NATIONAL LABOR RELATIONS BOARD v. CATHOLIC BISHOP OF CHICAGO

Supreme Court of the United States, 1979
440 U.S. 490

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

[The National Labor Relations Board (NLRB) exercised jurisdiction over lay faculty members at two groups of Roman Catholic high schools, certified unions as bargaining agents for the teachers, and ordered the schools to cease and desist their refusals to bargain with these unions.]

[The NLRB asserted jurisdiction based on its policy of declining jurisdiction only when schools are 'completely religious,' not 'religiously associated.' The NLRB found that the schools in the instant case were in the latter category, since secular as well as religious topics were taught in the schools.]

[The Court of Appeals denied enforcement of the NLRB order, and the Supreme Court affirmed. The Court first held that the NLRB distinction between schools that were 'completely religious' and those that were 'religiously associated' was not a workable guide for the exercise of the NLRB's discretionary jurisdiction. Recognizing that rejection of this distinction meant that the Board could extend its jurisdiction to all church-operated schools, the Court stated that the Free Exercise and Establishment Clauses of the First Amendment might preclude such an exercise of jurisdiction.]

IV

That there are constitutional limitations on the Board's actions has been repeatedly recognized by this Court even while acknowledging the broad scope of the grant of jurisdiction. The First Amendment, of course, is a limitation on the power of Congress. Thus, if we were to conclude that the Act granted the challenged jurisdiction over these teachers we would be required to decide whether that was constitutionally permissible under the Religion Clauses of the First Amendment.

Although the respondents press their claims under the Religion Clauses, the question we consider first is whether Congress intended the Board to have jurisdiction over teachers in church-operated schools. In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in Murray v. The Charming Betsy, 2 Cranch 64, 118 (1804), by holding that [HN1] an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available. Moreover, the Court has followed this policy in the interpretation of the Act now before us and related statutes.

In *Machinists v. Street,* 367 U.S. 740 (1961), for example, the Court considered claims that serious First Amendment questions would arise if the Railway Labor Act were construed to allow compulsory union dues to be used to support political candidates or causes not approved by some members. The Court looked to the language of the Act and the legislative history and concluded that they did not permit union dues to be used for such political purposes, thus avoiding "serious doubt of [the Act's] constitutionality." Id., at 749.

Similarly in *McCulloch v. Sociedad Nacional de Marineros de Honduras,* 372 U.S. 10 (1963), a case involving the Board's assertion of jurisdiction over foreign seamen, the Court declined to read the National Labor Relations Act so as to give rise to a serious question of separation of powers which in turn would have implicated sensitive issues of the authority of the Executive over relations with foreign nations. The international implications of the case led the Court to describe it as involving "public questions particularly high in the scale of our national interest." Id., at 17. Because of those questions the Court held that before sanctioning the Board's exercise of jurisdiction "'there must be present the affirmative intention of the Congress clearly expressed.'" Id., at 21-22 (quoting *Benz v. Compania Naviera Hidalgo,* 353 U.S. 138, 147 (1957)).

The values enshrined in the First Amendment plainly rank high "in the scale of our national values." In keeping with the Court's prudential policy it is incumbent on us to determine whether the Board's exercise of its jurisdiction here would give rise to serious constitutional questions. If so, we must first identify "the affirmative intention of the Congress clearly expressed" before concluding that the Act grants jurisdiction.

V

In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What was said of the schools in *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), is true of the schools in this case: "Religious authority necessarily pervades the school system." The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools. For example, in *Lemon, supra,* at 617, we wrote:

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

Only recently we again noted the importance of the teacher's function in a church school: "Whether the subject is 'remedial reading,' 'advanced reading,' or simply 'reading,' a teacher remains a teacher, and the danger that religious doctrine will become intertwined with secular instruction persists." *Meek v. Pittenger,* 421 U.S. 349, 370 (1975). Good intentions by government -- or third parties --

can surely no more avoid entanglement with the religious mission of the school in the setting of mandatory collective bargaining than in the well-motivated legislative efforts consented to by the church-operated schools which we found unacceptable in *Lemon,* [and *Meek*].

The Board argues that it can avoid excessive entanglement since it will resolve only factual issues such as whether an anti-union animus motivated an employer's action. But at this stage of our consideration we are not compelled to determine whether the entanglement is excessive as we would were we considering the constitutional issue. Rather, we make a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed.

Moreover, it is already clear that the Board's actions will go beyond resolving factual issues. The Court of Appeals' opinion refers to charges of unfair labor practices filed against religious schools. The court observed that in those cases the schools had responded that their challenged actions were mandated by their religious creeds. The resolution of such charges by the Board, in many instances, will necessarily involve inquiry into the good faith of the position asserted by the clergy-administrators and its relationship to the school's religious mission. It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.

The Board's exercise of jurisdiction will have at least one other impact on church-operated schools. The Board will be called upon to decide what are "terms and conditions of employment" and therefore mandatory subjects of bargaining. See 29 U. S. C. § 158 (d). Although the Board has not interpreted that phrase as it relates to educational institutions, similar state provisions provide insight into the effect of mandatory bargaining. The Oregon Court of Appeals noted that "nearly everything that goes on in the schools affects teachers and is therefore arguably a 'condition of employment.'" *Springfield Education Assn. v. Springfield School Dist. No. 19,* 24 Ore. App. 751, 759, 547 P. 2d 647, 650 (1976).

The Pennsylvania Supreme Court aptly summarized the effect of mandatory bargaining when it observed that the "introduction of a concept of mandatory collective bargaining, regardless of how narrowly the scope of negotiation is defined, necessarily represents an encroachment upon the former autonomous position of management." *Pennsylvania Labor Relations Board v. State College Area School Dist.,* 461 Pa. 494, 504, 337 A. 2d 262, 267 (1975). Inevitably the Board's inquiry will implicate sensitive issues that open the door to conflicts between clergy-administrators and the Board, or conflicts with negotiators for unions. What we said in *Lemon, supra,* at 616, applies as well here:

> "[Parochial] schools involve substantial religious activity and purpose.
>
> "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." (Footnote omitted.)

Mr. Justice Douglas emphasized this in his concurring opinion in *Lemon*, noting "the admitted and obvious fact that the *raison d'etre* of parochial schools is the propagation of a religious

faith."

The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. 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. We therefore turn to an examination of the National Labor Relations Act to decide whether it must be read to confer jurisdiction that would in turn require a decision on the constitutional claims raised by respondents.

VI

There is no clear expression of an affirmative intention of Congress that teachers in church-operated schools should be covered by the Act. Admittedly, Congress defined the Board's jurisdiction in very broad terms; we must therefore examine the legislative history of the Act to determine whether Congress contemplated that the grant of jurisdiction would include teachers in such schools.

In enacting the National Labor Relations Act in 1935, Congress sought to protect the right of American workers to bargain collectively. The concern that was repeated throughout the debates was the need to assure workers the right to organize to counterbalance the collective activities of employers which had been authorized by the National Industrial Recovery Act. But congressional attention focused on employment in private industry and on industrial recovery. See, *e. g.*, 79 Cong. Rec. 7573 (1935) (remarks of Sen. Wagner), 2 National Labor Relations Board, Legislative History of the National Labor Relations Act, 1935, pp. 2341-2343 (1949).

Our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools. It is not without significance, however, that the Senate Committee on Education and Labor chose a college professor's dispute with the college as an example of employer-employee relations *not* covered by the Act. S. Rep. No. 573, 74th Cong., 1st Sess., 7 (1935).

* * * *

The absence of an "affirmative intention of the Congress clearly expressed" fortifies our conclusion that Congress did not contemplate that the Board would require church-operated schools to grant recognition to unions as bargaining agents for their teachers.

The Board relies heavily upon *Associated Press v. NLRB,* 301 U.S. 103 (1937). There the Court held that the First Amendment was no bar to the application of the Act to the Associated Press, an organization engaged in collecting information and news throughout the world and distributing it to its members. Perceiving nothing to suggest that application of the Act would infringe First Amendment guarantees of press freedoms, the Court sustained Board jurisdiction. Here, on the contrary, the record affords abundant evidence that the Board's exercise of jurisdiction over teachers in church-operated schools would implicate the guarantees of the Religion Clauses.

Accordingly, in the absence of a clear expression of Congress' intent to bring teachers in church-operated schools within the jurisdiction of the Board, we decline to construe the Act 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 Clauses.

Affirmed.

DISSENT

MR. JUSTICE BRENNAN, with whom MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join, dissenting.

The Court today holds that coverage of the National Labor Relations Act does not extend to lay teachers employed by church-operated schools. That construction is plainly wrong in light of the Act's language, its legislative history, and this Court's precedents. It is justified solely on the basis of a canon of statutory construction seemingly invented by the Court for the purpose of deciding this case. I dissent.

I

The general principle of construing statutes to avoid unnecessary constitutional decisions is a well-settled and salutary one. The governing canon, however, is *not* that expressed by the Court today. The Court requires that there be a "clear expression of an affirmative intention of Congress" before it will bring within the coverage of a broadly worded regulatory statute certain persons whose coverage might raise constitutional questions. But those familiar with the legislative process know that explicit expressions of congressional intent in such broadly inclusive statutes are not commonplace. Thus, by strictly or loosely applying its requirement, the Court can virtually remake congressional enactments. This flouts Mr. Chief Justice Taft's admonition "that amendment may not be substituted for construction, and that a court may not exercise legislative functions to save [a] law from conflict with constitutional limitation." *Yu Cong Eng v. Trinidad,* 271 U.S. 500, 518 (1926).

The settled canon for construing statutes wherein constitutional questions may lurk was stated in *Machinists v. Street,* 367 U.S. 740 (1961), cited by the Court, *ante*

> "'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.' *Crowell v. Benson,* 285 U.S. 22, 62." Id., at 749-750 (emphasis added).

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

II

The interpretation of the National Labor Relations Act announced by the Court today is not "fairly possible." The Act's wording, its legislative history, and the Court's own precedents leave "the intention of the Congress . . . revealed too distinctly to permit us to ignore it because of mere misgivings as to power." Section 2 (2) of the Act, *29 U. S. C. § 152 (2)*, defines "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 organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization." (Emphasis added.)

Thus, the Act covers all employers not within the eight express exceptions. The Court today substitutes amendment for construction to insert one more exception -- for church-operated schools. This is a particularly transparent violation of the judicial role: The legislative history reveals that Congress itself considered and rejected a very similar amendment.

The pertinent legislative history of the NLRA begins with the Wagner Act of 1935, 49 Stat. 449. Section 2 (2) of that Act, identical in all relevant respects to the current section, excluded from its coverage neither church-operated schools nor any other private nonprofit organization. Accordingly, in applying that Act, the National Labor Relations Board did not recognize an exception for nonprofit employers, even when religiously associated. An argument for an implied nonprofit exemption was rejected because the design of the Act was as clear then as it is now: "[Neither] charitable institutions nor their employees are exempted from operation of the Act by its terms, although certain other employers and employees are exempted." *Central Dispensary & Emergency Hospital,* 44 N. L. R. B. 533, 540 (1942) (footnotes omitted), enf'd, 79 U. S. App. D. C. 274, 145 F.2d 852 (1944). Both the lower courts and this Court concurred in the Board's construction.

* * * *

In construing the Board's jurisdiction to exclude church-operated schools, therefore, the Court today is faithful to neither the statute's language nor its history. Moreover, it is also untrue to its own precedents. "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest *jurisdictional* breadth constitutionally permissible under the Commerce Clause." *NLRB v. Reliance Fuel Oil Corp.,* 371 U.S. 224, 226 (1963) (emphasis in original). As long as an employer is within the reach of Congress' power under the Commerce Clause -- and no one doubts that respondents are -- the Court has held him to be covered by the Act regardless of the nature of his activity. Indeed, *Associated Press v. NLRB,* 301 U.S. 103 (1937), construed the Act to cover editorial employees of a nonprofit news-gathering organization despite a claim -- precisely parallel to that made here -- that their inclusion rendered the

Act in violation of the First Amendment. Today's opinion is simply unable to explain the grounds that distinguish that case from this one.

Thus, the available authority indicates that Congress intended to include -- not exclude -- lay teachers of church-operated schools. The Court does not counter this with evidence that Congress *did* intend an exception it never stated. Instead, despite the legislative history to the contrary, it construes the Act as excluding lay teachers only because Congress did not state explicitly that they were covered. In Mr. Justice Cardozo's words, this presses "avoidance of a difficulty . . . to the point of disingenuous evasion." *Moore Ice Cream Co. v. Rose,* 289 U.S., at 379.[11]

---

[11] Not even the Court's redrafting of the statute causes all First Amendment problems to disappear. The Court's opinion implies limitation of its exception to church-operated schools. That limitation is doubtless necessary since this Court has already rejected a more general exception for nonprofit organizations. See *Polish National Alliance v. NLRB,* 322 U.S. 643 (1944). But such an exemption, available only to church-operated schools, generates a possible Establishment Clause question of its own. *Walz v. Tax Comm'n,* 397 U.S. 664 (1970), does not put that question to rest, for in upholding the property tax exemption for churches there at issue, we emphasized that New York had "not singled out . . . churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations . . . ." *Id.*, at 673. Like the Court, "at this stage of [my] consideration [I am] not compelled to determine whether the [Establishment Clause problem] is [as significant] as [I] would were [I] considering the constitutional issue." It is enough to observe that no matter which way the Court turns in interpreting the Act, it cannot avoid constitutional questions.