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Civil Rights and Civil Liberties

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THE SEVENTH CIRCUIT decided civil liberties cases last year involving such diverse issues as immunity from suit,1 measure of damages,2 implied causes of action,3 housing discrimination,4 employment discrimination,5 rights of public employees,6 rights of prisoners,7 freedom of speech,8

* Assistant Professor of Law, The University of Chicago Law School. J.D., University of Chicago; member of the Illinois and Texas Bar. The diversity of the separate parts of this paper required me to seek advice from many of my colleagues. Andrew Greeley, Joseph Kattan, Stanley Katz, Philip Kurland, Bernard Meltzer, Antonin Scalia, and Geoffrey Stone provided helpful comments on all or parts of intermediate drafts. William McCready, Teresa Sullivan and David Tracy introduced me to the sociological and theological literature cited in the section on Catholic schools. Frank Lerman of the Massachusetts Institute of Technology introduced me to the political science literature cited in the section on municipal immunity. Paul Beach, Richard Deremer and Nancy Shurlow provided research assistance.


2. Crumble v. Blumthal, 549 F.2d 462 (7th Cir. 1977) (housing discrimination); Piphus v. Carey, 545 F.2d 30 (7th Cir. 1976), cert. denied, 98 S. Ct. 1042 (1978) (denial of hearing) (suspension from school).


6. Andre v. Board of Trustees of Maywood, 561 F.2d 48 (7th Cir. 1977), cert. denied, 98 S. Ct. 727 (1978) (residence requirement); Newcomb v. Brennan, 558 F.2d 825 (7th Cir.), cert. denied, 98 S. Ct. 513 (1977) (right to run for office) (policy making employee); COP v. City of Chicago, 547 F.2d 375 (7th Cir. 1977) (disciplinary procedures); Kaplan v. Corcoran, 545 F.2d 1073 (7th Cir. 1976) (right to patent).

7. United States ex rel. Sims v. Sielaff, 563 F.2d 821 (7th Cir. 1977) (parole revocation); Reddin v. Israel, 561 F.2d 715 (7th Cir. 1977) (effect of detainer); Hayes v. Walker, 555 F.2d 625
freedom to petition,\textsuperscript{9} freedom of religion,\textsuperscript{10} equal protection,\textsuperscript{11} due process,\textsuperscript{12} association with one’s family,\textsuperscript{13} 
\textbf{Younger} abstention,\textsuperscript{14} police brutality,\textsuperscript{15} res judicata,\textsuperscript{16} the effect of pardons,\textsuperscript{17} the right to travel,\textsuperscript{18} and the contract clause.\textsuperscript{19} Because civil rights and civil liberties is far too broad a field to meaningfully review in an article of reasonable length, only a few of the more important cases can be discussed. Cases concerning judicial immunity, municipal immunity, and church labor relations have been selected.

I. \textbf{JUDICIAL IMMUNITY—SPARKMAN v. MCFARLIN}

The traditional formulation of the limits of judicial immunity is poorly defined, ill-considered, and only slightly related to the policies underlying the immunity or to the results in actual cases.\textsuperscript{20} The normal statement of the rule has been that a judge is immune from liability for all judicial acts except

\begin{itemize}
  \item[(7th Cir.),] \textit{cert. denied}, 98 S. Ct. 491 (1977) (disciplinary hearing); Cox v. Benson, 548 F.2d 1186 (7th Cir. 1977) (probation revocation); French v. Heyne, 547 F.2d 994 (7th Cir. 1976) (free speech and equal protection); Aikens v. Lash, 547 F.2d 372 (7th Cir. 1976) (hearing before transfer).
  \item 10. Catholic Bishop v. NLRB, 559 F.2d 1112 (7th Cir. 1977), \textit{cert. granted}, 98 S. Ct. 1231 (1978).
  \item 12. United States ex rel. Sims v. Sielaff, 563 F.2d 821 (7th Cir. 1977) (parole revocation); United States v. Brugger, 549 F.2d 2 (7th Cir.), \textit{cert. denied}, 431 U.S. 919 (1977); Cox v. Benson, 548 F.2d 1186 (7th Cir. 1977) (grant of parole); Miller v. Carter, 547 F.2d 1314 (7th Cir. 1977), \textit{aff'd by an equally divided court}, 98 S. Ct. 786 (1978) (attack on irrebuttable presumption analysis); COP v. City of Chicago, 547 F.2d 375 (7th Cir. 1977) (police discipline); Aikens v. Lash, 547 F.2d 994 (7th Cir. 1976) (transfer of prisoners).
  \item 13. Drollinger v. Milligan, 552 F.2d 1220 (7th Cir. 1977) (grandparent).
  \item 14. \textit{Id.} (attack on condition of probation) (state defendant and her father-in-law).
  \item 15. Davis v. Murphy, 559 F.2d 1098 (7th Cir. 1977).
  \item 16. Grossgold v. Supreme Court of Illinois, 557 F.2d 122 (7th Cir. 1977) (challenge to disbarment).
  \item 17. \textit{Id.} (disbarment for pardoned conduct).
  \item 19. \textit{Id.}
  \item 20. My thinking on judicial immunity was stimulated by J.R. Block’s student paper, \textit{Judicial Immunity: History, Policy, and Recent Cases}, submitted in my seminar on governmental immunities. My views on immunity issues generally have been sharpened by conversations with Joseph Kattan.
those done in clear absence of jurisdiction. Judge Swygert, writing for the
Seventh Circuit in Sparkman v. McFarlin, applied a modified version
of this traditional formulation; he assumed that "jurisdiction" referred only to
subject matter jurisdiction. The resulting standard seemed to require immu-
nity for the defendant judge, but the Seventh Circuit managed to impose
liability.

While this article was being printed, the Supreme Court reversed,
accepting and relying on Judge Swygert's modification of the traditional
test. Unfortunately, neither court noticed that it was modifying, or at least
resolving a dispositive ambiguity in, the traditional formulation.

A. The Facts

Sparkman arose on motion to dismiss; the facts alleged are egregious.
Defendant McFarlin is the mother of plaintiff Linda Sparkman. In 1971,
when Linda was fifteen years old, McFarlin sought a court order authorizing
Linda's sterilization. McFarlin's attorney presented a document to defend-
ant Stump, an Indiana Circuit Court judge, entitled "Petition to Have Tubal
Ligation Performed on a Minor and Indemnity Agreement." The petition
includes McFarlin's affidavit that Linda is "somewhat retarded" and spends
nights with men, and that McFarlin cannot watch her all the time.

The state court petition and order are astonishing documents. Both
were apparently drafted by McFarlin's attorney; they are stapled together
with a blueback bearing his name and address. The order is typed at the
bottom of the second page of the petition. The petition has no case caption
naming parties and the court; the caption is of the sort used for affidavits.
The first two paragraphs of the petition set out the facts summarized above.
The fourth and last is an attestation clause. If the petition has any operative
legal language, it is the third paragraph, which reads as follows:

Said affiant does hereby in consideration of the Court [sic] of the
DeKalb Circuit Court approving the Tubal Ligation being per-
formed upon her minor daughter does hereby [sic] covenant and
agree to indemnify and keep indemnified and hold Dr. John Hines,
Auburn, Indiana, who said affiant is requesting perform said oper-
ation and the DeKalb Memorial Hospital, Auburn, Indiana,
whereat said operation will be performed, harmless from and
against all or any matters or causes of action that could or might
arise as a result of the performing of said Tubal Ligation.

23. The Office of the Clerk of the United States District Court for the Northern District of
Indiana, Fort Wayne Division, furnished copies of these documents. The order is set out in the
Seventh Circuit's opinion at 552 F.2d 174 n.1. Both documents are set out in the Supreme
Court's opinion at 98 S. Ct. 1102-03.
The order states:

I, Harold D. Stump, Judge of the DeKalb Circuit Court, do hereby approve the above Petition by affidavit form on behalf of Ora Spitler McFarlin, to have Tubal Ligation performed upon her minor daughter, Linda Spitler, subject to said Ora Spitler McFarlin covenanting and agreeing to indemnify and keep indemnified Dr. John Hines and the DeKalb Memorial Hospital from any matters or causes of action arising therefrom.

The order does not tell Linda to submit to sterilization, nor does it tell the doctor or the hospital to perform the sterilization. The order merely "approve[s] the petition," which does not expressly ask for anything. The use of consideration language suggests that the petition offers a contract, which the order accepts, but that is presumably an artifact of the incompetent draftsmanship; no consideration runs to the judge. The order seems more like a declaratory judgment than anything else, and that is the arguable intention of the parties. But the indemnity provisions suggest that the parties had some doubt as to whether the operation was legal even with the court's approval, which suggests that they did not consider it a declaratory judgment. That, together with the bizarre form of the petition and order, at least raises the possibility that these two documents had no legal effect whatsoever.

The order and petition bear the same date. Linda was not served; no guardian ad litem was appointed; no hearing was held; apparently, no medical evidence was submitted. Linda was told that she was being hospitalized for an appendectomy, and the sterilization was performed. In 1973 she married plaintiff Leo Sparkman, and in 1975 she learned what had happened to her. The Sparkmans filed a damage action against Linda's mother, her mother's lawyer, Judge Stump, the hospital, and the three doctors who participated in the operation. The only issue reached by the Seventh Circuit was whether Judge Stump is immune from suit.

B. The Seventh Circuit's Opinion

The court began by citing the two leading cases, Pierson v. Ray24 and Bradley v. Fisher25 for the rule that Judge Stump had absolute immunity unless he acted in clear absence of all jurisdiction. Next, the court stated that "jurisdiction" refers to jurisdiction over subject matter, implying that clear absence of jurisdiction over persons is irrelevant. Bradley can be read either to support or refute that conclusion;26 several courts have indicated in dicta that personal jurisdiction is required.27 Without discussion, the Seventh
Circuit resolved that question in a way which precluded easy resolution of the case. The court could have said that Judge Stump acted in clear absence of all jurisdiction over Linda, since no effort was made to serve her, and that therefore he is not immune to any suit by her. The Supreme Court also resolved this issue without ever seeing that it existed. It simply stated, without explanation, that subject matter jurisdiction is the test.\(^{28}\) Neither the majority nor the dissenters even noted that personal jurisdiction was lacking.

The Seventh Circuit sought to demonstrate that Judge Stump acted in clear absence of subject matter jurisdiction. The relevant statutes give Judge Stump’s court jurisdiction "in all cases at law and in equity whatsoever, and in criminal cases and actions for divorce, . . . of the settlement of decedents’ estates and of guardianships, . . . and . . . of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law on some other court, board or officer,"\(^{29}\) "in all cases in which a child is alleged to be delinquent, dependent or neglected [and] to determine the paternity of any child born out of wedlock, and to provide for the support and disposition of such child."\(^{30}\) The court ignored all but the first phrase of these jurisdictional grants, and said the test was whether McFarlin’s claim presented a case in law or equity.

Having said that, the court substantially ignored McFarlin’s claim and proceeded to analyze whether Judge Stump had authority to order sterilization.\(^{31}\) That is, the court shifted its focus from the claim to the result. This was an important shift, for it blurred the merits with the jurisdictional issue. Indeed, the court equated the two. It argued that Judge Stump had no jurisdiction to order sterilization because there was no statutory authorization and no precedent, and because it was not "a valid exercise of the power . . . to fashion new common law."\(^{32}\)

Apparently the court’s view was that if the result is sufficiently erroneous—if there is no authority at all for a judge’s order—then it is not merely an erroneous order, but an order entered without jurisdiction. But "jurisdiction" normally refers to the power to decide a case at all, not the power to decide it in a certain way.\(^{33}\) "[I]t is well settled that the failure to state a

\(^{28}\) 98 S. Ct. at 1104-05.

\(^{29}\) IND. CODE § 33-4-4-3 (1975) (quoted at 552 F.2d at 174 n.2).

\(^{30}\) IND. CODE § 33-12-2-3 (1975); see IND. CODE §§ 33-12-1-1, 33-12-2-1 and accompanying Compiler’s Note, and 33-12-2-2 (1975).

\(^{31}\) 552 F.2d at 174-75.

\(^{32}\) Id. at 175-76.

proper cause of action calls for a judgment on the merits and not for a
dismissal for want of jurisdiction. Whether the complaint states a cause of
action on which relief could be granted . . . must be decided after and not
before the court has assumed jurisdiction over the controversy.\textsuperscript{34}

The distinction is more than formal. The purpose of jurisdictional rules
is to allocate the power to decide. If one court dismisses a case for lack of
jurisdiction, the plaintiff remains free to seek relief in other courts, unhamp-
ered by res judicata. The dismissal means only that the plaintiff was in the
wrong court; the implication is that some other court can hear the claim.

But that is not at all how the Seventh Circuit used the word jurisdiction
in \textit{Sparkman}. It did not find that McFarlin was in the wrong court; it found
that no court in Indiana could approve Linda's sterilization. That conclusion
goes to the merits. The only effects of calling it jurisdictional are to reduce
the res judicata effect of refusals to approve sterilizations in Indiana, leaving
plaintiffs free to try again in other states, and, of course, to make Stump
liable. There are other authorities which confuse jurisdiction with the merits
in similar ways, but none justify the usage and few have escaped criticism.\textsuperscript{35}

In any event, it is unnecessary to decide the meaning of jurisdiction in
the abstract. The Indiana jurisdictional statute is written in conformity with
the usage advocated here. Its grant of jurisdiction over "all . . . causes,
matters and proceedings where exclusive jurisdiction thereof is not con-
ferred by law on some other court, board or officer,"\textsuperscript{36} is clearly intended to
avoid the anomaly posited by the Seventh Circuit—a claim over which no
tribunal has jurisdiction. Nor is there anything in the statute that suggests
there can be jurisdiction to deny a claim without there being jurisdiction to
grant it. The statute confers jurisdiction "in cases . . . and of . . . causes,
matters and proceedings,"\textsuperscript{37} nothing suggests that jurisdiction depends on
what the court does with the case, cause, matter, or proceeding.

\textsuperscript{34} Hagans v. Lavine, 415 U.S. 528, 542 (1974) (quoting with approval from Bell v. Hood,
327 U.S. 678, 682 (1946)).

\textsuperscript{35} See, e.g., Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 319 (1870) (unexplained dicta
that jurisdiction can refer to power to reach a particular result); Wade v. Bethesda Hosp., 337
F. Supp. 671, 673 (S.D. Ohio 1971) (same, in judicial immunity case); McGlasker v. Calton, 397
U.S. (13 Wall.) 335, 351-52 (1871) (dictum giving examples inconsistent with normal usage, but
stating that immunity would attach in each such example); Kattan, \textit{Knocking on Wood: Some
Thoughts on the Immunities of State Officials to Civil Rights Damage Actions}, 30 \textit{VAND. L.
REV.} 941, 959-62 (1977) (supporting much of Seventh Circuit's reasoning in \textit{Sparkman})
[hereinafter cited as Kattan]; Briley v. California, 564 F.2d 849, 856-58 (9th Cir. 1977) (follow-
ning Seventh Circuit's reasoning in \textit{Sparkman}); Ex parte Poresky, 290 U.S. 30, 32 (1933) (no
federal jurisdiction if federal claim obviously foreclosed by prior decision); Hagans v. Lavine,
(same); Bell v. Hood, 327 U.S. 678, 682-83 (1946) (same); 29 U.S.C. §§ 101-115 (1970) (Norris-
LaGuardia Act, accomplishing substantive ends of Congress in jurisdictional language).

\textsuperscript{36} \textit{IND. CODE} § 33-4-4-3 (1975).

\textsuperscript{37} \textit{Id.}
The Seventh Circuit alluded twice to a view of jurisdiction as depending on the nature of the case, but its analysis went to the result. The court first relied on an Indiana statute which authorized sterilization of institutionalized persons under specified circumstances and procedures, concluding that it "clearly negates jurisdiction to consider sterilization in cases not involving institutionalized persons and in which these procedures are not followed." The court did not consider the effect of other sterilization statutes, or of the statute providing that a parent can consent to "medical or surgical treatment" of a minor. Suppose McFarlin had requested a declaratory judgment that sterilization is "surgical treatment" within the meaning of this last statute and that so construed, the statute is constitutional. It would be absurd to say that the statute authorizing sterilization of institutionalized persons "clearly negates jurisdiction" over such a claim.

A.L. v. G.R.H. was very similar to that hypothetical case. In A.L., a mother sought a declaratory judgment that she had the right to have her son sterilized. The Indiana Appellate Court denied her request on the merits. Obviously there was jurisdiction; a request for declaratory judgment presents a case at law or in equity. And as noted, Stump's order looks more like a declaratory judgment than anything else. Judge Stump relied on A.L. to prove that he could consider sterilization, but the court found that A.L. undercut his position because the sterilization had been refused. Only by equating jurisdiction with the merits could the Seventh Circuit draw support from A.L.

The court also cited four cases from other jurisdictions, each holding that courts may not order sterilization without legislative authorization. Here the court disregarded its earlier suggestion (offered as an additional ground for rejecting Judge Stump's reliance on A.L.) that only opinions before Stump's order were relevant; two of its four cases came after his 1971 decree. It acknowledged In re Simpson, which supports Judge Stump's action, but found that case "questionable" in light of Wade v. Bethesda Hospital, announced after Stump's decision. The court failed to

39. 552 F.2d at 175.
43. Id. at 502.
44. 552 F.2d at 175.
47. 552 F.2d at 175 n.5.
note that *In re Simpson* relied on an otherwise unreported Maryland case, *Ex parte Eaton*.\(^{49}\) Moreover, in both of the pre-1971 cases relied on by the Seventh Circuit,\(^{50}\) the state courts exercised jurisdiction over the sterilization request but denied it on the merits.

Finally, the court said that Judge Stump's order was not "a valid exercise of the power . . . to fashion new common law."\(^{51}\) That can only mean that Stump's order was erroneous, for anything he did would have made new law. McFarlin's claim presented a case of first impression in Indiana; to approve sterilization, to disapprove, or even to find that he lacked jurisdiction, would make new law. The Seventh Circuit understandably disagreed with the law he made. But the issue is whether Judge Stump would have jurisdiction to consider the question if properly presented, and the answer is clearly yes. No other tribunal would have jurisdiction. Judge Stump's job would be to decide the question one way or the other on the merits, not to dismiss for want of jurisdiction and leave it forever in limbo, presenting an unresolved legal issue which no court could decide.

Of course, it is arguable that McFarlin's bizarre petition presented nothing to decide. A document with no named parties and no prayer for relief may be so unlike any normal pleading that it does not present a "case," or even a "matter," within the jurisdictional statute. The Seventh Circuit might plausibly have disposed of the case on that ground. That would have been much more defensible than the actual holding that Judge Stump had no jurisdiction to consider sterilization even if the issue were properly presented.

In reversing, the Supreme Court relied squarely on the distinction which the Seventh Circuit blurred; it held that Judge Stump had jurisdiction to consider McFarlin's petition even if he should have rejected it on the merits.\(^{52}\)

**C. The Traditional Policies**

Arguably, the foregoing analysis puts too much emphasis on the word "jurisdiction." Perhaps the best thing that can be said for the Seventh Circuit's opinion is that it really suggests a new test, and its only mistake is to try to make the new test fit under the old label. This new test would be that a judge is not immune when he clearly exceeds his powers, without regard to whether his error is jurisdictional, substantive, or procedural. There is much to be said in favor of such a test. But such a test would be hard to reconcile with the traditionally stated reasons for judicial immunity.

\(^{49}\) 180 N.E.2d at 208.


\(^{51}\) 552 F.2d at 175-76.

\(^{52}\) 98 S. Ct. 1105-06.
One such reason is that judges are required to decide all cases within their jurisdiction, including difficult cases, cases with high stakes, and cases with intense feeling on both sides.\(^{53}\) It would be unfair to require a judge to decide and then hold him liable in damages when he errs, or more precisely, when a second judge disagrees with him.\(^{54}\) Moreover, the public interest requires that a judge be free to exercise his own judgment, independently and without fear of liability.\(^{55}\) The Supreme Court has given so much weight to these factors that the immunity extends beyond good faith errors and protects corrupt or malicious decisions.\(^{56}\) Similarly, there is no liability for errors on the merits, even when the issue is "settled beyond question" by earlier decisions of the United States Supreme Court.\(^{57}\)

Whether the reasons offered for this absolute immunity actually justify it is a difficult separate issue. Except for prosecutors,\(^{58}\) officials of the executive branch have only qualified immunity. They are liable for their malicious acts,\(^{59}\) and also for any act which they "knew or reasonably should have known . . . would violate constitutional rights."\(^{60}\) Such officials as school board members,\(^{61}\) state hospital superintendents,\(^{62}\) prison administrators,\(^{63}\) and policemen\(^{64}\) are held responsible for knowing "settled, indisputable law"\(^{65}\) and "basic, unquestioned constitutional rights."\(^{66}\) It is hard to understand why judges and prosecutors are not required to know at least as much law as policemen. But that question must be put aside for lack of space; this analysis will accept the Supreme Court's basic policy judgments concerning judicial immunity.\(^{67}\)

The Seventh Circuit's opinion does not serve the announced policies. It


\(^{54}\) Yates v. Lansing, 5 Johns. 282, 297 (N.Y. Sup. 1810); Jennings, Tort Liability of Administrative Officers, 21 MINN. L. REV. 263, 272 (1937).


\(^{60}\) Id. at 322.

\(^{61}\) Id.


\(^{64}\) Foster v. Zeeko, 540 F.2d 1310 (7th Cir. 1976).


\(^{66}\) Id. at 322.

is impossible in principle to distinguish a judicial act in excess of authority from an ordinary judicial error. Every judge must determine in the first instance the extent of his own authority, and he may err in doing so. The Seventh Circuit's opinion suggests that requiring "clear" or "substantial" excess of authority is not enough to protect all good faith errors. At the time Judge Stump acted, there were available to him two decisions from other states consistent with his action and two inconsistent with it.\textsuperscript{68} In addition, there were statutes giving him power to order sterilization under at least some circumstances, and a statute authorizing parents to consent to surgical treatment of their children. If after full briefing by real adversaries Judge Stump had given the matter careful consideration and decided to follow the two decisions ordering sterilization, it would be hard to say he so clearly exceeded his authority that he should be held liable in damages for his error. Yet that is the basis of the Seventh Circuit's opinion.

Of course, Judge Stump did not carefully consider the issue. What makes his alleged conduct so reprehensible is not that he was wrong on the merits, but that he ignored any semblance of due process. Linda was not notified. No guardian ad litem was appointed. No one had a chance to argue that sterilization was beyond Judge Stump's power, or that Linda was not retarded, or that she should not be sterilized even if she were. Finally, Judge Stump did not notify Linda of his order. His failure to require that Linda be notified at any stage of the proceedings made it possible for the other defendants to carry out the sterilization without telling her what was happening.

Most importantly, Judge Stump's procedural omissions made it impossible for Linda to appeal. This is directly related to the other component of the justification for judicial immunity. Absolute judicial immunity is tolerable only because there is usually a way to correct a judge's errors without suing him. The remedy, of course, is to defend vigorously, make one's record, and appeal.\textsuperscript{69} Having made it impossible for Linda to pursue the normal remedy, Judge Stump is responsible for the fact that compensatory damages are the only remedy still available, and he should be liable for those damages.

In a paragraph near the end of the opinion, the Seventh Circuit relied on Judge Stump's "failure to comply with elementary principles of procedural due process,"\textsuperscript{70} but only as an alternate ground for finding lack of subject matter jurisdiction. The court said that "'[t]his kind of purported justice does

\textsuperscript{68} See text accompanying notes 45-50 supra.


\textsuperscript{70} 552 F.2d at 176.
not fall within the categories of cases at law or in equity . . . and was therefore taken without jurisdiction."

Obviously the Seventh Circuit felt locked into the Supreme Court's formulation of the judicial immunity rule as depending on jurisdiction. But the Court has never squarely addressed the question whether jurisdiction is the proper test, and it could reformulate the standard without overruling any of its earlier decisions. _Sparkman_ provided an opportunity for the Court to do so, but it refused the chance.\(^7\)

The clear absence of jurisdiction test is subject to all the problems of the clear excess of authority test explored above; as the Court has said, "some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction."\(^7\) The policies of preserving judicial independence and not penalizing good faith errors are as important with respect to jurisdictional questions as they are with respect to the merits. And it is just as hard to distinguish ordinary errors on jurisdictional questions from actions taken in clear absence of all jurisdiction.

The Supreme Court has offered only one example of an act outside the scope of immunity; in _Bradley v. Fisher_, the Court hypothesized that a judge with jurisdiction limited to probate matters would not be immune if he tried a criminal case.\(^7\) The Court has also suggested that it is impossible for a court of general jurisdiction to act in clear absence of subject matter jurisdiction,\(^7\) a dictum overlooked by the Seventh Circuit in _Sparkman_. Questions of personal jurisdiction are equally difficult. The complete failure to give notice that the action was pending makes _Sparkman_ an easy case for finding clear absence of jurisdiction over the person, but there are not many other examples.

The rule that a judge loses his immunity when he clearly exceeds his jurisdiction did not arise from any consideration of the policies underlying the immunity rule. Rather, it was apparently derived from a notion that when a judge exceeds his jurisdiction, he ceases to act as a judge; "his commission would afford no protection to him in the exercise of usurped authority."\(^7\) Because that idea so completely failed to serve the policies underlying the immunity, it was immediately modified by introducing the requirement that the absence of jurisdiction must be clear.\(^7\) But that is no

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71. _Id._
72. 98 S. Ct. 1106.
74. _Id._
75. _Randall v. Brigham_, 74 U.S. (7 Wall.) 523, 536 (1868).
77. _Id._ at 351-53.
substitute for reframing the rule to serve its purpose directly. The dangers of the present rule are illustrated by *Sparkman*; the Seventh Circuit surely would have written a better opinion if it had not felt compelled to frame everything it said in jurisdictional terms. The opinion it did write could result in good judges being afraid to make ground-breaking decisions, in bad judges being held liable for stupid but honest mistakes, and in litigants who never had a chance to defend or appeal being denied a damage remedy because the offending judge had subject matter jurisdiction. The Supreme Court’s reversal avoided the first two dangers, but it brought the third to fruition.

**D. A Rule Based on the Policies**

A rule derived from the policies underlying the immunity would focus not on jurisdiction, but on whether the judge accorded all parties an adequate opportunity for hearing and appellate review. At a minimum, a judge should be liable if he proceeds without proof of proper efforts to notify all parties, or if he proceeds without appointing a guardian ad litem for a minor or incompetent defendant, or if he imposes irreversible harm on a litigant before an appeal can be perfected, as in *Sparkman* and the cases where judges have physically assaulted litigants.\(^7\)\(^8\) Exceptions from the foregoing rules would have to be made in cases where judges act or purport to act pursuant to special procedural rules dispensing with notice, as in temporary restraining orders, attachments, and similar devices for granting temporary relief on an ex parte basis, and in class actions and other fiduciary litigation. Arguably, there should be liability for obviously unjustifiable reliance on a defaulting fiduciary.

The existence of exceptions means that the standard proposed does not furnish a bright line test. But the line-drawing problems under this standard do not have the same effect as the line-drawing problems under the jurisdiction and excess of authority tests. Those tests encourage judicial caution on substantive, jurisdictional, and procedural issues where the cautious approach will be right only part of the time; sometimes the bold decision is correct. Liability for exceeding jurisdiction or authority would introduce an unacceptable bias into decision-making.

By contrast, it is always wrong for a judge to grant permanent relief without efforts to notify the other litigants or their representatives. If the risk of liability causes judges to be more cautious about satisfying themselves that notice has been given, or insisting on scrupulous compliance with the rules and statutes governing notice, no harm has been done. Judges should

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78. Gregory v. Thompson, 500 F.2d 59 (9th Cir. 1974); Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972) (referee).
be independent in deciding cases after full opportunity for adversary proceedings, but they should not be free to independently dispense with that opportunity. A bias in favor of giving all litigants a chance to defend is quite acceptable.

A rule of liability for judicial action taken without permitting defense or appeal is directly related to the justifications for immunity. This is best demonstrated by considering the possible results of an appeal in *Sparkman*. A timely state appeal would have made the Seventh Circuit's analysis impossible. If the sterilization order had been reversed before surgery, the federal suit would never have been brought. If the Supreme Court of Indiana had affirmed, the decision would have authoritatively established that Judge Stump had jurisdiction and had decided the case correctly insofar as state law controlled. A federal defense could be raised on appeal to the Supreme Court of the United States, or on habeas corpus to the hospital, but the federal defense could not plausibly be characterized as jurisdictional.

Similarly, if a litigant is given a meaningful chance to defend and appeal and fails to use it, then he should be held barred by res judicata or failure to mitigate damages in any subsequent suit against the judge. Suits under section 1983 may be an exception to the federal res judicata statute; it is disconcerting to think that all opportunity for future exercise of a federal right could be lost through lack of diligence or through one erroneous decision by someone like Judge Stump. But however strong the argument for injunctive relief, damage actions against the judge raise stronger countervailing considerations. Since an appeal would normally protect him, either by correcting his error and eliminating damage, or by vindicating his judgment and eliminating liability, a judge should be entitled to insist that the appeal be taken. Thus, he should be liable for the long run effects of his judgments only when he culpably precludes defense or appeal. And when he does that, there is no reason to also consider whether he acted without jurisdiction.

Damages pending appeal, such as time in jail or time subject to an erroneous injunction, raise different considerations. Those damages would be irreparable under the test proposed here. A jurisdiction test could occasionally remedy such damages, but the cases reached by such a test would not necessarily be the grossest examples; the real problem is not lack of jurisdiction. A rule tailored to the problem would impose liability for orders in violation of clearly settled rights. That would require the overruling of

Pierson v. Ray,82 and consideration of the possibility raises basic policy questions beyond the scope of this discussion.83

Mr. Justice Stewart's dissent in the Supreme Court relied on the impossibility of appeal as one factor supporting his conclusion that Judge Stump's signing of the petition had not been a judicial act,84 a conclusion rejected by the majority.85 Justice Powell's dissent took a position quite similar to the one urged here. He argued that judicial immunity presupposed the possibility of relief elsewhere in the judicial system, and that Judge Stump had forfeited his immunity by precluding such relief.86 The majority did not even acknowledge his argument.

E. The Supreme Court Precedents

The rule proposed here is not inconsistent with the Supreme Court's prior holdings. Pierson v. Ray87 and Randall v. Brigham88 present little problem. In each, the defendant judge clearly had jurisdiction of both person and subject matter, heard both sides, and decided in due course.89 The proceedings in Randall were informally commenced, but the judge gave full opportunity to defend. There are references in both cases to jurisdiction as the test of immunity,90 and in Randall to malice and corruption as the test,91 but careful definition of the limits of immunity was not required in either case. Randall turned on whether judicial immunity should be recognized at all, and Pierson on whether the doctrine was repealed by section 1983.

Bradley v. Fisher92 is more difficult. Bradley was an attorney who allegedly insulted Judge Fisher during a trial and threatened to assault him; Bradley denied those allegations. At the conclusion of the trial, without notice, Fisher disbarred Bradley from his court.

Bradley sued, alleging that he had been disbarred from the Supreme Court of the District of Columbia. Fisher answered that the disbarment order extended only to the Criminal Court of the District of Columbia, which was a division of the Supreme Court. The Court first decided the case on this side issue, holding that Bradley was not disbarred from the Supreme Court of the District and therefore had not proved his complaint.93 Only then did

82. 386 U.S. 547 (1967); see note 57 supra.
83. See text accompanying notes 58-67 supra.
84. 98 S. Ct. at 1111. (Stewart, J., dissenting).
85. Id. at 1106-08.
86. Id. at 1111-12 (Powell, J., dissenting).
87. 386 U.S. 547 (1967).
88. 74 U.S. (7 Wall.) 523 (1868).
89. 386 U.S. at 553; 74 U.S. (7 Wall.) at 539-40.
90. 386 U.S. at 554; 74 U.S. (7 Wall.) at 535-37.
91. 74 U.S. (7 Wall.) at 535-37.
92. 80 U.S. (13 Wall.) 335 (1871).
93. Id.
the Court take up the immunity issue as an alternative ground for decision.

The Court found it well settled that Fisher was immune if he had jurisdiction. Several times the Court referred to jurisdiction over the subject matter, and once to "'jurisdiction of both subject and person.'"94 Some of the Court's examples of exceeding jurisdiction seem to be examples of errors on the merits which result in the judge exceeding his powers, but the Court said no liability would attach in those examples because they involved mere excess of jurisdiction, not clear absence of jurisdiction.95 The Court had no difficulty in concluding that every court had jurisdiction over the attorneys admitted to practice before it and had the power to disbar them.96 The Court then said that it was error to disbar Bradley without citing him to show cause why disbarment should not be entered. However, the Court continued:

But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.97

Bradley simply accepted earlier cases holding that clear absence of jurisdiction is the test for loss of immunity, without examining whether that should be the rule, or even carefully considering and defining what is meant by "'jurisdiction'". Certainly it does not furnish any general solution to judicial immunity questions. But its alternative holding that Fisher did not lose his immunity by failing to notify Bradley that disbarment was being considered is obviously relevant to Sparkman v. McFarlin. Indeed, the Supreme Court in Sparkman relied on the passage just quoted to support the proposition that even "'grave procedural errors'" do not affect immunity so long as there is jurisdiction. The easy answer is to say that that part of Bradley is old, only an alternative holding, and wrong, and that the Court should have disregarded it. But the Court was not required to go that far. Sparkman and Bradley are distinguishable in at least two important ways.

First, Bradley's references to jurisdiction over attorneys are ambiguous; they may refer to jurisdiction over the subject matter of attorney discipline, or to jurisdiction over the persons of attorneys, or both. Bradley can be read as suggesting that all attorneys submit to the continuing personal jurisdiction of each court that admits them to practice, or that Bradley submitted to the jurisdiction of Judge Fisher's court when he appeared before it for the trial out of which the alleged contempt arose. Under either of these views, notice that disbarment was being considered would not be

94. Id. at 352.
95. Id. at 351-52.
96. Id. at 356.
97. Id. at 357.
necessary to obtain jurisdiction, but only to assure procedural fairness. This reading would reconcile the paragraph quoted above with the earlier dictum that jurisdiction of both person and subject matter is required, and with a holding in Sparkman that Judge Stump is not immune because he never acquired jurisdiction over Linda's person. The Supreme Court never considered this possibility, because it never considered the lack of personal jurisdiction.

Second, the degree of procedural abuse in Bradley was much less than in Sparkman. Bradley was notified of the disbarment order, and unlike sterilization, it was not irreversible. Bradley was free to ask Judge Fisher to reconsider and to offer whatever denial, explanation, apology, or other defense he had. If disbarment orders had then been appealable, Bradley could have appealed. Appeal was not permitted, and review by mandamus was limited, but those limitations were not imposed by Fisher. The Court refused to decide in Bradley whether the disbarment was valid, or whether the attorney had some other remedy available to him in which he could deny the whole incident; it concluded only that suing the judge was not the remedy. Thus, the result in Bradley is not inconsistent with deciding Sparkman on the ground that Stump lost his immunity by making it impossible for Linda to either defend or appeal.

Affirming Sparkman on that ground would have gone far toward rationalizing the law of judicial immunity. It would have accounted for all the Court's decisions and reconciled the rule with the reasons given for the rule. But if the Supreme Court also felt bound by the traditional emphasis on jurisdiction, then it should have made clear that "jurisdiction" includes jurisdiction over the person. That would have led to affirmance in Sparkman and would reach many of the cases covered by the rule proposed here.

The Supreme Court did none of these things. It did not even think about them, despite Justice Powell's urgings. It simply applied its modified version of the traditional formulation in the broadest possible way. The result is an immunity with no meaningful limits—perhaps no limits at all for judges of courts of general jurisdiction. The result would apparently have been no different if Judge Stump had ordered Linda executed rather than sterilized; the Court went out of its way to say that "tragic consequences" were irrelevant except to the extent that their "controversial" nature increased the need for immunity.

98. Cf. Cooper v. Reynolds, 77 U.S. (10 Wall.) 308, 319 (1870) (levy of writ of attachment gives jurisdiction over property; failure to publish notice is error, but does not affect jurisdiction).
101. 98 S. Ct. at 1108.
Such conclusions follow from making immunity depend solely on subject matter jurisdiction. *Sparkman* squarely adopts the subject matter jurisdiction test, and it is hard to see how any future court could distinguish it away. But the test is adopted by assertion in a single sentence; the Court has still never attempted to explain why subject matter jurisdiction should be the test. One can at least hope that some future Court will consider itself free to take "the first opportunity . . . to fully explore and treat . . . in a written opinion"\(^{102}\) the relevance of personal jurisdiction to judicial immunity, and perhaps even the rest of the issues disposed of sub silentio in *Sparkman*.

II.

MUNICIPAL IMMUNITY—*McDonald v. Illinois*

A. The Issue

A second important immunity decision is *McDonald v. Illinois*.\(^{103}\) McDonald was convicted of murder and served two years in prison before being given a pardon based on innocence. He then filed suit against a large number of defendants. The district court entered dismissals or summary judgments for defendants on every claim. Most of these results were affirmed for failure to state a claim or in routine applications of various immunities.

Only one of McDonald’s claims was reinstated. He alleged that defendant Weil, former Superintendent of the Cook County Department of Corrections, had refused to allow McDonald’s attorney to photograph him shortly after his arrest. The photograph would allegedly have tended to corroborate McDonald’s somewhat improbable trial testimony that he had been robbed and beaten near the scene of the murder. This claim of interference with the right to counsel was remanded for trial of the merits and of any immunity defense.

The important issue was posed by McDonald’s claim against Cook County based on Weil’s alleged misconduct; this claim was dismissed. Some background is necessary to an understanding of the claim against the county. McDonald’s claim against Weil was brought under section 1983, which gives a cause of action against "any person" who, under color of state law, deprives another of a federal right. In 1961, the Supreme Court held that municipalities cannot be sued under this statute because they are not persons within its meaning.\(^{104}\) The decision went much further than the

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103. 557 F.2d 596 (7th Cir.), cert. denied, 98 S. Ct. 508 (1977).
legislative history on which it relied, but the result is settled and has been extended to include counties. Accordingly, the claim against Cook County was not based on section 1983.

Instead, McDonald sued Cook County directly under the fourteenth amendment, asserting an implied cause of action rather than one created by statute. Implied causes of action for constitutional violations were authorized by the Supreme Court in Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, a case involving federal agents and the fourth amendment. The Seventh Circuit applied Bivens to a fourteenth amendment claim against a unit of local government in Hostrop v. Board of Junior College District No. 515, where a college president was unconstitutionally discharged by the college board. There is some dispute whether Bivens should be extended to suits against local government, but Hostrop is in accord with the majority view on that issue, and it will be treated as settled in this discussion.

Despite Bivens and Hostrop, Judge Fairchild’s opinion for the Seventh Circuit approved dismissal of the claim against Cook County. Hostrop was distinguished on the ground that there, the unconstitutional act was committed by the governing board of the district, whereas McDonald sought to impose vicarious liability. The reasons given for this distinction were superficial; the major premises on which they rest were not stated. To analyze the opinion fairly, its hidden premises must first be identified.

The basic premise of this discussion is that a county’s corporate
existence must be treated as real. A county is not the same as its citizens, its officers, or its employees. Relationships between a county and its employees and officers should be analyzed in terms of agency law. Relationships between a county and its citizens should not be analyzed that way; those relationships depend on organic and constitutional law, and to consider the county as a common law agent of the citizenry can only create confusion. Whenever a county claims immunity from normal liability rules, it bears the burden of demonstrating that the public interest requires immunity. *McDonald* does not make a case for immunity from vicarious liability.

Indeed, the court's vicarious liability argument did not succeed in distinguishing *Hostrop*. Organizational liability is always vicarious, for the organization can only act through individuals authorized to act for it. In *Hostrop*, individual board members voted to fire the plaintiff. Those individuals did not pay any judgment; they were held personally immune. The district's liability for their act was vicarious. The *McDonald* opinion initially viewed *Hostrop* exactly that way. It said that *Hostrop* was different because "the responsibility of the entity arose directly out of the action of its governing board," thus clearly viewing the entity as vicariously liable for the acts of its board.

For purposes of determining liability, board members should be treated as the district's highest ranking agents. They are so treated under Illinois law. The Restatement of Agency draws a slight distinction in the analogous case of corporate directors, but the distinction is not relevant to vicarious liability.

**B. The County and Its Citizens**

However one characterizes board members, the primary question is whether there is a relevant factual difference between them and other county employees. Perhaps the court's major premise was that the less authority or responsibility a representative has, the more hesitant courts should be to hold a county responsible for his conduct. There is some intuitive appeal to the suggestion that it is fairer to hold taxpayers liable for the torts of an elected board than for the torts of a jailguard; the chain of responsibility may seem shorter and clearer. A politically appointed department superintendent such as Weil is more like the board than like a jailguard, but that raises only a line-drawing objection if a distinction between low and high ranking agents is accepted in principle.

111. Id.; 523 F.2d 569, 577-78.
112. 557 F.2d at 604 (emphasis added).
114. RESTATEMENT (SECOND) OF AGENCY § 14C and accompanying Comment a (1958).
However, such a distinction does not survive careful analysis. Much of the surface attractiveness of the distinction depends on disaggregating the entity to focus on taxpayers, and on equating taxpayers with voters. Both steps are misleading. Many taxpayers are ineligible to vote; corporations and non-resident property owners are the most notable examples. Thus, the group entitled to elect the board is not the same as the group required to finance the board's activities. Taxpayer control cannot be the rationale for entity liability.

Disaggregation would prove too much even if all taxpayers were voters. Except for the limited scope of mandamus, no individual voter has any right to control elected officials, and few have any significant power to persuade. Nearly half generally voted against each set of incumbents, and issues which attract the attention of lobbyists and letterwriters generally produce substantial division of opinion. If liability is to be disaggregated, then opponents of the incumbent board may plausibly claim exemption from their share, an obviously unworkable result. Even as a group, voters have no right to supervise government activities directly, and ballot box control is better suited to suggesting the general direction of policy than to preventing torts. 115

This lack of control undercuts the rule in McDonald. If a taxpayer's power to prevent torts by the board is negligible, it does not matter that he has even less power to prevent torts by the superintendent or by the guard. Since the taxpayer's power is negligible in each case, no viable distinction can be drawn. His share of the entity's liability is not based on his power to prevent the tort, but on his role in financing the entity. Efforts to assure fairness to him must focus on the political and fiscal structure of the entity, not on the liability rules.

Taxpayers' inability to prevent governmental torts might support an argument that they should not be liable for anything done at any level of government. But that highlights the fundamental error of looking behind the entity in the first place. Disaggregating the entity is inconsistent with the basic notion that all citizens are bound by government action without regard to individual views or responsibility. 116 Requiring citizens to pay for torts they oppose is no different from requiring them to obey laws they oppose,


fight in wars they oppose, or most analogously, pay for government services they cannot use and oppose for those who can.

C. The County and Its Employees

Analysis of government liability rules must proceed, at least initially, without regard to taxpayers and must focus on the entity itself. The law has long recognized that a county has a separate existence from the people who create or inhabit it. Indeed, one of the first effects of incorporating local governments was to make liability possible—to create an entity which could be sued.

If the entity and its activities are analyzed in terms of the policies of the respondeat superior doctrine, it is very difficult to distinguish high ranking officials from low ranking officials. Three related considerations underlie respondeat superior; each depends to some extent on the view that torts committed by servants in the course and scope of their employment are a cost of the master's business and should be internalized. The first consideration is that since servants carry out the master's business and he is entitled to the fruits of their labors, fairness requires that he also be responsible for the harm they cause in his behalf. The second is that since the master has the right to control his servants, efficiency requires that he be given an incentive to exercise that control in a way which will minimize the harm his servants cause. The third is that servants are likely to be insolvent, leaving innocent plaintiffs to bear the loss alone unless the master is liable. The first two reasons are built into the common law definition of master, so that respondeat superior never applies if they are not present. The third is reflected in the plaintiff's option to sue the servant and in the master's right to indemnity. The effect of the doctrine is to shift the risk of servant insolvency from plaintiff to master.

*McDonald* raises the question whether any of these reasons for respondeat superior liability apply more strongly to the county board than to the superintendent of corrections, or to lower-level employees generally. With respect to the first reason, the answer is easy. All the county's servants were hired to carry out its activities; it is as much entitled to benefit from the

121. *Id.* § 343.
122. *Id.* § 401 and accompanying Comment d.
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jailguard's labors as from the county board's. That consideration provides no distinction.

The third reason is also easy to analyze. An empirical question is raised, but it seems nearly certain that lower ranking servants are more likely to be rendered insolvent by a tort judgment than are higher ranking servants. Thus, the need to apply respondeat superior for deep pocket purposes is probably greater when low-level servants commit the tort; certainly this reason does not support *McDonald*.

The second reason for respondeat superior is more difficult to analyze, but does not change the conclusion. The point of the second reason is supervision. The need for supervision extends through the entire chain of command; indeed, it is plausible to argue that the need for supervision is greater at the lower levels.

But before this straightforward conclusion can be reached, it is necessary to sort out some problems at the top. It is obviously fictional, and arguably circular, to think of a county or any other corporation being encouraged to supervise its servants, when everything it does must be done through representatives, most of whom are servants. Financial incentives directed to a county must have their effect on persons with a financial stake in the county and on persons with fiduciary duties to the county. Of these, the most important are high-ranking servants—fiduciaries in positions of control. Respondent superior encourages the county board and other high officials to see that the entire chain of supervision works to prevent torts. The board itself is unsupervised, but if its members' personal immunities are broader than the county's immunities, then respondeat superior liability will add to their incentive not to commit torts themselves—assuming (as one must) that they take their fiduciary responsibilities seriously.

Thus, there is little reason to distinguish the board from the guard for liability purposes, and what distinction there is cuts against *McDonald*'s refusal to find liability rather than in favor of it. The law has not drawn any distinction; masters are responsible for the acts of all their servants. "Thus, . . . managers of great corporations are normally superior servants, differing only in the dignity and importance of their positions from those working under them. The rules for determining the liability of the employer for the conduct of both superior servants and the humblest employees are the same." Municipal corporations have not been a special case; courts have normally assumed that liability for torts of ordinary employees followed automatically once municipal immunity objections were eliminated.

123. 557 F.2d 604.
125. *Id.* § 220 and accompanying Comment a.
126. See, e.g., Workman v. New York City, 179 U.S. 552, 565 (1900); Holytz v. City of
D. The Seventh Circuit’s Opinion

The Seventh Circuit’s assessment of the need for vicarious liability mentioned only one of the three reasons underlying the normal rule—the need to give municipalities an incentive to supervise agents in a way which will minimize constitutional violations. But the court’s conclusion that vicarious municipal liability must be justified as a “judicially imposed prophylactic” analogous to the fourth amendment exclusionary rule does not follow. The exclusionary rule deters one wrong by inflicting another and does not give any rational measure of compensation. By contrast, municipal liability places losses on the entity in whose behalf they were incurred, and it is essential to compensation of innocent victims. It is unlikely that Weil will be able to pay a judgment which compensates McDonald for two years in prison, or that individual policemen or guards can pay for a beating.

In addition, individual defendants are protected by a set of personal immunities. These immunities are not derivatively available to masters, and their rationales do not support independent immunity for municipalities. Without municipal liability for the acts of municipal employees, there will be no viable remedy of any kind for the many types of constitutional violations that cannot be raised in defense of a criminal proceeding or effectively regulated by injunctions. By noting only one of the three policies underlying respondeat superior, the court considerably understated the case for it.

The court did offer some reasons for not applying respondeat superior. First the court said that the doctrine had not been applied under section 1983. That was factually incorrect, but more importantly, it was irrelevant. McDonald’s claim was not brought under section 1983, and as the court


127. 557 F.2d at 604.


130. See Damage Remedies, supra note 109, at 926-27, 955-58; Hundt, supra note 105, at 781-82.

noted, there have been few opportunities to apply respondeat superior under section 1983 because of the rule that municipalities are not persons who can be liable under it.\textsuperscript{132} There are cases deciding whether supervisors should be held liable for the acts of subordinates, and some judges have made the mistake of discussing those cases in terms of respondeat superior.\textsuperscript{133} But that is simply wrong; the doctrine makes masters liable, not higher ranking fellow servants,\textsuperscript{134} because only the master is entitled to benefit from the servant's labor. The supervisor cases have created some confusion,\textsuperscript{135} but they do not support \textit{McDonald}. The court also said that respondeat superior liability "would be out of harmony with the doctrine built up under § 1983, a drastic extension of the decided cases, and we are not persuaded of the existence of a sufficient need."\textsuperscript{136} This passage suggests that the court's major premise may have been quite simple: that it had historically been hard to sue governmental units for constitutional torts, and \textit{McDonald} had to show why his claim should be different. But the historical difficulties had nothing to do with respondeat superior; they derived from the technical definition of "person" under section 1983. That barrier to recovery was surmounted in \textit{Bivens} and \textit{Hostrop}. If the precedents were drastically extended, it occurred there. The question in \textit{McDonald} was not, "Can the county be a defendant?", a question to which the court's section 1983 analogy might have been relevant. Rather, the question was, "What rules apply to entities that can be defendants?"\textsuperscript{137} Thus, there was nothing new in \textit{McDonald}'s claim. Rather, the court shied away from a combination of settled elements. Causes of action for constitutional violations are settled law; respondeat superior is settled law; in the Seventh Circuit, municipal liability is settled law.

It follows that \textit{McDonald} should not have had to show any need for liability; the burden of persuasion should have been on the county to show its right to exemption from the pre-existing rules. That would place the normal arguments for general governmental immunity in their logical position. If the differences between public and private fiscal structures or the

\textsuperscript{132} 557 F.2d at 604.


\textsuperscript{135} \textit{See} Draeger \textit{v. Grand Central, Inc.}, 504 F.2d 142, 145-46 (10th Cir. 1974).

\textsuperscript{136} 557 F.2d at 604.

\textsuperscript{137} \textit{See} Hundt, \textit{supra} note 105., at 780-81.
need to protect the policy making process justify governmental immunity, it is not because such considerations negate the reasons for liability, but because they outweigh them. The county's argument must sound in confession and avoidance. It is only at this stage that concern for taxpayers becomes relevant to liability rules. Evaluation of these more general arguments is beyond the scope of this article. It is sufficient to note that they were not the rationale for *McDonald*, and probably could not have been in light of Illinois' failure to accord its counties general immunity from vicarious liability even under state law.\textsuperscript{138} Immunity from a federal cause of action is determined by federal law,\textsuperscript{139} but federal courts should not be impressed by a claim that counties need immunity broader than that accorded by the state that created them.\textsuperscript{140}

*McDonald* did suggest that *Hostrop* might be extended to hold municipalities liable for such acts of their employees as are "required by a policy adopted by the governing board."\textsuperscript{141} This suggestion should at least result in liability for enforcement of unconstitutional ordinances.\textsuperscript{142} That would fill a very important remedial gap, for at present injunctions against enforcement are hard to obtain,\textsuperscript{143} and without damage liability municipalities have no incentive to honor declaratory judgments of unconstitutionality.\textsuperscript{144}

But the suggestion is puzzling. Unlike most immunity rules, it would put a greater risk of liability on policy making than on routine administration. And it would have undesirable consequences. It would give municipalities an incentive to refrain from policy making and to let individual employees decide for themselves whether and how to honor constitutional rights. That would be exactly contrary to the law's normal incentive, implemented by the respondeat superior doctrine: masters are liable if they control or have the right to control the conduct of their servants.\textsuperscript{145} Municipalities should not be encouraged to abdicate their right to control employees on constitutional issues. The court should reconsider the vicarious liability issue en banc as soon as it arises in another case.

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\textsuperscript{140} Cf. Miller-Davis Co. v. Illinois State Toll Highway Auth., 567 F.2d 323, 330 (7th Cir. 1977) (weight given to state court decision that defendant agency was not the state for sovereign immunity purposes).

\textsuperscript{141} 557 F.2d at 604.

\textsuperscript{142} See Kattan, supra note 35, at 999.

\textsuperscript{143} See Steffel v. Thompson, 415 U.S. 452 (1974); Younger v. Harris, 401 U.S. 37 (1971); Laycock, supra note 80.

\textsuperscript{144} See generally Laycock, supra note 80, at 200-02.

\textsuperscript{145} RESTATEMENT (SECOND) OF AGENCY § 220(1) and accompanying Comment d (1958).
III.
REGULATION OF CHURCH LABOR RELATIONS—
CATHOLIC BISHOP v. NLRB

Catholic Bishop v. NLRB\(^\text{146}\) presented an enormously difficult question: whether the first amendment exempts religious schools from any duty to bargain collectively with teacher’s unions. This issue arose in 1974, when the National Labor Relations Board first asserted jurisdiction over religious schools.\(^\text{147}\) Since then, the Board and various Roman Catholic bishops have been in constant litigation.\(^\text{148}\) The Seventh Circuit was the first appellate court to decide the constitutional issue.

Catholic Bishop involved two unions of lay teachers at Roman Catholic schools in two dioceses. Each union won a Board-conducted certification election; each bishop refused to bargain; each union filed unfair labor practice charges. The Board found each bishop in violation of the National Labor Relations Act\(^\text{149}\) and ordered him to bargain, to cease interfering with employees’ rights under the Act, and to post the usual notices explaining those rights and promising not to violate them.\(^\text{150}\) The Seventh Circuit set aside the Board’s orders on the ground that they violated the religion clauses of the first amendment.\(^\text{151}\)

The result seems correct, at least under current Supreme Court authority, and it was reached for basically the right reasons. But much of the

\(^{146}\) 559 F.2d 1112 (7th Cir. 1977), \textit{cert. granted}, 98 S. Ct. 1231 (1978).

\(^{147}\) Henry M. Hald High School Ass’n, 213 N.L.R.B. 415, 415 n.2 (1973) [hereinafter the National Labor Relations Board will be referred to in the text as the Board].


\(^{149}\) 29 U.S.C. § 158(a)(5) and 158(a)(1) (1970) [Hereinafter referred to in the text as the NLRA].


opinion is disturbing, especially the way in which the court managed to offend Catholics while protecting their rights. This discussion will review several such troublesome aspects of the opinion, and then suggest a more general approach to the central issue. The analysis will be kept within manageable bounds by assuming that the relevant Supreme Court decisions are correct.

A. The Supreme Court Precedents

Controlling Supreme Court decisions indicate that when neutral regulation interferes with religious practice, the citizen's interest in continuing the religious practice must be balanced against the government's interest in regulation.\(^{152}\) Sometimes this balancing has led to the conclusion that the free exercise clause requires an exemption from regulation\(^{153}\) and sometimes not;\(^ {154}\) no clear standard has emerged. In the century since the first free


exercise challenge to regulation, the Courts’ balancing has become more explicit and more favorable to conscience-based claims for exemption. Concern has been expressed that such exemptions discriminate against non-believers, but the Court has never held that such an exemption violates the establishment clause. Internal church affairs are also protected from government interference. One line of cases prevents secular courts from reviewing the judgments of ecclesiastical courts; another limits state power to monitor the use of financial aid given to religious institutions for secular purposes.

Analysis of Catholic Bishop must draw on each of these lines of authority. The bishops sought exemption from neutral regulation, but not on the customary basis of conscientious objection to compliance. They did not claim that collective bargaining is immoral, but rather that it would interfere with internal church affairs.

B. The Seventh Circuit’s Opinion

Judge Pell’s opinion for the Seventh Circuit is not easily summarized. Indeed, another commentator’s understanding of the opinion differs significantly from the one offered here. Part of the problem is the ponderous

159. See 559 F.2d 1112, 1122-24; see also Parochial Schools, supra note 151, at 662-64.
160. Parochial Schools, supra note 151, at 637, 653-57.
prose; some of the meaning is irretrievably lost in ambiguity. More confusion arises from the court’s refusal to distinguish the free exercise clause from the establishment clause, and the refusal to state which clause the court relied on for which conclusions. This refusal was based on the court’s “belief that there has been some blurring” and that both clauses have “the identical purpose of maintaining a separation between Church and State.”

The fact that there has been some blurring does not justify obliteration of all distinctions. The effect of the court’s stated approach would be to substitute a separation clause for the existing free exercise and establishment clauses. But separation is not a sufficient principle of decision. As the court acknowledged, “total separation” is impossible. Additional principles must be brought to bear to decide which contacts between church and state should be permitted and which forbidden. With only a separation clause, the court would have to find or create such principles on its own; separate attention to the free exercise and establishment clauses is necessary to identify the concerns most important to the framers. Not surprisingly, there are elements of free exercise and establishment clause doctrine in the opinion. But the court’s failure to identify them as such creates uncertainty about the following summary of the court’s reasoning.

What appears to be the court’s main ground of decision, and the only ground which will be analyzed in depth here, can only be based on the free exercise clause. Teaching in Catholic schools, even in secular subjects, was held to be part of the religious mission of the church, subject to exclusive control by the bishops. The court said it would violate the religion clauses to force bishops to share this control with anyone else, such as a union. The court also said that the Board would inevitably have to decide questions of religious doctrine and become entangled in religious affairs, and this may have been intended as an independent ground. However, these comments appear to have been offered to support the main holding as against the Board’s contention that it could avoid interfering with episcopal control of religious matters.

There is nothing wrong with the main thrust of the court’s argument; it goes to the heart of the problem. But much is wrong with the tone of the argument and with its details. Every respondent in a small and very non-random sample of practicing Catholics was offended by the opinion, and especially by the following paragraph taken from Loraine Boettner’s *Roman Catholicism*:

161. 559 F.2d at 1131.
162. *Id.* at 1124.
163. *Id.* at 1120-22.
164. *Id.* at 1125-26.
165. L. BOETTNER, *ROMAN CATHOLICISM* 360 (1962) [hereinafter cited as BOETTNER].
In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.\footnote{166}

Whether that statement is true is an empirical question to which no sure answer is presently available. But the court cites no evidence in the record to support it, and there is little support for it in the few broadly based empirical studies of Catholic education.\footnote{167}

Even if the statement is denotatively true, it is a connotative disaster. "Slant," "propaganda," "indoctrinate," and "regimented" are loaded words; they put the alleged situation in the worst possible light. To base a decision on a suggestion that Catholic schools do not teach "Scripture truths" is for a secular court to take sides in debate among religious sects over the meaning of the Bible. And to suggest that those schools do not teach "Americanism" is to resurrect historic charges about Catholic patriotism that were supposed to have been buried with the election of John Kennedy in 1960. The insinuation that Catholics may not be loyal Americans is heightened by immediate contrast with the schools' purpose of making "loyal Roman Catholics."

It is obvious that the court took the quote from a concurring opinion by Mr. Justice Douglas\footnote{168} and never examined Boettner's book itself. Had it done so, it would have discovered that it was relying on an elaborate hate tract. Here are some of Boettner's other comments on Catholic education:

The record is clear that an undue proportion of the gangsters, racketeers, thieves, and juvenile delinquents who roam our big city streets come, not from the public schools, but from the parochial schools.\footnote{169}

Many American Catholic children are being taught by ignorant European peasants . . . Too often their teachers are nuns who know nothing of American democracy or American institutions,
who cannot speak grammatically even in their own tongue. . . . The need of private tutoring before they are able to meet matriculation requirements at standard colleges and universities is a common experience for Catholic students.\textsuperscript{170}

Add to this the fact that 90 percent of the teaching in the parochial school is done by brain-washed nuns and priests who throughout their lives are kept in a rigid mental straight jacket . . . under the absolute authority of one man, the bishop of the diocese . . . .\textsuperscript{171}

Another series of events to which we must call attention, which surely cannot be pure coincidence, is that of the assassination of three presidents of the United States, all three of whom were killed by Roman Catholics educated in parochial schools.\textsuperscript{172}

Boettner's views on Roman Catholicism generally are capsulized by the following: "Our American freedoms are being threatened today by two totalitarian systems, Communism and Roman Catholicism. And of the two in our country Romanism is growing faster than is Communism and is the more dangerous since it covers its real nature with a cloak of religion."\textsuperscript{173} These samples are representative of the book. She recommends that practicing Catholics not be allowed to teach in public schools\textsuperscript{174} or hold high public office.\textsuperscript{175}

The debate over judicial use of published social scientific evidence has flourished since \textit{Brown v. Board of Education},\textsuperscript{176} and the general issue is

\textsuperscript{170} \textit{Id.} at 371. (quoting with approval from Montano, \textit{Christian Heritage} (May 1959) (no further citation given); \textit{but see} GREELEY, McCREADY & MCCOURT, supra note 156, at 195-205 (finding that graduates of Catholic schools have slightly higher levels of occupational and educational achievement than otherwise similar graduates of public schools); GREELEY & ROSSI, supra note 167, at 138-57 (same); NEUWIEN, supra note 167, at 67-79 (performance of Catholic school students on standardized examinations above national norms); \textit{id.} at 113-44 (description of training of teaching priests and nuns).

\textsuperscript{171} \textit{BOETTNER, supra} note 165, at 371-72; \textit{cf.} 559 F.2d at 1122 (quoted in text accompanying note 180 infra; \textit{but see} NEUWIEN, supra note 167, at 83, 103 (more than 30\% of Catholic school faculty neither priests, brothers nor nuns); Lemon v. Kurtzman, 403 U.S. 602, 668 (1971) (White, J., concurring and dissenting) (predicting, apparently on basis of record, that by 1976 majority of teachers in Rhode Island Catholic schools would be lay, apparently not including nuns within lay category); Greeley, \textit{Who Controls Catholic Education?}, 9 EDUC. & URB. SOC'Y 147 (1977) (suggesting that bishops' actual control over Catholic education quite limited) [hereinafter cited as \textit{Who Controls Catholic Education}]; \textit{Parochial Schools, supra} note 15, at 644-45 (citing argument by Archdioceses of Philadelphia and Los Angeles that canon law gives parish priest primary responsibility for temporal and spiritual guidance of parish school).

\textsuperscript{172} \textit{BOETTNER, supra}, note 165 at 399.

\textsuperscript{173} \textit{Id.} at 3.

\textsuperscript{174} \textit{Id.} at 372.

\textsuperscript{175} \textit{Id.} at 421.

outside the scope of this article. But a court desiring to use such evidence must at least take what steps it can to be sure the evidence is reliable. Had Boettner testified in person, any competent cross-examiner would have shown her pervasive bias and utterly discredited her.

To rely on such a source in any case is error. But to rely on such a source with respect to religion raises special problems. Judicial citation of Boettner's book lends legitimacy to it. Such governmental sponsorship of anti-Catholic propaganda, even if inadvertant, tends to establish the other religions.

The Boettner quote, together with other quotations from the Supreme Court's cases on financial aid to Catholic schools, supported the first step of the court's argument: that Catholic schools are pervasively religious. Fortunately, the court's holding did not depend on portraying Catholic schools as centers for the brainwashing of the next generation. It was only necessary to conclude that Catholic education is an integral part of the religious mission of the church, and that could have been done in much more restrained and less offensive language.

The second step in the court's argument was to find, not implausibly, that collective bargaining by teachers tends to reach into every aspect of educational policy and to directly affect the role of the school. The third step was to find this inconsistent with church law, which, according to the court, requires the bishops to have absolute authority over the schools. The court said:

All of these essentially patricentric schools are completely subject to the authority of the respective bishops who have the right of vigilance as to faith and morals and direct authority as regards religious instruction. The bishops operate the schools through functionaries who are completely subservient to the bishops' authority . . . . [If there were mandatory bargaining,] no longer would the bishop be the sole repository of authority as required by church law. Canon 1381.

In this passage, the court did what it later suggested would be unconstitutional if done by the Board—it passed judgment on a question of church doctrine. Episcopal control over church schools is theoretical at best. The extent of the bishops' authority generally has been a major subject of debate in the Catholic church since the work of Cardinal Newman in the last

177. 559 F.2d at 1120-22.
178. Id. at 1123-24.
179. Id. at 1122.
180. Id. at 1122-23.
century,182 and, to some extent, for much longer than that.183 It is inappropriate for a secular court to take sides in that debate,184 and it was unnecessary for the court to do so. It was enough that the church must have authority to determine matters of faith and morals and decide for itself how best to impart its values to students; it was not necessary to locate that authority within the church. Canon law was irrelevant to the bishops’ claim. The result should not have been different if the schools were run by a sect which places church authority in each congregation of believers. To say that the form of church organization or the details of church law matter is to authorize discrimination among denominations. Rather, the court’s point must be that the right to free exercise of religion is denied when a church is required to share decision making authority over part of its religious mission with an organization from outside the church.

The court’s reasoning up to this point had followed the analytic framework of Wisconsin v. Yoder,185 the most recent Supreme Court case on free exercise claims to exemption from regulation. Under Yoder, the last step in the court’s analysis should have been a determination of whether some state interest “of the highest order and . . . not otherwise served can overbalance”186 the restriction on the church’s right to internal control of its schools. The court substantially omitted this step. It did note that not all government interference with church schools is forbidden, and distinguished collective bargaining from a few examples of permissible interference.187 But it picked the easiest examples and avoided any hard comparisons. Collective bargaining is different from “fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws,”188 because, at least in the context of Catholic schools, those regulations do not interfere with church control of religious belief and instruction.

A better test of the court’s theory than fire inspections is state regula-

184. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); see generally supra note 157.
186. Id. at 215.
187. 559 F.2d at 1124.
188. Id.
tion of curriculum. Illinois, for example, effectively requires Catholic schools to teach all the "branches of education" taught in the public schools. 189 That law also requires a substantial sharing of authority with an outside agency. The Supreme Court has repeatedly indicated that reasonable standards of this nature would be upheld. 190 It is therefore necessary to ask why sharing control with the union is worse than sharing control with the state.

The state's interference is arguably less than the union's. If the state's interest is satisfied by setting reasonable minimum standards, the church may be able to meet those standards and still have adequate freedom to teach religion and religious values in its own way. 191 By contrast, union bargaining demands affect schools more pervasively.

For example, unions are much more likely than the state to demand more freedom for individual teachers. Three of the unfair labor practice charges filed against one of the bishops were based on refusal to renew teachers' contracts. 192 The bishop responded that one employee had been terminated for teaching the sexual theories of Masters and Johnson to a biology class, one for marrying a divorced Catholic, and one for refusing to structure a religion class as directed by the school principal. The union might also have approached these three disputes by demanding a contract provision restricting the grounds for termination and making such terminations arbitrable.

Catholics will no doubt disagree as to whether the three terminations described above serve the religious function of their schools. Indeed, Catholics disagree on the basic issue of whether these and other matters should be negotiated with a union. Some Catholics think the bishops' position in this litigation is inconsistent with papal affirmation of the moral right of workers to organize. 193 But all these issues are for Catholics to decide among themselves. They should not be decided by Congress or the Board or a union, unless the church voluntarily agrees to share its authority.

On the other side of the balance is the government's interest in regula-

191. Cf. Meyer v. Nebraska, 262 U.S. 390 (1923) (invalidating, on substantive due process grounds, statute providing that German could not be taught).
tion. The state’s interest in protecting children\textsuperscript{194} and in assuring that the next generation of citizens has a minimally acceptable education\textsuperscript{195} is very great. By contrast, the federal government’s interest in regulating the commerce affected by religious schools seems considerably less important.\textsuperscript{196} Congress has chosen to exempt all governmental employers\textsuperscript{197} and all agricultural laborers\textsuperscript{198} from the NLRA. These exemptions affect much more commerce than would an exemption of religious schools.\textsuperscript{199} That choice is not conclusive on the quite different question of whether a particular exemption is constitutionally required. But it is important in assessing the weight of the federal interest, because it indicates that Congress does not consider it essential to subject every employer affecting commerce to the NLRA. Because the church’s interest is greater, and the government’s interest is less, \textit{Catholic Bishop} is not inconsistent with the state’s power to set curricular standards.

\textbf{C. Regulation of Church Labor Relations}

Cases under other labor relations statutes also cast light on \textit{Catholic Bishop}. The Fair Labor Standards Act contains no exemption for churches or religious schools.\textsuperscript{200} The initially obvious distinction between the FLSA and the NLRA is that regulation of wages, hours, and child labor is less likely to affect church decisions concerning faith, morals, values, and how to teach them. But that distinction may not be determinative. Decisions overlooked in \textit{Catholic Bishop} illustrate the difficulties.

Application of the FLSA to newspapers was upheld over a free press claim in \textit{Mabee v. White Plains Publishing Co.}\textsuperscript{201} Its application to state and local governments was upheld over a constitutional challenge based on state sovereignty, inter-governmental immunity, and the tenth amendment in \textit{Maryland v. Wirtz}.\textsuperscript{202} However, \textit{Wirtz} was overruled in \textit{National League of Cities v. Usery}.\textsuperscript{203} The Court defined the issue as whether state power to determine the wages and hours of employees is “essential to

\textsuperscript{194} Prince v. Massachusetts, 321 U.S. 158, 166-70 (1944).
\textsuperscript{195} Wisconsin v. Yoder, 406 U.S. 205, 221-34 (1972).
\textsuperscript{196} But see Parochial Schools, \textit{supra} note 151, at 665.
\textsuperscript{199} Compare \textit{United States Bureau of the Census, Statistical Abstract of the United States: 1976} (97th ed. 1976), Table 418 ($480 billion spent by governments in 1974); \textit{and id.}, Table 1090 ($72.39 billion expenses of farm production in 1974), with \textit{id.}, Table 183 ($6.2 billion spent by elementary and secondary private schools in 1974).
\textsuperscript{201} 327 U.S. 178, 184 (1946).
\textsuperscript{203} 426 U.S. 833, 840, 855 (1976).
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separate and independent existence" of the states, and held that it is. The
Court said that its decision did not depend on the size of the financial burden
imposed by the FLSA, but rather on interference with the states' "authority
to make those fundamental employment decisions upon which their systems
for performance of [governmental] functions must rest." Mabee was not
cited.

Reasoning from Usery to Catholic Bishop is risky; two different
statutes and two different constitutional protections are involved. But unless
the establishment clause requires a different result, it would be difficult to
argue that the explicit protection of the free exercise clause gives churches
less freedom to manage their internal affairs than the truism of the tenth
amendment and the implied doctrine of inter-governmental immunity give
state and local governments. If "religious" is substituted for "governmental"
throughout the Usery opinion, the result is a strong argument that it is
essential to the independent existence of the churches that they be able to
determine the wages and hours of employees who carry out their religious
functions. The church's interest in internal control of other working condi-
tions, and especially of curriculum and pedagogy, is surely closer to the
heart of the free exercise clause than its interest in internal control of wages
and hours. Usery supports the result in Catholic Bishop.

This reasoning must be compared with Prince v. Massachusetts. Prince was convicted under state child labor laws for permitting her daugh-
ter to sell religious tracts on the streets of Brockton, Massachusetts; the
Supreme Court affirmed. Both mother and child were ordained Jehovah's
Witness ministers who believed that it was the child's duty to sell the tracts
and that failure to do so would condemn her "to everlasting destruction at
Armageddon."

Prince demonstrates that labor laws can constitutionally forbid conduct
which is central to the free exercise of religion, and thus raises doubts about
the result in Catholic Bishop. But the state interest at stake in Prince is the
interest in protecting children, the same interest that supports minimum
curricular standards. The Court in Prince attached great weight to this
interest, and in Yoder plausibly explained Prince as simply a case in
which the balance of interests tipped in favor of the state. In Catholic

204. Id. at 851 (quoting Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869)).
205. Id. at 851.
207. Id. at 162-63; see also id. at 164 (making clear that the child's rights were asserted; the
narrower explanation of the case in Parochial Schools, supra note 151, at 667-68, is inexplic-
able).
209. 406 U.S. 229-34.
Bishop, both the state’s interest and the church’s interest are more attenuated than in Prince. As with all balancing tests, the ultimate comparison is subjective. Prince does not undercut the analogy between Catholic Bishop and Usery, because the child labor provisions of the FLSA were not discussed in Usery.

The constitutionality of applying the FLSA to churches has not been resolved in the Supreme Court, but there is a Seventh Circuit opinion, Mitchell v. Pilgrim Holiness Church Corp. The employees in Mitchell worked in a church-owned printing plant. The printing plant was maintained to supply religious pamphlets, leaflets, and magazines distributed by the church “to glorify God, publish the full Gospel to every nation and promote the Christian religion by spreading religious knowledge.” Nearly 90% of the plant’s output consisted of such material. The remainder was apparently ordinary commercial printing for various customers. The workers were paid less than the minimum wage and were not paid the required premiums for overtime. Some of the workers filed affidavits stating that they did not consider themselves “mere wage earners,” but had come to the plant to help “in the work of the Lord.” The court upheld the statute, finding it “a reasonable, non-discriminatory regulation,” and finding the minimum wage as essential to the “health and well-being” of these workers as to that of any others.

Mitchell is distinguishable from Catholic Bishop because there was no interference with the content of the publications. The FLSA simply made it more expensive for the church to publish. The financial burden may have reduced the amount of material published, but it did not interfere with the church’s discretion to decide where the cuts should be made.

However, the short shrift given the employees’ attitude is troubling. Presumably they could have volunteered to print tracts for free, and that makes it hard to see why they could not volunteer to do so for less than the minimum wage. Moreover, Usery must be regarded as casting doubt on Mitchell.

There has also been litigation over the application of employment discrimination laws to religious organizations. The Civil Rights Act of 1964 originally permitted religious institutions to discriminate on the basis of religion in the employment of persons to carry on their religious ac-

211. 210 F.2d at 881.
212. Id. at 881, 884.
213. Id. at 884, 885.
The 1972 amendments expanded the exemption to all of a religious institution's activities. However, the Act does not exempt churches from the duty not to discriminate on the basis of race, sex, or national origin. As written, the Act makes illegal the requirements that Catholic priests be male and that Mormon priests be white.

There is one appellate decision under each version of the exemption. Neither compels any particular result in *Catholic Bishop*, but both support its conclusion that employees performing religious work are not wholly subject to government regulation.

*McClure v. Salvation Army* involved a complaint that a Salvation Army officer had been discriminated against in pay and benefits on the basis of sex, and discharged in retaliation for her complaints. The court concluded that the alleged discriminations were "matters of church administration and government and thus, of purely ecclesiastical cognizance," and that the Civil Rights Act would be unconstitutional if applied to the case. To avoid the constitutional issue, the court construed the Act as not applying to the relationship between a church and its ministers. It was apparently considered irrelevant that all Salvation Army officers are called ministers, and that McClure had actually worked as a Welfare Casework Supervisor and as a secretary in the Public Relations Department.

The second case is *King's Garden, Inc. v. FCC*. Federal Communication Commission rules forbid employment discrimination, with an implied exception for religious discrimination in employment "connected with the espousal of the licensee's religious views." King's Garden, a religious organization operating two licensed radio stations, claimed the right to refuse to hire non-Christians. King's Garden challenged the narrow scope of the FCC's exemption, arguing that it should be controlled by the Congressional policy, reflected in the Civil Rights Act, to exempt all hiring by religious employers, and that any narrower exemption violated the free exercise clause.

The court rejected both contentions. Moreover, it said in dicta that the broad Civil Rights Act exemption confers benefits having nothing to do with free exercise and is therefore probably invalid as an establishment, but that

217. 460 F.2d 553 (5th Cir.), cert. denied as untimely filed, 409 U.S. 896 (1972).
218. 460 F.2d at 560.
219. Id. at 560-61.
221. 498 F.2d 51 (D.C. Cir. 1974).
222. 47 C.F.R. §§ 73.125, 73.301 (1976).
the original exemption limited to religious activities is constitutionally required. Finally, the court said that King's Garden had forfeited the right to control its internal affairs to the extent that it had sought out a broadcasting license, and that the sect had "no constitutional right to convert a licensed communication franchise into a church." 224

D. An Attempt to Generalize

In each of these cases, the balancing process has been conducted ad hoc. Discretionary judgment is the essence of balancing tests, and one must be cautious of over-generalization. But discretion can be guided if factors which make cases similar or different are identified, and if cases are grouped according to such factors. Enough cases have been decided to reveal basic fact patterns and permit tentative steps toward such grouping.

Three distinct questions must be answered to identify the variables which determine the strength of a church's interest in exemption. In the context of labor regulation, those inquiries require a determination of: (1) what employees are affected by the regulation; (2) what aspects of control over these employees are interfered with by the regulation; and (3) the extent to which church control is superseded.

Some employees and some aspects of control are more central to the free exercise of religion than others. The answers to the first two questions may be ranked accordingly. These rankings will have some of the features of a continuum, but there are identifiable situations which differ from each other in kind, not merely in degree. Although there may be line-drawing problems in difficult cases, these situations seem conceptually distinct, especially with respect to the first question.

At least four kinds of employees may be affected by regulation: employees of believers, employees of the church working in church-owned commercial businesses, employees of the church performing jobs without religious content in the church's religious operations, and employees of the church performing jobs with religious content.

In the first category, employees of believers, the claim for exemption is weakest. Here, the church itself is not regulated at all; the claim is that the believer is conscientiously opposed to compliance. Free exercise claims to exemption from the NLRA have been rejected, 225 although employees'

224. 498 F.2d at 60.
claims under the religion clause of Civil Rights Act have fared somewhat better.\textsuperscript{226}

The second category is employees working in a church-owned commercial business. Here the claim for exemption is stronger because the church itself is being regulated, but the claim is still weak. Even the sweeping language in \textit{Usery} did not extend the FLSA exemption to workers not involved in carrying out governmental functions.\textsuperscript{227} A case in point is \textit{Good Foods Manufacturing and Processing Corp.},\textsuperscript{228} involving a commercial lamb processing plant owned by Muhammed's Temple No. 2 of the Holy Temple of Islam. The Board rejected Good Foods' religious claim to exemption from the NLRA, which seems right, but did so solely on the authority of cases rejecting the claims of individual believers, which is wrong. \textit{Good Foods} was a harder case, because the free exercise clause protects not only individual believers, but the institutional integrity and independence of the organized churches.\textsuperscript{229}

The third category, employees of the church performing jobs without religious content in the church's religious operations, is illustrated by \textit{Mitchell}, \textit{King's Garden}, and arguably \textit{McClure}. The printers who produce religious literature in a church-owned plant, the technicians and engineers who run a religious radio station, and the secretary or janitor in a church or parochial school, are essential to the religious functions of the church. Here the claim for exemption begins to become serious, especially if the analogy to \textit{Usery} is given any weight.\textsuperscript{230} \textit{Usery} emphasized the governmental function of the agency which the employee served, thus including support personnel in the exemption.\textsuperscript{231} By contrast, \textit{King's Garden} focused on the religious content of each job, and apparently grouped support personnel with the employees of church-owned commercial businesses.\textsuperscript{232} Whatever the ultimate result, this was error, for separate analysis is required.

\textit{McClure} avoided the issue by focusing on plaintiff's status as a minister rather than her work as a secretary. Consideration of the weight to be given ministerial status raises troubling questions. Even where the minister is a secretary, or where a priest is a bureaucrat in the chancery, more than

\begin{itemize}
  \item \textsuperscript{227} 426 U.S. 833, 852.
  \item \textsuperscript{228} 195 N.L.R.B. 418, 418 (1972), \textit{enforced on other grounds}, 492 F.2d 1302 (7th Cir. 1974).
  \item \textsuperscript{229} \textit{See} Kedroff v. Saint Nicholas Cathedral of the Russian Orthodox Church, 344 U.S. 94, 116 (1952); \textit{see generally} cases cited in note 157 \textit{supra}.
  \item \textsuperscript{230} \textit{See} text accompanying notes 203-214 \textit{supra}.
  \item \textsuperscript{231} 426 U.S. at 851-52.
  \item \textsuperscript{232} 498 F.2d at 61.
\end{itemize}
just a title is likely to be involved. Ministerial status may indicate a greater or more permanent commitment to the church; it may indicate potential for promotion or transfer to work unavailable to lay employees. Some churches and orders are obligated to permanently support those they ordain, a commitment with obvious relevance to laws designed to protect workers.233 A ministerial title is at least strong evidence that the job is a religious one.

But the title cannot be conclusive. The courts must be wary of discriminating in favor of those religions which take literally the priesthood of all believers,234 and of cynical misuse of titles to gain exemptions that would otherwise be unavailable.

The Supreme Court cases on ordained Jehovah’s Witness proselytizers235 are not instructive. Proselytizing is so obviously a religious function that ordination adds little to the claim. Prince is the only one of these cases the Witnesses lost; it must be justified by the strength of the state’s interests and not by questioning the validity of the child’s ordination.

The fourth category consists of church employees performing jobs with religious content. Traditional priests and ministers are obvious examples, as was the announcer on the religious radio program in King’s Garden. But it is hard, perhaps impossible, to provide a comprehensive definition. As a starting point, any church employee who does one or more of the following as an integral part of his job should be considered as having a job with religious content: perform, lead, or participate in worship services, liturgies, sacraments, or other rituals; formulate, expound, preach, teach, explain, or exemplify doctrine, faith, morals, or values; counsel, advise, absolve, console, or reassure individuals in light of the doctrines of the religion; proselytize. There are some very hard cases. Consider an order of nursing nuns running a major hospital for patients of all faiths,236 or a contemplative order of monks, supporting their monastery with a commercial business and providing an intensely religious environment for themselves.

The more religious content a job has, the stronger the church’s claim that its relationship with the employee should be exempt from regulation.

That is the point of Catholic Bishop's unfortunately over-zealous efforts to show the pervasive religiosity of Catholic schools. The centrality of the question, and its essentially factual nature, emphasize the need for the court to support its conclusion with evidence from the record. But that may be impossible. As the court noted, to conduct a trial over the extent of religious content in Catholic school teaching raises a separate set of first amendment problems. It is troubling to envision every bishop being hailed before an Administrative Law Judge and required to prove the extent to which instruction has a religious perspective in each of the schools in his diocese.

The Supreme Court's practice with respect to judicial inquiries into religiosity has been erratic, and it has not carefully analyzed the issue in any of its recent opinions. But several lines of authority, together with its most recent decision under the religion clauses, suggest that such inquiries are to be minimized. Secular courts cannot decide whether a religious belief is true, or whether it is the authoritative teaching of a particular sect. Most of the cases on financial aid to religious schools have been decided by treating all Catholic elementary and secondary schools as pervasively religious without regard to the facts proven in each case. This eliminates the need to litigate religiously sensitive factual issues, although the Court has never offered that as a reason for its practice. The entanglement doctrine developed in those cases prevents government from closely monitoring the activities of religious institutions. Although most of the cases have contemplated that the executive branch would do the monitoring, a judicial monitor would seem to raise similar concerns.

That inference has been confirmed in the most recent case, New York v. Cathedral Academy. The Court struck down a plan to reimburse

237. 559 F.2d at 1120.
239. Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969).
242. See note 158 supra.
Catholic schools for the cost of preparing examinations to comply with state-imposed testing requirements, in part because the plan contemplated that the New York Court of Claims would prevent reimbursement for any test with religious content. The Court said that "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment, and it cannot be dismissed by saying it will only happen once."244

Although that sweeping statement seems to vindicate the Seventh Circuit’s inclination to avoid close factual inquiry into the religious significance of instruction in Catholic schools, that conclusion cannot be so easily reached. The Court will surely be forced to limit its statement in Cathedral Academy. When two constitutional clauses refer explicitly to religion, the courts must necessarily determine what constitutes religion within the meaning of those clauses. Thus, the Court found it necessary to satisfy itself in Wisconsin v. Yoder that Amish objections to public secondary education were "rooted in religious belief,"245 and in the selective service cases246 that registrants' conscientious objections were religious within the meaning of the statute.247 In each of these examples, despite its obvious misgivings, the Court required litigation over what does and does not have religious meaning. Presumably, Cathedral Academy means that litigation over the meaning of religion is to be avoided where possible, and handled in ways that minimize both judicial pronouncements concerning religious doctrine and judicial interference with religious functions. That principle might lead to exempting all church employees from regulation, to reduce the occasions on which it is necessary to litigate over what jobs and functions have religious content.

Whatever limits are ultimately placed on litigation over what is religious,248 the line must be drawn neutrally. Having denied the church a benefit on the ground that the extent of religious content in elementary and secondary Catholic education cannot be litigated, the Court must apply the same rule where the church seeks relief from a burden. It cannot require litigation of what has religious meaning in Catholic Bishop if that is forbidden in Cathedral Academy.

It follows that the Seventh Circuit was justified in accepting the Supreme Court’s characterization of Catholic schools as pervasively religious without insisting on detailed factual proof. That characterization leads

244. Id. at 346; see also Cantwell v. Connecticut, 310 U.S. 296, 305-07 (1940).
245. 406 U.S. at 215-16.
248. For suggestions, see Parochial Schools, supra note 151, at 653-55; Killilea, supra note 152; Giannella, supra note 152, at 1416-21.
directly to an answer to the first question suggested here—what employees are affected by the regulation? Teachers in Catholic schools have jobs with religious content. It is irrelevant that some teachers may make no effort to assist the religious mission of the schools; litigation to identify such teachers is forbidden because it is indistinguishable from litigation to identify the examinations without religious content in *Cathedral Academy*.\(^{249}\) Moreover, as the pending unfair labor practice charges\(^ {250}\) illustrate, the church may seek to prevent teachers from interfering with the school's religious mission even if it does not require all of them to actively assist it.

The second question relates to the aspects of control over the employees with which the state interferes. It is harder to clearly identify and rank the possible answers to this question, but review of the decided cases suggests four categories.

The first category consists of regulations which merely increase the expense of operation, as in the case of minimum wage laws. The church's interest is weakest here. Such burdens may reduce the total volume of religious activity, but the church retains virtually complete control of the activity it can still afford. Even a claim to exemption from the minimum wage law must be taken seriously in light of *Usery*.\(^ {251}\) But there is an establishment clause concern not present in *Usery*: if low income religious workers or their families become public charges, the effect is a subsidy to the church that employed them.

The church's claim is much stronger with respect to the second category: regulations which interfere with the way in which church activities are conducted. This is the primary effect of laws requiring collective bargaining.\(^ {252}\) Other labor regulations have similar, less direct, effects. Maximum hours laws, overtime pay laws, and laws forbidding discrimination in wages and benefits may have the primary effect of increasing expenses, and thus look like they belong in the first category. But these laws also provide financial incentives to restructure work assignments.\(^ {253}\) In addition, anti-discrimination laws require secular tribunals to review the church's comparisons of the responsibilities and difficulties of jobs and the skills and qualifications of workers. This occurs even under wage discrimination

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\(^ {249}\) *Cf.* Lemon v. Kurtzman, 403 U.S. 602, 618-19 (1971); *id.* at 666-67 (White, J., concurring and dissenting) (invalidating financial aid to supplement salaries of teachers in Catholic schools, on ground that it was impossible to assure that they would not inject religion into secular subjects, despite district court finding that they did not do so).

\(^ {250}\) *See* text accompanying note 192 *supra*.

\(^ {251}\) *See also* Follett v. Town of McCormick, 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jones v. City of Opelika, 319 U.S. 103 (1943) (all striking down taxation as applied to religious prosleytizing).

\(^ {252}\) For a more detailed analysis of the effect of applying the NLRA to religious schools, *see* *Parochial Schools, supra* note 151, at 642-62.

laws. The effect is greater when the law forbids discrimination in any of the "terms, conditions and privileges of employment." Thus, these laws interfere with the conduct of church affairs, even though they are not as intrusive as collective bargaining.

The third category consists of regulations which control who will perform church functions. The most obvious examples are anti-discrimination laws as applied to hiring, firing, and job assignment. The NLRA also affects this interest. Unions will normally demand that employees be discharged only for "good cause" and that all discharges be arbitrable; the Act itself prohibits discrimination on the basis of unionism. Child labor laws are in this category, as are maximum hour regulations if they have their intended effect of forcing employers to spread the work among more employees.

The fourth category of regulation, and the most intrusive, consists of regulations that interfere with the decision whether to conduct the activity at all. Most often, these would be regulations which forbid some church activities altogether, but the category would also include taxing some activities more heavily than others or otherwise creating incentives to abandon certain activities. It is difficult to think of an example in a labor regulation context, although one might arise under the Occupational Safety and Health Act. Examples from other contexts include prohibition of the use of hallucinogenic drugs without an exception for bona fide religious ceremonies, prohibition of snake handling, and restrictions on proselytizing.

The third question which must be considered is the extent to which church control is superseded by the labor regulation. A maximum hour law is much less intrusive than a Fair Employment Practices Commission order to reinstate a defrocked priest. Though both restrict the church's freedom to

258. See note 251 supra.
select its own employees, the hour law leaves an enormous range of discretion; the FEPC order leaves none. There are no analytically distinct categories; the extent of interference is infinitely variable. But it is important to identify the extent of interference as a separate variable from the aspect of control interfered with, particularly if one wants to compare precedents. It will often be possible to make simple quantitative comparisons of the extent of interference in two cases involving the same aspect of control. But such a comparison between cases involving two different aspects of control may be like adding apples and oranges; courts must recognize that a qualitative judgment is required before analysis can proceed.

Had the Board been upheld, the extent of interference in Catholic Bishop would have been great. The church would have had no power to make unilateral decisions affecting "conditions of employment." All such matters would have been subject to mandatory bargaining, and the union would have been authorized to coerce acquiescence in its demands to the extent it had economic power to do so. The near certainty of unfair labor practice charges and the likelihood of an arbitration clause would further erode church control; the Board, the courts and the arbitrators would make binding decisions on many issues.

This analysis supports the result in Catholic Bishop. The Board attempted to interfere with church control over employees carrying out an important church function and whose jobs have religious content. The Board would have interfered both with the church's control over how the work was done and over who did it. The extent of interference would have been great. All three variables indicate that mandatory collective bargaining with parochial school teachers would be a serious intrusion into church autonomy. This intrusion is not justified by the government's interest in regulating church labor relations. Nor would an exemption amount to an establishment under present law.

The foregoing is offered as a tentative framework for analysis. It will not decide hard cases or eliminate the need for sound judgment, and new cases will likely reveal new situations that require expansion or revision. But it is a start towards thinking systematically about church labor regulation.

264. See text accompanying notes 197-199 supra.
265. See note 156 supra; but see 559 F.2d 1131 (Sprecher, J., concurring) (suggesting, without explanation, that a partial exemption would be an unconstitutional preference for religion although a total exemption would not be); see also Parochial Schools, supra note 151, at 655-57.
IV.

CONCLUSION

The substantive conclusions of the article are, of course, at the ends of its three main divisions. The three cases discussed illustrate the importance and complexity of litigation before the Seventh Circuit. They are not unique; other cases of equal importance and complexity could have been discussed instead. It is the regular flow of such cases that makes life exciting for Seventh Circuit law clerks and Seventh Circuit critics, and, one might speculate, for Seventh Circuit judges as well.