SPITTING DISTANCE: TENTS FULL OF RELIGIOUS SCHOOLS IN CHOICE PROGRAMS, THE CAMEL'S NOSE OF STATE LABOR-LAW APPLICATION TO THEIR RELATIONS WITH LAY FACULTY MEMBERS, AND THE FIRST AMENDMENT'S TETHER

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I. BACKGROUND AND INTRODUCTION

In the spring of 1995, the Wisconsin state legislature was considering Republican Governor Tommy G. Thompson's 1995-97 biennial budget proposal. The proposal contained provisions[1] that dramatically expanded the state's already-pathbreaking, first-in-the-nation Milwaukee Parental Choice Program (M.P.C.P.)[2] to include more private, including parochial, schools and students. At the end of March of that year, then-Wisconsin Education Association Council (W.E.A.C.).President Richard Collins either promised or threatened (depending on one's point of view about universal[3] school choice) an organized attempt to unionize the faculty members of private elementary and secondary schools participating in such an expanded program — including, of course, the lay faculty

[1] 1995 Wis. Legis. Serv. Act 27 §§ 4003-09 (1995 A.B. 150) (West).

[2] WIS. STAT. § 119.23 (1995).

[3] "Universal" is used here in the sense of including both parochial and non-parochial schools in a particular geographic jurisdiction. It does not include all jurisdictions of, say, an entire state.

of parochial schools.[4] "If it comes down to that," Collins said, "we would have no problem attempting to organize teachers in private and parocial schools."[5]

A budget including the M.P.C.P.-expansion amendments was ultimately passed by the legislature and signed by Governor Thompson. The amendments were then almost immediately enjoined in their entirety, though, in a case granted original jurisdiction by the state supreme court. The case was initiated by, among others, the W.E.A.C.- affiliated Milwaukee Teachers' Education Association (M.T.E.A.) and the state American Civil Liberties Union (A.C.L.U.). Later, the local Milwaukee chapter of the National Association for the Advancement of Colored People (N.A.A.C.P.) joined the M.T.E.A. and the A.C.L.U. in the suit against the bigger program. The supreme court enjoined even the possible participation of the many additional private, *non-parochial* schools.[6] The court later tied 3-3 (there was a recusal) on whether the expansion's inclusion of parochial schools unconstitutionally infringed upon both the Establishment Clause of the U.S. Constitution's First Amendment and the establishment clause of the state constitution, and the court sent the case back to the trial court from which it was heard specially.[7] Just before the start of the 1996-97 academic year, the trial judge orally dissolved the injunction only partially, keeping it intact as to the participation of private, *parochial* schools — thus, at the time, still permitting a wide expansion in both the number of students and eligible private *non-parochial* schools for that academic year. In mid-January 1997, though, the judge struck down the *entire* expansion — including its increase in the number of eligible students and *non-parochial* schools — on various Wisconsin state-constitutional grounds, including the state constitution's establishment clause.[8] The case is, at this writing, pending at Wisconsin's court of appeals.

The original, unexpanded M.P.C.P. began in 1990. Under the terms of this original program, more than 1,600 low-income kindergarten

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[4] Dan Parks, *WEAC Threatens to Turn to Private Schools*, MILWAUKEE SENTINEL, Mar. 30, 1995, at 5A; *Union May Organize at Private Schools*, WISCONSIN ST. J., Mar. 31, 1995, at 3D.

[5] *Union May Organize at Private Schools, supra* note 4. Expressing what can really only be considered a decided lack of confidence in the ability of his membership to effectively compete with other educators, Collins said that broad expansion of choice would shrink student enrollment at public schools and thus force them to cut their teaching staffs (and also paid W.E.A.C. membership). At the time, the superintendent of schools for the Milwaukee Archdiocese, John T. Norris, said the archdiocese itself would not resist unionization efforts. He did not say whether particular employing parishes might do so. Parks, *supra* note 4.

[6] State *ex rel.* Thompson v. Jackson, No. 95-2153-OA (Wis. Aug. 25, 1995).

[7] State *ex rel.* Thompson v. Jackson, No. 95-2153-OA (Wis. Mar. 29, 1996). Justice Ann Walsh Bradley recused herself.

[8] Jackson v. Benson, No. 95 CV 1982 (Dane County Cir. Ct. Jan. 15, 1997).

through 12th-grade students attended the 20 participating private, non-parochial schools in the 1996-97 academic year. Had the M.P.C.P. expansion been allowed, parents of up to an estimated 7,000 students in the 1995-96 academic year and 15,000 in the 1996-97 academic year could have chosen from among 122 private — including parochial — schools in Milwaukee to send their children if the schools chose to participate in the enlarged program. Eighty-nine of these schools are religious; in fact, approximately 84% of the 1994-95 private-school enrollment in the city was in parochial schools.[9] According to a Wisconsin Policy Research Institute (W.P.R.I.) study that was headed by former Milwaukee Public Schools (M.P.S.) Superintendent and current Marquette University Professor Howard L. Fuller and University of Wisconsin-Milwaukee Professor Sammis B. White, at the nine of these religious schools that are high schools (six of which are Roman Catholic) the 1993-94 dropout rate of 0.6% was far lower than the M.P.S.'s high school dropout rate of 15%; the 88% of entering freshman who actually graduated four years later far exceeded the M.P.S.'s 48%, and the religious high schools' composite score on the A.C.T. test that is taken by students in their junior year was 22.6 — higher than the M.P.S.'s 18.9.[10]

The second major legislative success — among several notable setbacks — for the school-choice movement is occurring in Ohio with the Cleveland Scholarship and Tutoring Program (C.S.T.P.).[11] The C.S.T.P. was proposed by Republican Governor George V. Voinovich as part of a two-year budget that was passed by the state legislature in early 1995 and signed by Voinovich in spring of that year. It has included private, including parochial, schools since its beginning at the start of the 1996-97 academic year. A state trial-court decision which upheld the C.S.T.P. against federal Establishment Clause and state-constitutional challenges by, again, the local affiliate of the American Federation of Teachers (A.F.T.) and the local A.C.L.U. chapter was reversed by a three-judge state appellate-court panel on May 1, 1997.[12] The Ohio Supreme Court

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[9] *Id.* at 10.

[10] Howard L. Fuller & Sammis B. White, *Expanded School Choice in Milwaukee: A Profile of Eligible Students and Schools*, 8 W.P.R.I. REP. 5 (1995). The author, then a resident public-policy research fellow at the Institute, was a project team member.

[11] OHIO REV. CODE ANN. §§ 3313.975-79 (1996). Two other sites of interest to both proponents and opponents of universal school choice in the United States are Vermont and the Commonwealth of the Northern Mariana Islands (C.N.M.I.). Regarding Vermont, see *infra* note 181. Regarding the C.N.M.I., legislative efforts are underway to create a universal Parental Choice Scholarship Program. *See* Clint Bolick, *Pacific Vouchers: If They Work Here . . .*, WALL ST. J., June 10, 1997, at A18 ("That unique phenomenon can be explained in three words: no teachers' unions").

[12] Simmons-Harris v. Goff, No. 96APE08-982 (Ohio Ct. App., 10th App. Dist., May 1, 1997), *rev'g* Gatton v. Goff, No. 96 CVH-01-193 (Ohio Ct. C.P., Franklin County, July 21, 1996).

has stayed the effect of the appellate-court reversal pending a decision in the case there.[13]

Parents of more than 6,000 students that range from kindergarten to third-grade applied for the up to 2,000 available C.S.T.P. scholarships. As of early February 1997, 1,927 students were using their vouchers to attend the 52 participating private schools. Of these students, 1,735 (90%) were attending the 44 participating private, *parochial* schools; 1,282 (67%) were attending the 33 of those parochial schools that are Catholic schools.[14]

If the W.E.A.C.-affiliated M.T.E.A. in Milwaukee, or either the local A.F.T. or an existing Catholic-school teachers' organization in Cleveland (that currently represents lay-faculty members of Catholic high schools, which are not C.S.T.P.- eligible) seeks to unionize the lay faculty members of these private, parochial schools that are participating in an expanded M.P.C.P. or the existing C.S.T.P., they could be doing so for one of two reasons: the benign one of entrepreneurially filling a new market "void" by providing needed representational services to those parochial-school teachers who are willing enough to "contract out" that task to others, or the less benign one of preventing, or at least helping to prevent, a competitive-market challenge to what is now a governmental educational monopoly — of which teachers' unions are a significant part and in which they have a significant stake — from succeeding by raising its costs. If it is the former reason, one would ask why such a void does not now exist and, if it does exist, why the unions have not already moved to fill it.[15] One genuine reason could be that to do so, in this context, would not be worth the costs that the unions would incur. A union usually could not just represent one massive, M.T.E.A.-like bar-

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13 *See* Rene Sanchez, *Cleveland Students Can't Use Vouchers for Religious Schools, State Court Rules*, WASH. POST, May 2, 1997, at A4; *Ohio Vouchers Ruled Unconstitutional*, MILWAUKEE J. SENTINEL, May 2, 1997 at 10A; *see also* Kimberly J. McLarin, *Ohio Paying Some Tuition for Religious School Students*, N.Y. TIMES, Aug. 28, 1996, at B6; Curtis Lawrence, *Cleveland Choice Students Enter Religious Schools: Activists in Ohio Learned from Milwaukee in Fight over Voucher System*, MILWAUKEE J. SENTINEL, Sept. 4, 1996, at 2B.

14 From the author's calculations, which are based on data in Cleveland Scholarship and Tutoring Program, February 7, 1997 (provided by Bert L. Holt, C.S.T.P. Depart. Of Education, State of Ohio). As of Feb. 11, 1997, there were actually 1,935 total participating C.S.T.P. students.

15 Of the estimated 100,000 lay-faculty members of Catholic elementary and secondary school in the United States, there are approximately 5,000 elementary and secondary Catholic-school lay-faculty members that are currently represented by roughly 25 local unions affiliated with the Philadelphia-based National Association of Catholic School Teachers (N.A.C.S.T.), almost all of them east of the Mississippi River. (One of them, again, already represents lay-faculty members of Cleveland Catholic *high* schools, not C.S.T.P.-eligible.) In Pennsylvania, five of eight dioceses have such union representation. Telephone Interview with Rita Schwartz, President of N.A.C.S.T. (Feb. 20, 1997). *See also Organizing at Catholic Schools*, RETHINKING SCHOOLS, Winter 1996/1997, at 19 ("Elementary parochial school teachers in the St. Louis Archdiocese have begun union organizing").

gaining unit that deals with one massive, M.P.S.-like school district employing all of its members; it would — in most, but not all,[16] cases — have to singularly unionize and then deal with individual parishes and high schools as employers. If motivated by the latter reason, however, a union might decide to incur those (what it would then treat as short-term) costs if it considers these costs "worth it" to meet the larger goal. The tenor and timing of W.E.A.C.'s Collins's remark certainly seems to stem from this latter motivation.

Whatever the reason, any union in a position that is similar to W.E.A.C.'s in Wisconsin and the local A.F.T.'s (and, again, perhaps the existing Catholic-school teachers' organizations) in Ohio would very likely — and understandably — seek, if possible, to rely on an application of any relevant government labor-relations laws. As of now, almost by default, most, but not all,[17] of the labor market for Catholic school teachers is essentially governed by common-law principles. While tort and contract law — though themselves sometimes properly proscribed by the employing religious schools' constitutionally protected Free Exercise rights — are generally applicable, the national labor-relations statute and most, but, again, not all, of its state counterparts do not apply in this context. These federal and state laws are, generally, deliberate legislative decisions to consciously *displace* market mechanisms with systems of state-mandated collective bargaining; labor unions like them. Under these systems, if they exist and are applicable by either their own terms or as subsequently judicially interpreted, the majority of union members in any state-determined (and usually certified) bargaining unit are able to *require* the employer to negotiate with them in good faith.[18] Collective bargaining also provides a forum in which to air accusations of defined unfair labor practices against employers. In this case, from the unions' standpoint, even school choice's difficult and politically costly introduction of anti-monopoly market forces would very likely warrant this partial displacement of equally anti-monopoly market forces in return.

The N.A.C.S.T. was itself once affiliated with the national A.F.T., but broke away essentially because of the A.F.T.S. longtime fierce opposition to religious school choice. Schwartz, *supra*.

16 New York City is one prominent exception. Schwartz, *supra* note 15.

17 *See infra* text accompanying *supra* notes 42-90.

18 Most — but, again, not all — of the N.A.C.S.T. unionization has, contrarily, occurred outside the application of these laws and through the *voluntary* negotiation of the religious-school employers. In this case, of course, there is no governmental market-mechanism displacement. (There may, in fact, be reason to believe that this type of essentially *market*-based collective bargaining is more efficient than the state-mandated and bureaucratically overseen kind.) Interestingly, rather than relying on any state labor-relations *statutes* in negotiations with the archbishops, the N.A.C.S.T. often relies instead on the persuasiveness of decades of formal Catholic social doctrine regarding the dignity of the worker. *See infra* note 63; Schwartz, *supra* note 15.

The interest of educational researchers in the overall effect of teacher unionization on education in general is, surprisingly, relatively sparse[19] and, perhaps not surprisingly, seemingly contradictory. The best recent research is an August 1996 peer-reviewed study by Caroline Minter Hoxby, an assistant professor of economics at Harvard University. Professor Hoxby found that unionized districts experienced student-dropout rates during the period from 1963 to 1992 that were an estimated 2.3% higher than in those districts without unions, even though the spending per-pupil was an estimated 12% higher.[20] An October 1996 study by A.F.T. researcher F. Howard Nelson and Michael Rosen, who is the chairman of the economics department at the Milwaukee Area Technical College, for the Milwaukee-based Institute for Wisconsin's Future, found that average S.A.T. test scores were 43 points higher in states where more than 90% of teachers are unionized than in the states where less than 50% of teachers are unionized.[21] Almost all studies, however, either find or acknowledge that unionization over time leads to higher teacher salaries. This is a priority in and of itself, but leaves at least in some cases, school systems with diminished resources for other, rival educational priorities; Hoxby's study, for instance, concluded that unionization causes a five-percent salary rise.[22] There is also some reason to believe — on the basis of several lawsuits filed against school-choice and other reform efforts and the higher number of filed grievances arising out of them, along with the general union-contract rigidity about basic procedures like teacher-assignment and course-scheduling changes, as well as more substantive ones like curriculum-standard revision — that unionization hinders boldness in education-reform efforts.

From a public-policy perspective, suffice it to say that the success of religious choice-school unionization could, very arguably, either jeopardize or at least make more difficult and expensive the success of universal school choice itself and any participating religious schools in particular.

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19 *See* Ann Bradley, *Education's "Dark Continent,"* EDUC. WEEK, Dec. 4, 1996, at 25.

20 Caroline Minter Hoxby, *How Teachers' Unions Affect Education Production*, Q. J. ECON., Aug. 1996, at 671. Dropout rates are the sole variable that can be derived from the census data for each school district in America.

21 F. Howard Nelson & Michael Rosen, *Are Teachers Unions Hurting American Education?: A State by State Analysis of the Impact of Collective Bargaining Among Teachers on Student Performance*, Inst. For Wisconsin Future (I.W.F.), Oct. 1996, at 2. "This study," according to Rosen, "is not saying that higher scores are a result of teachers unions," but only that they are not a barrier to academic success. Curtis Lawrence, *Studies Differ on Teachers' Unions: Two views on whether collective bargaining hurts or helps education*, MILWAUKEE J. SENTINEL, Nov. 20, 1996, at 2B.

"There is a big difference between these two studies," though, according to Hoxby; "My study is a piece of serious research and theirs is a political thing." Hoxby, *supra* note 20, at 671. Hoxby specifically questioned the I.W.F. study's validity because "it took a one -time snapshot of states" and did not measure academic outcomes over a lengthy time period. *Id.*

22 Hoxby, *supra* note 20, at 694.

From the perhaps more-important perspective of religious-freedom proponents, the prospect of what can be considered yet another governmental encroachment on the free exercise of religion (in such an important area as education of the young) is cause for concern — and litigation. This article, then — taking W.E.A.C. at its word — briefly surveys the vast legal terrain on which would be fought one of the most important battles between the proponents of true American education reform and their equally aggressive opponentsi a constitutional counter-offensive by the private, parochial elementary and secondary schools participating in a universal school-choice program against those attempting to unionize the lay faculty members of those schools, relying on the intervention of governmental labor-relations laws for assistance.

Section II broadly examines the current state of the law surrounding efforts to unionize lay faculty members of private, parochial elementary and secondary schools.[23] Section III describes in somewhat more detail the two above-described legislative successes of the school-choice movement and the ongoing legal reactions of teachers' unions to those successes, and specifically applies the relevant Wisconsin and Ohio labor law to the hypothetical reliance of those who are attempting to unionize the schools that are participating in the Wisconsin and Ohio programs on that law,[24] thus using the sets of facts with which this next big legal battle would likely be fought, "[i]f," in the words of W.E.A.C.'s Collins, "it comes to that."[25] Section IV concludes the piece.

II. THE CURRENT LAW SURROUNDING UNIONIZATION OF LAY FACULTY MEMBERS OF PRIVATE, PAROCHIAL SCHOOLS

A. FEDERAL LABOR-RELATIONS LAW AND THE U.S. SUPREME COURT'S 1979 *NATIONAL LABOR RELATIONS BOARD V. CATHOLIC BISHOP OF CHICAGO*

In *National Labor Relations Board v. Catholic Bishop of Chicago*,[26] the United States Supreme Court declined to decide whether the Free Exercise rights of private, parochial high schools would be infringed if the application of *federal* labor law could be relied upon by those seeking to unionize the lay faculty members of those schools. Chief Justice Warren E. Burger's opinion for the 5-4 majority invoked a canon of construction that statutes should be interpreted, whenever possible, in a way so as to avoid constitutional problems. The Court "recogniz[ed] the critical

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[23] *See infra* § II (text accompanying notes 26-178).

[24] *See infra* § III (text accompanying notes 179-362).

[25] *Unions May Organize at Private Schools*, *supra* note 4.

[26] N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490 (1979).

and unique role of the teacher in fulfilling the mission of a church-operated school,"[27] and stated that, first, granting the National Labor Relations Board (N.L.R.B.) jurisdiction over the relations between such schools and their lay teachers — including the N.L.R.B.'s very process of inquiry leading to findings and conclusions"[28] — would heavily implicate both of the First Amendment's religion clauses; and, second, that when Congress defined "employer" in the National Labor Relations Act (N.L.R.A.), it did not explicitly include private, parochial schools[29] - and that they are thus not within the jurisdiction of the Board. Therefore, the Court need not have decided whether N.L.R.B. jurisdiction violates either of the clauses.

The heavy First Amendment implications of labor-board jurisdiction over relations between private, parochial schools and their lay faculty arise because "[t]he Board will be called upon to decide what are

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[27] *Id.* at 501.

[28] Specifically, "It is not only the conclusions that may be reached by the Board which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *Id.* at 502 (footnote omitted).

Chief Justice Burger includes as an appendix to his opinion an excerpt of an examination by an N.L.R.B. Hearing Officer. The subject of the examination was the rector of one of the high schools asserting its Free Exercise rights against Board jurisdiction. *Id.* at 507-08. It is chilling — and its tenor will become what was familiar in some of the examined cases that follow.

> Q. (By Hearing Officer) Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?
> A. I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?
> Q. I believe you defined it before, is that correct, when you first testified?
> A. I am not sure. Let me try briefly to do it again, okay?
> Q. Yes.
> A. A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer. Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of these — and there is a big spectrum in between those two extremes — all of these are popularly referred to as liturgies.
> Q. I see.
> A. Now, possibly in repeating your question, you could give me an idea of that spectrum; I could respond more accurately.
> Q. Well, let us stick with the formal Masses. If you know, how many Masses are required at Catholic parochial high schools?
> A. Some have none, none required. Some would have two or three during the year where what we call Holy Days of Obligation coincide with school days. Some schools on those days prefer to have a Mass within the school day so the students attend there, rather than their parish churches. Some schools feel that is not a good idea; they should always be in their parish church; so that varies a great deal from school to school.

Id. at 507-08 (brackets in original).

[29] 29 U.S.C. § 152(2) (1995).

the 'terms and conditions of employment' and therefore mandatory subjects of bargaining," according to Chief Justice Berger. "Although the Board has not interpreted that phrase as it relates to educational institutions, similar state provisions provide insight into the effect of mandatory bargaining . . . . '[N]early everything that goes on in the schools affects teachers and is therefore arguably a condition of employment,'"[30] and

> [t]he church teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.[31]

Chief Justice Burger's opinion thus concludes that because there is

> the absence of a clear expression of Congress's intent to bring teachers in church-operated schools within the jurisdiction of the Board, [the Court] declines to construe the act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.[32]

Any constitutional problem(s) would now have to be resolved piecemeal, if and when religious schools similarly challenge the many potentially applicable *state* labor laws.

B. OTHER, LOWER-LEVEL CASES REGARDING THE JURISDICTION OF GOVERNMENT LABOR-RELATIONS LAWS OVER RELATIONS BETWEEN PRIVATE, PAROCHIAL SCHOOLS AND THEIR LAY FACULTY MEMBERS

1. *Post-*Catholic Bishop *Decisions Finding that Neither the Free Exercise Nor Establishment Clauses of the First Amendment Prohibit State-Mandated Collective Bargaining between Parochial Schools and Lay Faculty: Tenuous Twine*

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[30] *Catholic Bishop*, 440 U.S. at 502-03 (citations omitted) (quoting 29 U.S.C. § 158(d) (1995), and Springfield Educ. Ass'n. v. Springfield Sch. Dist. No. 19, 547 P.2d 647, 650 (Or. Ct. App. 1976)).

[31] *Id.* at 504. Specifically, the First Amendment guarantees that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercize thereof." U.S. CONST. AMEND. I.

[32] *Catholic Bishop*, 440 U.S. at 507.

a. The U.S. Second Circuit Court of Appeals's 1985 *Catholic High School Ass'n of Archdiocese of N.Y. v. Culvert*: Jurisdiction of the New York State Labor Relations Act to lay private, parochial-school faculty members

According to Judge Richard J. Cardamone in *Catholic High School Ass'n of Archdiocese of New York v. Culvert*,[33] considering just such a challenge, "[i]f we allow the camel to stick its nose into the constitutionally protected tent of religion, what will follow may not always be controlled. Thus, we must now turn to the question of whether the camel can be kept firmly tethered outside."[34] One would not want the twine of such a tether to be tenuous. "The camel is a very phlegmatic[35] animal and has a reputation for stupidity and obstinacy;"[36] a "cud[37]-chewing animal," it will, "if ill-treated by someone, spit its foul-smelling cud directly into the person's face."[38] The average actual spitting distance for camels is, "oh, at least a good six feet or more,"[39] according to the Milwaukee County Zoo's Bob Hoffman, area supervisor of the winter quarters, where the camels are kept. The spit can make it up to about eight feet — or, the third row of spectators during Hoffman's camel presentations.[40] The Second Circuit's three-judge panel hearing for *Culvert* believed — 2-1[41] — that the unionization nose itself *could* (as opposed to *cud*) be allowed to stick itself into the religious-school tent, if the teachers' union camel is still kept firmly tethered outside.

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33 Catholic High School Ass'n of Archdiocese of New York v. Culvert, 753 F.2d 161, (2d Cir. 1985), *aff'g in part and rev'g in part* Catholic High School Ass'n of New York v. Culvert, 573 F. Supp. 1550 (S.D.N.Y. 1983)).

34 *Id.* at 1166. *See generally* Ellyn S. Rosen, *Keeping the Camel's Nose Out of the Tent: The Constitutionality of N.L.R.B. Jurisdiction Over Employees of Religious Institutions*, 64 IND. L.J. 1015 (1989).

35 Either "resembling, consisting of, or producing the humor phlegm" or, hopefully, "having or showing a slow and stolid temperament." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 883 (1988) [hereinafter WEBSTER'S].

36 5 ENCYCLOPEDIA AMERICANA 262 (1993). "The males are quarrelsome during the rutting season and bite savagely when they fight."

37 Different from saliva, cud is "food brought up into the mouth by a ruminating animal from its first stomach to be chewed again." WEBSTER'S supra note 35, at 313.

38 5 COLLIER'S ENCYCLOPEDIA 198 (1985). *See also* 2 THE NEW ENCYCLOPEDIA BRITANNICA 764 (15th ed. 1995) ("Camels are docile when properly trained and handled but, especially in the rutting season, are liable to fits of rage. They spit when annoyed and can bite and kick dangerously.").

39 Telephone interview with Bob Hoffman, Area Supervisor, Winter Quarters, Milwaukee County Zoon, Milwaukee, Wisconsin (Feb. 26, 1997). The zoo has one male camel, Gobi, and three femalest— Katie, Lynn, and newborn Georgia, both to Gobi and Katie on February 25, 1997. *Id.*

40 *Id.* "It's sort of a defense, y'know," Hoffman said, though "they do go through a stage; we call it 'the terrible twos.'"

41 Judge George C. Pratt dissented. Catholic High School Ass'n of Archdiocese of New York v. Culvert, 753 F.2d 1161, 1171 (Pratt, J., dissenting).

In *Culvert*, the Second Circuit rejected a facial challenge by 11 private, parochial high schools represented by the Archdiocese of New York's Catholic High School Association (C.S.H.A.). The schools challenged the lay teachers in those schools represented by the Lay Faculty Association (L.F.A.) on application of the New York State Labor relations Act (S.L.R.A.),[42] through the State Labor Relations Board (S.L.R.B.) it created to manage labor disputes with the Association schools.[43] At least 18 states, including Wisconsin, have similar state labor-relations statutes[44] — though not all the statutes create the equivalent of the S.L.R.B. Unlike the N.L.R.A. in *Catholic Bishop*, the

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[42] N.Y. LAB. LAWt§§ 700-17 (McKinney 1997).

[43] The C.H.S.A. schools were already unionized by the L.F.A., with the acquiescence of the Association, and the two groups had in fact (relatively amicably) arrived at several collective-bargaining agreements. The jurisdictional dispute — with all of its many constitutional implications — arose from an inevitable, first-time, unfair-labor-practice charge against the C.H.S.A. while it was conducting negotiations for a new contract with the L.F.A. in 1980. *See Culvert*, 753 F.2d at 1163.

The S.L.R.B. contended "that there must be a factual record developed before a court strikes down the assertion of a state agency's jurisdiction as unconstitutional," while the C.H.S.A. argued "that permitting jurisdiction over its labor relations with its teachers would *necessarily* implicate the Religion Clauses." *Id.* at 1165 (emphasis in original). Agreeing with the Association, the *Culvert* court found that a justiciable controversy exists in this case." Id. at 1165-66 (emphasis in original). (Similarly, *Catholic Bishop* does not consider it necessary to wait for factual issues to be developed; it made what it termed "a narrow inquiry whether the exercise of the Board's jurisdiction presents a significant risk that the First Amendment will be infringed." *Catholic Bishop*, 440 U.S. 520.

Interestingly, in deciding that the C.H.S.A.'s challenge to S.L.R.B. jurisdiction constituted a "justiciable controversy" in and of itself, the Second Circuit in *Culvert* relied on its prior decision in Felton v. Secretary of Education, 739 F.2d 48 (2d Cir. 1984), *aff'd.* Aguilar v. Felton, 473 U.S. 402 (1985). According to the *Culvert* court,

> we struck down a provision in *Felton* that gave parochial schools in disadvantaged areas the services of public school teachers. Under the facts of that case we could find no principled basis to limit the state intrusion to secular aims. . . . We considered that case although there was no record evidence that the aid fostered religion. . . and explained:
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> > In our view, the Court has been wise in relying upon its reasoned apprehension of potentials rather than sanctioning case-by-case determinations of the precise level of risk of fostering religion, since such an empirical approach would inevitably lead to increased litigation in an area where some degree of certainty is needed to prevent constant controversy.
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> For the same reasons, a justiciable controversy exists in this case.

Culvert, 753 F.2d at 1165-66 (citations omitted) (quoting *Felton*). *See* text accompanying *infra* notes 182e92.

[44] COLO. REV. STAT. §§ 8-3-101 - 123 (1996); CONN. GEN. STAT. §§ 31-101 - 11b (1996); HAW. REV. STAT. §§ 377-1 - 18 (1994); KAN. STAT. ANN. §§ 44-801 - 817 (1994); MASS. GEN. LAWS ch. 150A, §§ 1-12 (1989); MICH. COMP. LAWS§§ 423.1-.30 (1995); MINN. STAT.§§ 179.01-.16 (1993); N.J. STAT. ANN.§§ 45; 13A-1 - 14 (West 1994); N.Y. LAB. LAW §§ 700-17 (McKinney 1988); N.D. CENT. CODE §§ 34-12-01 - 12-14 (1978); OR. REV. STAT. §§ 663.005-.295 (1989); 43 PA CONS. STAT.t §§ 211.1-.13 (1992); R.I. GEN. LAWS§§ 28-7-1 -7-48 (1995); S.D. CODIFIED LAWS §§ 60-9A-1 - -15 (Michigan 1993); UTAH CODE ANN. §§ 34-20-1t- 13 (1994); VT. STAT. ANN tit. 21, §§ 1501-1623 (1987); W. VA. CODEt§§ 2101A-1 - -8 (1996); WIS. STAT. ANN. §§ 111.01-.19 (West 1988). All of these statutes are cited in

S.L.R.A. in *Culvert* clearly included private, parochial schools within its definition of covered "employers,"[45] and the Second Circuit was thus forced to confront thorny First Amendment issues.[46]

Like the Supreme Court in *Catholic Bishop*, the court considered both the Establishment and Free Exercise Clauses implicated by the prospect of labor-board jurisdiction, even though, as Judge Cardamone noted, "[they] involve the same considerations and are not easily divided and put into separate pigeon holes."[47] The C.H.S.A. argued that any jurisdiction given to the S.L.R.B. over school-L.F.A. relations *inevitably* result in both Establishment and Free Exercise Clause violations;[48] the L.F.A., on the other hand, argued that board jurisdiction would violate neither clause.

Establishment Clause analysis.

Regarding the Establishment Clause, which *Culvert* deals with first, the opinion almost mechanically applied the well-worn, three-prong test first enunciated 1971 *Lemon v. Kurtzman*:[49]

> [1] whether the challenged law or conduct has a secular purpose,

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Robert J. Pushaw, *Labor Relations Board Regulation of Parochial Schools: A Practical Free Exercise Accommodation*, 97 YALE L.J. 135, 141 n.48 (1987).

45 "While the Act does not specify that its jurisdiction extends to such teachers, stated District Court Judge Morris E. Lasker, "the intent to extend such coveage is established by the fact that the statute was specifically amended to remove religious employers of religious institutions from the list of workers excluded from coverage." Catholic High School Ass'n of N.Y. v. Culvert, 573 F. Supp. 1550, 1555 (S.D.N.Y. 1983).

46 The First Amendment is applicable to New York and all other states through the Fourteenth Amendment, Everson v. Board of Educ., 330 U.S. 1, 5 (1947) (Establishment Clause held applicable to states); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (Free Exercise Clause held applicable to states).

47 *Culvert*, 753 F.2d at 1166. "Nonetheless, for organization purposes, we will discuss the clauses independently of each other." *Id.*

48 At the trial level, the C.H.S.A. unsuccessfully argued that the federal N.L.R.A. pre-empted all state labor-relations laws, including the S.L.R.A. *Culvert*, 573 F. Supp. at 1552-53, 1558. Had this argument succeeded, of course, the Supreme Court's interpretation in *Catholic Bishop* that the N.L.R.A. did not include private, parochial elementary and secondary schools would have pre-empted any state laws from including private, parochial schools.

49 Lemon v. Kurtzman, 403 U.S. 612-13 (1971). In *Lemon* — as well as in Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977), which *Culvert* considers the two other "key Supreme Court cases addressing excessive administrative entanglement," *Culvert*, 753 F.2d at 1167 —

> [S]tates attempted to provide and to support certain secular aspects of classroom instruction in parochial schools. In these three cases the Supreme Court held that the aid resulted in excessive administrative entanglement, finding that the restrictions imposed to ensure secular use of the funds would inevitably require comprehensive, discriminating, and continuing state surveillance.

Culvert, 753 F.2d at 1167 (quoting *Lemon*, 403 U.S. at 619, *Meek*, 421 U.S. at 370, and *Wolman*, 433 U.S. at 254).

> [2] whether its principal or primary effect is to advance or inhibit religion, and
> [3] whether it creates an excessive entanglement of government with religion.[50]

The first two prongs posed no problem for the court, for the parties did not dispute that the S.L.R.A. had a secular purpose and that its primary effect neither advanced nor inhibited religion. *Lemon's* last, excessive-entanglement prong, however, was highly problematic and thus considered more thoroughly.

- First, according to the Second Circuit, the S.L.R.B.'s "relationship with the religious schools over mandatory subjects of bargaining" — the terms and conditions of lay faculty members' employment, all of which are considered wholly secular by the court — "does not involve the degree of 'surveillance' necessary to find excessive administrative entanglement."[51]
- Second, the S.L.R.B.'s regulation of collective bargaining between the C.H.S.A. and the L.F.A. merely "brings private parties to the bargaining table and then leaves them alone to work through their problems."[52] "The [board] cannot compel the parties to agree on specific terms," only "order an employer who refuses to bargain in good faith to return and bargain on the mandatory bargaining subjects, all of which are secular."[53]
- Third, while the board could never constitutionally conduct an inquiry into a genuinely protected, C.H.S.A.-asserted, *religious* motive for terminating an L.F.A. member,[54] it *could* — consistent with the First Amendment — "protect teachers from unlawful discharge by limiting its finding of a violation of the collective bargaining agreement to those cases in which the teacher would not have been discharged 'but for' the unlawful motivation."[55]

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50 Lynch v. Donnelly, 465 U.S. 668, 679 (1984), *quoted in Culvert*, 753 F.2d at 1166 (emphasis supplied).

51 *Culvert*, 753 F.2d at 1166.

52 *Id.* at 1167.

53 *Id.*

54 *See, e.g., id.* at 1168 (the "First Amendment prohibits the State Board from inquiring into an asserted religious motive to determine whether it is pretextual").

55 *Id.* at 1169.

> Were the Board allowed to apply an "in part" test in addressing an asserted religious motive, an order based on such a finding would violate the First Amendment. A parochial school might be forced to reinstate a teacher it otherwise would have fired for religious reasons simply because the school administration was also partly motivated by anti-union animus. To avoid this unconstitutional result, the Board therefore may order reinstatement of a lay teacher at a parochial school only if he or she would not have been fired otherwise for asserted religious reasons.

Id.

"Where a principled basis exists, as it does here, to limit state aid to or regulation of parochial schools," according to *Culvert*, "an attempt should be made to accommodate the interests of church and state under the Establishment Clause. Such accommodation firmly tethers the State Board's jurisdiction outside the constitutional tent that protects the Association's First Amendment rights."[56]

Free Exercise Clause analysis.

"For basically the same reasons," *Culvert* continues, "we reach the same result with respect to the Association's Free Exercise claim."[57] Using the Supreme Court's strict-security standard from *Sherbert v. Verner*[58] and *Wisconsin v. Yoder*,[59] the Second Circuit (again, almost mechanically) applied the familiar three-part, Free Exercise balancing test. It considers whether:

> (1) the claims presented were religious in nature and not secular;
> (2) the State action burdened the religious exercise; and
> (3) the State interest was sufficiently compelling to override the constitutional right of free exercise of religion.[60]

- First, as to whether the C.S.H.A.'s presented claims were religious or secular in nature, *Culvert* noted that "[c]ourts have long upheld regulation that merely causes economic hardship or inconvenience"[61] and that "[m]any matters that pertain to private schools are already subject to governmental regulation" — including "state requirements for fire inspections, building and zoning regulations and compulsory school attendance laws, all of which regulate the conduct of the Association's schools."[62]
- Second, "[f]or the reasons discussed in [the court's prior Establishment Clause analysis] and because of the restrictions . . . placed on the Board's power, these claims do not burden freedom of religious exercise."[63]

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56 *Id.*

57 *Id.*

58 Sherbert v. Verner, 374 U.S. 398 (1963).

59 Wisconsin v. Yoder, 406 U.S. 205 (1972).

60 *Culvert*, 753 F.2d at 1169 (parentheses in original; emphasis supplied).

61 *Id.* (citing Braunfeld v. Brown, 366 U.S. 599 (1961) (Orthodox Jewish businessmen's Free Exercise rights are not violated by Pennsylvania's Sunday closing laws)).

62 *Id.* at 1169-70.

63 *Id.* at 1170. "Not only does the Act not compel a belief in the value of collective bargaining, but the Encyclicals and other Papal Messages make clear that the Catholic Church has for nearly a century been among the staunchest supports of the rights of employees to organize and engage in collective bargaining." *Id.* (citations omitted). Indeed, see the subsequent CATECHISM OF THE CATHOLIC CHURCH, No. 2430-2431:

- Third, the Second Circuit concludes in *Culvert* that any admitted but minimal "indirect and incidental burden on religion is justified by a compelling state interest" because "[s]tate labor laws are essential to the preservation of industrial peace and a sound economic order" and because a state may, to help attain that order, enforce through the operation of its laws what it sees as "all unions[']and employers['] . . a duty to bargain collectively and in good faith."[64]

b. The Minnesota Supreme Court's 1992 *Hill-Murray Federation of Teachers v. Hill-Murray H.S.*: Jurisdiction of the Minnesota Labor Relations Act to lay private, parochial-school faculty members after the U.S. Supreme Court's 1990 *Employment Division, Department of Human Resources of Oregon v. Smith*

Seven years after *Culvert*, in *Hill-Murray Federation of Teachers v. Hill-Murray High School*,[65] the Minnesota state supreme court applied the controversial Free Exercise analysis that had then just been enunciated by the Supreme Court in *Employment Division, Department of*

> *Economic life* brings into play different interests, often opposed to one another. This explains why the conflicts that characterize it arise. Efforts should be made to reduce these conflicts by negotiation that respects the rights and duties of each social partner: those responsible for business enterprises, representatives of wage-earners (for example, trade unions), and public authorities *when appropriate.*

Id. at No. 2430 (initial emphasis in original, latter emphasis supplied; footnote omitted). "The principal task of the state is to guarantee," according to the teaching, "that those who work and produce can enjoy the fruits of their labors and thus feel encouraged to work efficiently and honestly. However, primary responsibility in this area belongs not to the state but to individuals and to the various groups and associations which make up society." *Id.* at 2431 (footnote omitted).

C.H.S.A. compliance with the state's S.L.R.A. regulations — made clear by either Encyclicals, Papal Messages, or the Catechism — is actually encouraged by Catholic religious beliefs. *Culvert*, 753 F.2d at 1170. *See also* CATECHISM OF THE CATHOLIC CHURCH, No. 2435.

> Recourse to a strike is morally legitimate when it cannot be avoided, or at least when it is necessary to obtain a proportionate benefit. It becomes morally unacceptable when accompanied by violence, or when objectives are included that are not directly linked to working conditions or are contrary to the common good.

Id. (emphasis in original).

64 *Culvert*, 753 F.2d. at 1171. *See also* Louis F. Simonetti, *The Constitutionality of State Labor Relations Board Jurisdiction over Parochial Schools*: Catholic High School Association v. Culvert, 30 CATH. LAW. 162 (1986) ("[W]hile the court was correct in recognizing that the conflict implicated both the Free Exercise and Establishment Clauses, its analysis was insufficient to support the constitutionality of the statute in question.").

65 Hill-Murray Fed'n of Teachers v. Hill-Murray H.S., 487 N.W.2d 857 (Minn. 1992), *rev'g* Hill-Murray Fed'n of Teachers V. Hill-Murray H.S., 471 N.W.2d 372 (Minn. Ct. App. 1991).

Human Resources of Oregon v. Smith.[66] With only a single dissenter,[67] the Supreme Court rejected a facial challenge by a Catholic high school — Maplewood's Hill-Murray High School — to reliance of lay faculty members, represented by the Hill-Murray Federation of teachers (H.M.F.T.) on the application of the Minnesota Labor Relations Act (M.L.R.A.)[68] to labor-management disputes with the school. Like the federal N.L.R.A. in *Catholic Bishop* and unlike New York's S.L.R.A. in *Culvert*, the M.L.R.A. does not explicitly include private, parochial schools within its definition of covered "employers."[69] The top Minnesota court's own statutory interpretation of the M.L.R.A., though, *sans* any *Catholic Bishop*-like use of the canon of construction that statutes be interpreted in a way that avoids constitutional problems, determined that the Act's language *meant* to include private, parochial schools. Thus the state court essentially forced itself to confront the First Amendment issues in the same way the factual circumstances themselves in *Culvert* forced the Second Circuit to do so. Almost all of the 18 state labor-relations statutes have been similarly construed to include within their definitions of covered "employer" those that are not specifically exempted,[70] including Wisconsin's.[71]

Like the Catholic-schools' association in *Culvert*, *Hill-Murray* argued that applying the M.L.R.A. to it would violate both the Establishment and Free Exercise Clauses;[72] like the L.F.A. in *Culvert*, The H.M.T.F. argued in *Hill-Murray* that M.L.R.A. jurisdiction would violate neither clause. According to Chief Justice Alexander M. "Sandy" Keith,

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66 Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

67 Justice M. Jeanne Coyne dissented on Minnesota state constitutional grounds. *Hill-Murray*, 487 N.W.2d at 868 (Coyne, J., dissenting).

68 MINN. STAT. ANN. §§ 179.01-17 (West 1993).

69 "Employer," for M.L.R.A. purposes, includes

> all persons employing others and all persons acting in the interest of an employer, but does not include the state, or any political or governmental subdivision thereof, nor any person subject to the Federal Railway Labor Act, as amended from time to time, nor the state or any political governmental subdivision thereof except when used in Section 179.13.

MINN. STAT. § 179.01, subd. 3 (West 1993), *quoted in Hill-Murray*, 487 N.W.2d at 862. The statute's next subdivision clarifies "employer" to include "the accepted definition of the word . . . but does not include any individuals employed in agricultural labor or by a parent or spouse or in domestic service of any person at the person's own home." *Id.* at subd. 4, *quoted in Hill v. Murray*, 478 N.W.2d at 862.

70 Pushaw, *supra* note 44, at 141.

71 Wisconsin Employment Relations Bd. v. Evangelical Deaconess Soc'y, 7 N.W.2d 590 (Wis. 1943).

72 Hill-Murray also unsuccessfully asserted protection against M.L.R.A. jurisdiction under the Minnesota state constitution's freedom-of-conscience clause. *Hill-Murray*, 478 N.W.2d at 864-67.

> we believe that church-labor relations presented here are most appropriately analyzed under the free exercise clause and that the establishment clause challenge raised by Hill-Murray is actually a free exercise question. . . . Nevertheless, we realize these issues are being analyzed under the establishment clause in some jurisdictions and for this reason we will consider the establishment clause.[73]

Free Exercise Clause, analysis and application of which as modified by *Smith.*

Regarding its Free Exercise analysis, the state supreme court in *Hill-Murray* found that the Supreme Court's reasoning in *Smith* directed allowing the application of the M.L.R.A. to private, parochial schools because the statute is — as the criminal law against the use of peyote was in *Smith* — "a generally applicable and otherwise valid regulatory law which was not intended to regulate religious conduct or belief and which incidentally burdens the free exercise of religion."[74]

In *Smith* itself,[75] the Supreme Court refused to apply the strict-scrutiny standard for Free Exercise cases, as used by the Second Circuit in *Culvert,* to review a denial of unemployment-compensation aid to two members of the Native American Church who became unemployed because they used a criminally prohibited "controlled substance" in religious ceremonies. Alfred Smith and Galen Black "were fired from their jobs with a private drug rehabilitation organization because they ingested peyote at a ceremony" of their church, as recounted in Justice Antonin Scalia's opinion in *Smith.*[76] "They were determined to be ineligible for benefits because they had been discharged for work-related 'misconduct' "[77] because of this — a denial that did not, according to Scalia, violate their Free Exercise rights.

Smith's and Galen's claim for relief, Scalia wrote in *Smith,*

> rests on our decisions in *Sherbert . . ., Thomas v. Review Board . . .*, and *Hobbie v. Unemployment Appeals Comm'n . . .*[78] in which we [using the strict-scrutiny,

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[73] *Id.* at 863.

[74] *Id.* at 862 (citing Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878 (1990)).

[75] Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 874 (1990).

[76] *Id.*

[77] *Id.* at 874.

[78] Thomas v. Review Bd. of Indiana Employment Sec. Div., 540 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987).

> compelling-interest standard] held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. . . . [H]owever, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical.[79]

Later in Smith, Justice Scalia maintained this distinction: "Although we have sometimes purported to apply the Sherbert test in contexts other than the employment-compensation cases," according to his opinion, "[i]n recent years we have abstained from applying the Sherbert test (outside the unemployment compensation field) at all. . .a Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law." The unemployment-compensation decisions, he noted, "have nothing to do with an across-the-board criminal prohibition on a particular form of conduct."[80]

- Nonetheless, according to the Minnesota top court in *Hill-Murray*, because "there is no dispute that the MLRA is a valid law of general applicability and does not intend to regulate religious conduct or beliefs,"[81] the new *Smith* standard left Hill-Murray without a Free Exercise claim.
- Second, and relatedly, the state supreme court found "no basis for Hill-Murray's argument that *Smith* applies only to criminal laws,"[82] as one may contrarily have gathered from the above-quoted Justice Scalia opinion in *Smith*.
- And third, according to *Hill-Murray*, while "*Smith* retained the compelling interest test for so called hybrid situations in which the regulatory law impacts the free exercise of religion and some other constitutionally protected interest,"[83] no such other, hybrid interest exists here.[84]

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79 *Smith*, 494 U.S. at 876.

80 *Smith*, 494 U.S. at 883-84.

81 Hill-Murray Fed'n of Teachers v. Hill-Murray H.S., 481 N.W.2d 857, 862-63 (Minn. 1992).

82 *Id.* at 863 (citing Vandiver v. Hardin County Bd. of Educ. 925 F.2d 927,c932 (6th Cir. 1991); Salvation Army v. Dep't of Community Affairs, 919 F.2d 183, 194-95 (3d Circ. 1990)).

83 *Id.* at 862 (citing *Smith*, 494 U.S. at 881-82).

84 *Id.* at 863. "[T]he rights of parents in the education of their children," according to *Hill-Murray*, "are altogether different than the rights of a religiously affiliated employer with respect to the control of and authority over their lay employees." *Id.* Moreover, "[e]ven if we did find a hybrid interest, under the compelling state interest balancing test, we conclude that the application of the MLRA is not unconstitutional." *Id.* at 863 n.2 (citing its own use of its balancing test under the state constitution, *id.* at 864-67).

Lemon Establishment Clause analysis's excessive-entanglement prong.

As for its seemingly reluctant Establishment Clause analysis, Minnesota's *Hill-Murray* — like the Second Circuit's *Culvert* — considered only the *Lemon* test's third excessive-entanglement prong to be problematic. *Hill-Murray* looked quite closely — more so than *Culvert* — at *Lemon's* actual language. "In analyzing an excessive entanglement claim," according to *Hill-Murray*, a court should scrutinize:

> 1) the "character and purposes of the institutions that are benefited;"
> 2) "the nature of the aid that the state provides;" and,
> 3) "the resulting relationship between the government and the religious authority."[85]

- First — considering apparently the Catholic school itself, and *not* the teachers' association, as the "institutions that are benefitted" by an application of the Minnesota labor law — Justice Keith wrote in *Hill-Murray* that "the character and purpose of Hill-Murray are intertwined with the Catholic religion."[86]
- Second, in scrutinizing the nature of the "aid" that the M.L.R.A. itself provides to employee-employer disputants and not also considering any sort of state aid provided to Hill-Murray — which would certainly be important to an analysis of potential state labor-board jurisdiction over a hypothetical Hill-Murray participating in a truly universal school-choice program because of the arguably greater degree of such aid —according to *Hill-Murray*, "The nature of the *activity* that is mandated by the application of the MLRA is jurisdiction by the Bureau [of Mediation Services (B.M.S.), created by the statute to help implement it] and the ensuing obligation of the parties to negotiate in good faith about wages, hours, and conditions of employment."[87]
- And third, "[t]he resulting relationship between the state and Hill-Murray is centered on the state's authority to certify a bargaining unit, chosen by the lay employees, and on the potential power of the state to appoint a mediator and to resolve unfair labor practices through the district courts."[88]

"The obligation imposed upon Hill-Murray by the application of the MLRA," the court in *Hill-Murray* concluded,

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85 *Id.* at 865 (quoting *Lemon v. Kurtzman*, 403 U.S. at 615 (1971)).

86 *Id.*

87 *Id.* (emphasis added).

88 *Id.*

> is the duty to bargain about hours, wages, and working conditions. We decline to categorize this minimal responsibility as excessive entanglement. Allowing lay teachers, almost all of whom are Catholic, to bargain collectively will not alter or impinge upon the religious character of the school. The first amendment wall of separation between church and state does not prohibit limited governmental regulation of purely secular aspects of a church school's operation.[89]

With *Hill-Murray,* Minnesota's became the third state labor board (in addition to New York's after *Culvert* and Hawaii's, unchallenged so far) to regulate private, parochial schools.[90]

Just waiting for that close *Culvert*'s camel's cud.

c. The Superior Court of New Jersey, Appellate Division's 1996 South Jersey Cath. Sch. Teachers Ass'n v. St. Teresa: Applicability of a state-constitutional labor provision to lay private, parochial-school faculty members after 1993's federal Religious Freedom Restoration Act (R.F.R.A.), subsequently held unconstitutional by the U.S. Supreme Court in *City of Boerne v. Texas*

i. St. Teresa

In *South Jersey Catholic School Teachers Association v. St. Teresa*[91] — 17 years after *Culvert* — the Appellate Court of the Superior Court of New Jersey attempted to apply the Free Excercise analysis mandated by the post- (and anti-) *Smith* Religious Freedom Restoration Act (R.F.R.A.) that was passed by Congress and then signed by President Clinton in November 1993, but struck down by the Supreme Court in June 1997. *St. Teresa* rejected a challenge by six Catholic elementary schools in the Diocese of Camden to the reliance of lay faculty members represented by the South Jersey Catholic School Teachers Association (S.J.C.S.T.A.) on application of the New Jersey state constitution's article 1, paragraph 19, which guaranteed "[p]ersons in the private employment" the right to organize and collectively bargain[92] to labor-management disputes with the schools. New Jersey is one of only three states with such labor-relations language enshrined in the state constitutiona Because *St. Teresa* is the most-recent of examined lower-level

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89 *Id.*

90 *Id.*

91 South Jersey Catholic Sch. Teachers Ass'n. v. St. Teresa, 675 A.2d 1155 (N.J. Super. Ct. App. Div. 1996).

92 "Persons in private employment shall have the right to organize and bargain collectively." N.J. CONST. art. 1, ¶ 19, *quoted in St. Teresa,* 675 A.2d at 1159.

cases that govern the jurisdiction of government labor-relations laws over relations between private, parochial schools and their lay faculty members, it is treated herein at somewhat more length.[93]

Again, like the Catholic-schools' association in *Culvert* and Hill-Murray High School in *Hill-Murray*, the six Diocese schools argued in *St. Teresa* that applying paragraph 19 to them would violate both the Establishment and Free Exercise Clauses, and again, like the lay faculty in *Culvert* and *Hill-Murray*, the S.J.C.S.T.A. argued that applying the state-constitutional provision would violate neither clause. As for the court, "We fail to see [the schools'] contention as an Establishment Clause claim," wrote Judge Michael P. King. "This is clearly a free exercise claim. . . . [T]he parochial schools are really requesting the benefit of a special exemption from a neutral labor-relations law of constitutional dimension[,] so the issue should be analyzed *solely* under the Free Exercise Clause."[94]

Free Exercise Clause, analysis and application as (re-) modified by the R.F.R.A.

Judge King acknowledged in *St. Teresa* that the R.F.R.A. was passed in direct response to *Smith* and that its "stated purpose was to restore the compelling interest test set forth in *Sherbert* and *Yoder*, and to guarantee its application in all cases where free exercise was substantially burdened by otherwise neutral laws."[95] Specifically, according to the R.F.R.A.:

> (a) In general. — Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception. — Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person —
>
> (1) is in furtherance of a compelling governmental interest; and

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93 The New Jersey Education Association would likely have challenged on First Amendment and state-law grounds a decision by the Lincoln Park, New Jersey, school board to provide vouchers to allow parents to choose to send their children to any other public or private high schools than the one in the district, Boonton High School. Many parents were quite vocally dissatisfied with this decision. *Lincoln Park Board of Education, Tuition Voucher Program*, Feb. 2, 1997. Based on an April 4, 1997, ruling by state Attorney General Peter Veniero, however, New Jersey Education Commissioner Leo Klagholz barred the plan. Ronald Smothers, *Tax-Financed Vouchers Barred for Private Schools*, N.Y. TIMES, April 8, 1997, at B5.

94 *St. Teresa*, 675 A.2d at 1165 (citations omitted) (emphasis supplied).

95 *Id.* at 1166 (citing 42 U.S.C. § 2000bb(a), (b) (1994)).

> (2) is the least restrictive means of furthering that compelling governmental interest.[96]

Again, like *Culvert* and *Hill-Murray*, *St. Teresa* nonetheless upheld the use of the relevant state-labor-relations law to regulate relations between private, parochial schools and their lay faculty members. It concluded:

> that there is a compelling State interest which outweighs the claimed burden on defendants' free exercise rights. . . . In addition to the lay teachers' fundamental right guaranteed by the State Constitution is the fact, observed by *Culvert*. . . that the State has a compelling interest in the 'preservation of industrial peace and a sound economic order.'[97]

Second row?

But "unlike the NLRB and jurisdictions such as New York and Minnesota," though, Judge King then noted, New Jersey "does not have a labor board regulating private employees."[98] Such a board could be a potentially important factual distinction for use by private, parochial schools that are participating in a universal school-choice program that challenges an organized attempt to unionize the lay faculty members of those schools. Without a labor board, according to Judge King, any legal relief sought by plaintiffs must come from the courts," which presumably would be better-equipped than a labor board to "avoid or prevent any undue interference in the ecclesiastical concerns of the schools through the application of 'neutral principles' and insure that the 'least restrictive means' are employed in the bargaining relationship."[99]

Specifically, the appellate court in *St. Teresa*, echoing the applications of the Establishment Clause's excessive-entanglement prong in both *Culvert* and *Hill-Murray* held that judicial "reliance on the doctrine

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[96] 42 U.S.C. § 2000bb-1 (1994), *quoted in St. Teresa*, 675 A.2d at 1166. The R.F.R.A. thus did not technically *fully* restore the *Sherbert/Yoder* test, forsaking its first two parts and retaining only what had usually been the most-problematic, "compelling-interest" part (and adding the need for using the least-restrictive means of furthering it).

[97] *St. Teresa*, 675 A.2d at 1171 (citations omitted) (quoting Catholic High School Ass'n of New York v. Culvert, 753 F.2d 1161, 1171 (2d Cir. 1985), *quoted in* text accompanying *supra* note 64).

[98] *Id.* (emphasis added).

[99] *Id.* (quoting 42 U.S.C. § 2000bb) (1994). "No New Jersey statute has ever been enacted to implement Article in, paragraph 19 with respect to private employers" according to *St. Teresa*.

> In the absence of such legislation, our Supreme Court has held that the constitutional provision is self-executing and that the courts, traditionally the proper forms for dealing with matters affecting labor relations, have both the power and the obligation to enforce rights and remedies under this constitutional provisions.

Id. at 1175 (citations omitted).

of neutral principles" — "wholly secular legal rules whose application to religious parties does not entail theological or doctrinal evaluations"[100] — will

> prove proper and efficacious. . . concerns of secular intrusion . . . are not nearly as substantial here because of the absence of a leviathan-like governmental regulatory board. Concern over a court's ability to make the necessary distinctions between the secular and the theological is, in our view, no obstacle given the anticipated nature of the collective bargaining process. . . .[101]

Oral arguments in the schools' appeal of *St. Teresa* were heard by the New Jersey supreme court on March 17, 1997.[102]

ii. *City of Boerne v. Flores*

The R.F.R.A. that imposed the compelling-interest standard on new Jersey in *St. Teresa,* which it satisfied anyway, was held unconstitutional by the Supreme Court in its June 1997 *City of Boerne v. Flores* decision.[103] In *City of Boerne*, the Saint Peter and Apostle Catholic Church

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[100] *Id.* at 1171 (citing Elmore Hebrew Ct., Inc. v. Fishman, 593 A.2d 725 (1991)).

[101] *Id.* (citing Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112, 1125 (7th Cir. 1977), about which see text accompanying *infra* notes 159-67). More specifically, "the scope and extant collective bargaining agreement between the Diocese and plaintiff regarding the lay secondary or high school teachers carefully recognizes and preserves the Diocese's autonomy," according to *St. Teresa*, and

> [t]here is nothing in the record to suggest that any ultimate agreement reached between the elementary school teachers and the diocese will not also be as carefully circumscribed, or more so, to assure the religious autonomy of the schools and the Diocese. . . .
>
> We are satisfied that adherence to historic principles will protect the teachers' right to organize and bargain without any substantial burdens on the schools' autonomy.

Id. 1172-73, 1175.

St. Teresa also previously addressed a second factual distinction that was urged on the court by the six diocesan schools, those six Catholic *elementary* schools, and the eleven Catholic *high schools* in the C.H.S.A. that were found to be subject to New York's S.L.R.A. in *Culvert*. While noting that the Supreme Court has "observed that there are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial and elementary schools, and that there was substance to the contention that college students are less-impressionable and less susceptible to religious indoctrination," Judge King in *St. Teresa* found "no persuasive case law supporting [the schools'] attempted distinction between secondary and elementary schools on the grounds of the degree of religious indoctrination with respect to First Amendment analysis." *Id.* at 1170 (citing Tilton v. Richardson, 403 U.S. 672, 685-86 (1971)). *See also* Roemer v. Board of Pub. Works of Maryland, 426 U.S. 736, 764-65 (1976).

[102] James M. O'Neill, *Camden Diocese Fights Unionization Ruling*, PHILADELPHIA INQUIRER, Mar. 19, 1997 at A1.

[103] City of Boerne v. Flores, 65 U.S.L.W. 4612 (June 25, 1997), *rev'g* Flores v. City of Boerne, 73 F.3rd 1352, 1364 (5th Cir. 1996). *See* Joan Biskupic, *Supreme Court Overturns Religious Practice Statute*, WASH. POST, June 26, 1997, at A1; Laurie Goodstein, *Bitter Over*

in Boerne, Texas, 30 miles nothwest of San Antonio, was denied permission in 1993 by both the city's Landmark Commission and, on appeal, the City Council, to expand its 74-year old Mission Revival church structure in order to meet the worship needs of its growing congregation.[104] The archbishop of the diocese, P.F. Flores, sued in federal court—invoking the R.F.R.A., which the city argued in defense was unconstitutional on separation-of-powers and federalism grounds.[105] When the case reached the Court, it agreed with the city.

In passing the R.F.R.A., according the Court, Congress exceeded the scope of power that the Fourteenth Amenment granted to it so it could enforce the amendment's guarantees.[106] "Legislation which alters the meaning of the Free Exercize Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is," according to Justice Kennedy's opinion for five of the six justices in the majority who wanted to strike down the R.F.R.A.[107]

> While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governiong law is not easy to discern, and Congress must have wide latitude in determoining where it lies, the distinction exists and must be observed. There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect.[108]

To illuminate, he later compared what he would consider the constitutionally impermissible "substantive" R.F.R.A. change to First Amendment law and the permissible "remedial" or "preventive" Voting Rights Act of 1965 enforcement of the Fourteenth Amendment. "In contrast to the record which confronted Congress and the judiciary in the voting

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Ruling, Groups See Trouble for Minority Faiths, WASH. POST June 26, 1997, at A1; Linda Greenhouse, *High Court Voids a Law Expanding Religious Rights; Puts Limits on Congress*, N.Y. TIMES, June 26, 1997 at A1.

104 *City of Boerne*, 65 U.S.L.W. at 4613

105 *See* Flores v. City of Boerne, 877 F.Supp. 355 (W.D. Tex. 1995).

106 Specifically, the Fourteenth Amendment guarantees that no state shall make or enforce a law depriving one of "life, liberty, or property, without due process of law," or denying "equal protection of the laws." U.S. CONST. amend. XIV,t§ 1, and grants Congress the power "to enforce" these guarantees with "appropriate legislation." *Id.* at § 5.

107 *City of Boerne*,65 U.S.L.W. at 4615. Justice Stevens wrote a concurrence that would have held the R.F.R.A. a violation of the First Amendment. "[T]he statute has provided the Church with a legal weapon that no athiest or agnostic can obtain," according to Justice Stevens. "This governmental preferaence for religion, as opposed to irrelegion, is forbidden by the First Amendment." *Id.*at 4620 (Stevens, J., concurring).

108 *Id.* at 21.

rights cases, RFRA's legislative record lacks examples of modern instances of generally applicable laws" — a phrase familiar from *Smith*'s weakened Free Exercise standard used in *Hill-Murray*,[109] to which *City of Boerne* returns us (though perhaps only in criminal cases, because of the way in which Justice Scalia seemed to purposefully distinguish *Smith* from the unemployment compensation cases)[110] — "passed because of religious bigotry. The history of persecution on this country detailed in the hearings mentions no episodes occuring in the past 40 years. . . . Rather, the emphais of the hearings was on laws of general applicability which placed incidental burdens on religion."[111]

Justice Kennedy's allusions to the revived *Smith* standard then became explicit as he addressed the raised federalism concerns: "Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise. We make these observations not to reargue the position of the majority in *Smith* but to illustrate the substantive alteration of its holding attempted by [the] RFRA."[112]

> The substantial costs RFRA exacts, both in practical terms of imposing a heavy litigation burden on the states and in terms of curtailing their traditional general regulatory power, far exceed any power or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. . . . It is a reality of themodern regulatory state that numerous state laws, such as the zoning regulations at issue here

—and of course, state labor laws (neither of which are criminal)—

> impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened

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109 Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 878, (1990), *cited in* Hill-Murray Fed'n of Teachers v. Hill Murray H.S., 487 N.W.2d 857, 862 (Minn. 1992), *quoted in* text accompaning *supra* note 74.

110 *See Smith*, 494 U.S. at 876, *quoted in* text accompanying *supra* note 79.

111 *City of Boerne*, 65 U.S.L.W. at 4618. "It is difficult to maintain that they are examples of legislation enacted or enforced due to animus or hostility to the burdened religious practices or that they indicate some widespread pattern of religious discrimination in this country," Justice Kennedy noted. *Id.*

112 *Id.* at 4619. "Even assuming RFRA would be interpreted in effect to mandate some lesser test, say one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of state law with the attendent liklihood of invalidation," he continued. "This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." *Id.*

> any more than other citizens, let alone burdened because of their religious beliefs.[113]

Close, close cud. Already airborne, almost.

2. *Three Other, Pre-*Catholic Bishop *Decisions to the Contrary — Finding that N.L.R.B. Jurisdiction over Private, Parochial School Lay Faculty Members Violates Both the Free Exercise and Establishment Clauses*

a. Two U.S. District Court Decisions in Pennsylvania

i. The Eastern District's 1977 *Caulfield v. Hirsch*

Caulfield v. Hirsch[114] is pre-*Catholic Bishop*, -*Smith*, R.F.R.A., and -*City of Boerne*.[115] In *Caulfield*, the United States District Court of the Eastern District of Pennsylvania sustained a facial challenge by five local parish schools in the Archdiocese of Philadelphia against the reliance of the lay faculty members of those schools on the application of the N.L.R.A. to their labor-management dispute. The court permanently enjoined the N.L.R.B. from conducting a representation election among the teachers. Like *Catholic Bishop* itself, *Culvert, Hill-Murray*, and unlike *St. Teresa*, *Caulfield* considered both the Establishment and Free Exercise Clauses of the First Amendment implicated by prospective labor-law application — though, presaging Judge Cardamone's comment in *Culvert*[116] and Justice Keith's in *Hill-Murray*,[117] Judge Donald W. Van Artsdalen noted that the clauses "may become intertwined in the same set of

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113 *Id.*

> Simply put, RFRA is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion. In most cases, the state laws to which RFRA applies are not ones which will have been motivated by religious bigotry. If a state law disproportionately burdened a particular class of religious observers, this circumstance might be evidence of an impermissible legislative legislative motive.

Id. (citing Washington v. Davis, 426 U.S. 229, 241 (1976). "Who can possibly be against the abstract proposition that government should not, even in its general, nondiscriminatory laws, place unreasonable burdens upon religious practice?" asked Justice Scalia, author of the original *Smith* opinion, in his *City of Boerne* concurrence. "The issue presented by *Smith* is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome of those concrete cases." *Id.* (Scalia, J., concurring).

114 Caulfield v. Hirsch, 95 L.R.R.M. 3164 (E.D. Pa. 1977), *cert. denied*, 436 U.S. 957 (1978). *See also* Caulfield v. Hirsch, 410 F. Supp. 618 (E.D. Pa. 1976) (granting motion to dissolve earlier, three-judge court for the case).

115 *Catholic High School Ass'n of Archdiocese of N.Y. v. Culvert*, 757 F.2d 1161 (2d Cir. 1985), recall, also precedes all of these but for *Catholic Bishop* — which, again, prevented federal labor law application.

116 *Culvert*, 753 F.2d at 1166, *quoted in* text accompanying *supra* note 47.

117 *Hill-Murray*, 487 N.W.2d at 863, *quoted in* text accompanying *supra* note 73.

circumstances."[118] Unlike *Culvert*, however, *Caulfield* considers the Free Exercise Clause first and more extensively.

> Free Exercise Clause analysis, and application of which, resembles *Culvert* — but with very differing results — and was initially enunciated in *Sherbert* and *Yoder*.

As did *Culvert* eight years later, *Caulfield* — with what seems like some reluctance[119] — dutifully applied the requisite three-part *Sherbert/Yoder* compelling-interest balancing test.[120]

- First, as to whether the pastors' presented claims were religious in nature: "[T]here can be no question as to the religious nature of the parish schools"[121] and "the admitted secular characteristics of the schools are so intertwined with the schools' religious mission" — according to *Caulfield*, contrary to *Culvert* — "that they blend imperceptibly with one into the other."[122]
- Second, as to whether the state action would burden the schools' religious exercise: "[w]here the potential for government interference and confrontation with a Church are as inevitable as the NLRA here provides," according to *Caulfield* — again differing with *Culvert* —

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118 *Caulfield*, 95 L.R.R.M. at 3176. "Plaintiffs, five pastors of those elementary schools, through the course of this litigation," Judge Van Artsdalen stated, "have primarily asserted that" N.L.R.A. application to them

> interferes with their religious liberty and the religious liberty of their Church. A contention of this nature, by category, suggests a "free exercise" claim in that the pastors claim an indirect burden will be placed upon the exercise of the religious mission of these Catholic schools by the intervention of the NLRB as an "arbiter" of internal Church affairs. On the other hand, the plaintiffs also claim that the continuing assertion of jurisdiction by the NLRB, the "inevitable" NLRB bargaining order directing the Archdiocese and the pastors to bargain with the lay teachers over religious matters, as well as other potential and inevitable conduct on the part of the NLRB, will "excessively entangle" the Government in the administration of Church affairs.

Id.

119 "[T]he court is to be guided more by the then existing fears and concerns of the framers of the Religion Clauses," according to *Caulfield*, "than by whether the instant circumstances can neatly fit within one or another of the 'tests' announced by the Supreme Court in other cases." *Id.* at 3166.

120 *See Culvert*, 753 F.2d at 1169, *quoted in* text accompanying *supra* notes 58-60.

121 *See* CATECHISM OF THE CATHOLIC CHURCH, No. 2229:

> As those first responsible for the education of their children, parents have the right to *choose a school for them* which corresponds to their own convictions. This right is fundamental. As far as possible parents have the duty of choosing schools that will best help them in their task as Christian educators. Public authorities have the duty of guaranteeing this parental right and of ensuring the concrete conditions for its exercise.

Id. (emphasis in original; footnote omitted).

122 *Caulfield*, 95 L.R.R.M. at 3176. *But see Culvert*, 753 F.2d at 1169, *quoted in* text accompanying *supra* notes 61-62.

"an objective of the first amendment is threatened and thus a religious liberty interest is necessarily at stake."[123]

- And third, as to whether the government's interest was sufficiently compelling to override those of the schools in their constitutionally implicated religious liberty: "the non-application of the Act to Catholic parish elementary schools," *Caulfield* concludes — contrary to *Culvert* yet again as well as to *St. Teresa's* R.F.R.A. analysis — "simply does not conjure up an impression of grave abuses endangering paramount federal interests, or for that matter, the lesser abuses and dangers sought to be implicated by the Act."[124]

Caulfield seems to find *Sherbert/Yoder's* second prong — whether the state action would burden religious exercise — the most problematic of the three. The court considered it more thoroughly than the other two prongs. Generally, concluded Judge Van Artsdalen in *Caulfield*,

> the special circumstances surrounding the religious mission of these parish schools, the relationships of lay teachers with their pastors, religious teachers, and fellow lay teachers, the inseparable intertwining of factors such

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[123] *Caulfield*, 95 L.R.R.M. at 3178. *But see Culvert*, 753 F.2d at 1170, *quoted in* text accompanying *supra* note 63. In response to the N.L.R.B.'s argument — similar to the S.L.R.B.'s in *Culvert* — that, as *Caulfield* summarized it, "the mere *potential* for interference with [the schools'] right to freely exercise their religious belief is insufficient to invoke the protection of the Religion Clauses," the court cited *Lemon*.

> There the court examined aid-to-parochial-school statutes based upon *allegations* of excessive entanglement and without benefit of a record establishing such entanglement. The Court dealt unmistakably with legislation "*apt* to entangle," with the "*potential* for impermissible fostering of religion," and creating a "relationship *pregnant* with *dangers* of excessive entanglement." . . . The Court certainly was addressing prospective circumstances, and not existing ones. There is no reason to believe that the potential for excessive entanglement of the government in church affairs is any less offensive to the first amendment than the potential for burdening the free exercise of religion. The Supreme Court in Lemon suggested this equal treatment of establishment and free exercise when it stated:
>
> > [W]e cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

Caulfield, 95 L.R.R.M. at 3177 (footnote omitted) (quoting *Lemon*, 403 U.S. at 619-20 (emphasis supplied)).

[124] *Caulfield*, 95 L.R.R.M. at 3178 (citing Sherbert v. Verner, 374 U.S. 398 at 406 (1963)). *But see Culvert*, 753 F.2d at 1161, *quoted in* text accompanying *supra* note 64; *St. Teresa*, 675 A.2d at 1171, *quoted in* text accompanying *supra* note 97. "[T]he argument that if not required to be regulated by the NLRA," according to *Caulfield*,

> then Catholic schools would necessarily be also exempt from fire inspections, building and zoning regulations, and public health requirements is baseless on two counts. First, . . . these forms of government regulation coalesce with general religious belief and the Church would not seek to insulate itself from these civic obligations. Second, these types of regulations reflect the paramount responsibilities of government, to provide for individual health and safety, and they represent the "compelling" end on the contiuum of governmental interests.

Caulfield, 95 L.R.R.M. at 3178.

> as curriculum and teacher discipline with the religious mission of the schools, and the pervasive authority of theo NLRB over the employment area, persuade me that an interference with religious activity has occurred, and that further interference is inevitable.[125]

- First, specifically according to *Caulfield*, the N.L.R.B. — for purposes of determining an appropriate bargaining unit that properly accommodates the First Amendment "has devised and sanctioned the division of lay teachers from religious teachers, affording to the former group the potential benefits of NLRB protection and regulation while excluding those to the latter." That division, according to the court, "though characterized as neutral or secular in purpose and effect by [the N.L.R.B.], burdens the free exercise of the Church schools' belief in a single undivided community of faith as contemplated by the schools' religious mission."[126]
- Second, while "the NLRB could never require the pastors to agree to a certain proposal or accede to a certain demand which touches upon religious matters," according to *Caulfield*, "under the Act they could be compelled to at least *bargain* 'in good faith' as to those matters" and "the 'terms and conditions' of employment at some point become inseparable from the religious mission of the Church schools."[127]

The court thus further (and more broadly) concluded that, "[a]s can be seen, the religious mission of the Church schools will almost inevitably fall within the scope of mandatory bargaining" and that "[t]his is an impermissible restraint on plaintiffs' first amendment right to freely exercise their religious beliefs."[128]

- And third, even more specifically,

> [s]hould the pastors or Archdiocese refuse to bargain over curriculum, teacher discipline, or other topics they

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125 *Id.* at 3176.

126 *Id.* "The adverse effects upon the religious faculty members which flow from the failure to be made part of the bargaining unit," according to the court, "may very well include their partial, substantial, or total ouster. This would do grave injury to the pastors' belief that a proper mixture of religious and lay teachers is necessary to the mission of the parish schools." *Id.*

127 *Id.* (emphasis in original). "The schools and their teachings are so pervasively religious that nearly all activities which are appropriate for mandatory collective bargaining embrace or at least relate to religious matters," according to the court.

> Thus, even assuming the NLRB would afford some protection to religious doctrine, it would be faced with the insuperable task of separating that which is secular from that which is religious in order to determine what is appropriate for bargaining. Particularly sensitive to the pastors' concerns are matters of curriculum and teacher discipline.

Id. at 3176-77.

128 *Id.* at 3176.

> regard as central to the religious mission of the Church, or should a pastor discipline or dismiss a lay teacher for conduct considered morally or spiritually incompatible with the tenets of the Catholic faith but suspected by the teacher to be disciplinary reprisal for union activity,

according to *Caulfield*,

> the NLRB would be empowered to proceed against the pastors or the Archdiocese in order to prevent an "unfair labor practice." In the former situation, the unconstitutionality of the NLRB compelling the Church schools to bargain over what they firmly believe to be religious concerns and doctrine has been discussed. In the latter situation, the NLRB would be authorized by the Act to inquire and determine whether the disciplinary action taken by the pastors was for reasons related to the religious mission of the Church schools or to discourage union activity. As a consequence, the NLRB would be required to interpret a matter of ecclesiastical concern, a matter not only far beyond its expertise but also transgressing the limits of its constitutional authority.[129]

Lemon Establishment Clause analysis's excessive-entanglement prong.

Like *Culvert* and *Hill-Murray, Caulfield* also dutifully proceeded to a brief consideration of *Lemon's* excessive-entanglement prong. First, the Court "paus[ed] to reiterate that total separation of church and state is not possible," noting that "there are many church-state contacts which would be permissible" and observing that "[t]he test of excessive entanglement is inescapably one of degree."[130] Because "the entangling relationships which can arise under the NLRA . . i may result in numerous conflicts and confrontations between the NLRB and the church schools," Judge Van Artsdalen concluded, "they are, in my mind, excessive and, therefore, not permissible within the meaning of the first amendment."[131]

- First, specifically, according to *Caulfield* in initially determining its jurisdiction, the N.L.R.B. may compel a school — against its will — to "produce documents, books, records, etc.," in order "to ascertain the amount, if any, of interstate commerce affected by the employer's activities."[132]

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129 *Id.* at 3177 (footnote omitted).
130 *Id.* at 3179.
131 *Id.*
132 *Id.*

- Second, "[t]he NLRB is authorized to gather and inspect financial data of the parish schools and can compel the disclosure of such data."[133]
- And third, "the matters of bargaining over curriculum and teacher discipline" previously addressed "in the free exercise context . . . may also be viewed as contributing to the fostering of an excessive entanglement."[134]

Fourth row, far from cud; very dry.

ii. The Middle District's *McCormick v. Hirsch*

In *McCormick v. Hirsch*,[135] which came one year after *Caulfield* — the federal district court of Pennsylvania's middle district similarly sustained a facial challenge by the bishop of the Catholic Diocese of Scranton to the reliance by lay faculty members of Bishop Hogan High School (they were represented by the Bishop Hogan Education Association (B.H.E.A.) on the application of the N.L.R.A. to labor management disputes with the high school. The court permanently enjoined the N.L.R.B. from taking the steps preceding a representation election for purposes of bargaining-unit certification. Again, like all of the above cases except for *St. Teresa*, *McCormick* considered both of the First Amendment's clauses — which, according to the court, are "now recognized as doctrines that overlap."[136]

Free Exercise Clause analysis and application of which — like *Culvert* but (again) with very differing results and *Caulfield* — as initially enunciated in *Sherbert* and *Yoder*.

As did *Culvert* seven years later and *Caulfield* one year earlier, *McCormick* also applies the Free Exercise Clause's then-requisite three-part *Sherbert/Yoder* balancing test.[137]

- First, according to *McCormick*, "it cannot seriously be doubted that Catholic schools in Pennsylvania are an integral part of the religious mission of the church"[138] — generally noting past U.S. "Supreme Court references to the religious mission of the Catholic school" and

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133 *Id.*

134 *Id.*

135 McCormick v. Hirsch, 460 F. Supp. 1337 (M.D. Pa. 1978). The defendant is the same Hirsch that Caulfield sued — Peter W. Hirsch, who was then the regional director of the fourth region of the N.L.R.B.

136 *Id.* at 1351 (citation omitted).

137 *See* text accompanying *supra* note 60.

138 *McCormick*, 460 F. Supp. at 1352.

that, "[i]n fact, the Supreme Court's definition of the schools is that [they are] the church itself."[139]

- Second, according to the court, "after reviewing the action that has already been begun by the NLRB and its numerous powers that lay in wait for the religious schools, it is more than reasonable to say that religious liberties will be infringed if the Board is permitted to act in the normal fashion."[140]
- Third, "no compelling interest sufficient to justify the intrusion upon free exercise has been shown," *McCormick* concluded, "[t]he showing that the NLRB has made is less than that presented in *Yoder*" — in which "the court held that religious liberty overrode even the educational practices of the state that was considered to 'rank at the very apex of the function of a State'" — "and therefore their interest in attempting to extend the NLRA into areas not even considered by Congress cannot be said to be compelling, if it is even reasonable."[141]

As did *Caulfield*, *McCormick* more thoroughly considers *Sherbert/Yoder's* second, "religious-burden" test. Echoing *Caulfield*, *McCormick* also fears several specific "areas of possible conflict with the First Amendment due to the NLRB's powers under the NLRA."[142]

- First, the division of faculty between religious and lay members — for purposes of determining an appropriate bargaining unit that properly accommodates the First Amendment — "raises the constitutional issue as the Catholic school is considered a single community of faith," according to *McCormick*. "In separating the faculty into two discrete and possibly conflicting camps of lay and religious, decisiveness [sic] between the lay and religious members seems inevitable."[143]

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139 *Id.* at 1353 (citing Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971). "At the hearing held on this matter," according to the court,

> extensive evidence was offered to show the pervasive religious character of the institutions. For example, testimony was presented that Catholic education is an expression of the mission entrusted by Jesus to the church he founded, that the mission of the Catholic schools is to teach Christian values, that the school is a community of faith serving its purpose of preparing the students for the service of God, and that the Catholic faith and morals permeate and pervade the whole school.

Id. at 1352.

140 *Id.* at 1355-56 (quoting Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3176 (E.D. Pa. 1977)). "[T]he charge of *threatened* deprivation of First Amendment rights goes to any exercise of jurisdiction of the NLRB," according to *McCormick*, and the religious high school "made a substantial showing that [its] First Amendment rights will be infringed if an injunction is not entered. The beginnings of entanglement and restraint of free exercise rights would start immediately on the institution of the certification proceeding." *Id.* at 1349.

141 *Id.* at 1356 (quoting *Yoder*, 406 U.S. 205, 213 (1972)).

142 *Id.* at 1353.

143 *Id.* "The Supreme Court has stated that division along religious lines was one of the principal evils against which the First Amendment was intended to protect," according to *McCormick*,

- Second — again, as *Caulfield* also concluded — to allow N.L.R.B. enforcement of the N.L.R.A.'s requirement to bargain in "good faith" regarding the "terms and conditions" of employment "which has been always considered inseparable from the religious mission of the church school[,] is thus to inhibit and burden what has been considered ecclesiastical concerns. . . o Within the scope of terms and conditions, such matters as workloads and employee discipline, and curriculum are subject to mandatory collective bargaining. In *Lemon*, the Supreme Court recognized that lay teachers are under the religious control and discipline of the religious authority that necessarily pervades the school system."[144]
- Third — once again, as *Caulfield* also feared — "if the church would refuse to bargain about actions taken on what is alleged to be strictly religious grounds," according to *McCormick*,

> the NLRB would be placed in the untenable and unconstitutional position of determining if the church's objections to bargaining were religiously based or due to anti-union animus and second, whether the grounds relied on by the church were applicable to the bargaining question. The NLRB would thus enter the unconstitutional thicket of determining what is the religious doctrine and whether the doctrine applies under the circumstances to exempt the church from the bargaining requirement.[145]

Lemon Establishment Clause analysis's excessive-entanglement prong.

McCormick's shorter consideration of the excessive-entanglement prong also tracked *Caulfield's* considerationi "The potential for entan-

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and further that difficulties inherent in the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions should be avoided. Even the very determination of the appropriate unit involves the NLRB in making a decision that concerns the internal structure of the church school and the management relationship which is contrary to prior case law.

Id. at 1353-54 (footnote omitted).

144 *Id.* at 1354 (footnotes omitted). "This potential for requiring the church to bargain on issues that go to the very heart of church doctrine and its mission is concern for alarm. For example," the court stated, "if the union desired the curriculum to be restructured to eliminate formal courses devoted to religion, the Bishop would be required to bargain. . . ." *Id.*

145 *Id.* at 1354-55 (footnote omitted). "In a myriad of situations," the court stated, "such as dismissing a teacher for teaching a doctrine at odds with the tenets of the Roman Catholic faith, or for adopting a lifestyle contrary to Catholic moral teachings, the Board would be empowered to determine if a firing was for union or ecclesiastical concern." *Id.* at 1355 (footnote omitted).

glement is far more present here than that condemned in *Lemon*" itself, *McCormick* concluded.[146]

> The kind of entanglement involved . . . is administrative entanglement which requires analysis on the institutional interference between church and state and moreover, requires strict scrutiny of the extent of the intrusion into the spiritual realm. Unconstitutional administrative entanglement has been chartered in two distinct lines of "doctrinal development. . . .
>
> If the NLRB were allowed to exercise its jurisdiction over religious institutions it would breach not just one but [two] strands of administrative entanglement.[147]

- The first such strand, according to the court, is "excessive government surveillance of religious institutions and personnel,"[148] which, the court found, "would be violated by the excessive involvement by the NLRB with the internal workings of the religious community of the school, which *Lemon* denotes as being the church itself, and its scrutiny of the financial affairs of the church."[149]
- The second, "administrative-entanglement" strand, according to *McCormick*, was "government resolution of internal religious disputes,"[150] which, the court found, would be violated "when the NLRB determines the appropriate bargaining unit within a school or within a diocese and when unfair labor practices would be adjudicated by the Board;" in such cases, it "would have to decide the nature of the religious doctrine, the intent of the school administrator and . . . if union sentiment or religious doctrine was the real motive of a decision assertedly made on religious grounds."[151]

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A Philadelphia Catholic lay-faculty union recently creatively sought to force application of the state's *public*-employee labor-relations law to its attempt to hold a representation election at a Catholic school though no federal or state constitutional issues were directly at issue. In *Association of Catholic School Teachers Local 1776 v. Pennsylvania Labor*

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146 *Id.* at 1358.

147 *Id.* at 1357 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 869-70 (1978)).

148 *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 869-70 (1978)).

149 *Id.* "If the union would become certified," the court stated, "the entanglement would heighten as it would then sit in judgment over management decisions made by the church." *Id.*

150 *Id.* (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 869-70 (1978)).

151 *Id.* at 1357-58.

Relations Board,[152] the teachers unsuccessfully asserted: 1) that they were within the definition of "public employee" in the Pennsylvania Labor Relations Act (P.L.R.A.); and 2) that since covered by the Act, the Pennsylvania Labor Relations Board (P.L.R.B.) thus had jurisdiction to consider their petition to be certified to collectively represent the school's lay faculty. The original P.L.R.B. decision on the matter did not consider the school's constitutional claims,[153] instead, "bas[ing] its decision on the narrow question of the meaning of 'public employee'[154] — the P.L.R.A. definition of which specifically excepted "clergymen or other persons in a religious profession [and] *employers or personnel at church offices or facilities when utilized primarily for religious purposes.*"[155]

According to Judge Joseph T. Doyle's affirmed opinion for the (three-judge) Commonwealth Court of Pennsylvania in *Local 1776*, "it would be most unusual to statutorily describe an individual's action as 'utilized' for anything"[156] — as the union wanted, so that its members can be excluded from the exception and therefore be covered by the P.L.R.A. "Furthermore, we believe any doubt as to the correct interpretation of the statute must be resolved in favor of the [school] and against the Association," citing the canon of construction used by the Supreme Court in *Catholic Bishop*.[157] The state supreme court agreed. Since "the General Assemblyhas not clearly and affirmatively expressed an intention to include lay teachers at religious schools within PERA's definition of public employees, "according to the opinion of Chief Justice John P.

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152 Association of Catholic School Teachers, Local 1776 v. Pennsylvania Labor Relations Board, No. J-22-1997 (Pa. Apr. 21, 1997), *aff'g* Association of Catholic School Teachers, Local 1776 v. Pennsylvania Labor Relations Board 671 A.2d 1207 (Pa. Cmwlth. 1996).

153 Those claims being: 1) no jurisdiction under the Supreme Court's *Catholic Bishop* canon of construction; 2) traditional Free Exercise and Establishment Clause assertions; and 3) the former under invocation of the R.F.R.A. *Local 1776*, 671 A.2d at 1209 n.2.

154 *Id.* at 1208.

155 P.S. § 1101.301(2), *quoted in Local 1776*, 671 A.2d at 1210 (emphasis in quotation). Given its decision to include lay teachers at private, parochial schools within the P.L.R.A.'s exception to the definition of "public employee," the P.L.R.B. left unaddressed the question of whether the religious schools fall within the same Act's definition of "public employer," *id.* at 1208, which, with potentially heavy implications for such schools in a universal choice program, specifically *in*cludes "any nonprofit organization or institution and any charitable, religious, scientific, literary, recreational, health educational or welfare institution *receiving grants or appropriations from local, State or Federal governments*," 43 P.S. § 1101.301(1) (emphasis supplied), *quoted in Local 1776*, 671 A.2d at 1210 n.7.

156 *Local 1776*, 671 A.2d at 1210 (emphasis in original).

157 *Id.* "Although the statute involved in [*Catholic Bishop* is] not identical to PERA, we find the Supreme Court's reasoning in that case to be highly persuasive and believe that its approach to statutory construction should be followed here.'" *Id.*

Flaherty, following the analysis set out in *Catholic Bishop of Chicago*, we may not extend the jurisdiction of the PERA to religious schools."[158]

Fourth row; still safe.

b. The U.S. Seventh Circuit Court of Appeals' 1977 *Catholic Bishop of Chicago v. N.L.R.B.* and supporting dicta in other federal appellate-court decisions

i. The Seventh Circuit's *Catholic Bishop*

The Seventh Circuit Court of Appeals' *Catholic Bishop of Chicago v. National Labor Relations Board*[159] came one year before *Caulfield*[160] and the same year as *McCormick*, and as discussed, was affirmed on other grounds by the Supreme Court. Perhaps importantly, from the appellate circuit in which the M.P.C.P. is currently in effect. Like *Caulfield* and *McCormick*, the Seventh Circuit's three-judge panel in *Catholic Bishop*, with one short concurrence,[161] sustained a challenge by the Catholic bishop of Chicago to the reliance of lay faculty members of five diocesan secondary schools in Indiana and two minor (secondary-level) seminaries in Chicago represented by two unions on the application of the N.L.R.A. to labor-management disputes with the schools[162] — preventing the N.L.R.B. from enforcing orders against the church to bargain in good faith with its schools' employees.

Unlike *Caulfield* and *McCormick*, the Seventh Circuit's *Catholic Bishop* neither considered the Free Exercise and Establishment Clauses separately in general nor formalistically in particular. "Our treatment of the Religion Clauses jointly" — "each of which has the identical purpose

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158 Association of Catholic School Teachers, Local 1776 v. Pennsylvania Labor Relations Board, No. J-22-1997 (Pa. Apr. 21, 1997), at 7.

> Of course, the General Assembly is free to amend the language of the PERA and to include lay teachers at religious schools if it so chooses, and in that event, we may then be required to consider whether the inclusion of lay teachers as public employees within PERA violates the religion clauses of the First Amendment of the Constitution of Pennsylvania.

Id.

159 Catholic Bishop of Chicago v. N.L.R.B., 559 F.2d 1112 (7th Cir. 1977).

160 Caufield v. Hirsch, 95 L.R.R.M. 3164 (E.D. Pa. 1977).

161 *Catholic Bishop*, 559 F.2d at 1131.

162 "There is in the present case no facial challenge to the statute under which the Board is proceeding," according to the Seventh Circuit,

> but rather one to the application of the statute to certain parochial schools. The manner of application as we pointed out in *Grutka* [v. Barbour, 549 F.2d 5 (7th Cir. 1977), *cert denied*, 431 U.S. 908 (1977)] required the development of a factual record, which has now been done.

Id. at 1118 n.8. Earlier, the same panel of three Seventh Circuit judges that ultimately decided *Catholic Bishop* disallowed an actual, facial challenge by the Indiana bishop to the N.L.R.A. itself — the panel required the Bishop to wait for the union to win the election and be certified by the N.L.R.B., after which he could then "refuse to bargain with the union and test the validity of the Board's jurisdiction in this court." *Id.* at 1115.

of maintaining a separation between Church and State" — "has been because of our belief that there has been some blurring of sharply honed differentiations," according to the opinion of Judge Wilbur F. Pell, Jr.[163] Like *Caulfield* and *McCormick*, though, the Seventh Circuit's *Catholic Bishop* implicitly concluded: 1) in what would be its putative Free Exercise Clause analysis, a) that the schools were very religious in nature, b) that the challenged state action, N.L.R.A. jurisdiction, would heavily burden their religious character, and c) that the state's interest was not sufficiently compelling to override the schools' constitutionally protected religious liberty; and also 2) that "church-state"/school-N.L.R.B. entanglement would be too excessive for purposes of (again, a putative) Establishment Clause analysis.

"[T]he very threshold act of certification of the union," according to the Seventh Circuit, "necessarily alters and impinges upon the religious character of the schools" — because

> [n]o longer would the bishop be the sole repository of authority as required by church law. . . . As the Board recognizes, the bishop now has to share "some decision-making" with the union and, as a practical matter, must now consult the lay faculty's representative on all matters bearing upon the employment arrangement.[164]

This N.L.R.B.-ordered shared decision making would thus "inhibit[s] the bishops' authority to maintain parochial schools in accordance with ecclesiastical concern," according to the court. "In sum, it is unrealistic to say that an employer which has to honor a bargaining order is not substantially inhibited in the manner in which it conducts its operations."[165]

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[163] That of Judge Robert A. Sprecher's. *Id.* at 1131 (Sprecher, J., concurring).

[164] *Id.* at 1123. "Once a bargaining agent has the weight of statutory certification behind it," the Seventh Circuit stated and then the court quoted then-Yale Law School Associate Dean Ralph S. Brown, Jr.,

> a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.

Ralph S. Brown, Jr., *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067, 1075 (1969) (quoted in Catholic High Such. Ass'n of Archdiocese of New York v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985) ("We decline to follow the Seventh Circuit down this slippery slope."); *Caulfield*, 95 L.R.R.M. at 3177.

[165] *Catholic Bishop*, 559 F.2d at 1123, 1124:

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institution, or because he wanted to replace lay teachers with religious-order teachers, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice.

The bulk of the Seventh Circuit's *Catholic Bishop* opinion is an ultimately potentially troublesome summary and analysis, under the two "Religion Clauses," of a professed distinction in the challenged, and several previous, N.L.R.B. decisions between "completely religious" schools, over which it would decline jurisdiction, and merely "religiously associated" schools, over which it would assert jurisdiction. Since the board in this case considered both the five Indiana high schools and the two Chicago seminaries only "religiously associated," the Seventh Circuit attacked this self-imposed jurisdictional standard. "We find the standard itself to be a simplistic black or white, purported rule containing no borderline demarcation of where 'completely religious' takes over or, on the other hand, ceases. In our opinion the dichotomous 'completely religious-merely religious associated' standard," according to the court,

> provides no workable guide to the exercise of discretion. . . .
>
> In our view the Board decisions dealing with the present question demonstrate that the Board has essentially adopted a per se rule that Catholic secondary schools will be subject to its statutory jurisdiction. The simple truth is that the Board had defined those Catholic schools which offer the regular range of secondary subjects as being intrinsically incapable of meeting its jurisdictional standard of "completely religious."[166]

Then — in articulating that which could, here by negative implication, be a pivotally important concept in any future analysis of potential state labor-board jurisdiction over a religious school participating in a truly universal choice — the Seventh Circuit's *Catholic Bishop* noted that the government generally and the N.L.R.B. specifically cannot have its First Amendment jurisprudence both ways:

Id. at 1123-24 (citations omitted).

[166] *Id.* at 1118 (footnote omitted). "If history demonstrates, as it does, that Roman Catholics founded an alternative school system for essentially religious reasons and continued to maintain them as an 'an integral part of the religious mission of the Catholic Church,'" the court stated,

> courts and agencies would be hard pressed to take official or judicial notice that these purposes were undermined or eviscerated by the determination to offer such secular subjects as mathematics, physics, chemistry, and English literature.
>
> . . . .
>
> Under the rationale the Board has adopted, it is readily apparent that secondary schools operated by various dioceses of the Roman Catholic Church can never be characterized as "completely religious." Once the employer admits the fact that its schools are performing "in part the secular function of educating children," it becomes definitionally impossible under the Board's cases to establish that the institutions can be anything else but "merely religiously associated."

Id. at 1118, 1119.

> The vagaries of litigation seldom present a "no lose" situation. Yet the Board. ... does seem to present a quintessential example of one. . . . [I]nstitutions which the Supreme Court has generically labeled as "sectarian," "substantially religious," "pervasively sectarian," "church-affiliated," and "religious-pervasive institutions[.]" are definitionally transmuted into schools which are "merely religiously associated." The total inability of the employers to overcome what appears to be an irrebuttable presumption in practical operation makes more understandable the complaint of the employers that the *Board is cruelly whip-sawing their schools by holding that institutions too religious to receive governmental assistance are not religious enough to be excluded from its regulation.*
>
> . . . .
>
> *[A]n even-handed approach to justice might seem to suggest that the Religion Clauses, serving as they do as a buckler to stop financial aid to these schools[,] should not now be any less effective to ward off the inhibiting effect of the government regulation involved.*[167]

The Seventh Circuit's *Catholic Bishop* is the highest-level opinion that has upheld the religious-freedom position in this context. But, given certain plausible applications of the logic in the above-quoted language to a hypothetical constitutional counter-offensive by parochial schools participating in a universal school-choice program against reliance by lay faculty members attempting to unionize themselves on state labor law, is the cud of *Culvert's* close camel actually coming closer?

Third row?

11. *Supporting dicta from other circuit courts of appeals*

As noted in the brief prepared and submitted by the religous schools' counsel in *St. Teresa*,[168] there is persuasive support in both the thinking and the language of other courts of appeal for the same result reached by the Seventh Circuit in *Catholic Bishop.*

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[167] *Id.* at 1119, 1131 (emphasis supplied) (citations, footnote omitted)(citing and quoting *Roemer*, 426 U.S. 748-54; Meek v. Pittenger, 421 U.S. 349, 366 (1975); Levitt v. Comm. for Pub. Educ., 413 U.S. 472 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 767-68; Lemon v. Kurtzman, 403 U.S. 602, (1971)), *quoted in* McCormick v. Hirsch, 460 F. Supp. 1337, 1352-53 (M.D. Pa. 1978).

[168] *Brief of Defendants-Respondents*, South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa, 615 A.2d 1155 (1996) (N.J. Super. Ct. App. Div. No. A-002593-94T3), at 36-40.

The Eighth Circuit's 1985 *Volunteers of America-Minnesota-Bar None Boys Ranch v. N.L.R.B.* and the Tenth Circuit's 1984 *Denver Post of the Nat'l Soc. of the V.O.A. v. N.L.R.B.*

In *Volunteers of America-Minnesota-Bar None Boys Ranch v. N.L.R.B.*,[169] the Eighth Circuit allowed N.L.R.B. jurisdiction over a church-operated camp at which youth would, among other things, receive religious instruction. It did so explicitly because of what it considered to be the differences between the ranch and private, parochial schools — over which, by negative implication, again, it would not have allowed labor-board jurisdiction. Although the Volunteers of America church "may view the Ranch as a vehicle for its religious missionary activities," according to Judge Theodore McMillian in the case,

> the Ranch resembles a secular institution in critical aspects. The Ranch has as its primary purpose a secular institution in critical respects. The Ranch has as its primary purpose the care of children, not the propagation of faith. The Ranch is operated by the VOA-Minnesota, a church, but there are no ministers on staff at the Ranch. The lay staff is chosen without regard to religious beliefs or affiliations and does not propagate the tenets of the VOA. The staff does not conduct religious classes or services and does not attempt to persuade children to accept VOA sectarian doctrines. Religious services are conducted at the Ranch by ministers of various denominations from the community.
>
> The Ranch and its employees perform essentially secular functions. This is in contrast to the parochial schools in *Catholic Bishop* where the religious character of the schools existed at all three levels: the church had a religious purpose in establishing the schools, the schools had a religious purpose, and the teachers were mandated to propagate sectarian doctrines.[170]

[169] Volunteers of Am.-Minnesota-Bar None Boys Ranch v. N.L.R.B., 752 F.2d 345, 348-49 (8th Cir. 1985).

[170] *Id.* at 348-49. Unlike the Supreme Court in *Catholic Bishop*, the Eighth Circuit therefore concluded,

> The NLRB's assertion of jurisdiction over the Ranch does not pose a significant risk of entanglement and does not violate the free exercise clause or the establishment clause of the first amendment. We therefor need not decide whether Congress expressed an "affirmative intention" to confer jurisdiction. Accordingly, we enforce the NLRB's order requiring the Ranch to bargain collectively with the union.

Id. at 349.

In *Denver Post of the National Society of the Volunteers of America v. National Labor Relations Board,* the Tenth Circuit similarly allowed N.L.R.B. jurisdiction over a V.O.A. facility, in part because its employees' "role is a far cry from that of the parochial school teachers in *Catholic Bishop*" — in which the First Amendment problems identified by the Supreme Court "stemmed not from the church's religious philosophy itself, but from the infusion of that philosophy into the school's functions and the critical role it performed. In contrast, although the VOA's social programs are expressive of its religious philosophy, the two are not overly intertwined."[171]

The Ninth Circuit's 1991 *National Labor Relations Board v. Hanna Boys Center.*

In *National Labor Relations Board v. Hanna Boys Center*,[172] a Ninth Circuit panel allowed N.L.R.A.-mandated collective bargaining between the non-faculty employees of a church-owned residential school for boys and their religious employer. It did so because of the differences between these employees and teachers; by implication, the Court would not have allowed Board jurisdiction over the relations between the teachers and the employer. "The difficult constitutional question that the [Supreme] Court sought to avoid" in *Catholic Bishop*, according to the opinion of Judge William C. Canby, Jr., in *Hanna Boys Center*, "was that which would flow 'from the Board's exercise of jurisdiction over teachers in church-operated schools.' The point was reiterated throughout the Court's opinion, and it was clearly founded on the 'unique role' of teachers in accomplishing the religious goals of the school."[173] The Ninth Circuit in *Hanna* found no similar difficulties of constitutional import with the "exercise of jurisdiction over the relationship between Hanna and its secular employees *who are not significantly involved in teaching.*"[174] (In *Volunteers of America, Los Angeles v. National Labor Relations Board*, an earlier Ninth Circuit panel allowed Board jurisdiction

171 Denver Post of the Nat'l Soc'y of the V.O.A. v. N.L.R.B., 732 F.2d 769, 772 (10th Cir. 1984).

172 N.L.R.B. v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991), *cert. denied,* 112 S. Ct. 2965 (1992).

173 *Id.* at 1301 (citations, footnotes omitted).

174 *Id.* at 1302 (emphasis supplied). "After the parties filed their briefs in this case," *Hanna Boys Center* notes, the Supreme Court announced its opinion in *Smith.*

> The initial question thus arises whether Hanna's claims should be evaluated using the traditional *Sherbert* balancing test or the more restrictive test authorized in certain situations by *Smith.*
>
> Were this issued determinative, we would ask for supplemental briefing . . . , although we have serious doubts regarding [*Smith's*] applicability in light of the fact that the constitutionally challenged law is not a criminal one, as *Smith* seems to require before its test can be applied.

over another V.O.A. facility because its "staff cannot propagate their employer's religious doctrine, an important distinction from the parochial schoolteachers in *Catholic Bishop*."[175])

Justice Stephen G. Breyer's opinion in the First Circuit's 1986 *Universidad Central de Bayamon v. N.L.R.B.*

In *Universidad Central de Bayamon v. N.L.R.B.*,[176] after a three-judge panel allowed N.L.R.B. jurisdiction over the relations of even a "Catholic-oriented" university in Puerto Rico with its lay-faculty members, the full First Circuit vacated this decision and heard the matter *en banc*. Then, "[s]ince this court is equally divided" — interestingly, 3-3 again — "it cannot grant the Labor Board's request to enforce its order requiring the University to bargain with its faculty union," according to the opinion of now-Supreme Court Justice Stephen G. Breyer.[177] Importantly, though, Justice Breyer was on the side against labor-board jurisdiction. According to Justice Breyer in *Universidad Central*, the Supreme Court in *Catholic Bishop*

> expressed concern about the scope of potentially entangling Board inquiry, giving the fact that the "terms and conditions of employment" of teachers — "mandatory subjects of bargaining" — in the context of "educational institutions" may concern the whole of school life, for "nearly everything that goes on in the school affects teachers and is therefore arguably a condition of employment." . . .
>
> One might reply that many of these *Catholic Bishop* concerns exist whenever a church runs a non-religious enterprise, such as a hospital or a farm. . . . Yet, philosophical, theological and church-related moral issues would seem more likely to permeate the educational process (especially how or what students are taught or counseled) than the administration of farms or even hospitals.

Id. at 1305. *See also text* accompanying *supra* note 80 (quoting *Smith*). "We need not decide," according to *Hanna Boys Center*, however, because we find that Hanna's free exercise claims do not survive even the less restrictive *Sherbert* balancing test. . .

Board jurisdiction will clearly circumscribe Hanna's operation, as suggested by the vigor with which Hanna resists such jurisdiction. . . .

Board jurisdiction here will not interfere with the free exercise of *religious beliefs* of anyone at Hanna. Catholic doctrine has no objection to unionization or collective bargaining. *Id.* at 1305-06 (emphasis in original). Regarding this last point, *see supra* note 63.

175 Volunteers of Am., Los Angeles v. N.L.R.B., 777 F.2d 1386, 1390 (9th Cir. 1985).

176 Universidad Central de Bayamon v. N.L.R.B., 793 F.2d 383 (1st Cir. 1986).

177 *Id.* at 399.

> And, here, the inculcation of religious values is at least one purpose of the institution.
>
> [W]e cannot avoid entanglement by creating new, finely spun judicial distinctions that will themselves require further court or Labor Board "entanglement" as they are administered. To order the Board to exclude priests from the bargaining unit; to approve its having separated the seminary from the rest of the school; to create special burden of proof rules; to promise that courts in the future will control the Board's efforts to examine religious matters, is to tread the path that *Catholic Bishop* forecloses. These *ad hoc* efforts, the application of which will themselves involve significant entanglement, are precisely what the Supreme Court in *Catholic Bishop* sought to avoid.[178]

And did, with the equivalent of about a fifth-row seat.

[178] *Id.* at 402-03 (emphasis in original) (citations omitted). As in *Catholic Bishop*, see *supra* note 28, Justice Breyer included as an appendix to his First Circuit opinion portions of (another) chilling N.L.R.B. examination of the Archbishop of San Juan, a Cardinal of the Catholic Church, by a Board hearing officer:

Q. [By Mr. Garcia, University Counsel]: Your Eminence, if you know, how many liturgies are required at Universidad Central de Bayamon?
A. May I ask what that will prove?
Q. Well we are asking a question of Your Eminence that we hope you can answer. If you can't answer it tell us you cannot.
A. Well I suppose they have liturgies, but I don't know how many.
Hearing Officer: If I may, Witness. If you know the answer you are instructed to answer. If not please state that you have no personal knowledge of whether there are any or whether they are required.
[Colloquy]
Q. Yes, Your Eminence, we would like to know in regards to the liturgies that may be required or may occur at Universidad Central de Bayamon, if you have any personal knowledge or if you have participated in any of them?
A. Well, first of all I don't know exactly the number of liturgies they may have at the University. I don't know exactly the number. Secondly, I don't remember having said Mass at the University itself, since it doesn't have a chapel as such. The Church nearby, which belongs to the parish; there I have said Mass. Now I would like to add that I have said Mass in other institutions like prisons and so forth and that doesn't make them Catholic.

Q. Do you remember if in or around November 1974 you met with President Vicente Rooij and discussed the possibility that some of the persons working as his underlings in the administration could be fired or substituted by other persons.
A. I remember very well interceding for some priests who were bounced from the University. I disliked the way in which it was done, so I called Father Vicente and I told him my great displeasure at the way these priests had been treated.
Q. Do you remember if in or around January of 1975 you sent communications to Rome regarding your desire to have a closer and more effective power over Universidad Central de Bayamon?
A. That I have done several times. Definitely.

III. TWO SCHOOL-CHOICE TENTS, AND THE REAL AND POTENTIAL LEGAL REACTIONS OF TEACHERS' UNIONS TO — INCLUDING PERHAPS PUTTING THEIR NOSES *INe*— THEM

Of course, any court considering a hypothetical challenge to the attempted reliance on state labor-law application to the relations between the religious schools participating in a choice program and their lay faculty members should, if that law is ambiguous regarding such coverage, invoke — as the Supreme Court did in *Catholic Bishop* — the statutory canon of construction to avoid the constitutional problems altogether. If a court felt that it could not or did not want to invoke this principle of statutory construction, it would then need to apply both the Free Exercise and Establishment Clause analyses to the particular set of facts before it.

Free Exercise Clause analysis.

Because the Supreme Court's *City of Boerne* struck down the R.F.R.A., the Court's *Smith* standard applies. Under this standard, a valid law of general applicability that does not intend to regulate religious conduct or beliefs is not subject to a Free Exercise challenge.[179] Religious choice schools could still plausibly attempt to effectively exempt themselves from *Smith* by relying on the implications of Justice Scalia's distinction therein between its reasoning's aplicability to only criminal and not civil laws, including civil state labor-relations laws—as (unsuccessfully) tried in *Hill-Murray*.[180] Otherwise, such a religious choice school would "only" — as opposed to *also* — be left with Establishment Clause arguments.

Establishment Clause analysis.

According to the still jurisprudentially extant three-prong Establishment Clause test from *Lemon* — applied, with varying degrees of vigor

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Q. Do you remember if in or around February, 1975 you also sent letters to Rome regarding the functions of Father Vicente van Rooij as president of the University and Maria Mollinero as vice president of the University and regarding other persons in the administration of the University?

A. I may have in the same sense that I said I have certain prerogatives with the priests of the Archdiocese. I may have done it. I don't remember exactly as I did it, but I may have. He is a priest of the Archdiocese, Father Vicente.

Id. at 406-07 (brackets in original).

[179] *See* text accompanying *supra* notes 75-77.

[180] *See* Employment Division, Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 876, 883-84 (1990), *quoted in* text accompanying *supra* notes 78-80; Hill-Murray Fed'n of Teachers v. Hill-Murray H.S., 481 N.W.2d 857,t863 (Minn. 1992), *quoted in* text accompanying *supra* note 82.

(and differing results), in all of the above-examined cases except for the "pro-union" *St. Teresa* — a court hearing this hypothetical case would need to consideri

- first, whether a challenged state labor-relations law, if one exists, has a secular purpose;
- second, whether the principal or primary effect of any such labor law — *not* the school-choice program, the constitutionality of which presumably will have been adjudicated at this point — is to advance or inhibit religion; and,
- third, whether application of a labor law to religious choice schools will create an excessive administrative entanglement with religion — for which such a court should, as in *Hill-Murray*, consider:

    1) the character and purposes of the institutions benefited — here, presumably the lay teachers' associations, though *Hill-Murray* seems to think that it was the school itself to here be considered;
    2) the nature of the aid that the state provides — here again, presumably the "aid" or, as *Hill-Murray* termed it, the "activity" mandated by application of state labor law to religious-school/lay-teacher relations and not, more broadly, any aid the state provides any parties in the case (including making available indirectly, through parents, school-choice "aid" to religious schools); and,
    3) the resulting relationship between the state and the religious authority running the schools.

The "pro-union" cases of *Culvert* and *Hill-Murray*, recall, considered the relevant New York and Minnesota state labor-relations laws, respectively, to have secular purposes and effects of neither enhancing nor inhibiting religion, and neither saw any realistic prospects of the laws' application creating excessive administrative entanglements with religion. The "pro-religious school" cases of *Caulfield* and *McCormick*, of course, arrived at the opposite conclusion regarding the *Lemon* excessive-entanglement prong— with the Seventh Circuit's "pro-school" *Catholic Bishop*, applying the "Religion Clauses" as one, doing the same only implicitly.[181]

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[181] According to an ambiguous 1994 Vermont state supreme court decision that allows governmental reimbursement for the costs of tuition at some religious schools in remote areas of the state, "First Amendment jurisprudence has evolved greatly since 1961 and in directions unpredictable at the time. Thus, we must examine the difficult constitutional issues anew in light of more recent teachings." Campbell v. Manchester Bd. of Sch. Dir., 641 A.2d 352, 357 (Vt. 1994).

Significant portions, particularly for this overall analysis, of this methodical and at times reletively "tightly" applied *Lemon* mode of Establishment Clause analysis were "loosened" by the Supreme Court, 5-4, in last June's *Agostini v. Felton.*[182] In *Agostini,* the Court was asked by New York City, parents of parochial school children, and the Clinton Administration, to aggressively use the Federal Rules of Civil Procedure[183] and overrule its 1985 *Aguilar v. Felton* decision.[184] *Aguilar,* on those "tight" Establishment Clause grounds, prevented the New York City public school system from satisfying certain provisions of Title I of the 1965 federal Elementary and Secondary Education Act (E.S.E.A.)[185] to educate and counsel impoverished and low-acheiving students by sending teachers into of the private, including parochial, schools that they were attending. The school system and the U.S. Department of Education had chafed at the burdensome costs caused by the ruling ever since; the city, with federal support, spent $15 million to lease 114 mobile vans for the public-school teachers to use while educating some 22,000 parochial-school students in them as they were parked just outside of the 250 participating private and parochial schools.[186]

"*Aguilar* is no longer good law,"[187] according to Justice Sandra Day O'Connors's majority *Agostini* opinion. Understandably, *Agostini* very much heartened universal school-choice proponents,[188] whose legal ad-

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Campbell has spawned litigation that is potentially very important to the school-choice movement. While more than 90 mostly small, rural Vermont school districts without schools "tuition" their students to approved public or private schools elsewhere, the Chittendon Town School District is attempting to "tuition" 15 high schoolers to the nearby Mount Saint Joseph's Academy, a Catholic school. In late June 1997 in *Chittendon Town Sch. Dist. v. Vermont Dep't of Educ.*, a state trial court rejected the district's attempt to seek a declaratory judgment that would affirm its ability to "tuition" the high schoolers under *Campbell. See generally* Sally Johnson, *Vermont Parents Ask State to Pay Catholic School Tuition*, N.Y. TIMES, Oct. 30, 1996 at B9. An appeal has been filed directly with the state supreme court.

A *Campbell*-like suit has also been filed in Maine. Diego Ribadeneira, *Maine Parents Raise Church-State Issue: Suit Will Seek Tuition for Religious Schools*, BOSTON GLOBE, July 30, 1997.

182 Agostini v. Felton, 65 U.S.L.W. 4524 (June 23, 1997), *rev'g* Aguilar v. Felton, 473 U.S. 402 (1985), *rev'g in part* School Dist. Of Grand Rapids v. Ball, 473 U.S. 373 (1985).

183 Fed.R. Civ. P. 60 (b). According to Rule 60 (b), a "court may relieve a party or party's legal representative from a final judgment, oreder, or proceeding" for one of several reasons. *Id.* In this case, the "reason" was an expressed desire on the part of several — collectively, a majority, in facto— of the justices in their opinions in Board of Educ. of Kiryas Joel Village Sch. Dist v. Grumet, 512 U.S. 687 (1994), to seriously reconsider *Aguilar.*

184 *Aguilar,* 473 U.S. 402.

185 20 U.S.C. § 6301 *et seq.*

186 Jacques Steinberg, *After Years of Classes in Vans, It's Back to School,* N.Y. TIMES, June 24, 1997, at A11. *See* Linda Greenhouse, *High Court Asked to Reverse Ruling in a Religion Case: An Unusual Procedure,* N.Y. TIMES, Oct. 31, 1996, at A1.

187 *Agostini,* 65 U.S.L.W. at 4524.

188 *See, e.g.*, Peter Applebome, *Parochial Schools Ruling Heartens Voucher Backers: Court Seen as Receptive to School Aid Plan,* N.Y. TIMES, June 25, 1997, at A19 (Michael Dorf, Professor, Columbia University School of Law: "I think this ruling makes it slightly

vocates are arguing in this related context elsewhere (among other things) that vouchers for parents to possibly use in sending their children to private, religious schools do not violate the federal Establishment Clause. O'Connor found in *Agostini* that Title I — as universal school choice advocates are contending is also the case with both the M.P.C.P. and the C.S.T.P. — first, has a secular legislative purpose; second, has a principal or primary effect that neither advances nor inhibits religion; and third, is not excessively entangling.[189]

Since — for purposes of the Establishment Clause portion of the overall analysis herein, constitutionally scrutinizing application of state labor law to relations between lay faculty and religious choice schools employing them — only the third prong is problematic (*Caulfield* and *McCormick* did not consider Pennsylvania labor law to have a religious purpose or a principal or primary effect of either advancing or inhibiting religion), Justice O'Connor's thus-important *Agostini* analysis thereof is here more closely examined. Might it be the case that the same excessive-entanglement "loosening" in *Agostini* that may constitutionally permit religious schools to participate in choice programs may also prevent them from subsequently successfully arguing that state labor-law application to them is too excessively entangling to be constitutionally permissible?; if it is not too entangling for religious school choice to exist, in other words, how could it be possibly be too entangling for religious choice schools to be regulated? Does *Agostini* make "positive" the feared negative implication of the Seventh Circuit's *Catholic Bishop* opinion's remark that "an even-handed approach to justice might seem to suggest that the Religion Clauses, serving as they do as the buckler to stop financial aid to these schools[,] should not now be any less effective to ward off the inhibiting effect of the government regulation involved;"[190] if no longer a buckler to stop financial aid, in yet these other words, could the excessive entanglement clause still ward off inhibiting regulation?

Specifically, then, *Agostini* finds no excessive entanglement between the government and the private, parochial schools because "the

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easier to argue to the Court in the future that vouchers for private schools are constitutional when used at parochial schools"); Joan Biskupic & Laurie Goodstein, *Church-State Divide Narrowed*, WASH. POST, June 24, 1997 at A1 (Mark Chopko, General Counsel, United States Catholic Conference: "This decision confirms that vouchers can be constitutional"); Linda Greenhouse, *Court Eases Curb on Aid to Schools with Church Ties: Upends Precedent*, N.Y. TIMES, June 24, 1997, at A1 (Kevin J. Hasson, President, Becket Fund for Religious Liberty: "The tea leaves look spectacular for vouchers"). *See also* Edward Felsenthal, *High Court Rules Public Teachers Can Work in Religious Schools*, Wall St. J., June 24, 1997, at B8.

189 *Agostini*, 65 U.S.L.W. at 4524.

190 Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977), *quoted in* text accompanying *supra* note 167.

Court's finding of 'excessive' entanglement in *Aguilar*' — erroneously, acccording to Justive O'Connor's opinion —

> rested on three groundsi (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board [of Education of New York City, which was running the program] and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." . . . Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement.

And as for the first consideration, it

> has been undermined. In Aguilar, the Court presumed that full time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required touphold. Because of this risk pervasive montoring would be required. But after Zobrest [v. Catalina Foothills Sch. Dist.[191]] we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required.[192]

A. THE MILWAUKEE PARENTAL CHOICE PROGRAM (M.P.C.P.)

1. *The Program (I)*

a. A pup tent[193]

The original M.P.C.P. passed the Wisconsin state legislature, in large part at the behest of Democratic state Rep. Annette "Polly" Williams, as part of a larger budget bill in March 1990 and was signed by Republican Governor Thompson the next month. It first took effect in

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191 Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993).

192 *Agostini*, 65 U.S.L.W. at 4532.

193 This original-M.P.C.P. overview is in part reflective of what appears in Michael E. Hartmann, *Cleaning Up with Banquo's Ghost in the Dairyland? A Brief (Economic) Analysis of the Milwaukee Parental Choice Program's Unconstitutional Conditioning of Its Aid on an Effective Waiver of a Recipient's Free Exercise of Religion: Professor Richard A. Epstein's Bargaining with the State and Miller v. Benson*, 27 AKRON L. REV. 445, 454-59 (1994).

the 1990-1991 academic year and, because of the injunction against its expansion, is still in effect in practice. Specifically, the program — against which strong libertarian-conservative reservations have been expressed,[194] principally because of the properly perceived danger of its inviting the ultimately stifling government overregulation of existing successful private schools — allows parents of "a family that has a total family income that does not exceed an amount equal to 1.75 times the poverty level [to send their children to] any nonsectarian private school located in the city" using state tax money equal to what the state would have given the M.P.S. system per pupil, provided certain criteria are met by the student, his or her family, and the particpating private school chosen.[195]

At first, the original M.P.C.P. restricted the number of students that could even be eligible for the program to "[n]o more than 1% of the [M.P.S.] school district's membership . . . in any school year." For the 1994-95 academic year, this was increased to 1.5%.[196] "Officials at participating [M.P.C.P.] schools, "moreover, according to a November 1992 W.P.R.I. report by prominent local public-policy research consultant George A. Mitchell, believed "that because state reimbursement does not cover their operating costs they cannot afford to expand so more students can attend."[197] These limits, as well as another — that the number of M.P.C.P. students in any private school could not exceed 49% of its total enrollment — combined to deny hundreds of students the opportunity to participate in the program. This latter limit was increased to 65% in 1994-'95.[198]

A parent seeking to participate in the M.P.C.P. submits an application to a participating school and, if and when their child is then accepted and enrolled at that school, provides proof of that enrollment to the D.P.I. At this direct behest of the parent, the D.P.I. thereafter pays quarterly tuition reimbursements to the school that are based on a statutorily provided formula.[199] An increasing number of parents have done this, stimulating an increasing number of private schools to supply their demand. Table 1 below shows this increasing level of participation — by eligible students and private, non-parochial schools — in the M.P.C.P. during the seven years since its inception.

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194 *See generally* Rick Henderson, *Schools of Thought*, REASON, Jan. 1997, at 30.

195 WIS. STAT. § 119.23(2)(a) (1991).

196 *Id.* § (2)(b)1.

197 George A. Mitchell, *The Milwaukee Parental Choice Program*, 5 W.P.R.I. REP. 5, 51 (1992).

198 WIS. STAT. § 119.23(2)(b)2 (1991).

199 *Id.* at§§ (3)-(5).

TABLE 1 Participation by Students and Private Schools in the Original M.P.C.P., 1990–'91 to 1996–'97[200]

	1990–'91	1991–'92	1992–'93	1993–'94	1994–'95	1995–'96	1996–'97
Eligible Students	931	946	950	968	1,450	N.A.	N.A.
Applications	577	689	998	1,049	1,046	N.A.	N.A.
Available Seats	406	546	691	811	982	N.A.	N.A.
Participating Students*	341	521	608	733	802	1,454	1,652
Participating Schools	7	6	11	12	12	17	20
Private, non-parochial schools in Milwaukee	22	22	23	23	23	33	N.A.

* As of September of each respective academic year.
N.A. = Not available

These parents and students who benefit from the M.P.C.P. have been, and are (as intended) predominantly from low-income families. Their average reported household income was $11,630 during the first five years of the program, but rose to $14,210 in 1994; the average income of families with children enrolled in the M.P.S. system was approximately $24,000 and the average household income of those with children in non-M.P.C.P. private schools in Milwaukee was about $43,000.[201] M.P.C.P. families are also mostly non-white. Seventy-four percent of those applying to the program and 72% of those enrolled in its first five years were black; 19% of applicants and 21% of enrollees were Hispanic.[202] The cost to Wisconsin's state government of helping these families has risen, according to the state's Legislative Fiscal Bureau, from $733,800 in the program's first year (0.3% of all state aid to the M.P.S. system) to $7,106,000 in the last academic year (1.6% of all M.P.S. state aid)[203] — as shown in Table 2 below.

TABLE 2 Amount of Original-M.P.C.P. State Funding, 1990-'91 to 1996-'97[204]

	1990–'91	1991–'92	1992–'93	1993–'94	1994–'95	1995–'96	1996–'97
"Membership"*	300	512	594	704	771	1,202	1,625**
State Aid per Member	$2,446	$2,463	$2,745	$2,985	$3,209	$3,667	$4,373
Total State Payment***	$0.733M	$1.353M	$1.630M	$2.101M	$2.474M	$4.406M	$7.106M
As Percentage of State Aid	0.3%	0.5%	0.6%	0.7%	0.8%	1.2%	1.6%

* Different that the enrollment figures in Table 1, "membership" is the average number of pupils enrolled on the two "count dates" in September and January.
** Estimated.
*** In millions of dollars

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200 John F. Witte, Troy D. Sterr & Christopher A. Thorn, Fifth-Year Report, Milwaukee Parental Choice Program (Dec. 1995) (table 1); Bob Soldner, Milwaukee Parental Choice Program (Legislative Fiscal Bureau, State of Wisconsin, Jan. 1997) at 6 (table 1).

201 Witte, Sterr & Thorn, *supra* note 200, at iv (table 5a); Cecilia Elena Rouse, Private School Vouchers an Student Achievement: An Evaluation of the Milwaukee Parental Choice Program (Dec. 1996), at 6.

202 Witte, Sterr & Thorn, *supra* note 200, at iv (table 5b).

203 Soldner, *supra* note 200.

204 *Id.* at table 2.

Unlike with the effect of teachers' unions on education in general, generally discussed in the Background and Introduction section, the interest of educational researchers in the effect of the M.P.C.P. on the academic performance of these students has been quite high — and the debate among them has been conducted with not a little passion.[205] Project teams led by the Wisconsin Department of Public Instruction's (D.P.I.'s) chosen evaluator of the M.P.C.P. — John F. Witte, a University of Wisconsin-Madison political-science professor — have basically found in their annual reviews of the program that there is high parental involvement and satisfaction with it, but that there are no academic gains by students in choice schools.[206] Analyzing the data Witte's teams used — finally made available, via the World Wide Web, to other researchers for the first time only in 1996 — though an independent team led by Harvard University Professor Paul E. Peterson and University of Texas at Austin Professor Jay P. Greene has found otherwise. This team found significant math and reading gains by those M.P.C.P. students who have remained in the program for at least three years.[207] Another, subsequent independent study by Cecilia Elena Rouse of Princeton University and the National Bureau of Economic Research essentially corroborates the findings of Professors Peterson and Greene: Rouse found that the Milwaukee Parental Choice Program and the participating private schools likely increased math scores by 1.5-2 percentage points a year.[208] While "[t]he results for reading scores were quite mixed," when she combined "the math and reading scores, [Rouse]

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205 *See* Bob Davis, *Dueling Professors Have Milwaukee Dazed Over School Vouchers: Studies on Private Education Result in a Public Spat About Varied Conclusions*, WALL ST. J., Oct. 11, 1996, at A1.

206 *See, e.g.*, Witte, Sterr & Thorn, *supra* note 200.

207 Jay P. Greene, Paul E. Peterson & Jiangtao Du, *The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation*, Aug. 14, 1996 (paper prepared for presentation to the Panel on the Political Analysis of Urban School Systems at the Aug.-Sept. 1996 meeting of the American Political Science Association, San Francisco, Calif., August 30, 1996). *See also* Paul E. Peterson, Jay P. Greene & Chad Noyes, *School choice in Milwaukee*, PUB. INTEREST, Fall 1997, at 38. *Contra* John F. Witte, *Reply to Greene, Peterson and Du: "The Effectiveness of School Choice in Milwaukee: A Secondary Analysis of Data from the Program's Evaluation"* (Aug. 23, 1996). *But see* Jay P. Greene & Paul E. Peterson, *Methodological Issues in Evaluating Research: The Milwaukee School Choice Plan*, Aug. 29, 1996 (paper prepared for Program in Educating Policy and Governance, Department of Government and John F. Kennedy School of Government, Harvard University); Jay P. Greene, Paul E. Peterson & Jiangtao Du, *Effectiveness of School Choice: The Milwaukee Experiment*, Program in Education Policy and Governance, Department of Government and John F. Kennedy School of Government, Harvard University, Occasional Paper 97-1, Mar. 1997. *But see* John F. Witte, *Achievement Effects of the Milwaukee Voucher Program* (undated) (paper presented to the 1997 American Economics Association Annual Meeting, New Orleans, La., Jan. 4-6, 1997).

208 *See, Cecilia E. Rouse, Private School Vouchers and Student Achievement: An Evaluation of the Milwaukee Parental Choice Program*, Dec. 1996 (working papert# 371, presented at the Dec. 1996 Industrial Relations Section at Princeton University).

estimated that [M.P.C.P.] students gained approximately 1.3 percentage points per year."[209]

b. A big top, with crucifixes?

As also generally discussed in the Background and Introduction section,[210] Wisconsin's 1995-97 state budget expanded the popular M.P.C.P. — specifically, by deleting the restriction against sectarian-school participation,[211] allowing the additional participation of up to seven percent of the M.P.S.-system pupil population in 1995-'96 and 15% in 1996-'97, and outright repealing the participating-school enrollment limit on participating students.[212] The now-enjoined expansion also slightly — though perhaps to a judge hearing a constitutional challenge to it, *substantively* — changed the method of how schools received their parent-directed, tuition-reimbursement payments from the D.P.I. A parent seeking to participate in the M.P.C.P. as amended would still submit an application to a private school in the program and then, if and when accepted, provide proof of the enrollment to the D.P.I. The department though, would then — instead of making a check payable to the school at the behest of the parent, as before — make a check actually payable to the parent (or guardian) and send to the school that check, which would then be "restrictively endorse[d by the parent (or guardian)] for the use of the private school."[213] Also, unlike before (or, because of the injunction, *now*), under the M.P.C.P.: "[a] private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits to the pupil's teacher or the private school's principal a written request that the pupil be exempt from such activities."[214]

2. *The Lawsuit(s) (I)*

a. The education establishment vs. the pup tent and *Davis v. Grover*

Just 15 days after Governor Thompson ceremonially signed the original M.P.C.P. in May, 1990, at a Milwaukee school, the W.E.A.C. and the N.A.A.C.P., among many others — curiously, at the public urging of then-State Superintendent Herbert J. Grover, filed suit against the

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209 Howard L. Fuller, *New Research Bolsters Case for School Choice*, WALL ST. J., Jan. 21, 1997, at A14 (quoting Rouse). *See generally* George Mitchell, *School Choice is Making a Difference*, WIS. SCH. NEWS, May 1997, at 8.

210 Text accompanying *supra* notes 2-8.

211 1995 Wis. Act 27 § 4002 (1995), (amending WIS. STAT. § 119.23(2)(a) (1991)).

212 *Id.* § 4003 (repealing and recreating WIS. STAT. § 119.23(2)(b) (1991)).

213 *Id.* § 4006m, (amending WIS. STAT. § 119.23(4) (1991)).

214 WIS. STAT. § 119.23(7)(c) (1991 & Supp. I 1996), *created by* 1995 Wis. Act 27, § 4008 (1995).

program (and technically, against Grover himself), seeking original jurisdiction in the state supreme court. Grover's D.P.I. concomitantly sought to employ his department's administrative powers to encumber participating M.P.C.P. schools[215] and outright prevent the participation of

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215 An eight-page D.P.I. "compliance form," for example — sent, two weeks before the deadline to schools that are applying for participation in the M.P.C.P. — informed prospective participant schools of some state and federal regulatory requirements to which they would be obligating themselves to meet by participating.

> Special Education and related services are provided to EEN [Exceptional Educational Needs] children with the following handicapping conditions or any combination thereof:
>
> - Physical or orthopedic disability
> - Mental retardation or other developmental disabilities
> - Hearing impairment
> - Visual disability
> - Speech or language disability
> - Emotional disturbance
> - Learning disability
>
> The following supportive and related services are provided as needed to assist an individual child to benefit from special education.
>
> - Transportation
> - Audiological services
> - Psychological services
> - Occupational therapy
> - Physical therapy
> - Recreation
> - Medical services for diagnosis and evaluation
> - Counseling and guidance
> - Social work services
> - Parent counseling and training
> - Others

DANIEL MCGROARTY, BREAK THESE CHAINS: THE BATTLE FOR SCHOOL CHOICE 86 (1996) (brackets in original; footnote omitted) (quoting Program Notice from the Milwaukee Parental Choice). The form also required a guarantee to comply with:

- the Wisconsin Pupil Nondiscrimination Act, 118.13, Stats., and Wis. Adm. Code PI 9;
- Title IX of the Education Amendments of 1972, as amended, 20 USC 1681 et seq.;
- the Age Discrimination Act of 1975, as amended, 42 USC 6101 et seq.;
- [§] 504 of the Rehabilitation Act of 1973, as amended, 29 USC 794;
- the Family Education Rights and Privacy Act, 20 USC 1232g;
- the Drug-Free Schools and Communities Act of 1986, 20 USC 3171;
- "*all federal and state constitutional guarantees protecting the rights and liberties of individuals including freedom of* religion, expression, association, against unreasonable searches and seizure, equal protection and due process";
- "all regulations, guidelines, and standards lawfully adopted under the above statutes by the appropriate administrative agency;
- "all applicable federal and state laws" regarding the delivery of services to handicapped students under the Education for All Handicapped Children Act, 20 USC 1401 et seq., 115.76 et seq., Stats., and Wis. Adm. Code PI 11; and
- Public school district standards for staff licensure and development, ancillary services, curriculum, etc. under Wis. Adm. Code PI 8.

MCGROARTY, *supra* (brackets supplied; footnote omitted).

others — because of religion. In a D.P.I. hearing, the principal, Capuchin Brother Bob Smith, of Messmer High School — a highly successful high school in Milwaukee's central city that was closed by the Archdiocese of Milwaukee in 1984, but revived by parents for the next academic year[216] — sought to reverse a D.P.I. rejection of Messmer's application for participation in the M.P.C.P. The excerpted portion of the hearing, footnoted hereto, may shed some light on the subsequent excessive-church/state-entanglement analysis herein and on the way Wisconsin's labor board — the D.P.I.'s fellow state-government entitya— this part of the operation might question religious choice schools as it determines whether it has jurisdiction over them.[217]

Grover's inclination to regulate remains, surviving in his successor at the D.P.I., John T. Benson — who, after two M.P.C.P.-participating schools closed, referenced in an April 1996 memorandum to state legislators "the need for assurances that the private schools are viable, both administratively and financially," and "[r]equiring a more formal governance structure for the schools, authorizing more state financial oversight, and requiring that 'choice' students take all statewide assessments administered to public school students." Memorandum from John T. Benson to Members of Wisconsin State Legislature (Apr., 1996). (Benson was elected to another four-year term on April 1, 1997. Tom Heinen, *Wilcox wins easily; Benson beats Cross again: Incumbent in Superintendent's race increases margin slightly from '93*, MILWAUKEE J. SENTINEL, Apr. 2, 1997, at 1A.) *See generally* Susan Mitchell, *Why Choice Supporters Can't Relax*, WI: WISCONSIN INTEREST, Spring/Summer 1996, at 9. *See also* Steven Walters, *Background Checks for Private Teachers Opposed: Business Lobbyist Criticizes Plan to Include School Choice Program*, MILWAUKEE J. SENTINEL, Mar. 26, 1997, at 3B (regarding consideration of "bill to require criminal background checks to teachers in private schools that participate in the school choice program").

216 *See* Michael E. Hartmann, *"Sometimes So Simple, It's Sad:è' Milwaukee's Messmer High School*, WI: WISCONSIN INTEREST, Spring/Summer 1994, at 9.

217 [D.P.I. attorney Robert J.] PAUL: Let me get a clarification regarding the consecrated hosts . . . not being resident on the premises in the chapel. But . . . it's true that at any of the Masses that occur throughout the year, hosts *are* consecrated at those Masses —

Brother Bob: Yes.

Paul: — and in the Catholic faith, that's the conversion of the bread and wine into the body and blood of Christ Jesus.

Brother Bob: That's correct.

Paul: And that takes place at the Mass, and then those articles of bread and wine are consumed—

Brother Bob: Yes.

Paul: — then they are no longer on the premises.

Brother Bob: That's correct.

Paul: Then—*in the time between consecration and consumption*—then the consecrated hosts of the blessed sacrament *is* present.

Brother Bob: That's correct.

Paul: With that clarification, that ends my cross.

And, chillingly, in an elicited delineation of authority from Brother Bob to the Holy Father,

Paul: We left off with the Minister General in Rome—is he the top person in the province of St. Joseph?

Brother Bob: The top Capuchin.

Paul: There is a general for the Congregation—

Brother Bob: Correct.

Paul: —who is in turn answerable to the Pope.

Brother Bob: That is correct.

Twenty-four hours before the state court declined to grant original jurisdiction in *Chaney v. Grover*, some M.P.C.P. parents themselves "took the offensive" and sued Superintendent Grover in Dane County Circuit Court, in Madison, Wisconsin, to judicially force his full compliance with the statutory law of the state. The result was *Davis v. Grover*, in which the *Chaney* plaintiffs intervened as defendants, and thus became the vehicle through which the teachers'-union camel would have to fight, the mere existance of the pup tent — much less a later entrance into it. They argued that the M.P.C.P. violated:

- the state constitution's article IV, § 18: "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title."[218]
- the state constitution's article X, § 3: "The legislature shall provide by law for the establishment of school districts, which shall be as nearly uniform as possible;"[219] and
- the state's public-purpose doctrine: "[P]ublic funds can only be used for public purposes."[220]

Dane County Circuit Court trial judge Susan R. Steingass upheld the M.P.C.P. against each of these three challenges. A three-judge panel of the state court of appeals led by Presiding Judge Paul C. Gartzke held the program unconstitutional on the "private-or-local-bill" grounds. The panel did not address the latter two questions.[221] And the state supreme court, in a 6-3 split[222] — with Justice William G. Callow's opinion at-

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Paul: So it is true in a disciplinary chain, for doctrinal purposes, if you will . . . for religious purposes, it's fair to say that there is a direct line, authoritatively, from you to the Pope. Isn't that true?

Brother Bob: No. You could stretch it out there was a connection, but the reality—

Paul: —No; I just went through the chain step by step for who answers to whom, and in fact if we were to diagram the structure of the Franciscan order, and you in it as a Capuchin, I can make that line.

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Paul: In the Department's view, it is significant that there is a line between the Pope and Brother Bob.

Examiner: It's the Department's view that there is a direct line of authority?

Paul: And it's significant, yes.

MCGROARTY, *supra* note 215, at 150, 151-52.

218 WIS. CONST. art IV, § 18.

219 WIS. CONST. art. X, § 3.

220 State *ex rel.* Warren v. Reuter, 170 N.W.2d 790, 794 (Wis. 1969), *quoted in* Davis v. Grover, 480 N.W.2d 460,e474 (Wis. 1992).

221 Davis v. Grover, 464 N.W.2d 220 (Wis. Ct. App. 1990).

222 Davis v. Grover, 480 N.W.2d 460, 474 (Wis. 1992).

tracting one concurrence[223] and creating three separate dissents[224] — upheld the M.P.C.P. against each challenge. No federal constitutional questions were raised.

b. *Miller v. Benson*

With the original M.P.C.P. constitutionally "safe and sound" after *Davis v. Grover* (at least for the time being), some M.P.C.P. parents essentially sought to *judicially* expand the program to include religious schools by filing suit against Grover's successor and challenging it on federal Free Exercise grounds. This aggressive litigation effort— *Miller v. Benson* — introduced federal constitutional questions to the specific school-choice controversy for the first time. It did so just as others were preparing to attempt to *legislatively* expand the program—ultimately, of course, successfully — and so lobbyists were thus leery of the potentially negative effect a judicial "loss" might have on their legislative-lobbying effort. The judicial effort's argument was, at its core, based on a Free Exercise variant of the longstanding unconstitutional-conditions doctrine: "[I]f the state gives aid to private individuals for the perceived public good, *then* it must not attach conditions that coerce, pressure, or induce any individual to in return waive the exercise of any of his or her constitutional rights. The state cannot 'bargain' that way."[225]

Sherbert, whose strict-scrutiny standard the R.F.R.A. sought to legislatively restore, is an unconstitutional-conditions case; there, Seventh-day Adventist Adell Sherbert, fired for refusing to work on the Sabbath day of her faith, could not be denied unemployment-compensation benefits that are otherwise available to her because doing so "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion on the other hand." According to Justice Brennan, "[G]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her worship."[226] The state, in other words, cannot bargain that way. In the specific, original-M.P.C.P. context, however, Wisconsin

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223 The concurrence of Justice Lewis J. Ceci. ("Let's give choice a chance!"). *Id.* at 477.

224 Those of then-Chief Justice Nathan S. Heffernan, *id.* at 478 (Heffernan, C.J., dissenting), now-Chief Justice Shirley S. Abrahamson, *id.* at 481 (Abrahamson, J., dissenting), and Justice William A. Bablitch, *id.* at 485 (Bablitch, J., dissenting).

225 Hartmann, *supra* note 193, at 446.

226 *Sherbert*, 374 U.S. at 404 (1963) *quoted in* Hartmann, *supra* note 193, at 461. *See generally* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987). In *Thomas*, a Jehovah's Witness that was fired for refusing to help manufacture weaponry on religious grounds could not be denied unemployment-compensation benefits because

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated

> bargains with the low-income Milwaukee parents of the mostly non-white students . . .: *on the condition that you effectively waive your free-exercise rights by agreeing to spend it at religious schools, we'll give you* the [money] we would've given M.P.S. to educate your child and let you spend it at any other school of your liking.[227]

Corollary to this Free Exercise argument in *Sherbert*, of course, is the necessary argument that giving Sherbert unemployment-compensation benefits would *not* also violate the Establishment Clause — and, in *Miller*, the argument was vindicating the families' Free Exercise rights by forcing the inclusion of private, parochial schools in the program would not do so either.

In March 1995 — right in the middle of the effort to legislatively expand the M.P.C.P. — Judge John J. Reynolds of the federal District Court for the Eastern District of Wisconsin disagreed. Worse yet from the point of view of expansion proponents, Judge Reynolds framed his conclusion in the following language — making it seem to legislators who were considering including the expansion provisions in the budget that [such legislation] would be unconstitutional because of the federal Establishment Clause: "The present state of First Amendment law compels this court to hold that the plaintiffs' request to expand the current Choice Program to make tuition reimbursements directly payable to religious private schools who admit eligible Choice Program schoolchildren would violate the Establishment Clause."[228] Judge Reynolds did not have the benefit of the United States Supreme Court's reasoning in *Rosenberger v. Rector*[229] — which, some three months later (by a 5-4 vote) invoked the unconstitutional-conditions doctrine in the First Amendment context by prohibiting the University of Virginia from conditioning the receipt of student-activities funds on an effective waiver in return for some students' Free Speech rights to print religious materials with those

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by religious belief., thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religious benefits. "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

Id. at 719, *quoted in* Hartmann, *supra* note 193, at 462.

In *Hobbie*, as in *Sherbert*, a Seventh-day Adventist could not be denied unemployment compensation for refusing to work on the Sabbath day of her faith. *See also* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989) (unemployment compensation cannot be denied to one fired for refusing to work on Sabbath).

227 Hartmann, *supra* note 193, at 459 (emphasis in original; brackets supplied; footnote omitted). Similarly, in Vermont and Maine, *see supra* note 186, groups of parents are suing school districts that refuse to allow parents to use the otherwise-available reimbursements to send their children to religious schools.

228 Miller v. Benson, 878 F. Supp. 1209, 1216 (E.D. Wis. 1994).

229 Rosenberger v. Rector, 115 S. Ct. 2510 (1995).

funds. The state university, according to *Rosenberger*, cannot bargain that way; the Establishment Clause, moreover, does not "trump" (in fact, given *Agostini*'s touting of Title I's "neutrality," it could be read as something of an Establishment Clause "flipside" to Free Exercise's *Rosenberger* on the First Amendment "coin").

The Seventh Circuit Court of Appeals, in a *per curiam* opinion, after Wisconsin Governor Thompson signed the M.P.C.P.'s legislative expansion in late July 1995 (and after *Rosenberger*, which the *per curiam* opinion cited), vacated Judge Reynolds's *Miller* opinion.[230] The Seventh Circuit purposely prevented its reasoning from being cited by those seeking to judicially enjoin — first temporarily and then permanently — the program's expansion.[231]

c. The teachers' union vs. the big top with crucifixes: The pending *Jackson v. Benson*

Again, as discussed in the Background and Introduction section, this effort began — so far successfully — and remains underway in *Jackson v. Benson*.[232] (The *Miller* plaintiffs have intervened in the *Jackson* case.) Judge Higginbotham's opinion in *Jackson*, enjoining the entire M.P.C.P. expansion recognized that "[f]ederal and state constitutional provisions are implicated in this case. But Judge Higginbotham considered it "prudent, however, for this court to rely on the state provisions if possible without answering the federal question. This court does so and does not address any of the federal questions posed by this case."[233] In finding that the expanded M.P.C.P. violates the Wisconsin constitution's establishment clause,[234] Judge Higginbotham (correctly) noted that "[t]he participating schools announce forthrightly that their mission is religious

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230 Miller v. Benson, 68 F.3d 163 (7th Cir. 1995). The legislative expansion, according to the Seventh Circuit, "gives plaintiffs exactly what they want — equal treatment of secular and sectarian private schools under the state's funding program." *Id.* at 164.

231 "To prevent the unreviewable decision of the district court from having any collateral consequence in the state litigation, we now vacate the judgment and remand with instructions to dismiss the litigation as moot." *Id.* at 165.

232 Text accompanying *supra* notes 6-8. *See generally* Kristen K. Waggoner, *The Milwaukee Parental Choice Program: The First Voucher System to Include Religious Schools*, 7 REGENT U. L. REV. 145 (1996).

233 Jackson v. Benson, No. CV 1982 (Dane County Cir. Ct. Jan. 15, 1997), at 2.

234 In so doing, interestingly, Judge Higginbotham himself makes what could become a helpful distinction for the pro-school-choice advocates in future proceedings. While there is "a long line of federal cases that stand for the proposition that government payments to parents to subsidize their child's education is "indirect' aid to the schools, and thus not violative of the Establishment Clause," according to Justice Higginbotham, who cites *Rosenberger* and three other United States Supreme Court cases,

> [a]lthough the U.S. Supreme Court has chosen to turn its head and ignore the real impact of such aid, this court refuses to accept that myth. . . . Whether sent directly to the schools or sent directly to the schools with a mandate of restrictive endorsement by the parents, is irrelevant under Article I, sec. 18 which makes no distinction

and that the religious doctrine will be instilled in their students"[235] and

as to how the "benefit" is provided. As stated earlier in this case, the state cannot do indirectly what it cannot do directly.

Id. at 28.

(Perhaps more interestingly, to say that "the state cannot do indirectly what it cannot do directly" is essentially another formulation of the unconstitutional-conditions doctrine relied upon in *Miller* and *Rosenberger* and rejected by Judge Higginbotham, see text accompanying *supra* notes 226-29. Basically, in this context, the reasoning — if actually applied — would be that because the state could not discourage parents from sending their children to religious schools, it cannot indirectly discourage them from doing the same by funding only the parents who agree to send their children to non-religious, public schools.)

[235] *Id.* at 10. From "the mission statements and other written materials prepared by many of the religious schools that notified the Superintendent of Public Instruction of their intent to participate in the Amended MPCP," Judge Higginbotham's opinion then quotes the following:

- "Oklahoma Avenue Lutheran School is an integral part of the ministry of Oklahoma Avenue Lutheran Church."
- "The mission of St. Leo and St. Rose Catholic schools is to share in the parish evangelization effort through providing quality Catholic education in grades pre-kindergarten through eight."
- "The continuing purpose of St. Matthew Ev. Lutheran Church and School is to go and tell the pure Gospel of Jesus Christ for the conversion of unbelievers and the strengthening of believers in faith and Christian living."
- "St. Paul's Lutheran School exists to:
  —assist parents in training children in God's way,
  —and teach God's Word to children, and
  —make disciples of children.
- "We believe our school exists to carry out the Savior's command to 'go and make disciples' (Matthew 28:19). Consequently, our school's primary reason for existence is to be a tool for bringing young souls to faith in Jesus." (Fairview Lutheran School).
- "A prospective student whose parents are not members of a church will be considered as mission prospects. Christ Lutheran Church/School considers it a responsibility to teach the Word of God to those who have not heard this blessed Word."
- "The objectives of the [Clara Muhammad School] are:
  1. To foster within each student the principle of submissions to the will of Allah (God) as the essential element in achieving human excellence."
- "Holy Redeemer Christian Academy is an integral part of the ministry of Holy Redeemer Church of God in Christ."
- "As a Catholic High School, [Divine Savior Holy Angels High School] is dedicated to promoting the beliefs and traditions of the Catholic Church."
- "The Yeshiva Elementary School of Milwaukee was initiated by members of the Orthodox Jewish Community with the following objectives as their goals:
  To teach elementary school children Torah and Mitzovos in accordance with the ideals and aspirations of Torah as espoused by the G'Dolei Yisroel in order to provide the excellence in Orthodox Jewish Education which will prepare our children to attend the finest seminaries, Yeshivas and institutions of Jewish higher learning."
- "The function of St. Bernadette Day School is to provide for Christian individuals opportunities for growth in faith, for formation, for development."
- "First and foremost Garden Homes Lutheran Church conducts and maintains a Christian elementary school to assist Christian parents in the training and nurturing of their children in the Word of God."

Id. at 10-11 (citations omitted; brackets in original).

that "as the schools' literature emphasizes, one of the primary means by which these schools accomplish their religious missions is by integrating the religious and secular aspects of the schools' educational programs."[236]

Judge Higginbotham also struck down the expanded M.P.C.P. on two of the same grounds on which the state supreme court upheld the original program in *Davis*. The M.P.C.P., according to Judge Higginbotham, violates

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[236] *Id* at 11.

- "In keeping with the purpose of our school, our curriculum is taught in the setting of God's Word. Religion is not only taught as a subject, but out [sic] teachers have been trained to integrate God's Word across the curriculum. Our curriculum offerings place God as the focal point for all study." (The Lutheran Chapel of the Cross Church and School).
- "Each class is taught by a dedicated Christian teacher who believes in Biblical concepts of salvation. Teachers strive to build into the curriculum a philosophy of Christian living that includes moral and spiritual values." (Milwaukee Junior Academy (Seventh-day Adventist)).
- "Emmaus Lutheran Church and school is a Christian institution, *NOT* a private school. The Holy Gospel is the center of our curriculum."
- "[E]verything that confronts the child in the educational program offered by St. Matthew Ev. Lutheran School will be presented in the light of His inspired, inerrant word of truth and power."
- "The children will be thoroughly trained in the fundamental subject areas needed for a successful life here on this earth. It is our aim that these subjects be taught in accordance to Scripture and that all things related to the children's educational life be permeated with God's Word." (St. Paul's Lutheran School).
- "Christian teachings are fostered in all classes, but especially in the religion program." (All Saints Catholic Elementary School).
- At St. Veronica Catholic Elementary School, "Christian-Centered Education" means "Integrating Catholic faith in all academic areas."
- "The students of St. Alexander's are not only taught the basic truths of their religion; they are also exposed to the Christian attitudes and ideologies which pervade the school environment."
- "The message of Jesus is taught in religion classes and other curricular areas. Because of the nature of a Catholic school, religion is taught daily as part of the curriculum. Catholic values are also incorporated into all other aspects of the curriculum."
- "The Bible forms the core and center upon which all instruction is based. Each day is opened with a devotion followed by instruction in Christian doctrine and Bible study. Our school gives due instruction in all branches of academics, which are required by the State of Wisconsin. All subjects are taught by a Christian teacher in the light of God's Word, emphasizing God's love for all men through Jesus." (Bethlehem Lutheran School).
- "All subject areas in our school are Christ-centered." (Gospel Lutheran School).
- "We Believe that the Christian School, where every subject is taught from the Christian point of view, related to the teaching of Christianity and permeated with the spirit of Christianity, can be more successful in leading children to a vital Christian life than any other agency, except the Christian home." (Oklahoma Avenue Lutheran School).
- "We teach all the traditional subjects, but we teach them differently — from a Christian perspective." (Mount Olive Christian School).

Id. at 11-13 (citations omitted; emphasis in original).

- the state constitution's article IV, § 18's prohibition against a "local or private bill" because "it no longer serves a statewide purpose" — as did the original M.P.C.P. that was upheld in *Davis* because it was an "experimental form of education" that may have "benefit[ed] children outside of Milwaukee;"[237] and
- the state's public-purpose doctrine because "religious education does not constitute a valid public purpose."[238]

Judge Higginbotham found that the expanded M.P.C.P., as with the original program in *Davis*, did not violate the state constitution's article X, § 3's requirement that school districts be "as nearly uniform as possible."

If and when the *Jackson* case ever makes it back to the seven-justice Wisconsin supreme court, another 3-3 decision regarding the expanded M.P.C.P's constitutionality is unlikely. One of the three justices who voted against the expansion's constitutionality — Chief Justice Roland B. Day — has retired. He was replaced by incoming Justice N. Patrick Crooks, who is generally considered (and campaigned for the position as) a judicial "conservative." (Another justice who voted for upholding the expansion, Justice Jon P. Wilcox — previously appointed by Governor Thompson to complete the term of a retiring justice — was decisively elected to a full, 10-year term on April 1, 1997.)[239]

3. *Applying Current Law to a Hypothetical Challenge to Reliance on State Labor Law by Those Attempting to Unionize Lay-Faculty Members of Private, Parochial Schools Participating in an Expanded M.P.C.P.: The Potential Lawsuit (I)*

Take your seats.

If the M.T.E.A.[240] — as, again, promised — sought to unionize private, parochial schools that are participating in an expanded M.P.C.P.

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237 *Id.* at 36-37.

238 *Id.* at 45-46.

239 *See* Tom Heinen, *New Supreme Court Justice May be Key to Choice Battle: Crooks, Who Was Elected After Deadlock, Seen as Pivotal Vote in Case*, MILWAUKEE J. SENTINEL, Jan. 17, 1997, at 3B; Richard P. Jones, *Wilcox Wins Easily; Benson Beats Cross Again: Justice Backs Spending Limits in Future Supreme Court Elections*, MILWAUKEE J. SENTINEL, Apr. 2, 1997, at 1A. Justice Wilcox was challenged by prominent liberal-activist attorney Walter Kelly — who, one could comfortably have predicted, would have voted against expansion. *Id.* *See also* Craig Gilbert, *Low-Profile Races Will Have Big Impact*, MILWAUKEE J. SENTINEL, Mar. 20, 1997, at 2B ("On Politics"); Craig Gilbert, *School Choice Wars*, WKLY. STANDARD, Mar. 31, 1997, at 19; Craig Gilbert, *Supreme Court Balance Doesn't Change: Wilcox Victory Sets Court's Tone as it Approaches Coming High Profile Issues*, MILWAUKEE J. SENTINEL, Feb. 22, 1997, at 6B.

240 Wisconsin, at least right now, has no N.C.S.T.A.-affiliated local unions. Schwartz, *supra* note 15.

and met resistance, it would very likely seek to rely on the Wisconsin's Employment Peace Act (W.E.P.A.)[241] according to W.E.P.A.,

> [i]t is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated.[242]

The W.E.P.A. later defines "employer" as

> a person who engages the services of an employee, and includes any person on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.[243]

The W.E.P.A. also creates what is now called the Wisconsin Employment Relations Commission (W.E.R.C.) — an independent executive-branch agency that, like the state labor-relations boards in New York's *Culvert* and Minnesota's *Hill-Murray*, implements its terms. The W.E.R.C. would be the state entity that generally ensures mandatory collective bargaining as to the terms and conditions of lay-faculty employment at religious-choice schools — including, specifically, by conducting collective-bargaining unit elections at the schools[244] and ad-

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241 WIS. STAT. §§ 111.01-.19 (1996). Unlike the Association of Catholic School Teachers' Local 1776 in Pennsylvania's *Local 1776, see supra* notes 152e58, the M.T.E.A. would not really even be able to similarly creatively construct a semi-plausible, *Local 1776*-like claim that Wisconsin's relevant *public*-employee labor-relations between private, parochial M.P.C.P. schools and their lay-faculty members. Wisconsin's Municipal Employment Relations Act defines "municipal employe" to "mean[] any individual employed by a municipal employer other than an independent contractor, supervisor, or confidential, managerial or executive employe," *id.* § 111.70(1)(i), and "municipal employer" to "mean[t] any city, county, village, town, metropolitan sewerage district, school district, or any other political subdivision of the state which engages the services of an employee and includes any person acting on behalf of a municipal employer within the scope of the person's authority, express or implied," *id.* at § 111.70(1)(j).

242 WIS STAT. § 111.01(4)(1996). "While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat." *Id.*

243 *Id.* at § 111.02(7).

244 *Id.* ato§ 111.05.

ministratively adjudicating accusations of what the W.E.P.A. considers "unfair labor practices" by or at them.[245]

Wisconsin Employment Relations Board v. Evangelical Deaconess Society, the state supreme-court decision that construes the W.E.P.A. to include within its definition of "employer" those employers not specifically exempted, did so by allowing the act's application to a church society that was organized as a non-profit corporation for the purposes of running a hospital.[246] Moreover, in two more-recent W.E.R.C. decisions — one of which was then successfully judicially challenged at the state trial-court level — the Commission itself has indicated its desire to include religious schools within the W.E.P.A.'s definition of employer. In *Teamsters "General" Local Union 200 v. Archdiocese of Milwaukee and St. Albert*,[247] with its own then-chairman dissenting,[248] the W.E.R.C. re-

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[245] *Id.* at §§ 111.06-.07. There are three W.E.R.C. commissioners appointed by the governor (with the consent of the state senate) for six-year terms.

A union that tried to rely on state labor-law application to private, parochial school like Vermont's Mount Saint Joseph's Academy and its lay-faculty members, *see supra* note 181, would face a similar statutory framework to Wisconsin's. The Vermont State Labor Relations Act does not explicitly include religious schools within its lengthy definition of "employer," VT. STAT. ANN. tit. 21 § 1502(7) (1987) though a 1982 state supreme-court decision held that those nonprofit corporations not specifically excluded to are subject to the jurisdiction of the State Labor Relations Board created by the statute. Kelley v. Day Care Ctr., Inc., 451 A.2d 1106 (Vt. 1982).

As in Wisconsin, Vermont has no N.C.S.T.A.-affiliated local unions. Schwartz, *supra* note 16. That or a similar union would not be able to creatively construct a semi-plausible, *Local 1776*-like claim that the state's relevant *public*-employee labor-relations statute would somehow apply to relations between private, parochial schools like Mount Saint Joseph's Academy and its lay-faculty members. For purposes of Vermont's Municipal Labor Relations Act, a "municipal employee" is "any employee of a municipal employer, including a professional employee," except "elected officials, board and commission members and executive officers," "individuals employed as supervisors," and "individuals who have been employed on a probationary status," VT. STAT. ANN. tit. 21, § 1722(12) (1987); a "municipal employer" is "a city, town, village, fire district, lighting district, consolidated water district, housing authority or any of the political subdivisions of the state of Vermont which employs five or more persons," *id.* at § 1722(13).

[246] Wisconsin Employment Relations Bd. v. Evangelical Deaconness Soc'y, 7 N.W.2d 590 (Wis. 1943). On January 29, 1997, W.E.R.C. arbitrator Herman Torosian ruled that the health-insurance plan offerred by St. Francis Hospital to its employees represented by Local 5001 of the Federation of Nurses and Healthcare Professional must continue to include birth control, the use of which is contrary to the teaching of the Catholic Church that runs the hospital. The hospital's appeal of the ruling, filed April 18, 1997, is pending before federal District Court Judge Myron Gordon. *See* Jo Sandin, *Hospital opposes birth control coverage: St. Francis doesn't want to pay for insurance that counters Catholic teaching*, MILWAUKEE J. SENTINEL, Apr. 26, 1997, at 3B; Julie Sneider, *St. Francis Hospital sues to drop health benefit: Catholic hospital refuses to cover birth control*, MILWAUKEE BUS. J., Apr. 25, 1997, at 1.

[247] Teamsters "General" Local Union 200 v. Archdiocese of Milwaukee, Dec. No. 24781-B (W.E.R.C. Mar. 11, 1988).

[248] Chairperson Stephen Schoenfeld. *Id.* at 9 (Schoenfeld, Chairperson, dissenting). "I agree with the Examiner's conclusion that the Wisconsin Employment Peace Act (WEPA) does not apply to parochial schools," Chairperson Schoenfeld wrote. "WEPA's legislative history of the definition of 'employers' fails to establish intent to affirmatively include reli-

versed and set aside its appointed examiner's previous order to dismiss an unfair-labor-practices complaint that was brought to the Commission by a fired teacher who was trying to organize a union at St. Albert elementary school in Milwaukee.[249] "Here, as in *Evangelical Deaconness*, the words are broad enough to cover religious schools and there is no specific exception for religious schools in the statute," the other two W.E.R.C. commissioners found[250] in their *Teamsters "General" Local Union 200* opinion. "As there is no instructive legislative history, we thus have no basis for concluding that the legislature intended to exclude religious schools from the purview of the Wisconsin Employment Peace Act."[251]

Both the Archdiocese and the school[252] appealed this determination to a state trial court, which prohibited the W.E.R.C. from asserting jurisdiction. *Evangelical Deaconess* "is not applicable to the instant case because no fundamental constitutional guarantees were implicated," Judge Gary A. Gerlach held in *Archidocese of Milwaukee* v. *W.E.R.C.*

> The Court did not address a situation where, as here, the agency's jurisdiction created significant risks of infringement of constitutional rights.
>
> Therefore, I believe the statutory construction employed by the United States Supreme Court in *Catholic Bishop* would be adopted by the Wisconsin appellate

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gious schools or organizations. The Commission should decline jurisdiction over religious entities just as the NLRB has under the NLRA in the aftermath of *Catholic Bishop*." *Id.*

249 Teamsters "General" Local Union 200 v. Archdiocese of Milwaukee, Dec. No. 24781-A (W.E.R.C. Aug. 31, 1987).

250 Commissioners Herman Torosian and A. Henry Hempe.

251 *Teamsters "General" Local Union 200*, Dec. No. 24781-B at 6 (quoting *Dunphy Boart Corp.* v. W.E.R.C., 267 Wis. 316, 323-24 (1954)) (W.E.P.A. "should be liberally construed to secure the objectives stated in the declaration of policy" set forth therein)). "In reaching our conclusion, we are aware of NLRB v. *Catholic Bishop of Chicago* and the impact which that decision had upon the Examiner's determination," Commissioners Torosian and Hempe stated.

> However, the specific factual allegations by the parties in this matter as to the basis for [theteacher's] nonrenewal do not appear to raise any particular constitutional issues. . . . We also believe the Peace Act can as a general matter be applied in a constitutionally appropriate manner to religious schools. In this regard we find the Second Circuit Court of Appeals decision[t] in *Culvert* . . . to be persuasive and instructive.

Id. at 6-8.

252 "There are 280 parishes within the Archdiocese of Milwaukee and each is a separately organized and operated canonical subdivision of the Archdiocese run by a pastor or an administrator." according to the trial court. "St. Albert Parish is a corporation separate and distinct from the Archdiocese." Archdiocese of Milwaukee v. W.E.R.C., No. 007-640 (Milwaukee County Cir. Ct. Sept. 20, 1988), at 3.

> courts in determining whether or not [the W.E.P.A.] applies to religious organizations.[253]

Perhaps the W.E.R.C. did too; it did not appeal this decision.

This non-appeal presented the examiner in the most-recent W.E.R.C. case with a dilemma. In *Premontre Education Association v. The Premontratensian Order*,[254] Examiner Richard B. McLaughlin considered an unfair-labor-practices complaint by the Premontre Education Association (P.E.A.) and three of its individual members against Premontre High School in Green Bay. The members had been fired from the school when, as part of a reorganization, it was "closed" and "reopened" the next year as another entity, Notre Dame de la Baie Academy. Because 1) "[a]n unreversed circuit court decision in this state rules only the particular case in which it was rendered;" 2) [i]f the Commission believed *St. Albert* excepted religious schools from WEPA, then there was no reason to appoint an Examiners for these complaints;" and, 3) the W.E.R.C. left unaddressed previously raised jurisdiction objections in the case, then "it would appear the Commission views the laws and facts relevant to this case unsettled," according to Examiner McLaughlin, who concluded that, "[c]ontrary to the Commission's conclusion in *St. Albert*," the W.E.P.A.'s definition of "employer" "should not be considered to encompass religious entities operating a religious school."[255]

On appeal, the full W.E.R.C. disagreed. The same two commissioners in the *St. Albert* W.E.R.C. majority[256] still believed that a religious school was an "employer" for purposes of W.E.P.A. application. Two of the three commissioners, however, agreed with the result of Examiner McLaughlin's order and believed the complaint should be dismissed anyway because, at least in *this case*, "[t]o sort through [the facts] to determine whether the Premonstratensian Fathers committed an unfair labor practice in their efforts to advance Catholic religious education by consolidating existing educational institutions in the Green Bay area seems to fairly shriek of 'excessive entanglement.'"[257] In the words of the

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253 *Id.* at 11.

254 Premontre Education Ass'n v. The Premontratensian Order, Dec. No. 26762-A (W.E.R.C. Feb. 25, 1991).

255 *Id.* at 19-20.

256 *See supra* notes 250-51. Hempe became W.E.R.C. chairperson in the interim.

257 Premontre Educ. Ass'n v. The Premonstratensian Order, Dec. No. 26762-B (W.E.R.C. June 18, 1992), at 13. "This was not the case in *Teamsters "General" Local Union 200*," according to Chairperson Hempe. "The facts of that case involved a teacher whose non-renewal notice listed only secular, not religious, reasons. In the instant matter, however, respondents claim their conduct was motivated by legitimate religious considerations of providing a Catholic education to Green Bay area youth." *Id.* at 13 n.4.

other commissioner, William K. Stryker — who also would have excluded religious schools from the definition of "employer"—

> [c]overage under W.E.P.A. could lead to shared decision making with a labor organization and is likely to result in the infringement on constitutional rights. The formal collective bargaining/labor relations environment could lead to an intrusion on religious authority and could hinder the accomplishment of the religious mission. This may include limiting the ability to substitute religious faculty for lay faculty, the ability to control curriculum content, the ability to promote religious precepts, and the ability to evaluate faculty.[258]

The P.E.A.'s appeal of this decision to the courts basically fell apart; since its attorneys were not licensed to practice law, it had no standing, and its petition was summarily dismissed at the trial court.[259] The three individual union members' appeal of this dismissal to the state court of appeals failed.[260] Only one Wisconsin court, the trial court in *St. Albert*, has specifically considered whether the state's W.E.P.A. applies to religious schools — and that decision, as noted by Examiner McLaughlin in his initial consideration of *Premontre*, "rules only the particular case in which it was rendered."[261] No state appellate court has directly considered the question.

a. Invocation of the statutory canon of construction to, if possible, avoid constitutional problems

Again, a hypothetical Wisconsin court that considers a religious M.P.C.P. school's challenge to any attempted reliance on an application of W.E.P.A. to the relations between the school and its lay-faculty members should (because the law does not explicitly include religious schools at all within its definition of "employer") invoke — as did the Supreme Court in *Catholic Bishop* and the Pennsylvania supreme court in *Local 1776* — the statutory canon of construction to avoid, if possible, constitutional problems. Judge Gerlach, according to his opinion in *Archdiocese of Milwaukee v. W.E.R.C.*, believed Wisconsin appellate courts would invoke this canon;[262] indeed, the nature and degree of those con-

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[258] *Id.* at 10 (quoting *Catholic Bishop of Chicago*, 559 F.2d at 1123).

[259] Premontre Educ. Ass'n v. W.E.R.C., No. 92CV1309 (Brown County Cir. Ct. Dec. 1992).

[260] Premontre Educ. Ass'n v. W.E.R.C., No. 93-0170 (Wis. Ct. App. Aug. 17, 1993).

[261] Premontre Educ. Ass'n v. The Premonttratensian Order, Dec. No. 26762-A (W.E.R.C. Feb. 25, 1991), at 19, *quoted in* text accompanying *supra* note 255.

[262] Archdiocese of Milwaukee v. W.E.R.C., No. 007-640 (Milwaukee County Cir. Ct. Sept. 20, 1988), at 11, *quoted in* text accompanying *supra* note 253.

stitutional difficulties that the Court tried to avoid in *Catholic Bishop* are, in fact, no different or lesser — and may even be greater — in this hypothetical case. If the court felt it could not or did not want to invoke the canon, it would then apply both the Free Exercise and Establishment Clause analyses.

b. Free Exercise Clause analysis

Smith's criminal/civil distinction.

Again, because of *City of Boerne*, the *Smith* Free Exercise standard — that a valid law of general applicability not intended to regulate religious conduct of beliefs cannot be challenged — would apply. Religious-freedom proponents in general can, and likely will, react to *City of Boerne* in one or more ways. Legislatively, of course, they can attempt to: 1) help get passed a religous-freedom constitutional amendment, which the Court couldn't consider invalid because of being beyond the scope of anyone's power, prospects for the success of which must be very dubiously examined though;[263] 2) help get passed another statute, more narrowly drawn, that might somehow be considered by the Court to meet the *City of Boerne* restrictions on its Fourteenth Amendment, § 5, power, though such a version is hard to envision,[264] and/or 3) help get the states to pass religious-freedom laws, allowed under *City of Boerne*. Judicially, religious-freedom groups will likely seek to: 1) actually outright "re-litigate" *Smith*, with the ultimate end in mind of having the Court overturn it,[265] and 2) narrow the possible applications of *Smith* by, a) creative use of its "hybrid-situation" exception, under which a claim

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263 Robert D, McFadden, *High Court Is Criticized for Striking Down Federal Law Shielding Religious Practices*, N.Y. TIMES, June 27, 1997, at A18 (Most of those interviewed spoke against. . .a constitutional ammendment, which requires the approval of two-thirds of Congress and three quarters of the states and would take too long."); Greenhouse, *High Court Voids a Law Expanding Religious Rights*, *supra* note 103, at C24 ("but calls by some groups for a constitutional amendment met with, at best, a cautious response").

264 *See* Biskupic, *supra* note 103 ("Within hours of [the] ruling, congressional and religious leaders vowed to fight the decision, saying they would explore any legal avenues around the Supreme Court ruling[, b]ut legislators also acknowledged that they see no obvious solutions to how they could provide greater constitutional coverage"). *See also* McFadden, *supra* note 263.

265 Calls for the reconsideration of *Smith* by the three dissenters in *City of Boerne* — Justices O'Connor, *City of Boerne*, 65 U.S.L.W 4612, 4622 (June 25, 1997) (O'Connor, J. dissenting), who also dissented in *Smith*, and Justices Breyer and David H. Souter, *id.* at 4268. (Souter, J., dissenting) — were rebutted only by a concurring opinion of Justices Scalia and John Paul Stevens, *id.* at 4620 (Scalia, J., concurring). *See* McFadden, *supra* note 263 (Ira Glasser, Executive Director, A.C.L.U.: "Decisions are sometimes greeted by such criticism that it forces the court to rethink what it did."). *See also Religious Freedom, Still at Risk*, N.Y. TIMES, June 27, 1997, at A20 (editorial.) ("What is troubling is not what the Court did but what it did not do, which was to reconsider its contentious 1990 ruling"); Mary Ann Glendon, *Religious Freedom and Common Sense*, N.Y. TIMES, June 30, 1997, at A15 (op-ed) ("Sooner or later the Court will have to heed the message that Congress was trying to send by passing

combining alleged infringements of both Free Exercise and some other constitutionally protected right still invites *Sherbert/Yoder*-like strict scrutiny,[266] and/or(b) working for recognition of the implications of Justice Scalia's distinction therein between its reasoning's applicability to only criminal and not civil laws. A challenge by private, parochial schools participating in the M.P.C.P. to application of the civil W.E.P.A. to their relationships with lay faculty employees would present an opportunity to work for the latter distinction.

Some of the initial interpretations and applications of *Smith* by scholars[267] and judges,[268] including federal appellate-court judges, found — on the basis of Justice Scalia's very language therein[269] — that the criminal/civil distinction was part of the new standard created thereby, without even feeling the need to consider at length whether it did or not. The Ninth Circuit's 1991 *Hanna Boys Center*[270] and its *American Friends Service Committee v. Thornburgh*[271] of the same year considered the distinction part of the standard. In *American Friends Service Committee*, in holding that criminal sanctions against a Quaker charitable and relief organization under the "employer-sanction" provision of the Immigration and Reform and Control Act for instance did not violate the Free Exercise Clause, for instance, the same Judge Canby who wrote the *Hanna Boys Center* opinion summarized the then-new *Smith* standard which he applied in both cases as follows:

> the free exercise clause is not violated if a law (1) is "generally applicable and otherwise valid," . . . (2) does not have as its "object" the burdening of religion and only has an "incidental effect" on religious practices or beliefs, . . . (3) does not implicate another constitutional [right] other than free exercise of religion and thereby

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the Religious Freedom Restoration Act: To restore religion to its rightful place as the first of freedoms").

266 Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 881-82 (1990), *cited in* Hill-Murray Fed'n of Teachers v. Hill-Murray H.S., 487 N.W.2d 857, 862 (Minn. 1992), *quoted in* text accompanying *supra* note 84.

267 *See The Supreme Court, 1989 Term — Leading Cases*, 104 HARV. L. REV. 198, 201 (1990) (including criminal/civil distinction as part of *Smith* standard).

268 *See* U.S. v. Boyll, 774 F. Supp. 1333, 1341 (D.N.M. 1991). In *Boyll*, according to federal District Court Judge Juan G. Burciaga, the Court in *Smith* "elected to abandon the compelling interest test in cases involving a 'neutral, generally applicable [criminal] law,' reasoning that the application of such a statute does not implicate First Amendment concerns." *Id.* (quoting *Smith*; brackets in *Boyll*).

269 *Smith*, 494 U.S. at 876, 883-84, *quoted in* text accompanying *supra* notes 79-80.

270 N.L.R.B. v. Hanna Boys Ctr., 940 F.2d 1295, 1305 (9th Cir. 1991) (citing *The Supreme Court, 1989 Term, supra* note 267.) *See* text accompanying *supra* notes 172-74.

271 American Friends Service Committee v. Thornburgh, 961 F.2d 1405 (9th Cir. 1991).

> give rise to a "hybrid claim," . . . (4) punishes conduct which constitutes a *criminal* act."[272]

Similarly, in 1993's *Church of Scientology v. City of Clearwater*,[273] the 11th Circuit Court of Appeals' Judge Joel F. Dubina thought *Smith* "held that generally applicable *criminal* laws need not be justified by a compelling interest to withstand attack under the Free Exercise Clause."[274]

Other appellate-court applications of *Smith* either: 1) did not consider the criminal/civil distinction part of its new standard, without feeling the need to consider at length whether it did or not, or 2) felt the need to consider at length whether it did or not and found that it should not. The Eighth Circuit's 1991 *Cornerstone Bible Church v. City of Hastings*[275] is a former type of case. In *Cornerstone Bible Church*, in which zoning ordinances that precluded churches in a central business district did not violate Free Exercise, Judge Donald P. Lay believed of *Smith* that it "held that a neutral" — no modifying adjective — "law of general applicability that incidentally impinges on religious practice will not be subject to attack under the free exercise clause."[276] The Third Circuit's 1990 *Salvation Army v. New Jersey Department of Consumer Affairs*[277] and the Sixth Circuit's 1991 *Vandiver v. Hardin County Board of Education*,[278] both of which were relied upon by *Hill-Murray* in upholding Minnesota's civil M.L.R.A.,[279] are cases of the latter type.

Salvation Army considered at length a proposed interpretation that included the distinction, but rejected it. "We cannot accept this interpretation of *Smith*. While there are a number of phrases in the Court's opinion that might support such a limited reading," according to Judge Walter K. Stapleton's opinion's first point on this matter, "as often as the opinion makes references to generally applicable laws, it makes references that are not so limited,"[280] quoting thereafter *Smith* references to "decisions involving a neutral, generally applicable *regulatory* law" and ones "to carry out other aspects of public policy."[281] Second, "there are important indications in [*Smith*] that the Court was not contemplating a distinction between criminal and civil statutes," according to his opinion. "If such a distinction were in mind, we do not believe the Court would

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272 *Id.* at 1407 (quoting *Hanna Boys Ctr.*, 940 F.2d at 1305) (emphasis supplied).

273 Church of Scientology v. City of Clearwater, 2 F.3d 1514 (11th Cir. 1993).

274 *Id.* at 1539 (emphasis supplied).

275 Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991).

276 *Id.* at 472 (citing *Smith*).

277 Salvation Army v. New Jersey Dep't of Consumer Affairs, 919 F.2d 183 (3d Cir. 1990).

278 Vandiver v. Hardin County Bd. Of Educ. 925 F.2d 927 (6th Cir. 1991).

279 Hill-Murray Fed'n of Teachers v. Hill-Murray H.S., 481 N.W.2d 857, 862-63 (Minn. 1992), *cited in supra* note 82.

280 *Salvation Army*, 919 F.2d at 194-95.

281 *Id.* at 195 (quoting *Smith*).

have been as concerned as it was to distinguish and explain the numerous previous free exercise cases that address 'civil' statutes,"[282] including ones regarding Social Security payroll taxes,[283] compulsory school attendance,[284] and compelled licenses-plate slogans.[285] Third, "we doubt a distinction between criminal and civil statutes could be coherently applied since even statutes regulating what would not ordinarily be characterized as lawful activities can become criminal statutes depending on their mode of enforcement,"[286] according to *Salvation Army*, and fourth, "and most importantly, the rationale of the *Smith* opinion is not logically confined to cases involving criminal statutes. Justica Scalia's primary argument is a structural analysis of the effect of the compelling interest test."[287] In *Vandiver*, Senior Judge Albert J. Engel agreed, even quoting *Salvation Army*'s second point about *Smith*[288] — though he does (correctly) describe that "other circuit courts have *extended* its holding to neutral civil statutes as well."[289]

Indeed, in two post-*Smith* decisions, the Court seemed to contemplate or apply a *Smith* standard without the distinction. First, in *City of Boerne* itself, after defending *Smith* and decrying the potential costliness of states' having to defend R.F.R.A. claims, Justice Kennedy refers to the "modern *regularity* state" with (civil) laws like zoning regulations that only incidentally burden religion.[290] It could perhaps be argued, though, that while the R.F.R.A. was meant to apply to all federal and state criminal and civil laws — the "wide swath" of which was part of the reason why the R.F.R.A. was constitutionally objectionable — the *Smith* standard to which Free Exercise analysis reverts in its wake still just applies, by its own language, to criminal laws; while R.F.R.A. *was* meant to "replace" *Smith* (and would have, and more, if constitutional), in other words, striking down the whole wide R.F.R.A. did not expand the scope of a narrower *Smith*. Second, in 1993's *Church of the Lukumi Babalu Aye v. City of Hialeah*[291] — holding that a city ordinance dealing with the slaughter of animals, as often done in the ritual of a specific religion with local adherents, was not neutral, not of general applicability, and not

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282 *Id.*

283 United States v. Lee, 455 U.S. 252 (1982).

284 Wisconsin v. Yoder, 406 U.S. 205 (1972).

285 Wooley v. Maynard, 430 U.S. 705 (1977).

286 Salvation Army v. New Jersey Dep't of Consumer Affairs, 919 F.2d 183, 195 (3d Cir. 1990) (citing *Lee*).

287 *Id.*

288 Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991) (quoting *Salvation Army*, 919 F.2d at 195, *quoted in supra* note 282).

289 *Id.* (emphasis supplied).

290 City of Boerne v. Flores, 65 U.S.L.W 4612, 4619 (June 25, 1997), *quoted in* text accompanying *supra* note 113.

291 Church ofLukumi Babalu Aye v. City of Hialeah, 113 S. Ct. 2217 (1993).

justified by the thus-requisite compelling state interest — Justice Kennedy's opinion summarized the Court's Free Exercise cases as establishing "the general proposition that a" — here again, no modifying adjective, when there could have been — "that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[292]

Sherbert/Yoder's compelling-interest standard.

If the hypothetical federal or state court hearing this hypothetical case decides that the criminal/civil distinction in *Smith* does or should matter (and properly recognizes the W.E.P.A. to be a civil law), then the "old" *Sherbert/Yoder* compelling-interest standard applies to application of the W.E.P.A. to relations between lay faculty and private, parochial schools participating in an expanded M.P.C.P. According to this standard, a court must consider whether: 1) the schools' Free Exercise challenge to W.E.R.C. jurisdiction is, in fact, religious in nature and not secular; 2) W.E.R.C. jurisdiction burdens the schools' religious exercise; and 3) Wisconsin's interest in W.E.P.A. application is sufficiently compelling to override the schools' constitutional Free Exercise rights. Of the six above-discussed parochial-school/labor-relations cases, four apply this standard fully (*St. Teresa* found a compelling state interest, it declined to address the first two *Sherbert/Yoder* factors). Of those four, only the Second Circuit's *Culvert* finds for the union's position; the weight of authority is on the other side.

Whether claim is religious in nature or secular.

Unlike *Caulfield, McCormick,* and the Seventh Circuit's *Catholic Bishop, Culvert* considers the school's Free Exercise claim to be secular, because labor-board jurisdiction like W.E.R.C.'s would "merely cause[a] economic hardship or inconvenience" — labor-board jurisdiction is in the same category as "state requirements for fire inspections, building and zoning regulations and compulsory school attendance laws."[293] As for things like fire inspections, they also apply to church buildings themselves, for example. Would not *Culvert*'s logic, unconstrained, also allow governmental regulation of the Catholic Mass itself?[294] The Free Exercise Clause is there to properly constrain such logical extensions.

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[292] *Id.* at 2226.

[293] Catholic High School Ass'n of New York v. Culvert, 753 F.2d 1161, 1169-70 (2nd Cir. 1985) (citations omitted), *quoted in* text accompanying *supra* note 62.

[294] *See* McCormick v. Hirsh, 460 F.Supp. 1337, 1353 (M.D. Pa. 1978) ("[i]n fact, the Supreme Court's definition of the schools is that [they are] the church itself"), *quoted in* text accompanying *supra* note 139.

Pointing to the regulation of truly secular matters like fire inspection and compulsory school-attendance laws that are "accepted" by the church and its religious schools as proof that a Free Exercise objection to regulation of school-teacher relations — before even considering the merits of the claim — is disingenuine.[295] Teachers and thus school-teacher relations — as noted by the Supreme Court in *Catholic Bishop*[296] and Justice Breyer in his *Universidad Central* opinion[297] — are, importantly, *qualitatively* different from, say, fire inspections.

As there is no reason to believe that a substantial burden on the schools' constitutionally protected religious exercise would become merely incidental because of its participation in the M.P.C.P., there are thus similarly no grounds on which to plausibly assert — as would likely be asserted by the M.T.E.A. — that, *a lá Culvert*, the *quantitative* addition of W.E.R.C. jurisdiction to the "accepted" application of other laws and regulations of secular matters would "merely cause[ ] economic hardship and inconvenience" and that any Free Exercise challenge to such jurisdiction's *qualitative* effects is really secular and not "religious in nature."[298]

Whether religious exercise is burdened.

Also unlike *Caulfield*, *McCormick*, and the Seventh Circuit's *Catholic Bishop*, *Culvert* considers labor-board jurisdiction wholly nonburdensome to the religious schools: 1) because under an Establishment Clause analysis: a) labor-board jurisdiction would not result in "the degree of 'surveillance' necessary to *find* administrative entanglement"; b) the labor board could not essentially write the contract — it could only force the religious school and its lay faculty to negotiate in good faith; and c) the board could never inquire about a school's *religious* motive for firing a lay-faculty union member it could only inquire about "unlawful" secular motives[299] and, 2) because of "restrictions [the Court] ha[s] placed on the Board's power."[300]

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295 *But see* South Jersey Cath. Sch. Teachers Ass'n v. St. Teresa, 765 A.2d 1155, 1168 (1996) ("there is no question that their concern is genuine and not feigned or speculative").

296 National Labor Realtions Board v. Catholic Bishop of Chicago, 440 U.S. at 490, 501 (1979) ("we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school").

297 Universidad Central de Bayamon v. N.L.R.B. 793 F.2d 383, 402 (1st Cir. 1986), *quoted in* text accompanying note 178.

298 *See* Caulfield v. Hirsch, 95 L.R.R.M. 3164, 3176 (E.D. Pa. 1977) ("admitted secular characteristics of the schools are so intertwined with the schools' religious mission, that they blend one into the other"), *quoted in* text accompanying note 122.

299 *Catholic High School Ass'n of New Yorkv. Culvert*, 753 F.2d 1161, 1169-70 (2d. Cir. 1985), *quoted in* text accompanying *supra* notes 51-55.

300 *Id.* at 1170, *quoted in* text accompanying *supra* note 63.

As for labor-board "surveillance," even the Supreme Court's *Catholic Bishop* finds the N.R.L.B.'s "process of inquiry" itself constitutionally troublesome enough to reprint as an appendix — as did the Seventh Circuit's *Catholic Bishop* in a footnote (putting the lie to "the Board purport[ing] to avoid an excursion into religiosity"[301]) — the Board hearing officer's detailed examination of a religious high-school rector about Catholic liturgies and practices.[302] Justice Breyer does the same in his *Universidad Central* opinion with an N.L.R.B. hearing officer's examination of the San Juan Archbishop, which he places side by side with the same Supreme Court excerpt.[303] Indeed, both of these examinations could easily be placed side by side with the Wisconsin D.P.I.'s detailed examination of Messmer Principal Brother Smith New School. D.P.I. subsequently denied that school's participation in the original M.P.C.P.[304] The tenor and style of these examinations could as easily be reprised by the W.E.R.C.

As for a labor board not being able essentially to write the contract and only being able to force the religious school to negotiate contract terms in good faith with the union, all four of the examined decisions that apply this standard (except for *Culvert)* find that supposedly secular contract terms can, predictably enough, end up jeopardizing the schools' constitutionally protected religious freedom enough to prevent jurisdiction over relations with their teachers — especially when there is board "surveillance" necessary to ensure good faith bargaining.[305] As for the point that a labor board would never be able to inquire about a schools' religious motive for firing a lay-faculty union member and only about "unlawful" (and, presumably, secular) motivations, all four (except for *Culvert*) find the illegitimate inquiry very possible, if not outright probable.[306] And as for *Culvert*'s also-related, "umbrella" point — that "restrictions [can] be placed on the Board's power" — the warning in Justice Breyer's First Circuit opinion against "promis[ing] that courts in

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301 National Labor Relations Board v. Catholic Bishop of Chicago, 559 F.2d 1112, 1120 n.11 (7th Cir. 1977).

302 National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 502 n.10, 507-08, *quoted in supra* note 28.

303 Universidad Central de Bayamon v. N.L.R.B., 793 F.2 d 383, 401-02, *quoted in supra* note 178.

304 *Quoted in* text accompanying *supra* note 217.

305 Caulfield v. Hirsch, 96 L.R.R.M. 3164, 3177 (E.D. Pa. 1977), *quoted in* text accompanying *supra* note 123; McCormick v. Hirsch, 460 F. Supp. 1337, 1354-55 (M.D. Pa. 1978), *quoted in* text accompanying *supra* notes 148-49; *Catholic Bishop*, 559 F.2d at 1123-24, *quoted in supra* note 165.

306 *Caulfield*, 96 L.R.R.M. at 3177, 3179 (regarding "teacher discipline"), *quoted in* text accompanying *supra* note 125; *McCormick*, 460 F. Supp. at 1354 (regarding "employee discipline"); *id.* at 1357-58 ("intent of school administrator"), *quoted in* text accompanying *supra* notes 144, 151; *Catholic Bishop*, 559 F.2d at 1123-24 (generally regarding "shared decision-making"), *quoted in* text accompanying *supra* note 164.

the future will control the Board's efforts to examine religious matters" is instructive.[307]

There are, then, no reasons to believe that, because of a religious school's participation in an expanded M.P.C.P., 1) that the only-incrementally quantitative addition of such jurisdiction to other regulations newly applicable to that school would somehow cause a court to thus overlook its constitutionally qualitative effects; and 2) that that which would be considered burdensome external to the choice-program context, labor-board jurisdiction, would become considered wholly nonburdensome with*in* the choice context.

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As a practical legal matter, any possible implications (including the above three) of moving this particular issue — including both the Free Exercise and Establishment Clause analyses of it — from the non-choice factual context, where it is present in all of the above-examined non-hypothetical cases, into the *hypothetical* choice context *have* been addressed, peripherally and sometimes only by negative implication in the *non*-hypothetical cases. For example, the Seventh Circuit's *Catholic Bishop* seems to make something of the fact that the government's argument, that, on the one hand, such schools are essentially "too religious" to receive any governmental aid, but "not religious enough" to be exempt from N.L.R.B. jurisdiction.[308] And '[t]he secular appearance of the [ ] programs" over which the Tenth Circuit (in part, thus) *found* N.L.R.B. jurisdiction constitutionally permissible in *Denver Post* — six V.O.A.-operated, temporary emergency-care shelters for youth and women — "is readily understandable in view of the substantial funding they receive from federal and local government agencies."[309] (The Ninth Circuit's 1985 decision that allowed Board jurisdiction over the V.O.A. facility in Los Angeles did so in part because, unlike teachers, "its staff cannot propagate their employer's religious doctrine"[310]; the staff could not propagate religious doctrine '[p]rimarily because of funding conditions" on block grants given by the government.[311])

Justice Breyer and his two colleagues, in their more-relevant First Circuit's *Universidad Central*, though, found N.L.R.B. jurisdiction over

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307 *Universidad Central*, 793 F.2d at 402, *quoted in* text accompanying *supra* note 178.

308 *Catholic Bishop of Chicago*, 559 F.2d at 1131, *quoted in* text accompanying *supra* note 167.

309 Denver Post of the Nat'l Soc'y of V.O.A. v. N.L.R.B., 732 F.2d 769, 772 n.2 (10th Cir. 1984).

310 Volunteers of America, Los Angeles v. N.L.R.B., 777 F.2d 1386, 1390, *quoted in* text accompanying *supra* note 175.

311 *Id.*

the Catholic Universidad Central constitutionally impermissible despite the facta— known to, and acknowledged by, the other three judges on the court (and, presumably, thus also Justice Breyer's faction) — that, "[f]rom 1977 to 1978, the University received various federal grants totaling $5,042,298, of which $350,000 was direct aid to the University. From 1980 to 1983, the University received $3,750,000 in federal grants, seventy-five percent of which was student aid and $425,000 of which was direct institutional assistance." Subtracting the direct institutional aid, then, that is an approximate non-inflation-adjusted total of $8.017 million in indirect governmental aid to the religious school, through the students who chose to enroll themselves there. (*That* is almost one million dollars more than Wisconsin is sending to private, *non*-parochial M.P.C.P. schools, through the indirect choices of families, this academic year — as shown in Table 2 above. If, *truly* hypothetically, the families of an eligible 15,000 students in an expanded M.P.C.P. took their $4,373 state-aid-per-"member" payment to religious choice schools this year, totaling roughly $65.595 million.[312])

In some also- (though perhaps less-) relevant cases that find N.L.R.B. jurisdiction over religious health-related institutions that indirectly received governmental aid (through the "choices" of patients in them) constitutionally permissible, distinctions were made between the N.L.R.A.-"covered" hospital employees and non-covered religious-school employees, the distinctions were often on the basis of the Supreme Court's language in *Catholic Bishop* regarding the special role of parochial-school teachers. In *National Labor Relations Board v. St. Louis Christian Home*, for example, the Eighth Circuit Court of Appeals permitted N.L.R.B. jurisdiction over an emergency residential treatment center that received 55% of its funding from various governmental sources because, unlike the school in *Catholic Bishop*, the treatment center "does not involve a religious enterprise comparable to a church-operated school" — as *in* both *Catholic Bishop* and in *Jackson*,[313] "[t]he teachers in the bargaining unit, even though members of the laity, participate[a] in that religious mission."[314] In *Tressler Lutheran Home for Children v. National Labor Relations Board*, the Third Circuit permitted Board jurisdiction over a Lutheran nursing home — the majority of whose residents were eligible for Medicare and Medicaid because

> [t]he raison d'etre of parochial schools . . a is the teaching of religious doctrine [and t]hus, the "critical and unique role of the teacher in fulfilling the mission of a

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312 That would be roughly 14.8% of total state aid to the M.P.S. system.

313 *See supra* notes 235-36.

314 National Labor Relations Bd. v. St. Louis Christian Home, 663 F.2d 60, 64 (8th Cir. 1981).

> church-operated school," as found in *Catholic Bishop* . . . differs from the main function of those who give personal attention to the elderly and the infirm.[315]

The "critical and unique role" of all religious-school teachers, including lay ones, which is recognized by the Supreme Court in *Catholic Bishop* "survives" movement into the hypothetical M.P.C.P.-like context; the First Amendment, constitutional protection of this role from application of W.E.P.A.-like state labor-relations statutes has never been, and cannot be, conditioned on anything. *To* condition private, parochial schools' indirect receipt of an expanded M.P.C.P.'s aid — albeit indirectly, through the choices of families to enroll at those schools — on the waiver of their First Amendment rights by permitting W.E.R.C. jurisdiction over relations with lay-faculty members would be an unconstitutional infringement of those rights.

As a theoretical matter, of course, the doctrine upon which this conclusion solidly rests — the unconstitutional-conditions doctrine — is also addressed in some of the above-examined, non-hypothetical cases. It was, recall, invoked by the individual plaintiff families in the juridically "stillborn" *Miller*, in trying to judicially expand the original M.P.C.P. to include religious schools.[316] Its *Miller* variant is: *if* the state allows aid to private institutions through the free choices of private individuals for the legislatively determined public good, *then* it must not attach conditions on the indirect receipt of such aid that coerce, pressure, or induce the institution to waive the exercise of its constitutionally protected rights. The state cannot "bargain" that way.[317] In this specific, hypothetical case, though, the state *would* be bargaining with the private, parochial schools that are participating in an expanded, truly universal M.P.C.P. this way: "on the condition that you waive your First Amendment rights by agreeing to subject the relations with your lay-faculty members to our W.E.P.A. application and our W.E.R.C. jurisdiction, we

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[315] Tressler Lutheran Home for Children v. N.L.R.B., 677 F.2d 303, 305 (3rd Cir. 1983) (quoting N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 501 (1979). *See generally* Elizabeth Hosp. v. N.L.R.B., 715 F.2d 1193 (7th Cir. 1983). "Where the institution's primary activity is secular, assertion of NLRB jurisdiction does not violate the institution's first amendment rights.," according to the Seventh Circuit. "Where the primary function of the institution is integrally related to its religious mission, the first amendment precludes NLRB interference." *Id.* at 1196 (citations omitted). *See also* Saint Elizabeth Community Hosp. v. N.L.R.B., 708 F.2d 1436 (9th Cir. 1983).

Tressler Lutheran Home briefly summarizes the 1974 United States Senate debate on whether to amend the N.L.R.A. to explicitly include religious hospitals. Democratic Senator Alan Cranston of California, the court describes, "noted that religiously-affiliated hospitals were supported by a variety of governmental subsidies and grants . . . ." *Tressler Lutheran Home*, 677 F.2d at 305.

[316] *See* text accompanying *supra* notes 225-27.

[317] *See* text accompanying *supra* note 225.

will let you cash the checks we write to poor parents for the education of their children."

While invocation of the unconstitutional-conditions doctrine may or may not ultimately be found sufficient to preventolegislated private school-choice programs from forcing parents of families that want to participate to waive their religious-freedom rights, it *does* seem — if only on the basis of the unconditional "critical and unique role" of religious-school teachers relied upon in *Catholic Bishop*, *Universidad Central* opinion, *St. Louis Christian Home*, *Tressler Lutheran Home*, *V.O.A.*, and *Denver Poste*— as if the doctrine *would* be considered sufficient to prevent truly universal private school-choice programs from forcing the religious schools that want to participate from waiving *their* religious-freedom rights. This result is so even though, in the latter scenario (in which the state cannot essentially say, "you, as a school, cannot indirectly take aid that we give to third-party individuals who only *then* give it to you and be what we think is too religious with it") is a more-indirect kind of unconstitutional bargaining than the former scenario in *Sherbert*, *Rosenberger*, and *Miller* (in which the state cannot essentially say, "you, as an individual, cannot take aid that we give directly to you and be what we think is too religious with it").

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In the controversial *Grove City College v. Bell*,[318] though, the Supreme Court held — in the face of a Free Exercise challenge — that a federal statute that prohibits sex discrimination in any educational program that receives federal financial assistance applied to religious Grove City College. This statutory application was based — arguably very analogously to the way in which religious M.P.C.P. schools would be receiving state aid — on that institution's receipt of such aid only indirectly, through the individual choices of the students who themselves received United States Department of Education Basic Educational Opportunity Grants (B.E.O.Gs). While the indirect B.E.O.G. connection to Grove City, according to the Court, did not automatically trigger *institution*wide application of the statute (only application of the college's financial-aid program), Congress (over President Reagan's veto) amended the statute to make clear that entire institutions were covered if any component of one received federal aid even indirectly.[319] (Basically, after *Grove City* and the Congressional amendment, the government *can* say, "you, as a school, cannot indirectly take aid that we give to third-party individuals who only *then* can give it to you at their behest and be what

318 Grove City College v. Bell, 465 U.S. 555 (1984).

319 *"Grove City" Bill Enacted Over Reagan's Veto*, 1988 C.Q. ALMANAC 63.

we think is sexist with it.") The legislature "is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept," Justice Byron S. White wrote, "Grove City may terminate its participation in the BEOG program and thus avoid the requirements . . . . Students affected by the Department's actions may either take their BEOG's elsewhere or attend Grove City without federal financial assistance."[320]

Similarly, in *Rust v. Sullivan*,[321] Reagan-era U.S. Department of Health and Human Services (D.H.H.S.) regulations that prohibited federally funded family-planning projects from engaging in abortion counseling, referral, and any other type of advocacy withstood a First Amendment, Free-Speech challenge. In the words of Chief Justice Rehnquist, "subsidies are just that, subsidies. The recipient is in no way compelled to operate a . . . project; to avoid the force of the regulation, it can simply decline the subsidy."[322] (Basically, the government *can* say "you, a family-planning program, cannot take aid we give directly to you and be what we think is too 'lippy' about abortion with it").

Also similarly, in the Court of Appeals for the District of Columbia Circuit's *DKT Memorial Fund v. Agency for International Development*,[323] part of another Reagan-era anti-abortion funding policy — this one of the U.S. Agency for International Development (A.I.D.) — withstood a free-speech challenge.[324] The policy required a domestic non-governmental organization (D.N.G.O.) that received an A.I.D. grant

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[320] *Grove City*, 465 U.S. at 575-76. (First row; front, center, wet.) *See also* Bob Jones Univ. v. United States, 461 U.S. 574 (1983). In *Bob Jones*, while denial by the Internal Revenue Service (I.R.S.) of tax-exempt status to a religious university that the I.R.S. considered racially discriminatory "will inevitably have a substantial impact on the operation of religious schools," it "will not prevent the schools from observing their religious tenets," Chief Justice Burger stated, and because "[t]he governmental interest at stake here is compelling," the college's Free Exercise challenge to the I.R.S. denial fails.

> [T]he government has a fundamental overriding interest in eradicating racial discrimination in education . . . [that] substantially outweighs whatever burden denial of tax benefits places on petitioner's exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest . . . and no "less restrictive means" are available to achieve this governmental interest.

Id. at 603-04 (citations omitted). Attempting to reconcile this reasoning with his previous *Catholic Bishop* opinion, Chief Justice Burger quoted the affirmed Fourth Circuit Court of Appeals decision in *Bob Jones*, "uniform application of the rule to all religiously operated schools *avoids* the necessity for a potentially entangling inquiry into whether a racially restrictive practice is the result of sincere religious belief." *Id.* at 604 n.30 (emphasis in both Chief Justice Burger's quotation and the Fourth Circuit's original.)

[321] Rust v. Sullivan, 500 U.S. 173 (1991).

[322] *Id.* at 199 n.5.

[323] DKT Mem'l Fund v. Agency for Int'l Dev., 887 F.2d 275 (D.C. Cir. 1989).

[324] The policy implemented the United States' larger "Mexico City Policy," which announced several abortion-related limitations on the use of foreign-aid funds for family planning. *Id.* at 275.

under the Foreign Assistance Act (F.A.A.) to certify that it "will not furnish assistance for family planning *under this grant* to any foreign nongovernmental organization which performs or actively promotes abortion as a method of family planning in A.I.D.-recipient countries or which provides financial support to any other foreign nongovernmental organization that conducts such activities."[325] As summarized by Judge David B. Sentelle, "Thus, DNGOs are prohibited from using grant funds, not their own, for the promotion of abortion in AID-recipient countries." This policy contrasted with the policy towards a *foreign* N.G.O. (F.N.G.O.), which "during the term of an assistance . . . grant, is prohibited from *using its own funds* to perform or actively promote abortion as a method of family planning abroad."[326] *Thus*, Judge Sentelle concluded (on this matter) that what the D.N.G.O.s "actually complain of is not suppression of free-speech rights, but rather a refusal to fund . . a. [T]he AID program places no obstacle in the way of those who would perform or promote abortions that were not there before the commencement of FAA funding."[327]

Citing *Grove City*, Judge Sentelle notes that "[t]he present allegations cast DKT" a D.N.G.O., "in the role of Grove City, and allegedly bought-off FNGOs in the role of grant-receiving students. The hypothetical FNGOs may forgo the federal aid and associate with DKT in abortion programs or they may take the grants and their associations elsewhere."[328] In the opinion of then-Judge Ruth Bader Ginsburg, however, "the court lapses . . . when it equates this case not to *Sherbert*, but to *Grove City*.e . . DKT matches Grove City College, my colleagues say, and the foreign NGOs match the students . . . These are mismatches," Ginsburg wrote, "for abortion (or anti-abortion) counseling is speech protected by the first amendment, . . . while discriminating adversely on the basis of race, national origin, religion or sex is not one's constitutional right."[329]

In a hypothetical Free Exercise challenge by religious choice schools to state labor-law application, the schools could rely on factual distinctions between *Grove City* and *DKT*, including Justice Ginsburg and Judge Sentelle's use of the penalty/subsidy distinction in *DKT*'s unconstitutional-conditions context. As for the former, the statute at issue in *Grove City* specifically conditioned its application on receipt of governmental aid in a way that the M.P.C.P. statute does not; the state, in

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325 *Id.* at 278.

326 *Id.* at 278 (emphasis added).

327 *Id.* at 287, 289.

328 *Id.* at 297.

329 *Id.* at 301 n.2 (Ginsburg, J., concurring in part and dissenting in part). "It does not answer DKT's constitutional objection to say that the domestic NGO can go it alone, that DKT can spend its own (privately raised) funds abroad as it will." *Id.* at 302.

other words, while still "bargaining" in both cases, is bargaining in different ways. Also, just as Grove City's essential assertion of what Justice Ginsburg dubbed some sort of "right to discriminate" is not the conceptual equivalent of DKT's protected Free Speech rights. Neither would it be the equivalent of a religious choice school's protected Free Exercise rights."[330]

As for Judge Sentelle's latter, penalty/subsidy distinction in the unconstitutional-conditions context, according to University of Utah law professor Michael W. McConnell's insightful formulation of it,

> it is helpful to examine the extent to which those exercising [a] right are worse off then those not exercising it.
>
> If the only difference between the two is that the former are "poorer" to the extent of the cost of exercising the constitutional right, the case is one of a mere failure to subsidize. If the difference is greater than the cost of exercising the constitutional right, the case is one of penalty.[331]

In *DKT*, as Judge Sentelle found, the D.N.G.O.s that want to exercise their Free Speech rights are no worse off than those who do not want to exercise the same right; to the degree those wanting to exercise the right are "poorer," it is only to the extent of the cost of exercising the right. (The F.N.G.O.s in *DKT*, according to this formulation — because the degree to which they are "poorer" actually *exceeds* the cost of exercising the right, for wanting to exercise the right makes them ineligible for *any* of the A.I.D. aid money — are penalized. However they have no standing to assert First Amendment rights because, being foreign, they do not have any.[332] In the hypothetical religious choice school challenge to labor-law application, the schools, like the D.N.G.O.s in *DKT*, would be worse off, as they were forced or coerced into waiving their Free Exercise rights and thus penalized; the degree that wanting to exercise the right to Free Exercise leaves them "poorer" is likely greater than the cost

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330 *See* Jocz v. Labor and Indust. Rev. Comm'n., 538 N.W.2d 588 (Wis. Ct. App. 1995) (Equal Rights Division of Wisconsin Department of Industry, Labor and Human Relations has jurisdiction to hear sex-discrimination complaint against seminary by "ministerial," though not "ecclesiastical," employee).

331 Michael E. Hartmann, *Tiers for Fears, Fears of Tiers: Determining Whether the Effect of a Defendant State's Two-Tier Welfare Program's Durational Residency-Requirement Condition on the Receipt of Benefits is to Actually Outright Penalize an Indigent-Recipient Plaintiff's Exercise of the Constitutionally Protected, Fundamental Right to Travel or to Merely Refuse to Subsidize It*, 40 WAYNE L. REV. 1401, 1432-34 (1994) (*quoting* Michael W. McConnell, *The Selective Funding Problem: Abortion and Religious Schools*, 104 HARV. L. REV. 1014, 1017 (1991)).

332 DKT Memorial Fund v. Agency for Int'l Dev., 887 F.2d 275, 283-85 (D.C. Cir. 1989).

of exercising that right to— in this case, no M.P.C.P. aid money at all.[333] (In *Miller*, the religious families — like the F.N.G.O.s in *DKTe*— are similarly penalized for wanting to exercise their Free Exercise rights because this desire also results in their being ineligible for any school-choice aid at all; in *Miller*, though — *un*like *DKT*'s F.N.G.O.s — the plaintiff families have First Amendment rights to assert.)

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To the specific facts, then, that — for purposes of both Free Exercise and Establishment Clause analyses, as *Culvert* recognizes — a religious school's hypothetical M.P.C.P. participation does *not* somehow thus change what would otherwise be, 1) the only incrementally quantitative addition of W.E.R.C. regulation into a qualitatively ineffectual one, and 2) a burdensome regulation into a nonburdensome one, can be added, 3) the general Free Exercise fact (and theory) that in return absent a compelling governmental interest, conditioning the school's program eligibility on a waiver of its otherwise-enforced, constitutional religious-freedom protection against W.E.R.C. jurisdiction is unconstitutional.

Whether the state has a compelling governmental interest.

A compelling governmental interest in W.E.P.A. application to religious M.P.C.P. schools would thus be necessary for a court to constitutionally permit W.E.R.C. jurisdiction over the relations with lay faculty members. Again, unlike *Caulfield*, *McCormick*, and *Catholic Bishop*, *Culvert* and *St. Teresa* found the state's application of their respective labor laws constitutionally permissible because of a compelling interest in "the preservation of industrial peace and a sound economic order."[334] It might be interesting to ask the reader first to compare the degree of "industrial peace" surrounding the relations of *public*-school teacher relations with *public*-school boards in the United States and the industrial

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333 *Cf.* Douglas Laycock & Susan E. Waelbroeck, *Academic Freedom and the Free Exercise of Religion*, 66 TEX. L. REV. 1455, 1474 (1988) (citing Sherbert v. Verner, 374 U.S. 398, 404 (1963); Thomas v. Review Bd., 450 U.S. 707, 717 (1981); Hobbie v. Unemployment Comm'n, 480 U.S. 136 (1987):

> To require a religious university to grant academic freedom to theology professors as a condition of research grants in chemistry or scholarships in . . . education would penalize the religious university without advancing the governmental interest. Such penalties on constitutional rights are unconstitutional under well-settled rules against unconstitutional conditions. The free exercise cases describe such conditions as burdens on the constitutional right.

Id.

334 Catholic High School Ass'n of N.Y. v. Culvert, 753 F.2d 1161, 1171 (2d Cir. 1985), *quoted in* text accompanying *supra* note 64; South Jersey Cath. Sch. Teachers Ass'n v. St. Teresa, 675 A.2d 1155, 1171 (N.J. Super. Ct. App. Div. 1996), *quoted in* text accompanying *supra* note 97.

peace surrounding the relations of religious-school teachers' relations with their employers. Is there more "economic order" in the one context or the other? Also, it might be important to note that — consistent with Justice Ginsburg's factual distinction in *DKT*a— the hypothetical teachers' union's assertion is not one of a constitutional right to associate,[335] but a *statutorily* granted right to rely on W.E.R.C. jurisdiction and its enforcement of the W.E.P.A.'s terms. (The religious schools would not be, as Justice Ginsburg characterized Grove City's actions in her *DKT* opinion, saying, "for religious reasons, we basically have the right to trample on others' constitutionally protected rights."[336])

There is, furthermore, no basis on which to assert that that which is *non*compelling in the *non*-choice context would become considered compelling within the choice context. The state *does* have an interest in ensuring — in fact, perhaps a duty to ensure — that its funds are spent efficiently, wisely, and constitutionally in conformance with those laws and regulations that do not impinge upon the recipients' rights themselves. *If* it has a compelling interest in "labor peace" that is served by W.E.P.A. application to religious schools, then it has one now. Conceptually placing the schools in the M.P.C.P. changes nothing.

Existence of labor board.

Again, if the R.F.R.A. applies, a hypothetical Wisconsin court may deem significant — as done in the "pro-union" *St. Teresa* — the fact that the W.E.P.A. will be applied by the W.E.R.C. and not the courts. The W.E.R.C., in the words of *St. Teresa*, is not equipped like the courts to "avoid or prevent any undue interference in the ecclesiastical concerns of the schools."[337]

c. Establishment Clause analysis

The W.E.P.A.'s secular purpose.

According to both *Lemon* and (thus) the "template," the first question that a hypothetical court would need to consider is whether the W.E.P.A. has a secular purpose. It clearly does. By its own above-quoted terms,[338] the W.E.P.A.'s purpose is secular. All five of the above-examined cases that do an Establishment Clause analysis (*St. Teresa*, recall, does not) found a secular labor-law purpose. This purpose,

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335 The governmental interest in enforcing a statute that protects this *constitutional* right might be more likely to be considered compelling. *See* text accompanying *supra* notes 340-41.

336 The religious schools *would perhaps* be making this statement if they maintained that it was constitutionally permissible — in fact, because of the Free Exercise Clause, constitutionally mandated — to forbid lay faculty to join a union at all.

337 *St. Teresa*, 675 A.2d at 1171, *quoted in* text accompanying *supra* note 99.

338 WIS STAT. § 111.01(4) (1991), *quoted in* text accompanying *supra* note 242.

moreover, does not change when examined in the choice as opposed to the non-choice context.

The W.E.P.A's principal or primary effect.

The next question is whether the overall principal or primary effect of the W.E.P.A. is to either advance or inhibit religion. While there may be bona fide argument about the degree to which the effect of W.E.P.A. application to religious M.P.C.P.-participating schools may or may not inhibit religion, there cannot be warranted dispute about whether the *overall* principal or primary effect of the act is to either advance or inhibit religion. As with whether the W.E.P.A. has a secular purpose, none of the five above-examined cases that conduct an Establishment Clause analysis found that a labor law's principal or primary effect is to either advance or inhibit religion. As also with the secular purpose, this overall principal or primary effect does not change when examined in the choice as opposed to the non-choice context.

Private, parochial M.P.C.P. schools' excessive administrative entanglement with the W.E.R.C.

The way *Culvert* dealt with *Lemon*'s excessive administrative entanglement prong, that same reasoning's application to our hypothetical case, and the contrary conclusions of the other cases that answered the same questions(s) are described and discussed at length above — in that portion, also relevant to this Establishment Clause analysis, of the Free Exercize analysis consideration of whether religious exercise is burdened.[339] To summarize again the effect of changing from the existing non-choice to the hypothetical choice context, though, a religious M.P.C.P. schools' participation in the program does not change what would otherwise be:

1. the perhaps only incrementally quantitative addition of state labor relation into a qualitatively ineffectual one; and
2. an impermissibly burdensome regulation into a permissibly nonburdensome one.

As for Justice O'Connor's re-consideration in *Agostini* of that which *Aguilar* considered "pervasive monitoring" of religious New York schools participating in the E.S.E.A. Title I program for low-income students and whether W.E.P.A. application to religious M.P.C.P. schools would be as (in her word) "undermined" as she thought *Aguilar's* con-

339 Text accompanying *supra* notes 300-33.

cern about it was,[340] it would not. Rather, the *Aguilar* concern remains in this context — and so thus does "excessive entanglement." It is not the case, then, that the same excessive-entanglement "loosening" in *Agostini* constitutionally permitting religious school choice in the first place would also prevent religious choice schools from successfully arguing that state labor-law application to them is too excessively entangling to be constitutionally permissible.

In *Agostini*, recall, the Court considered *Aguilar's* pervasive-monitoring concern undermined because "we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment."[341] No such presumption can be made here; *private* employees at private, parochial M.P.C.P. schools would, in fact, as they are now, be *required* by their private, parochial-school employers to inculcate religion.[342] The constitutional concern (plausibly) "assumed away" in *Agostini* cannot be so easily "assumed away" in this context. What is essentially the "trust" properly placed in Title I public-school teachers at parochial schools in *Agostini* not to inculcate religion allows both the program's administrative bureaucrats and any court seeking to resolve a First Amendment dispute arising out of or in the midst of it to avoid even having to inquire about what may be "going on" in those classrooms on this issue (in this perhaps highly attenuated sense, invoking *sub silentio* the familiar canon of construction, used by the Supreme Court in its *Catholic Bishop* decision, to avoid constitutional problems). Here—making a similar distinction to those made by several courts of appeal in above-quoted dicta—a court must "trust" just the opposite: that — true to their word, their literal missions — parochial schools and the lay teachers they employ *will* be inculcating religion at every turn. W.E.R.C. bureaucrats and any court seeking to resolve a labor dispute between lay faculty and religion M.P.C.P. still could not steer so clear of having to confront such constitutional questions (invocation of the Court's *Catholic Bishop* doctrine to avoid such problems here dictates denying W.E.P.A. application). *Agostini* does not make "positive" the feared negative implication in the Seventh Circuit's *Catholic Bishop* about "an even-handed approach to justice" suggesting that if the "Religion Clauses" are no longer held to be a "buckler to stop financial aid" to religious choice schools, then they may be "less effective in ward[ing] off the inhibiting effect of . . . government regulation like state labor laws."[343]

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340 Agostini v. Felton, 65 U.S.L.W. 4524, 4532, *quoted in* text accompanying *supra* note 192.

341 *Id.*

342 *See supra* notes 235a36.

343 *See* Volunteers of Am.-Minnesota-Bar None Boys Ranch v. N.L.R.B., 752 F.2d 345, 348-49 (8th Cir. 1985) (distinguishing *Catholic Bishop*), *quoted in* test accompanying *supra*

Add to this the Free Exercise fact that — absent a compelling governmental interest, which does not exist here — to condition a religious school's very M.P.C.P. eligibility on a waiver of its otherwise-enforceable constitutionally protected religious-freedom is unconstitutional, and Milwaukee's religious choice schools would be comfortably clear of *Culvert*'s camel cud.

B. THE CLEVELAND SCHOLARSHIP AND TRAINING PROGRAM (C.S.T.P.): A TENT WITH CRUCIFIXES

1. *The Program (II)*

Again, as discussed in the introduction,[344] Ohio's C.S.T.P. began in the 1996-97 academic year. Two types of schools are eligible to participate in the "scholarship" portion of the C.S.T.P.: 1) private, including parochial schools that are within the boundaries of the Cleveland City School District;[345] and 2) public schools within adjacent school districts.[346] No adjacent-district public schools have chosen to participate thus far. The C.S.T.P. scholarship amount is $2,500 or 90% of tuition, whichever is less, and can be used by the student until he or she is in eighth grade at the participating school.[347] "Each scholarship," the statute reads, "to be used for payments to a registered private school is payable to the parents of the student entitled to the scholarship;"[348] in practice, as in the expanded M.P.C.P., an eligible parent receives the C.S.T.P.-scholarship check at the eligible school and then restrictively endorses it over to that school. Parents, according to the program, must pay either 10% or 25% of the school's tuition on their own, depending on the family's income.[349]

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note 170; Denver Post of the Nat'l Society of the V.O.A. v. N.L.R.B., 732 F.2d 769, 772 (10th Cir. 1984) (same), *quoted in* text accompanying *supra* note 171; N.L.R.B. v. Hanna Boys Ctr., 940 F.2d 1295, 1301-02 (9th Cir. 1991) (same), *quoted in* text accompanying *supra* notes 173-74; Volunteers of Am., Los Angeles v. N.L.R.B., 777 F.2d 1386, 1390 (9th Cir. 1985) (same), *quoted in* text accompanying *supra* note 175.

344 Text accompanying *supra* notes 11-14.

345 OHIO REV. CODE ANN. § 3313.975 (ANDERSON 1995).

346 *Id.* at § 3313.98. The "tutorial" portion of the program makes availible up to $500 for eligible students enrolled in Cleveland City School District schools. *Id.* at § 3313.978(C)(3).

347 *Id.* at § 3319.978.

348 *Id.* at § 3319.979.

349 *Id.* at § 3319.978. In findings similar to those regarding the M.P.C.P. in Wisconsin, Harvard Professor Peterson and University of Texas Professor Greene have found that "[t]he standardized test scores reported by the Hope Schools in Cleveland, two schools with large enrollments of low-income students participating in the Cleveland voucher experiment, show moderately large gains in reading and even more substantial gains in math." Jay P. Greene, Paul E. Peterson & William Howell, *Test Scores from The Cleveland Voucher Experiment* (undated), Program in Education Policy and Governance, Center for American Political Studies, Department of Government, Harvard University, at 2. *See* Joe Williams, *New study sayse choice helps students: Look at Cleveland voucher program finds that performance improves*, MILWAUKEE J. SENTINEL, June 28, 1997, at 3B.

2. *The Lawsuit (II):* Simmons-Harris v. Goff

As also previously discussed in the introduction,[350] the (sadly, seemingly requisite) A.F.T./A.C.L.U. lawsuit against the C.S.T.P. is now at the state supreme court level. In July, 1996, Franklin County Court of Common Pleas Judge Lisa L. Sadler upheld the program against federal First Amendment and several state-constitutional challenges.[351] As for the Establishment Clause grounds on which Judge Sadler upheld the C.S.T.P., "whether viewed on the face of the statute or as it is applied, the program does not appear to pose any of the dangers the Supreme Court was concerned with in those cases striking down programs which resulted in direct aid to sectarian schools," according to Judge Sadler.[352] "[I]t does not appear that the benefits received by the nonpublic schools participating in the program are of the sort which constitute a direct benefit to the schools."[353]

In his opinion reversing Judge Sadler's decision, Judge John C. Young wrote for the appeals court that "while the scholarship program facially suggests neutrality, we cannot ignore the fact that not a single public school chose to participate in the program for the 1996-97 school year" — though he *did*, as a substantive matter, ignore the fact that not all of the private schools choosing to participate in the program were religious: "benefits in the program are limited, in large part, to parents who are willing to send their children to sectarian schools," according to Judge Young, and what he thus saw as the effective

> lack of opportunity to apply scholarship aid toward a secular education, when coupled with the well-documented failings of the Cleveland City School System, creates a strong "incentive for students to undertake sectarian education." . . . In short, the lack of public-school

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350 Text accompanying *supra* note 13.

351 Gatton v. Goff, No. 96CVH-01-193 (Ohio Ct. Common Pleas, Franklin County July 21, 1996), at 7-8 (quoting Ohio constitution).

352 *Id.* at 28-29. "The program does not provide for reimbursement of money already paid by the parents to the schools," according to Judge Sadler. "Nor does the program provide funds which subsidize the secular functions of the schools, thus making additional money available to fund the religious functions." *Id.* at 12.

As for the Free Exercise Clause, dealt with first in *Gatton*, Judge Sadler agreed with *Miller* despite *Rosenberger's* unconstitutional-conditions analysis, which Judge Sadler narrowed in application to the First Amendment, "public-forum" context. "It is clear that in fact the scholarship program is not a forum of the type discussed in *Rosenberger* and the other cases in that line, according to her opinion. "Thus, while *Rosenberger* is certainly instructive on the notion of government neutrality toward religion, its forum analysis is not controlling in this case." *Id.*

353 *Id.* at 29.

> participation in the scholarship program "skew[s the program] toward religion."[354]

Curiously, then, the same troubled state of the Cleveland city schools that forces low-income parents to look elsewhere for their children's education became that which prevented those parents from looking elsewhere to educate their children.

> The only real choice available to most parents is between sending their children to a sectarian school and having their child remain in the troubled Cleveland City School District. Such a choice can hardly be characterized as "genuine and independent." Rather, such a choice steers aid to sectarian schools, resulting in what amounts to a direct government subsidy.

And this subsidy — in an analysis itself to, again, at this writing, now on appeal to the Ohio supreme court — "has the primary effect of advancing religion in violation of the Establishment Clause."[355]

3. *The Potential Lawsuit (II) — Current Law Applied to Reliance on State Labor Law by Those Attempting to Unionize the Lay Faculty of Private, Parochial C.S.T.P. Schools*

It does not appear that an attempt by the local A.F.T. or the already-existing Catholic-school teachers' union to unionize the lay-faculty members of the private, parochial schools that are participating in the

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354 Simmons-Harris v. Goff, No. 96APE08-982 (Ohio App. Ct., 10th Dist., May 1, 1997), at 15 (quoting Witters v. Washington Dept. of Serv. for the Blind, 474 U.S. 481, 488 (1986) (citations omitted; brackets in original)). *But see* Agostini v. Felton, 65 U.S.L.W. 4524, 4531 (June 23,1997). "Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid," according to Justice O'Connor in *Agostini*. "*Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign language interpreter to attend a parochial school." *Id.*

The tutorial portion of the C.S.T.P., according to Judge Young, did nothing to "neutralize" it. "Because the scholarship program offers vastly greater benefits to parents who send their children to private, mostly sectarian schools, than the tutorial program offers to parents who send their children to Cleveland City School District schools," he wrote, "the Pilot Program creates an impermissible incentive for parents to send their children to sectarian schools." *Id.* at 19.

355 *Id.* at 20, 21. Again, at this writing, the state is asking the supreme court to stay the effect of the reversal pending a decision in the case there. Separately, the court is also being asked to vacate and dismiss that portion of Judge Young's opinion precluding C.S.T.P. participation by private *religious* schools.

Relevant to this overall analysis, Judge Young disposed of a plaintiffs' argument that the C.S.T.P. also violates the third prong of the *Lemon* test. "[N]othing in the scholarship program, or the Pilot Program as a whole, calls for the sort of 'comprehensive, discriminating and continuing state surveillance' necessary to foster an excessive government entanglement with religion." *Id.* at 21 n.4.

C.S.T.P. and meeting their resistance could rely on the assistance of Ohio state labor-law intervention.[356] "[G]enerally in the field of labor relations," according to the state supreme court's *Building Service & Maintenance Union Local No. 47 v. St. Lukes Hospital*, Ohio "is a common law jurisdiction, and . . a we have no comprehensive labor relations act as do the federal and some state governments."[357] Nor is there "a word in Ohio's common law rule book that says an employer must, against his will, bargain collectively."[358] There *is* an Ohio state statute that refuses to enforce contracts as part of which an employee must promise *not* to ever join a union, but the state supreme court in the same decision similarly found that "[n]either by express terms nor by thinnest implication does it command that either an employee or an employer must bargain collectively."[359] Finally, the attempt by the nonprofessional hospital employees who were seeking to have Ohio mandate collective bargaining to rely on state-constitutional language that guaranteed that "all courts shall be open, and every person, for an *injury done* him in his hand shall have remedy by due course of law"[360] failed. "If the law recognized that an

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356 *Nor* does it appear that such a union would be able to creatively construct a semi-plausible claim that Ohio's relevant *public*-employee labor-relations statute would somehow apply to relations between private, parochial C.S.T.P. schools and their lay-faculty members. Ohio's public-sector labor-relations act defines "public employee" as

> any person holding a position by appointment or employment in the service of a public employer, including any person working pursuant to a contract between a public employer and a private employer and over whom the national labor relations board has declined jurisdiction on the basis that the involved employees are employees of a public employer,

with exceptions, of which none is applicable here. OHIO REV. CODE ANN. § 4117.01(C) (1995). A "public employer" is

> the state or any political subdivision of the state located entirely within the state including, without limitation, any municipal corporation with a population of at least five thousand according to the most recent federal decennial census, county, township with a population of at least five thousand in the unincorporated area of the township according to the most recent federal decennial census, school district, state institution of higher learning, any public or special district, any state agency, authority, commission, or board, or other branch of public employment.

Id. at § 4117.01(B).

357 Building Serv. & Maintenance Union Local No. 47 v. St. Lukes Hosp., 227 N.E.2d 265, 271 (Ohio 1967). *Compare* South Ridge Baptist Church v. Industrial Comm'n of Ohio, 911 F.2d 1203 (9th Cir. 1990) (including church within statutory workers'-compensation system violates neither Free Exercise nor Establishment Clauses).

358 *St. Lukes*, 227 N.E.2d at 271. "It is indicative," the court noted,

> that where a state *has* a labor relations act which imposes the duty of collective bargaining, but the act expressly exempts from its operations certain types of employers, such as charitable corporations, then the particular labor relation status is relegated to the common law and the exempt employer is under no duty to bargain collectively.

Id. (emphasis supplied).

359 *Id.*

360 OHIO CONST. art. I, § 16, *quoted in St. Lukes*, 227 N.E.2d at 271 (emphasis in quotation). "The purpose of this statute is to outlaw the so-called 'yellow dog' contract by which

employer's refusal to bargain collectively was an 'injury done' to his employees, this court would enforce this constitutional provision instantly," the court stated. Circularly, however, the Court determined that there was no injury because "nowhere in Ohio's common law rule book does it say that such refusal constitutes a wrong or injury."[361]

IV. CONCLUSION

Religious schools participating in an expanded M.P.C.P. in Milwaukee — and those in any future similar programs in states with labor-law statutes like Wisconsin's W.E.P.A. and labor boards like the W.E.R.C. that implement these statutes — would be right in the fourth row, close to cud.eReligious C.S.T.P. schools in Cleveland, and those in any future such programs in states that also rely on common-law principles, would also be clear of cud. Indeed, they would probably be farther away, in the fifth or sixth row.[362]

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either party agrees not to join or remain in an employee or employer organization." *St. Lukes*, 227 N.E.2d at 271.

361 *St. Lukes*, 227 N.E.2d at 271. "Such a constitutional provision refers to wrongs that are recognized by law." *Id.*

362 *See* text accompanying *supra* notes 33-40.