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NLRB v. Catholic Bishop: Lay Teachers Seek More Than Good Shepherd to Protect Their Rights

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NLRB v. Catholic Bishop: Lay Teachers Seek More Than Good Shepherd to Protect Their Rights

In *NLRB v. Catholic Bishop*,[1] the Supreme Court, in a 5-4 decision, held that coverage of the National Labor Relations Act (NLRA)[2] does not extend to lay teachers employed by church-operated schools which include both religious and secular subjects in their curriculums.[3] As will be seen, this conclusion was reached not on traditional first amendment analysis, but instead on narrow statutory construction.

Prior to the decision in *Catholic Bishop*, the National Labor Relations Board (Board) had long wrestled with jurisdictional issues pertaining to nonprofit educational institutions. The 1951 decision in *Trustees of Columbia University*[4] made firm the Board's choice to refuse jurisdiction over these institutions. However, in 1970, the Board overruled *Columbia*, and in *Cornell University*[5] held that the policies of the NLRA would best be effectuated by asserting jurisdiction over nonprofit institutions of higher education.[6]

In 1974, the issue arose again, this time as applied to secondary schools. In *Henry M. Hald High School Association*,[7] the Board asserted jurisdiction over a system of Catholic high schools in the Archdiocese of Brook-

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

2. The present National Labor Relations Act, 29 U.S.C. §§ 151-169 (1976), had its beginning with the National Labor Relations (Wagner) Act, Pub. L. No. 198, 49 Stat. 449 (1935). The 1935 Act was amended by the Labor Management Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, 61 Stat. 136. The Act was further amended by the Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519. A final amendment was the Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395. All subsequent references will be to "the NLRA" unless otherwise specified.

3. 440 U.S. at 507.

4. 97 N.L.R.B. 424, 29 L.R.R.M. 1098 (1951).

5. 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970).

6. *Id.* at 334, 74 L.R.R.M. at 1271. *Cornell* was decided on the basis of the substantial effect that colleges and universities exerted on commerce. The Act seeks to protect the flow of commerce for reasons stated in § 2 of the Landrum-Griffin Act (current version at 29 U.S.C. § 151 (1976)). The Board also discussed whether the term "employer" as found in § 3(e) of the Landrum-Griffin Act (current version at 29 U.S.C. § 152(a) (1976)), applied to educational institutions. The Board also noted that the statute did not specifically exempt educational institutions from jurisdiction. 183 N.L.R.B. at 334, 29 L.R.R.M. at 1271.

7. 213 N.L.R.B. 415, 87 L.R.R.M. 1403 (1974).

lyn. However, the issue was not decided on the basis of the first amendment, but instead on the findings of the Administrative Law Judge that neither the NLRA nor the Constitution required lay teachers employed by a religious institution to surrender their rights of self-organization.[8]

A more flexible standard was formulated in *Roman Catholic Archdiocese of Baltimore*,[9] in which the Board announced its intention to decline jurisdiction over only those schools which were completely religious, and not merely religiously associated.[10] The test proved to be unsatisfactory, although it was used by the Board to assert jurisdiction in *Catholic Bishop*,[11] its companion case,[12] and at least one other decision.[13]

The *Baltimore* test was the predominant standard for determining the validity of the Board's jurisdiction when, in 1974 and 1975, petitions for representation were filed with the Board by union organizations interested in representing lay teachers at two separate groups of Catholic high schools.[14] One group, operated by the Catholic Bishop of Chicago, consisted of Quigley North and Quigley South, two private religiously oriented high schools. These schools described themselves in their catalogues as metropolitan, contemporary, and college preparatory high schools. Admissions were open to students who, in the opinions of their parish priests, had "the kind of character, ability and temperament which might lead to the personal discovery of a vocation in the priesthood."[15] The other group of schools, the Diocese of Fort Wayne-South Bend, consisted of five high schools. These schools were also religiously oriented, and had compulsory religion requirements in their curriculums.

The employers in each group contended that the schools failed to meet the jurisdictional criteria of the NLRA, since no single school had gross income of over one million dollars.[16] This argument was rejected by the

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8. 213 N.L.R.B. at 418 n.7. The right to self-organization is set forth in 29 U.S.C. § 157 (1976), which describes employees' rights, including rights to organize, to join a union, to bargain collectively, and to engage in concerted activities for mutual aid and protection.

9. 216 N.L.R.B. 249, 88 L.R.R.M. 1169 (1975).

10. *Id.* at 250.

11. 220 N.L.R.B. 359, 90 L.R.R.M. 1225 (1975).

12. Diocese of Fort Wayne-South Bend, Inc., No. 25-RC-5984 (NLRB, ___, 1975) (order granting certification).

13. Archdiocese of Philadelphia, 227 N.L.R.B. 1178, 94 L.R.R.M. 1719 (1977).

14. Catholic Bishop, 220 N.L.R.B. 359, 90 L.R.R.M. 1225 (1975); Diocese of Fort Wayne-South Bend, Inc., No. 25-RC-5984 (NLRB, ___, 1975).

15. 220 N.L.R.B. at 359, 90 L.R.R.M. at 1225.

16. The definitions of "commerce" and "affecting commerce" in § 2(6) and (7) (29 U.S.C. § 152(6),(7) (1976)) have been further clarified by the NLRB in 29 C.F.R. § 103.1 (1979), which states:

> The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, be-

Board, which considered each group of schools to be an "integrated enterprise" whose operating budgets totaled over one million dollars. The Board held that the NLRA's jurisdictional requirement that the schools affect commerce was satisfied, and accordingly ordered union elections in each case.[17]

The Board brushed aside the employers' contentions that this would constitute an improper entanglement of church and state, relying on the "completely religious/merely religiously associated" distinction enunciated in *Baltimore*. The Board refused to classify the schools as completely religious, despite the employers' contentions that they were "minor seminary schools."[18]

The Board-ordered elections were subsequently held and bargaining units were certified for the lay teachers at each group of schools. However, because the schools refused to recognize the unions, the unions filed unfair labor practice complaints with the Board, alleging violations of sections 8(a)(1) and 8(a)(5) of the Act.[19] The Board, in two substantially similar opinions,[20] granted summary judgments to the unions and ordered the schools to bargain collectively with the unions, as well as to cease their unfair labor practices. The employers contended that the Board had failed to address itself fully to the constitutional issues raised in the petition for representation. The Board rejected that argument by pointing out that its previous decision had ascertained that the schools were not completely religious, but merely religiously associated, thus falling within the Board's jurisdiction.[21]

The employers appealed to the Court of Appeals for the Seventh Circuit, which denied enforcement of the Board's orders.[22] The court held that the distinction between "completely religious" and "merely religious" schools, set forth in *Baltimore* and perpetuated by the Board in its order to the employers, provided "no workable guide to the exercise of discretion."[23] The determination that an institution is so completely reli-

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cause of limitation by the grantor, are not available for use for operating expenses) of not less than $1 million.

17. 220 N.L.R.B. at 360, 90 L.R.R.M. at 1226.

18. 220 N.L.R.B. at 359, 90 L.R.R.M. at 1225.

19. 29 U.S.C. § 158(a)(1), (5) (1976).

20. Catholic Bishop, 224 N.L.R.B. 1221, 92 L.R.R.M. 1553 (1976); Diocese of Fort Wayne-South Bend, Inc., 224 N.L.R.B. 1226, 92 L.R.R.M. 1550 (1976).

21. 224 N.L.R.B. at 1222, 92 L.R.R.M. at 1553. The Board further justified its decision on the basis of Cardinal Timothy Manning, 223 N.L.R.B. 1218, 92 L.R.R.M. 1114 (1976), in which the Board held that "regulation of labor relations does not violate the First Amendment when it involves a minimal intrusion on religious conduct and is necessary to obtain that objective." 224 N.L.R.B. at 1218.

22. Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977).

23. *Id.* at 1118.

gious that it excludes any significant secular elements would implicate questions in the area of tradition and faith, and the court therefore declined to make that determination. It implicitly rejected the *Baltimore* test.[24]

The court of appeals determined that the Board's jurisdiction would interfere with the religious character of the schools in several areas. The primary certification itself would call for an investigation which would require the Board to consider the religious nature of the institution.[25] The requirement that the Bishop consult with the lay faculty's representative would diminish his power to guide the school along the religious paths he might deem proper.[26] Additionally, the Board would be forced to consider any unfair labor charge and to decide the extent to which religious considerations influenced the employer's decision to engage in a particular labor practice. This procedure would be costly and lengthy, and the court felt that the employer would tailor his conduct and decisions to steer wide of the zone of impermissible conduct, further interfering with his religious beliefs as to how the school should be operated.[27]

The Supreme Court granted certiorari to consider whether the Board's jurisdiction extended to the situation in which a church-operated school taught both secular and religious subjects, and whether that jurisdiction would violate the guarantees of the religion clauses of the first amendment.[28] The majority opinion, written by Chief Justice Burger, traced the development of the Board's jurisdiction over nonprofit educational insti-

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24. *Id.* For an excellent statement of the law's status prior to the Supreme Court's decision in *Catholic Bishop, see* McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978), decided after the Seventh Circuit decided *Catholic Bishop*. The court granted a preliminary injunction restraining the NLRB from asserting jurisdiction over a parochial school, rejecting the *Baltimore* test and using the three step test used in analyzing first amendment free exercise claims:

> First, it must be determined that a legitimate religious belief is held by the Plaintiff or under the facts . . . that the religious school . . . is pervasively religious. Second, inquiry must be made whether the free exercise rights of the Plaintiff would be either burdened or inhibited by the exercise of jurisdiction by the NLRB. Last, if an affirmative answer is arrived at by the second inquiry, the government must show that the burdening of rights is justified by a compelling state interest.

Id. at 1351. *See also* Wisconsin v. Yoder, 406 U.S. 205 (1972).

25. 559 F.2d at 1123. Procedure for certification of a bargaining unit is set out in 29 U.S.C. § 159 (1976).

26. 559 F.2d at 1123.

27. *Id.* at 1124. *See* Caulfield v. Hirsch, 95 L.R.R.M. 3164 (2d Cir. 1977), holding that application of the Act to parochial elementary schools violated the free exercise clause of the first amendment. The court found that there was a burden on the employer's freedom to exercise his religious beliefs, and that the governmental interest was not sufficiently compelling to endanger individual rights. *Id.* at 3178.

28. NLRB v. Catholic Bishop, 434 U.S. 1061 (1978).

tutions and ascertained that the Board had a policy of asserting jurisdiction over all such institutions, whether secular or religious, which met its jurisdictional criteria.[29]

The Court first considered whether an assertion of jurisdiction would create an "impermissible risk of excessive governmental entanglement in the affairs of . . . church-operated schools."[30] It cited three of its recent decisions which held that certain legislative controls on church-operated schools were impermissible.[31] The Court found that Board controls over collective bargaining would be equally offensive. Regulation of this type would necessarily result in orders and rulings which would conflict with the religious mission of the school. Additionally, the process of inquiry leading to its findings might of itself impinge on first amendment rights of free exercise.[32] A final consequence of the Board's jurisdiction would be the duty of the Board to determine mandatory subjects of bargaining under the NLRA.[33] This would place the religiously oriented institution in the position of being forced to prove that its policies and actions were based on religious requirements and were not "conditions of employment." The Board, on the other hand, would be placed in the equally awkward position of deciding whether in fact the school was operating from a religious motivation.

The Court then turned to the question of whether the Act was intended to cover church-operated schools. It is an established judicial principle that if possible an act of Congress should be construed so as to avoid any constitutional violation.[34] Therefore, the Court examined existing case law for examples of standards of construction. It determined that an "affirmative intention of the Congress clearly expressed"[35] must be found in order to conclude that legislation was meant to apply to a particular area.[36] Since no language on the face of the statute could be termed an affirmative intention clearly expressed, the Court examined the legislative

29. 440 U.S. at 497.

30. *Id.* at 501.

31. Wolman v. Walter, 433 U.S. 229 (1977) (invalidating state loans of instructional materials, use of state funds for commercial transportation, and use of state school buses, by parochial schools); Meek v. Pittenger, 421 U.S. 349 (1975) (invalidating state loans of instructional materials of a secular nature to nonpublic schools); Lemon v. Kurtzman, 403 U.S. 602 (1971) (invalidating state attempts to subsidize the costs of parochial school education).

32. 440 U.S. at 502. 29 U.S.C. § 161 (1976) details the investigatory procedure. *See* the appendix to the opinion quoting the examination of the Director of Quigley North by the Hearing Officer. It was included to illustrate the sensitivity of this inquiry process. 440 U.S. at 507-08.

33. 29 U.S.C. § 158(d) (1976).

34. *See* Murray v. The Charming Betsy, 6 U.S. 64 (1804).

35. 440 U.S. at 500.

36. *Id.*

history of the NLRA.

The NLRA was enacted in 1935 to protect the rights of the American worker to engage in collective bargaining. Congressional emphasis was placed on industry and industrial employees,[37] and no mention was made of church-operated schools. In 1947, the scope of the term "employer" as found in the 1935 Act was examined when the Labor-Management Relations Act was passed.[38] At that time, Congress amended the term to exclude nonprofit hospitals, since Congress deemed that these institutions did not affect commerce.[39] However, in 1974 the exemption was removed;[40] the Board contended that the amendment implied that Congress also approved the Board's assertion of jurisdiction over church-operated schools. The Court found this argument to be invalid, however, because the amendment was passed in 1974, *before* any of the controversial cases concerning the Board's exercise of jurisdiction over that type of school were decided.[41] Obviously, the legislature could not have been expressing an intention on an issue which had not yet arisen. Thus, in the absence of "an affirmative intention of the Congress clearly expressed," the Court concluded that the word "employer" as found in the NLRA was not intended to cover church-related schools.

Having determined that the NLRA was not intended to extend to religiously operated schools, the Court did not feel justified in basing its opinion on the employers' claim that Board jurisdiction would create impermissible entanglement between church and state, and therefore violate the religion clauses of the first amendment. By employing statutory construction, the Court was able to avoid construing the NLRA "in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion

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37. The Wagner Act of 1935, Pub. L. No. 198, § 1, 49 Stat. 449 (current version at 29 U.S.C. § 151 (1976)), provides:

> 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 and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

See also, 79 Cong. Rec. 7573 (1935) (remarks of Sen. Wagner), 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, AT 2341-43 (1949).

38. Labor Management Relations Act of 1947, Pub. L. No. 101, § 101, 61 Stat. 136. The term "employer" was originally defined in the National Labor Relations Act of 1935, Pub. L. No. 198, § 2(2), 49 Stat. 449.

39. 440 U.S. at 505. *See* H.R. REP. No. 245, 80th Cong., 1st Sess. 12 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess., *Reprinted in* [1947] U.S. CODE CONG. & AD. NEWS 1135.

40. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395.

41. 440 U.S. at 505-06.

Clauses."[42]

The dissent disagreed with the majority's interpretation of the legislative history of the NLRA.[43] Specifically, it found fault with the Court's requirement that a clear expression of affirmative intent be found before a statute may be construed to include a particular category of subjects.[44] The dissent pointed out that examples of clear legislative intent are infrequent in general statutes and noted the inconsistencies between the "clear expression" test[45] and the test set forth in *Machinists v. Street*:[46]

> When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided.[47]

The dissent contended that the "affirmative expression" rule served to release the "brake against wholesale judicial dismemberment of congressional enactments,"[48] and instead chose to adopt the "fairly possible" test of *Machinists*.

The Court's construction of the statute, the dissent argued, was not fairly possible. The term "employer" is defined in section 2(2) of the NLRA:

> The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.[49]

The dissent argued that to add another exception for church-related schools would not be to construe the provision, but rather to amend it.[50] The dissent found that the legislative history of the NLRA led to the conclusion that it was never intended to exclude religiously operated

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42. *Id.* at 507.
43. *Id.* at 508 (Brennan, J., dissenting).
44. *Id.* at 509.
45. *Id.* The clear expression test was first articulated in McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21-22 (1963). The dissent criticized the majority's reliance on the case, saying that *McCulloch* was decided in the face of an abundance of *contrary* legislative history, whereas in *Catholic Bishop* there was *no* contrary legislative history.
46. 367 U.S. 740 (1961).
47. *Id.* at 749 (emphasis added).
48. 440 U.S. at 511 (Brennan, J., dissenting).
49. 29 U.S.C. § 152(2) (1976).
50. 440 U.S. at 511.

schools as employers.[51]

Since the dissent concluded that the NLRA was intended to extend to lay teachers in the church-operated schools, it contended that the Court should have reached the constitutional issue. Instead, the Court chose to "avoid it by a cavalier exercise in statutory interpretation which succeeds only in defying congressional intent."[52]

The Supreme Court's decision in *Catholic Bishop* came at a time when guidance was needed in the area of Board jurisdiction over lay teachers at parochial schools. Thus, the decision should be accorded a critical look to examine the standard which the Court articulated.

The problem facing the Court was to decide whether the government's interest in protecting the freedom of lay teachers to form unions for mutual aid and protection[53] should be allowed to override the religious freedoms of the employer schools. The Court spent considerable time discussing the consequences of permitting the Board to assert jurisdiction,[54] and pointed out the specific areas in which Board procedures would infringe on the religious rights of the institution.[55] However, despite its lengthy discussion of the first amendment problems, the Court did not decide the case on a constitutional basis. It chose instead to resolve the issue by statutory interpretation.

The requirement that a case be decided on a statutory basis if possible seems to be sound. It forces the Court to make the narrowest decision possible, thus precluding any judicial influence on related areas in which a constitutional precedent not only would be unnecessary but also might be restrictive. Although the determination to seek a solution by statutory interpretation was proper, the result reached by the Court is somewhat tenuous. The Court adopted the "clear intention affirmatively expressed" test.[56] Finding no expression on the face of the statute, it turned to the legislative history of section 2(2); here the Court did some rather creative analysis. It reasoned that since there was no affirmative mention of the application of the NLRA to religiously oriented schools in that history, the NLRA was not intended to include them. This logic is the type that would force Congress to be tediously specific in drafting its statutes. As a result, in many situations to which the statute ought to apply, individuals

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51. *Id.* at 517. The dissent relied on H.R. REP. No. 1051, 93d Cong., 2d Sess. 4 (1974), which stated that "the only broad area of charitable, eleemosynary, educational institutions wherein the Board does not now exercise jurisdiction concerns the nonprofit hospitals, explicitly excluded by section 2(2) of the Act."

52. 440 U.S. at 518 (Brennan, J., dissenting).

53. 29 U.S.C. § 151 (1976).

54. 440 U.S. at 497-99, 501-04.

55. *See* text accompanying notes 31-33.

56. *See* note 45 *supra*.

would be denied its protection because it was too narrow.

The Court's consideration of the NLRA's legislative history is further weakened by the fact that the issue of Board jurisdiction in church schools did not arise until after the most recent development in the legislative history of section 2(2). Thus, the Court's arguments by analogy do not have great force, since there is no evidence at all that Congress ever had the situation in mind. Indeed, the House Report which extended Board jurisdiction to nonprofit hospitals seems to indicate that if Congress *had* considered the matter, it would have granted jurisdiction to the Board.[57]

One aspect of the decision in *Catholic Bishop* is particularly noteworthy. The Court felt that the entanglement issue was important enough to discuss in depth and with great specificity, but yet went to great lengths to find a legislative expression that the schools should be excluded from Board jurisdiction. It appears that the Court felt that Board jurisdiction over these schools would implicate first amendment questions. A reluctance to address these issues may have led the Court to seek a statutory "escape" for which it might not have searched so diligently had there been no pressing first amendment questions.

The cases decided after *Catholic Bishop* are useful in pointing out the weakness in the decision. The most obvious conclusion is that *Catholic Bishop* did not succeed in resolving the uncertainty in the area. The Court's holding that the term "employer" as used in the NLRA does not extend to lay teachers in church-operated schools gives potential union organizers the opportunity to assert that, in any particular case, the school is not church-operated in the *Catholic Bishop* sense.

The Board used this tactic in *Bishop Ford*.[58] It claimed that the school in question was not church-operated, despite the fact that its trustees, administrators and faculty members were predominantly members of Catholic religious orders, because the board of trustees was not directly controlled by the Diocese. The appellate court denied jurisdiction, holding that the critical factor was the religious mission of the school,[59] and that the Court in *Catholic Bishop* had "employed the term 'church-operated' not in the restricted sense . . . but rather as a convenient method of characterizing schools with a religious mission."[60] This "religious mission" standard sounds suspiciously like the completely religious/religiously oriented test articulated in *Baltimore*. However, under *Baltimore*, a merely religiously oriented school would have been subject to Board jurisdiction, whereas the decision in *Bishop Ford* seems to suggest that a school with a

57. The report relied on was H.R. REP. No. 1051, *supra* note 51.
58. NLRB v. Bishop Ford Cent. Cath. High School, 623 F.2d 818 (2d Cir. 1980).
59. *Id.* at 823.
60. *Id.*

"religious mission" might *not* be subject to Board jurisdiction. Thus, the decision in *Bishop Ford* narrows the jurisdictional reach of the Board.

Naturally, the next inquiry must be into how religiously oriented a school must be in order to qualify as having a religious mission. The Board, in its certification process, will be forced to consider the religious nature of each school.[61] This inquiry will eventually lead to the Board's questioning the institution's religious beliefs, which was one of the very procedures the majority in *Catholic Bishop* felt was a potential first amendment intrusion. Thus, the Court's decision, viewed in light of the subsequent decision in *Bishop Ford*, seems to have forced a return to the potential constitutional violations objected to by the schools in the days before the issue was "settled" by the Supreme Court.

The Court in *Catholic Bishop* avoided reaching the first amendment infringement claims of the employer schools. However, if the approach taken in *Bishop Ford* is tested, the Court may be forced to face the constitutional issue. If this occurs, the Court may find guidance in the Title VII[62] area, in which first amendment problems similar to those found in *Catholic Bishop* arise. The cases illustrate that the EEOC has also had difficulty resolving the issue. *Dolter v. Wahlert*[63] dealt with the claim of a teacher at a Catholic high school that she had been fired as a result of sex discrimination. The court found an "affirmative intention clearly expressed" that Title VII should apply to sectarian schools,[64] and thus reached the constitutional issue. The court granted jurisdiction, distinguishing *Catholic Bishop* as involving an entire area, whereas the grant of jurisdiction to the EEOC in *Dolter* involved only one individual claim.[65]

In a second Title VII case, *EEOC v. Southwestern Baptist Theological Seminary*,[66] the EEOC sought to establish jurisdiction over a religious seminary, but the court held that such an assertion would infringe on the employer's free exercise of religion.[67] The court said that as the function of an institution becomes increasingly religious, the risk of impermissible entanglement becomes dramatically greater, and that because of South-

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61. 29 U.S.C. § 159 (1976).

62. "Title VII" refers to title VII of the 1964 Civil Rights Act, 42 U.S.C.A. § 2000e to 2000e-17 (West 1973 & Supp. 1979 & Supp. I 1980), covering equal employment opportunity. Section 2000e-4(a) created the Equal Employment Opportunity Commission, and § 2000e-4(g) provides that the Commission is empowered to enforce the provisions of Title VII.

63. 483 F. Supp. 266 (N.D. Iowa 1980).

64. *Id.* at 269. The court held that Title VII applied when the charge was one of *sex* discrimination, not one of *religious* discrimination.

65. *Id.* at 270 (citations omitted).

66. 485 F. Supp. 255 (N.D. Tex. 1980).

67. *Id.* at 260.

western's status as a seminary, the risk was too great to be avoided.[68] Obviously, these two Title VII cases relied on different standards; *Dolter* focused on the instant effects, while *Southwestern Baptist* considered the long range effects, holding that because the likelihood of intrusion was great, the EEOC should not assert jurisdiction.

It is difficult to perceive any significantly different aspect of entanglement between governmental protection of an employee's right to be free from unfair labor practices and protection of an employee's right to be free from unjust employment practices. Governmental intrusion in either area would raise the same types of entanglement problems, and it seems anomalous that a lay teacher at a Catholic high school may complain of sex discrimination, but not that her employer engages in unfair labor practices.

The Supreme Court's decision in *Catholic Bishop* is a strained one, at best. It decides the issue on a narrow statutory ground, the validity of which is questionable. A large part of the opinion is spent discussing a constitutional issue that the Court does not care to reach. Subsequent cases, in applying *Catholic Bishop,* have forced the Board and the courts to interpret the term "church-operated," a term which was undefined by the Supreme Court. This interpretation puts the courts squarely in the position in which they found themselves *before Catholic Bishop,* when the religiously oriented/completely religious test of *Baltimore* was employed. Additionally, for no apparent reason, the EEOC is allowed jurisdiction over religiously oriented schools in some cases while the NLRB is not. In short, it is extremely unlikely that the rule of *Catholic Bishop* will prove to be satisfactory. Further judicial or legislative action will be required to provide the necessary guidance in this unsettled area.

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68. *Id.*