on the conceptual incoherence of the *Lemon* test. *Catholic Bishop I*'s many flaws perhaps explain why the Supreme Court decided to affirm the Seventh Circuit on different grounds. That few courts have followed the Seventh Circuit down the slippery slope of its chilling effect argument lends further support to this suspicion.[175] Moreover, the dearth of cases finding an outright constitutional violation suggests that the Supreme Court may have overstated the freedom of religion concerns that motivated its decision to require a clear expression of congressional intent. Above all, it is clear that the Supreme Court's and the Seventh Circuit's focus on excessive entanglements and chilling effects was misplaced. Instead, the constitutional question truly posed by *Catholic Bishop* is whether applying the NLRA to parochial schools would unduly burden the schools' free exercise rights.

C. The Accommodation Approach

Notwithstanding the Supreme Court's decision in *Catholic Bishop*, most courts have held that labor board jurisdiction over sectarian schools does not violate the First Amendment's freedom of religion provisions.[176]

173. As the Court noted in *Lemon*, the crucial word in the Establishment Clause is "respecting" because a "law may be one 'respecting' the forbidden objective while falling short of its total realization." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

174. As noted previously, this problem also militates against adopting *Catholic Bishop*'s clear statement approach, as Justice Brennan pointed out in his lively dissent. *See* NLRB v. Catholic Bishop of Chi., 440 U.S. 490, 518 n.11 (1979) (Brennan, J., dissenting).

175. *See* Catholic High Sch. Ass'n v. Culvert, 753 F.2d 1161, 1167 (2d. Cir. 1985) (declining to follow *Catholic Bishop I* down the "slippery slope").

176. *See Culvert*, 753 F.2d at 1161; Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 863 (Minn. 1992); N.Y. State Employment Relations Bd. v. Christ the King Reg'l High

Aside from highlighting the limited reach of the Court's holding in *Catholic Bishop*, these cases present some forceful arguments for eschewing the clear statement and religious exemption approaches critiqued above. These cases also suggest ways in which the law can accommodate church-operated schools' freedom of religion rights without depriving lay teachers of the constitutional protections afforded by the NLRA.

*1. The Pre-*Smith *Approach to Accommodation*

Catholic High School Association v. Culvert[177] is perhaps the most intriguing accommodation case in the *Catholic Bishop* line because it was decided five years before the Supreme Court radically reformulated free exercise doctrine in *Employment Division v. Smith*.[178] In *Culvert*, the Second Circuit could not avoid the substantive constitutional question because the statute at issue, New York's State Labor Relations Act (SLRA), had been amended in 1968 to cover employees of religious organizations.[179] As a result, neither *Catholic Bishop* nor the Second Circuit's 1980 decision in *Bishop Ford* amounted to controlling authority. Both the defendant New York State Labor Relations Board (SLRB) and the plaintiff Association agreed that the schools in question were church-operated within the meaning of *Catholic Bishop*.[180] And the court noted that the school's lay faculty was "directly involved in the transmission of religious values to the students."[181] These facts forced the Second Circuit to answer the question that only *Catholic Bishop I* had addressed. The court refused to follow the Seventh Circuit down the slippery slope of its chilling effect argument,[182] instead holding that the SLRB's assertion of jurisdiction did not offend the First Amendment because the SLRB could order the Association to bargain only on secular, mandatory bargaining subjects.[183]

Culvert's predominant virtue lies in its revelation that any accommodation approach to the *Catholic Bishop* problem must include a fact-sensitive inquiry into a church-run school's proffered religious defense. In *Culvert*, for instance, three facts proved to be crucial factors in the court's analysis. First, the Association did not challenge the SLRB's assertion of jurisdiction when the faculty originally unionized in 1969.[184] From the union's formation until 1980, the union and the Association

Sch., 682 N.E.2d 960, 966–67 (N.Y. 1997); *see also* Pushaw, *supra* note 92, at 141 n.51 (citing an unpublished Hawaii case holding that NLRB jurisdiction did not violate the Religion Clauses).

177. *Culvert,*753 F.2d 1161.

178. 494 U.S. 872 (1990); *see also supra* text accompanying notes 61–70.

179. *Culvert*, 753 F.2d at 1163.

180. *Id*.

181. *Id*.

182. *Id*. at 1167.

183. *Id*. at 1166.

184. *Id*. at 1163.

had entered into "a series of collective bargaining agreements governing the secular terms and conditions of lay teachers' employment."[185] Second, the by-laws of the teachers' union specifically excluded religious faculty from membership.[186] Third, religious issues were deliberately excluded from each of the agreements that the school had struck with the teachers' union between 1969 and 1980.[187] In light of this history of cooperation, the Second Circuit perhaps had reason to doubt the sincerity of the Association's religious justification.

But even if the Association's defense smacked of pretext, *Culvert* provides a deeply flawed accommodation paradigm because the court misconceived the free exercise question at hand.[188] The Second Circuit characterized the degree of infringement as minimal on account of the Catholic Church's longstanding support of workers' rights.[189] The court even pointed out that, in a recent Pastoral Letter, the Catholic Bishops had reaffirmed the Church's strong commitment to socioeconomic justice, including in particular its commitment to collective bargaining rights.[190] This misguided focus on the meaning of Catholic doctrine undeniably constituted a violation of the bedrock Establishment Clause principle that the sovereign is not competent to ascertain the significance of religious doctrine. This focus also led the court to neglect the free exercise question that the *Catholic Bishop* problem truly presents: whether labor relation board jurisdiction interfered with the schools' mission to impart Catholic spiritual values to their students.[191] Hence, although *Culvert* marked an important milestone on the road to a viable accommodation approach, it provides a profoundly problematic model of such an approach.

*2. The Post-*Smith *Accommodation Cases*

Employment Division v. Smith[192] has proven all but dispositive for courts that have treated the *Catholic Bishop* problem in the wake of that controversial decision. *Smith*'s reformation of free exercise doctrine fundamentally unsettled the Court's holding in *Catholic Bishop*. *Sherbert* stood for the proposition that the Free Exercise Clause requires governments to exempt religious adherents from laws of general applicability unless the governmental interest in enforcing that law is of the highest order. *Smith* essentially turned *Sherbert* on its head: a law burdening religious practice does not offend the Free Exercise Clause unless it targets

185. *Id*.
186. *Id*.
187. *Id*.
188. For critiques of *Culvert* on this basis, see Laycock, *supra* note 43, at 1399; Pushaw, *supra* note 92, at 140.
189. *Culvert*, 753 F.2d at 1170.
190. *Id*.
191. *See* Laycock, *supra* note 43, at 1399; Pushaw, *supra* note 92, at 140.
192. 494 U.S. 872 (1990).

religion. Given that labor relations statutes are neutral and otherwise valid regulatory laws, *Smith* would seem to render moot the free exercise concerns that underwrote both *Catholic Bishop*'s invocation of the clear statement canon and *Catholic Bishop I*'s chilling effect rationale. Indeed, when the highest courts in Minnesota and New York applied *Smith* to the *Catholic Bishop* problem in the 1990s, each readily held that its state's labor relations board could assert jurisdiction without violating the Free Exercise Clause.[193] Post-*Smith*, then, it would seem difficult for a court to conclude that the Free Exercise Clause compelled governments to carve out a blanket exception in their labor relations statutes for religiously affiliated schools.

a. *Sherbert* Revisited: Hybrid Constitutional Rights

Nonetheless, there is good reason to suppose that *Smith* might not apply to the *Catholic Bishop* scenario. Recall that *Smith* did not overrule *Sherbert*; instead, Justice Scalia appeared to leave intact the numerous prior decisions in which the Supreme Court had fashioned exemptions to prevent a constitutional violation. He justified this bold move on the basis that these were "hybrid" cases, meaning that the government action at issue burdened constitutional liberties independent of the believer's free exercise rights.

Whatever the merits of Justice Scalia's reasoning,[194] church-operated schools would seem to have a persuasive if not airtight argument that permitting NLRB jurisdiction over their labor relations implicates other constitutional guarantees. In fact, both of the supplemental constitutional rights that Justice Scalia identified in *Smith* are at play in the *Catholic Bishop* scenario.[195] Parochial schools' rights under the Free Speech Clause are in effect inseparable from their rights under the Free Exercise Clause, as it is a scholarly truism to point out that the concept of freedom of speech is historically and conceptually rooted in notions of religious liberty.[196] Further, because this issue implicates the educational welfare of children, the other constitutional right Justice Scalia mentioned is also at play: parental childrearing rights. If religious schools have standing to assert childrearing rights on behalf of their pupils, the

193. Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 863 (Minn. 1992) ("In accordance with *Smith*, we hold that the right to free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution."); N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch., 682 N.E.2d 960, 963 (N.Y. 1997) ("Applying the *Smith* standard to the instant matter, we are satisfied that the State Labor Relations Act properly governs labor relations between the appellant School and its lay faculty.").

194. For critiques of *Smith*, see generally McConnell, *supra* note 2; Roberts, *supra* note 2.

195. *See Smith*, 494 U.S. at 881 (citing Wisconsin v. Yoder, 406 U.S. 205 (1972) (free exercise claim connected with parental rights claim); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (free exercise claim conjoined with free speech claim)).

196. *See* Harry G. Hutchison, *The Future of Labor Unions and the Union Dues Dispute*, 49 WAYNE L. REV. 705, 713 n.48 (2003).

Court would be confronted with a hybrid constitutional rights claim. Alternatively, parents might argue that they have standing to challenge NLRB jurisdiction over their children's parochial schools insofar as such jurisdiction will impinge on their constitutionally protected childrearing rights. If the Court were to accept any one of these hybrid rights claims, the free exercise question presumably would be decided under *Sherbert*'s more demanding compelling state interest test.

b. Lay Teachers' Response

Nevertheless, lay teachers can answer this challenge in three ways. First, they can attack the schools' hybrid rights rationale. Whether parochial schools and the parents of children enrolled in such schools have standing to challenge NLRB jurisdiction is surely a debatable proposition. Likewise, bootstrapping a free speech claim onto the schools' free exercise claim would threaten to eviscerate *Smith* insofar as it is hard to imagine a case where such bootstrapping is not warranted.

Second, lay teachers can cast their argument as presenting a constitutional claim in its own right. As noted previously, one of the NLRA's policy objectives is to safeguard workers' freedom of association rights. Thus, the *Catholic Bishop* scenario presents a clash of constitutional claims. In other cases where both parties have sought to vindicate a constitutional right, the Court has treated First Amendment claims with special solicitude. For instance, when *Grutter v. Bollinger* held that law schools have a compelling state interest in assembling a diverse student body, the Court grounded this holding in the First Amendment values that educational institutions promote.[197] *Grutter* suggests that the NLRA's promotion of employees' associational rights should be a crucial factor in the *Catholic Bishop* analysis. Lay teachers therefore would do well to emphasize the First Amendment concerns weighing in favor of permitting NLRB jurisdiction.

Finally, lay teachers would be wise to draw on the ways in which courts have resolved comparable free exercise questions in other areas of employment law. Of particular relevance are the many cases involving the application of antidiscrimination statutes to the labor relations of religious organizations.[198] Courts routinely apply such statutes to religiously affiliated schools without impermissibly judging the merits of the

197. *See* Grutter v. Bollinger, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." (citations omitted)).

198. *See*, *e.g.*, NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991) (permitting NLRB jurisdiction over nonfaculty employees at religiously affiliated center for homeless or neglected boys); St. Elizabeth Cmty. Hosp. v. NLRB, 708 F.2d 1436, 1440 (9th Cir. 1983) (holding that *Catholic Bishop* does not prohibit NLRB jurisdiction over nonreligious service employees of church-run hospitals).

schools' religious defense.[199] These cases suggest that it is feasible for courts to balance teachers' collective bargaining rights and church-operated schools' freedom of religion rights. Part IV proposes one such way to negotiate this constitutional minefield.

IV. RECOMMENDATION

The foregoing analysis revealed the limitations of the clear statement and religious exemption approaches to the *Catholic Bishop* problem. Given these deficiencies, it should not be surprising that subsequent courts generally have eschewed both approaches. More importantly, Part III exposed both the doctrinal incoherence and the normative undesirability of *Lemon*'s Establishment Clause framework. Although the excessive entanglement doctrine provided courts with a seemingly compelling chilling effect rationale for disallowing NLRB jurisdiction over church-operated schools, that rationale was premised on a fundamentally flawed understanding of the Establishment Clause. Part III furthermore showed how various courts have tried to steer a course between the Scylla of the Establishment Clause and the Charybdis of the Free Exercise Clause by partially exempting parochial schools from NLRB jurisdiction. Viewed in the aggregate, these accommodation cases suggest that the law can safeguard parochial schools' religious liberty rights without altogether disregarding lay teachers' collective bargaining rights. Nonetheless, the accommodation approaches developed by the courts vary considerably across jurisdictions, and most are themselves flawed in some significant regard.

Congressional action, therefore, is in order. This Part accordingly recommends that Congress should operationalize the judiciary's best practices by amending the NLRA in the three ways detailed below. Given that so many states' labor relations acts are modeled on the NLRA, congressional action on this front is likely to wield a trickle-down benefit on many state legislatures.

A. Redefine "Employer"

In its current form, the NLRA defines an employer as

> 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 organiza-

199. *See*, *e.g.*, Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324 (3d Cir. 1993) (Age Discrimination in Employment Act applied to lay teacher at church-operated elementary school); EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980), (Title VII applicable to religious school). *But see* McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972) (barring application of Title VII to church's labor relations with its minister).

> tion (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.[200]

Immediately after "directly or indirectly," Congress should insert the following language: "including religious, nonprofit, and educational organizations, inclusive of religiously operated schools, acting as an employer." Such language would resolve conclusively the putative ambiguity upon which the Supreme Court rested its *Catholic Bishop* holding. In addition, this language would stamp Congress's approval on the NLRB's longstanding practice of asserting jurisdiction over educational and nonprofit institutions operated by nonreligious organizations. Express congressional approval of such jurisdiction would help foreclose the possibility that, at some later date, a court could interpret the NLRA as not covering nonsectarian schools despite its express coverage of religious schools. This language thus implements the Free Exercise Clause's command that religious entities not be treated less favorably than their secular counterparts. Moreover, this amendment is likely to survive *Smith* scrutiny because the NLRA is a generally applicable law that does not impose burdens targeted at religious exercise.

B. Redefine "Employee"

The NLRA currently defines an employee as including

> any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.[201]

Immediately following "or any individual employed as a supervisor," Congress should add the following language: "or any individual employed by a religious organization in a ministerial capacity, but not including lay teachers at religious schools." The first portion of this amendment would codify the time-honored ministerial exception that courts have read into statutes like the NLRA.[202] The second portion would prevent courts from expanding the ministerial exception to cover lay teachers. This change is necessary to thwart the occurrence of an-

200. NLRA, 29 U.S.C. § 152(2) (2000).
201. *Id*. § 152(3).
202. *See*, *e.g.*, DeMarco v. Holy Cross High Sch., 4 F.3d 166, 172 (2d Cir. 1993).

other *Catholic Bishop*. Because infusing students with religious values is an inextricable though subsidiary component of a lay teacher's job description, a resourceful judge could invoke the clear statement canon to enlarge the historically narrow scope of the ministerial exception. This amendment to the NLRA's definition of an employee would make it exceedingly difficult for a court to engage in such judicial activism. At the same time, of course, a parochial school would always be free to prove in court that NLRA coverage of lay teachers violated their rights under the Free Exercise Clause.

C. Restrict the NLRB's Inquiry into Religious Defenses

Finally, Congress should add a subsection to the NLRA that enumerates the precise scope of the NLRB's jurisdictional competence over labor disputes involving religious organizations. This subsection, entitled "Disputes Involving Religious Employers," should contain the following four provisions:

(1) In disputes involving a religious employer, the Board may not inquire into the validity of a religious justification that an employer proffers if such inquiry would entail assessing the validity of religious doctrine, which Congress considers per se beyond the competence of government jurisdiction.

(2) Where the evidentiary record shows that a religious employer made an employment decision based on religious grounds, the Board shall deem such grounds the but-for cause of that decision unless the complaining employee establishes, by clear and convincing evidence, that the employer's religious justification is a pretext for engaging in any of the unfair labor practices listed in section 8 [29 U.S.C. § 158].

(3) To prove pretext by clear and convincing evidence, the complaining employee must proffer evidence that the religious employer did not take an adverse employment action against a similarly situated employee who engaged in conduct comparable to that which the employer claims is the but-for cause of its employment decision.

(4) To find a violation of any of section 8's provisions in disputes involving religious employers, the Board must find, by clear and convincing evidence, that the employer engaged in an unfair labor practice.

This proposal imposes express and forceful limits on the NLRB's ability to inquire into a school's proffered religious defense of an employment decision. Rooted in the Free Exercise Clause, provision (1) safeguards the spiritual autonomy of church-operated institutions by ab-

solutely proscribing NLRB inquiry into matters of religious doctrine. Provision (2) establishes a strong presumption in favor of employers that raise a religious defense to the complained-of employment decision. Such a defense is deemed the legal cause of the employment decision at issue unless the complainant can establish pretext by clear and convincing evidence. Provision (3) affords lay teachers a feasible means of redress by granting an opportunity to prove pretext. But the elevated quantum of proof required to establish pretext ensures that administrators at religious schools will not feel the chill of NLRB jurisdiction every time they make an employment decision.

The operation of this subsection can be dramatized by revisiting the hypothetical Judge Pell depicted in *Catholic Bishop I*.[203] Suppose a Catholic school administrator terminates a teacher who previously advocated for both teacher unionization and abortion rights. That the teacher championed abortion rights triggers provision (2)'s presumption that this conduct was the but-for cause of the employment decision. To prove pretext, the teacher must establish, by clear and convincing evidence, that the school did not terminate another teacher who advocated for a position that likewise contravened the school's religious precepts. For example, the employee could point to another teacher who was not fired despite her advocacy of birth control. However, provision (1) would prevent the NLRB from asking whether advocating abortion rights is, in the eyes of the Catholic Church, as grave an offense as recommending birth control. Instead, the NLRB must accept the schools' assertion that these actions do not amount to equivalent violations of Church law. Finally, if the teacher is able to rebut the but-for presumption by establishing pretext, provision (4) will require her to establish, by clear and convincing evidence, that the school terminated her for advocating unionization and thereby engaged in a section 8 unfair labor practice.[204] As this example suggests, amending the NLRA in the proposed fashion will provide aggrieved lay teachers their day in court and a feasible means of redress without unduly burdening parochial schools' free exercise rights.

V. CONCLUSION

When it handed down *NLRB v. Catholic Bishop*, the Supreme Court opted to save for another day a complex religious liberty question. But the Court's decision to leave the substantive constitutional issue unresolved has proven another thorn in the thicket of Religion Clauses jurisprudence. The post–*Catholic Bishop* case law is riven by inconsistency, largely because the doctrines that impelled the Court to find that the NLRB lacked jurisdiction are not the same doctrines that subsequent

203. *See supra* notes 156–57 and accompanying text.
204. *See* 29 U.S.C. § 158.

courts have applied to freedom of religion questions. At the same time, however, these doctrinal changes allowed courts and scholars to approach the *Catholic Bishop* problem in novel ways. While analyzing the strengths and weaknesses of these approaches, this note determined that the Religion Clauses do not warrant a per se rule prohibiting labor relations boards from vindicating the collective bargaining rights of lay teachers at religious schools. Instead, Congress should amend the NLRA by incorporating into the Act a robust framework for addressing the peculiar features of the *Catholic Bishop* problem. Such an amendment would promote the purposes of the NLRA as well as the guarantees enshrined in the First Amendment. In doing so, this framework would avoid sacrificing lay teachers' freedom of association rights at the altar of their employers' free exercise rights.