FIRST AMENDMENT - ESTABLISHMENT CLAUSE AND FREE EXERCISE CLAUSE - REQUIRING CATHOLIC ELEMENTARY SCHOOLS TO BARGAIN WITH THE LAY TEACHERS' COLLECTIVE BARGAINING REPRESENTATIVE DOES NOT VIOLATE THE RELIGION CLAUSES OF THE FIRST AMENDMENT - *South Jersey Catholic School Teachers Organization v. Saint Teresa of the Infant Jesus Church Elementary School*, 150 N.J. 575, 696 A.2d 709 (1997).

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I. INTRODUCTION

> *The Religion Clauses of the Constitution represent a profound commitment to religious liberty. Our Nation's Founders conceived of a Republic receptive to voluntary religious expression, not of a secular society in which religious expression is tolerated only when it does not conflict with a generally applicable law.*[1]

With a growing number of secular laws affecting religious freedom, the courts have been faced with the task of defining those instances in which the state may act to regulate religious behavior. Church labor relations is just one area where the courts have been asked to undertake this task. Recently, the courts, rather than applying a strict separationist view of state regulation of church labor relations,[2] have concluded that some level of state regulation and interference in religious schools is permissible. As such, parochial institutions' religious freedom is being threatened.

At the core of the First Amendment Religion Clauses[3] are the guarantees

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[1]City of Boerne v. Flores, 117 S. Ct. 2157, 2185 (1997) (O'Connor, J., dissenting).

[2]United States Supreme Court Justice Sandra Day O'Connor explained, in her dissenting opinion in *Boerne*, that at the time the First Amendment was drafted, there was a belief that religious expression should be tolerated at all times, not just when the religious expression and secular laws do not conflict. *See id.* at 2177, 2185. Justice O'Connor emphasized that the drafters of the First Amendment believed that "the government could interfere in religious matters only when necessary 'to prohibit and punish gross immoralities and impieties . . . .'" *Id.* at 2184 (quoting Oliver Ellsworth, Landholder, No. 7 (Dec. 17, 1787), *reprinted in* 4 Founder's Constitution, 640).

[3]"Religion Clauses" refers specifically to the Establishment and Free Exercise Clauses by most scholars. The First Amendment Religion Clauses provide "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST., amend. I.

that the government will neither support religion nor interfere with the people's exercise thereof.[4] Thomas Jefferson believed that the combined effect of the Establishment Clause and Free Exercise Clause would create a highly valued, virtual "wall of separation between the church and state."[5]

Before 1990, the United States Supreme Court subjected state laws that restricted individuals' religious freedoms to "rigorous" tests.[6] For example, in 1952, the United States Supreme Court, in *Zorach v. Clausen*,[7] declared that when public institutions make adjustments in the conduct of their affairs to account for sectarian needs, "it follows in the best of our traditions."[8] As American society becomes increasingly secular, and government regulation increases, the spirit of accommodation for religious beliefs is quickly disintegrating.[9] In particular, litigation surrounding the regulation of church labor

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[4]*See* Douglas Laylock, *Towards a General Theory of Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1384 (1981).

[5]*Id.* at 1381 (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947)).

[6]*See* Peter M. Stein, Smith v. Fair Employment and Housing Commission*: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under* Employment Division v. Smith, 4 GEO. MASON L. REV. 141, 150-51 (1995).

[7]343 U.S. 306, 314 (1952) (holding that a release program excusing public school students from class to allow them to attend religion classes was constitutional).

[8]*Zorach*, 343 U.S. at 314; *see also Supreme Court Decision on Religious Issues Before the House Judiciary Comm.*, 105th Cong. (daily ed. July 14, 1997) (statement of Mark E. Chopko, General Counsel, United States Catholic Conference) [hereinafter *Supreme Court Decision*].

In *Boerne*, Justice O'Connor declared that "[t]o give meaning to [the ideal of religious freedom]—particularly in a society characterized by religious pluralism and pervasive regulation—there will be times when the Constitution requires government to accommodate the needs of those citizens whose religious practice conflict with generally applicable law." City of Boerne v. Flores, 117 S. Ct. 2157, 2185 (1997) (O'Connor, J., dissenting). Justice O'Connor further observed that pre-Constitutional America, too, was not without religion-government tensions, which arose mostly in the context of military conscription. *See id.* at 2182 (O'Connor, J., dissenting). Yet, Justice O'Connor explained that religious pacifists were often excused from military service, demonstrating that "long before the First Amendment was ratified, legislative accommodations were a common response to conflicts between religious practice and civil obligation." *Id.* at 2183 (O'Connor, J., dissenting). Justice O'Connor posited that these examples indicate that the Founding Fathers recognized that true religious freedom sometimes requires civil law to give way to religious belief. *See id.*

[9]*See id.* Even the United States Supreme Court has declared that the relationship

relations has increased.[10]

With the regulatory state growing, courts have required religious institutions to secularize in order to avoid entanglements, while correspondingly compromising the principal that the state would not interfere with the exercise of religion.[11] It has thus been offered that the United States Supreme Court has relegated religious values, once held with highest regard in American society, because of the prevailing view that religious obligation and governmental regulation cannot peacefully coexist, subject to a mere rational relationship test.[12] At times, it may even appear as though this country is embroiled in an era of forced secularization.[13]

Following this trend, the New Jersey Supreme Court in *South Jersey Catholic School Teachers Organization v. Saint Teresa of the Infant Jesus Church Elementary School*,[14] recently held that the New Jersey Constitution[15]

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between the state inspections of religious activities and the religious institutions "is a relationship pregnant with dangers of excessive government direction of church schools and hence churches . . . and we cannot ignore here the dangers that pervasive modern governmental power will ultimately intrude on religion and thus conflict with Religion Clauses." Lemon v. Kurtzman, 403 U.S. 602, 620 (1971).

[10]*See* Laylock, *supra* note 4, at 1373.

[11]*See Religious Freedom Before the House Judiciary Comm., Subcomm. on the Constitution*, 104th Cong. (daily ed. July 23, 1996) (statement of Carl E. Esbeck, Professor of Law, University of Missouri) [hereinafter *Religious Freedom*].

[12]*See Supreme Court Decision supra* note 8. Thus, government regulation of religion will pass constitutional muster so long as the regulation of a religious activity has a rational basis. *See id.*

[13]*See Religious Freedom supra* note 11.

[14]150 N.J. 575, 696 A.2d 709 (1997) [hereinafter in text *South Jersey*].

[15]Article I, paragraph 19 of the New Jersey Constitution states in pertinent part:

> Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

N.J. CONST., Art. I, para. 19. The argument advanced by the union was that because the lay teachers in the Catholic schools were private employees, the New Jersey Constitution granted them the fundamental right to organize. *See South Jersey*, 150 N.J. at 582, 696 A.2d at 713.

requires that Catholic elementary schools bargain with the lay teachers' union over secular terms and conditions of employment. Additionally, the court concluded that this requirement does not violate the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution.[16]

This Casenote will analyze the evolving jurisprudence in the context of the First Amendment Religion Clauses as well as explain the foundation upon which the majority based its decision. Additionally, this Casenote will argue that religious acceptance has diminished, thereby threatening the religious foundation and freedom of many institutions.

II. STATEMENT OF THE CASE

In *South Jersey*, the New Jersey Supreme Court held that lay teachers in parochial elementary schools have a state constitutional right to organize and bargain collectively regarding secular terms and conditions of employment as limited by the Religion Clauses of the First Amendment.[17] In so holding, the New Jersey Supreme Court reasoned that applying general, neutral laws to church labor relations neither creates an excessive entanglement between religion and the government nor infringes on one's free exercise rights.[18]

The plaintiff, South Jersey Catholic School Teachers Organization ("SCTO"),[19] instituted a lawsuit against the defendants, the Catholic elementary schools of the Diocese of Camden, in an attempt to force the schools to recognize the SCTO as the lay teachers' representative and to compel them to collectively bargain with the union.[20] The SCTO asserted its position as the

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[16]*See id.* at 602, 696 A.2d at 724.

[17]*See id.* at 581, 696 A.2d at 712.

[18]*See id.* at 592-93, 597, 696 A.2d at 718, 721.

[19]The SCTO is a member of the National Association of Catholic School Teachers, which acts as the bargaining representative for Catholic elementary and high school lay teachers throughout the United States. *See* South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary Sch., 290 N.J. Super. 359, 370, 675 A.2d 1155, 1160 (N.J. Super. Ct. App. Div. 1996).

[20]*See id.* at 368, 696 A.2d at 1160. Specifically, the plaintiff named six Catholic elementary schools that are under the dominion of the Diocese of Camden. *See id.* at 369, 675 A.2d at 1160. The Diocese of Camden includes Atlantic, Cape May, Glouchester, Salem and Cumberland counties in southern New Jersey. *See id.* The schools are Catholic because they are governed by the parish. *See id.* The parish in turn answers to the Bishop who answers to the Pope. *See id.* It is the job of all persons involved to ensure that schools are administered in accordance with the Church's guidelines. *See id.*

majority representative of the lay teachers at the schools and made a demand for recognition to the Board of Pastors, the supervising body of the schools.[21] The Board of Pastors conditioned recognition of the SCTO on its acceptance of the "Minimum Standards for Organizations Wishing to Represent Lay Teachers in a Parish or Regional Catholic Elementary School in the Diocese of Camden" ("Minimum Standards").[22] The Minimum Standards vested final authority over *all* disputes in the Board of Pastors and prohibited the collection of dues.[23] The union therefore refused to accept the Minimum Standards, stating that the document required the union to relinquish numerous rights that are the subject of mandatory bargaining.[24] Accordingly, the schools refused to recognize or bargain with the SCTO.[25]

The SCTO argued that Article 1, Paragraph 19 of the New Jersey Constitution, granted the lay teachers, as private employees, the right to engage in collective bargaining.[26] Additionally, the SCTO contended that New Jersey state courts retained subject matter jurisdiction over this issue, thereby vesting the courts with the power to compel the schools to recognize and bargain with the

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[21]*See id.* at 371, 675 A.2d at 1161.

[22]*See id.* at 582, 696 A.2d at 713.

[23]*See id.* The Minimum Standards agreement was non-negotiable. *See id.* The Appellate Division quoted the preamble of the proposed agreement, which stated, in pertinent part, that "neither the courts nor any governmental labor relations board or similar entity shall be involved in any way whatsoever in the enforcement, interpretation or application of these minimum standards or any other agreement between the parties." *South Jersey*, 290 N.J. Super. at 372, 675 A.2d at 1162. The parishes retained the right to hire, terminate, discipline or suspend all teachers with disciplinary actions being appealable to the Board of Pastors. *See id.* Furthermore, the agreement provided that all teachers who publicly contradict the Catholic Churches teachings or the diocese's policies would be immediately discharged. *See id.*

[24]*See South Jersey*, 150 N.J. at 582, 696 A.2d at 713. Section 8(a) of the National Labor Relations Act ("NLRA") renders "wages, hours, and other terms and conditions of employment" mandatory subjects of collective bargaining. 29 U.S.C. § 158(a) (1935). While the phrase "terms and conditions of employment" is somewhat nebulous, the court offered, as an example, that workload and employee discipline would be considered terms and conditions of employment and, thus, mandatory subjects of collective bargaining. *See* Caufield v. Hirsch, No. 76-279, 1977 WL 15572 at * 13 (E.D. Pa. 1977) *cert. denied*, 436 U.S. 957 (1978).

[25]*See id.*

[26]*See id.*

SCTO.[27]

The schools asserted that under the United States Supreme Court's decision in *NLRB v. Catholic Bishop*,[28] the New Jersey state courts lacked subject matter jurisdiction because the case involved labor relations, which are generally entrusted to the National Labor Relations Board.[29] Alternatively, the schools insisted that compelling the schools to participate in collective bargaining would violate the Free Exercise and Establishment Clauses of the First Amendment.[30]

The trial court granted summary judgment and dismissed the complaint against the schools on federal constitutional grounds.[31] The trial judge opined

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[27]*See id.* at 584, 696 A.2d at 714.

[28]440 U.S. 490 (1979).

[29]*See South Jersey*, 150 N.J. at 583, 696 A.2d at 713. The National Relations Board ("NLRB") is a governmental agency created by the National Labor Relations Act, 29 U.S.C. sections 151-169. *See* 29 U.S.C. § 153 (1935). The NLRA was intended to define and protect the rights of employees to collectively bargain and to eliminate labor and management practices that injure the public interest and cause industrial unrest. *See* 29 U.S.C. §151 (1935). The purpose of the Act was ensure industrial peace by requiring the employer and the union, elected by a majority of the employees, to meet and bargain in good faith. *See* Caufield v. Hirsch, No. 76-279, 1977 WL 15572, *10 (E.D. Pa. 1977), *cert. denied,* 436 U.S. 957 (1978).

The Act assigns the NLRB two major functions. *See id.* First, the Board acts as a judicial body, which adjudicates whether the challenged conduct constitutes an unfair labor practice under section 8 of the NLRA. *See id.* The adjudication process begins when a party files an unfair labor practice charge with the NLRB alleging that an employer or labor union violated the Act. *See id.* The NLRB then investigates the charge and determines whether to issue a formal complaint against the alleged violator. *See id.* If a complaint is issued, a hearing is held before an administrative law judge who renders a decision. *See id.* The losing party may appeal the judge's decision to a five-member Board. *See id.* The Board's order may then be appealed to the federal courts of appeals. *See id.*

Second, the NLRB acts as a "monitor-referee" regarding issues of representation. *See id.* Representation is the process whereby a unit of employees elects a bargaining representative, which bargains on their collective behalf. *See id.* The NLRB's duties include determining the appropriate bargaining units and certifying election results. *See id.* Upon certification of a union, sections 8(a) and 9(a) require that the labor union and employer bargain collectively in good faith "over terms and conditions of employment." *See id.* at *13.

[30]*See South Jersey*, 150 N.J. at 583, 696 A.2d at 713.

[31]*See id.* at 582, 696 A.2d at 713. Because the Fourteenth Amendment makes the First Amendment applicable to the states, the New Jersey courts have analyzed this case under the United States Constitution rather than the New Jersey Constitution. *See id.* at 586,

that compelling the schools to bargain with the SCTO would unduly burden the schools' free exercise rights and result in an "excessive entanglement" between the church and state.[32]

Conversely, the appellate division determined that the case posed a free exercise challenge only, not an establishment challenge.[33] The appellate court proclaimed that the lay teachers in the church-operated schools had a state right to organize under the New Jersey Constitution.[34] In so holding, the court reasoned that the state's compelling interest in maintaining economic order outweighed any burden that may be imposed upon the schools' free exercise rights.[35] Moreover, the court pointed out that the diocesan high schools had been collectively bargaining with its lay teachers for several years without encumbering the diocese's or schools' religious autonomy.[36] The Catholic schools appealed and the New Jersey Supreme Court granted certification.[37]

The New Jersey Supreme Court opined that the case implicated both the

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696 A.2d at 715. The New Jersey Supreme Court remarked that the Religion Clause of the New Jersey Constitution is less comprehensive than its federal counterpart. *See id.* Thus, the court reasoned that it was redundant to consider the New Jersey constitutional provisions separately. *See id.*

[32]*See id.* at 582-83, 696 A.2d at 713.

[33]*See* South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary Sch., 290 N.J. Super. at 379, 675 A.2d at 1165 (citations omitted). The appellate division noted that Establishment Clause claims involve the "excessive entanglement of government with religion." *Id.* at 378, 696 A.2d at 1165. Thus, the court opined that since the defendants' assertions concerned the government's burden on religion rather than its support of religion, the lawsuit should be more properly viewed as a free exercise claim. *See id.* As such, the appellate court did not discuss the Establishment Clause. *See id.* at 379, 675 A.2d at 1165.

[34]*See id.* at 389, 675 A.2d at 1171.

[35]*See id.*

[36]*See id.* At the time, the existing collective bargaining agreement between the high school lay teachers and the diocese covered matters such as medical insurance, dental insurance, life insurance and other benefits. *See South Jersey,* 150 N.J. at 590, 696 A.2d at 717. Additionally, the agreement expressly preserved the Bishop's exclusive right to define the schools' philosophies and teachings. *See id.*

[37]*See* South Jersey Catholic Sch. Teachers Org. v. St. Teresa of Infant Jesus Church Elementary Sch., 146 N.J. 567, 683 A.2d 1162 (1996). Article 6, section 5 of the New Jersey Constitution provides that "[a]ppeals may be taken to the Supreme Court in causes determined by the appellate division of the Superior Court involving a question arising under the Constitution of the United States or this State . . . ." N.J. CONST., art. 6, § 5.

Free Exercise and Establishment Clauses of the First Amendment.[38] The court, however, concluded that requiring the schools to bargain with the lay faculty violated neither the Free Exercise Clause nor the Establishment Clause.[39]

III. THE DEVELOPMENT OF THE ESTABLISHMENT AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT

The United States Supreme Court has defined the Establishment Clause as meaning: "Neither a state nor the Federal Government can set up a church. Neither can [they] pass laws which aid one religion, aid all religions, or prefer one religion over another."[40] In *Lemon v. Kurtzman*,[41] the United States Su-

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[38]*See South Jersey*, 150 N.J. at 587, 696 A.2d at 715 (1997). The court pronounced that "it is excessive entanglement that burdens free exercise of religion and may, under certain circumstances trigger application of the compelling state interest standard under a Free Exercise Clause analysis." *Id.* Thus, the court analyzed the case under both the Free Exercise and Establishment Clauses of the United States Constitution. *See id.* The court made this decision in light of the United States Supreme Court's recent decision in *Agostini v. Felton*, 117 S. Ct. 1997 (1997), overruling *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985). *See South Jersey*, 150 N.J. at 587, 696 A.2d at 715.

In *Agostini*, the United States Supreme Court held that a New York City program that required public school teachers to tutor disadvantaged students in parochial schools did not violate the Establishment Clause. *See Agostini*, 117 S. Ct. at 1997. In so holding, the Court recognized that the Establishment Clause jurisprudence had been modified in recent years. *See id.* at 2010. Specifically, the Court no longer subscribes to the presumption that placing public school teachers, as government employees, in parochial school classrooms, impermissibly advances religion, as a matter of law. *See id*; *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (declaring that the Constitution did not prevent a deaf student from bringing a state-employed interpreter with him to his parochial high school). Additionally, the Court rejected the rule that direct government aid to parochial school education programs are invalid. *See id.* at 2011. The New Jersey Supreme Court asserted that this decision represented a "major crack" in the "wall of separation" between the church and state. *See South Jersey*, 150 N.J. at 587, 696 A.2d at 715.

[39]*See id.* at 591, 602, 696 A.2d at 724.

[40]Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (ruling that the Establishment Clause does not prohibit the use of public funds to pay the bus fares of students that attend parochial schools as part of a general program that funds bus fares for public and private school students).

[41]403 U.S. 602, 602 (1971) (stating that Rhode Island statutes authorizing the government supplementation of the salaries of parochial school teachers, who taught secular subjects, offended the Establishment Clause and were therefore unconstitutional).

preme Court outlined the standard for analyzing an Establishment Clause claim.[42] In order for a challenged law to conform to the constitutional requirements of the Establishment Clause, the statute must 1) have a secular purpose; 2) have the primary effect of neither hindering nor promoting religion; and 3) not create an excessive entanglement between the state and religion.[43] Nevertheless, some level of entanglement between church and state has always been tolerated by the courts. As such, the Establishment Clause is only violated where the entanglement is "excessive."[44] The Supreme Court has recognized that continuing and comprehensive state surveillance to ensure compliance with the law will evidence excessive entanglements between church and state.[45]

By contrast, the Free Exercise Clause is designed to "secure religious liberty in the individual by prohibiting any invasions thereof by civil authority."[46] Originally, the United States Supreme Court's decisions in *Sherbert v. Verner*,[47] and *Wisconsin v. Yoder*,[48] combined to establish the standard for free exercise challenges.[49] This standard, known as the *Sherbert/Yoder* test, stated that unless the government was able to demonstrate a compelling interest, the application of a valid regulation to religious activity was impermissible, even where the burden on religion was merely incidental.[50] In performing this bal-

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[42]*See id.* at 612-13.

[43]*See id.*

[44]*See* Agostini v. Felton, 117 S. Ct. 1997, 2015 (1997).

[45]*See Lemon*, 403 U.S. 602, 619-20 (1970).

[46]*South Jersey Catholic Sch. Teachers Org. v. St. Teresa of Infant Jesus Church Elementary Sch*, 150 N.J. 575, 593, 696 A.2d 709, 719 (1997) (quoting School Dist. v. Schempp, 374 U.S. 203, 223 (1963)).

[47]374 U.S. 398, 398 (1963) (declaring that to deny the claimant unemployment benefits because he would not accept a "suitable" job which required him to work on Saturdays, violated the Free Exercise Clause because the claimant, as a member of the Seventh-Day Adventist Church, was prohibited from working on Saturdays).

[48]406 U.S. 205, 205 (1972) (holding that to require members of the Amish Church to comply with Wisconsin's compulsory school-attendance laws violated the Church members' free exercise rights).

[49]*See South Jersey*, 150 N.J. at 594, 696 A.2d at 719.

[50]*See Sherbert*, 374 U.S. at 406.

ancing test, the courts considered whether: 1) the primary purpose of the regulation was secular; 2) the regulation burdened religious activity; and, 3) the regulation was applied to the religious activity in furtherance of a compelling state interest that justifies the burden on the free exercise of religion.[51] The *Sherbert/Yoder* balancing test, created by the United States Supreme Court, served as the first benchmark for Free Exercise Clause challenges, but was later modified by subsequent court decisions and United States congressional legislation.[52]

Inevitably, the question of whether the National Labor Relations Act

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[51]*See Yoder*, 406 U.S. at 214-15; *Sherbert*, 374 U.S. at 407.

[52]*See South Jersey*, 150 N.J. at 594, 696 A.2d at 719. The *Sherbert/Yoder* test stood until 1990, when the United States Supreme Court, in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), discarded the test. *See South Jersey*, 150 N.J. at 595, 696 A.2d at 719. In *Smith*, the Court declared that the state need only demonstrate a compelling reason for the regulation where there has been a burden imposed upon an individual's free exercise right in conjunction with another constitutional right. *See Smith*, 494 U.S. at 882. Justice Scalia articulated that persons are not precluded from the application of "valid and neutral laws of general applicability on the ground that the law prescribes (or proscribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 263, n.3 (1982) (Stevens, J., concurring) (other citations omitted).

In 1993, Congress enacted the Religious Freedom Restoration Act [hereinafter "RFRA"], 42 U.S.C. § 2000bb-1 (1993), in response to the *Smith* decision. *See South Jersey*, 150 N.J. at 595, 696 A.2d at 720. RFRA provided that generally applicable laws could not substantially burden the free exercise of religion unless the regulation was applied "1) in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000bb-1 (1993). Essentially, the Act sought to restore the *Sherbert/Yoder* test. *See* 42 U.S.C. § 2000bb(b).

Then, in July 1997, the United States Supreme Court, in *City of Boerne v. Flores*, held RFRA unconstitutional, stating that the Act unconstitutionally sought to rewrite the First Amendment Religion Clauses. *See* 117 S. Ct. 2157 (1997). The United States Supreme Court proclaimed:

> 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 pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in *Smith*. Simply put, RFRA is not designed to identify and counteract state laws to which RFRA applies are not ones which will have been motivated by religious bigotry.

Id. at 2171. Yet, the question remains whether the *City of Boerne* decision reestablished the *Smith* standard. *See South Jersey*, 150 N.J. at 596, 696 A.2d at 721.

("NLRA") granted lay employees in religious schools the right to collectively bargain arose. The United States District Court for the Eastern District of Pennsylvania addressed the issue in its unreported decision in *Caufield v. Hirsch*.[53] In *Caufield*, a group of parochial schools sought a permanent injunction enjoining the NLRB from conducting a union representation election claiming that the NLRB's exercise of jurisdiction violated the First Amendment Religion Clauses.[54] Judge VanArtsdalen, writing for the majority, concluded that the potential interference with the parochial schools' religious activity,[55] combined with the resulting entanglement, invoked the protections of the Religion Clauses of the First Amendment.[56] Thus, the application of the NLRA to Catholic school labor relations was prohibited.[57]

In analyzing the free exercise challenge, the district court applied the *Sherbert/Yoder* balancing test.[58] The court found that, although neutral on its face,

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[53]No. 76-279, 1977 WL 15572 (E.D. Pa. 1977), *cert. denied*, 436 U.S. 957 (1978).

[54]*See Caufield*, 1977 WL 15572 at *1.

[55]Judge VanArtsdalen remarked that although the schools provided a secular education, they were indeed "religious." *See Caufield*, 1977 WL 15572 at *9. The court observed that providing a Catholic education to the schools' students was an "integral part of the religious mission of the Catholic Church." *Id.* Moreover, the court recognized that central to a true and well-rounded Catholic education is the presence of teachers who exhibit and display their religious faith and beliefs. *See Caufield*, 1977 WL 15572 at *8.

[56]*See Caufield*, 1977 WL 15572 at *17, *19. The Judge then commented that the Board's broad investigatory powers would likely lead to excessive entanglement. *See Caufield* 1977 WL 15572 at *14. This investigatory power, which arises in both the context of determining representation and adjudicating unfair labor practices, confers to the Board "a judicially enforceable power" to procure information from employers. *See Caufield*, 1977 WL 15572 at *13.

Specifically, section 11(1) of the NLRA vests the Board with the power to "have access to, for the purposes of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." 29 U.S.C. § 161(1) (1935). The Board may also issue subpoenas requiring the production of evidence or the testimony of witnesses. *See id.* Furthermore, section 6 of the NLRA gives the Board the power to promulgate rules and regulations when necessary to carry out the terms of the Act. *See* 29 U.S.C. § 156.

[57]*See Caufield*, 1977 WL 15572 at *19. The court noted that the Religion Clauses embrace a "spirit of freedom" that is guaranteed religious associations that would be offended by the regulation of religious schools for the purpose of ensuring industrial peace. *See Caufield*, 1977 WL 15572 at *19 (quoting Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952)).

[58]*See Caufield*, 1977 WL 15572 at *12-*17.

the NLRA unconstitutionally interfered with the exercise of the schools' religion.[59] The court observed:

> On its face, the NLRA neither advances nor inhibits religion. Nevertheless, 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 as curriculum and teacher discipline with the religious mission of the schools, and the pervasive authority of the NLRB over the employment area, persuade me that an interference with religious activity has occurred, and that further interference is inevitable.[60]

The district court noted that the NLRB would be dividing the schools' employees into religious and non-religious categories when defining the appropriate bargaining units.[61] The court feared that such division, although purportedly neutral, would have the effect of burdening the schools' free exercise of religion by rendering the schools' missions of "a single undivided community of faith," impossible.[62]

Additionally, the court was concerned that secular terms and conditions of employment were ultimately inseparable from the religious philosophies and doctrines of the schools.[63] Thus, because the Board could require the schools to bargain over terms and conditions of employment, the religious missions of the schools would inevitably fall within the purview of mandatory bargaining.[64]

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[59]*See Caufield*, 1977 WL 15572 at *14.

[60]*Id.*

[61]*See id.*

[62]*Id.*

[63]*See Caufield*, 1977 WL 15572 at *15.

[64]*See id.* The court explained that "[f]irst, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy." *Caufield*, 1977 WL 15572 at *15 (quoting Ralph S. Brown, *Collective Bargaining in Higher Education*, 67 MICH. L. REV. 1067, 1075 (1969) (internal quotation marks omitted)). The court opined that even if the NLRB agreed to take precautions in an attempt to lessen the burden on religion, the task of ensuring precise division between secular and non-secular conditions of employment was "insuperable." *See id.*; *see also* Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 887 (1990) (asking "[w]hat principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?").

Finally, the district court declared that although no interference with the exercise of religion had yet occurred, the *mere potential* to burden, in and of itself, was enough to justify ruling that the NLRB's exercise of jurisdiction would interfere with the schools' free exercise rights.[65] Moreover, the court determined that the government's interest in protecting employees' rights to organize and the subsequent effect on interstate commerce were not compelling reasons to justify the application of the NLRA to religious labor relations.[66] Because the government failed to advance a compelling interest that justified the burden on the church's administration of its religious schools, the court held that the Free Exercise Clause prohibited the NLRB from asserting its jurisdiction in the matter.[67]

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[65]*See Caufield*, 1977 WL 15572 at *16. The court reasoned:

> [T]he NLRB is empowered to compel collective bargaining by an employer and employees' representative over "wages, hours, and other terms and conditions of employment" . . . To governmentally compel the pastors of the Archdiocese to bargain with a union over ecclesiastical concerns would certainly, in my mind, constitute a constraint upon the free exercise of religion.

Caufield, 1977 WL 15572 at *15.

[66]*See Caufield*, 1977 WL 15572 at *17. The court explained that "only the gravest abuses, endangering paramount interests, give occasion for permissible limitations." *Id.* (quoting Sherbert v. Verner, 374 U.S. 398, 406 (1963)).

The purpose of the NLRA is recited in section 1 of the NLRA. It provides that:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1935). The plaintiff had argued that the federal interest in the free flow of interstate commerce and the importance of protecting employees' rights to organize justified the NLRA's interference with the defendant's religious freedom. *See Caufield*, 1977 WL 15572 at *17.

[67]*See id.* The court rationalized that while the application of the NLRA to Catholic schools may result in abuses to the public health and safety of the schools, such abuses are not those contemplated by the NLRA. *See id.* The court continued, "[t]he non-application of the Act to Catholic parish elementary schools simply does not conjure up an impression of grave abuses endangering paramount federal interests, or for that matter, the lesser abuses

In conclusion, the district court asserted that application of the NLRA would simultaneously violate the Establishment Clause as well.[68] The court stated that coerced bargaining necessarily involves the government in the internal workings of the church.[69] For example, the court considered an instance where the school is charged with an unfair labor practice, and the NLRB is then called upon to determine whether the Bishop acted with a religious or illegal motivation.[70] Thus, the potential entanglements were so "excessive" as to necessarily violate the Establishment Clause.[71]

Similarly, in *McCormick v. Hirsch*,[72] the United States District Court for the Middle District of Pennsylvania, in granting an injunction prohibiting the NLRB from exercising jurisdiction over a Catholic school whose lay teachers were seeking unionization, and held that the NLRB's exercise of jurisdiction under the NLRA, violated the Religion Clauses of the First Amendment.[73] The court first analyzed the Free Exercise Clause claim.[74] The court argued that the Board's powers to determine the bargaining unit, forced the parties to bargain in good faith over "terms and conditions" of employment, as well as adjudicate the motivation for many of the school's administrative decisions.[75] The

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sought to be alleviated by the Act." *Id.*

[68]*See Caufield*, 1977 WL 15572 at *17-*19. The court stated that "total separation of church and state is not possible; there are many church[-]state contacts which would be permissible. The test of excessive entanglements is inescapably one of degree." *Caufield*, 1977 WL 15572 at *18.

[69]*See id.*

[70]*See id.*

[71]*See Caufield*, 1977 WL 15572 at *19. As such, the injunction preventing the NLRB from holding elections of the lay teachers in the schools was granted. *See id.*

[72]460 F. Supp. 1337 (M.D. Pa. 1978); *But cf.*, Grutka v. Barbour, 549 F.2d 5 (7th Cir. 1977) (holding that federal district courts lack jurisdiction to enjoin the NLRA from conducting representational elections in Catholic schools, and that allowing the NLRB to hold the elections would not violate the Free Exercise Clause). The district court discounted the argument that there would be a "chilling" effect upon the Religion Clauses, reasoning that the schools would still have the opportunity to challenge the Board's jurisdiction by refusing to bargain with the union. *See Hirsch*, 460 F. Supp. at 1355.

[73]*See id.*

[74]*See id.*

[75]*See id.*

court held that this would be an unconstitutional regulation of religious doctrine.[76] The court further stressed that the United States Supreme Court had held that government investigations into religious organizations' operations and financial circumstances are beyond constitutional parameters.[77] Moreover, the district court opined that the NLRB's power to adjudicate whether the school's challenged decisions were motivated by union animus or religious doctrine would have a "chilling" effect on the church's exercise of religion.[78]

Finally, the court addressed the final prong of the *Sherbert/Yoder* test, and determined that the NLRB presented little evidence of a "compelling" state interest that justified the application of the Act in this situation.[79] Therefore, the court concluded that the NLRB's exercise of jurisdiction in this instance violated the Free Exercise Clause.[80]

Turning to the Establishment Clause, the court determined that the case involved administrative entanglements which required an analysis of the character and extent of "institutional interference."[81] The court pronounced that the

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[76]*See id.* at 1353-55. The court remarked that even potential burdens are constitutionally proscribed. *See id.* at 1353.

[77]*See id.* at 1355. The court was concerned that the NLRB *had already* sought the school's budget and financial information without even exercising its extensive investigatory powers. *See id.* Therefore, the court concluded that in view of those powers already exercised, in conjunction with those powers that "lay in wait' for the schools, the Board's exercise of jurisdiction in the matter would infringe on the school's religious liberties. *See id.* at 1355-56.

[78]*See id.* at 1354. The court cited *Catholic Bishop of Chicago v. NLRB*, 559 F.2d 1112, 1123 (7th Cir. 1977), where an unfair labor charge was filed against Catholic schools because a religious prayer was read aloud to a group of the schools' teachers. *See Hirsch*, 460 F. Supp. at 1354. The court noted that the charges were eventually dismissed, but only after several days of testimony and 531 transcript pages. *See id.* (citing Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1126 (7th Cir. 1977)).

[79]*See id.* at 1356. The court declared that the Board's showing of a compelling state interest to justify the exercise of jurisdiction was less than that offered by the government in *Yoder*. *See id.* (citing Wisconsin v. Yoder, 406 U.S. 205, 228-29 (1972)) (arguing that the state has a compelling interest in compulsory education to ensure an educated public, which is necessary to produce intelligent and self-sufficient members of society to protect and maintain our democracy). As such, the court refused to extend the NLRA to areas that Congress has not affirmatively indicated that the Act applies. *See id.*

[80]*See id.*

[81]*See id.* at 1357. The court explained that administrative entanglements involve the government "insinuat[ing] itself coercively into religious life . . . State inspection and evaluation of the religious content of a religious organization . . . ." *Id.* at 1357 (quoting Lemon v. Kurtzman, 403 U.S. 602, 620 (1971)). Administrative entanglements can be

Establishment Clause would be violated by both the Board's surveillance of, and inquiry into, the internal operations of the schools as well as its resolution of internal conflicts regarding alleged unfair labor practices.[82]

The United States Supreme Court finally spoke on the issue, in *NLRB v. Catholic Bishop of Chicago*,[83] where the Court held, that the NLRA does not confer to the NLRB jurisdiction over lay faculty members of church-run schools.[84] *Catholic Bishop* involved several church-operated schools whose curricula include both religious and secular subjects.[85] The lay teachers elected the union in Board certified elections, as their bargaining representative.[86] Notwithstanding the election, the schools refused to recognize the union.[87] The Board ordered the schools to recognize the union and the schools challenged the Board's exercise of jurisdiction over the matter.[88] While the Supreme Court found it irrefutable that the Board's exercise of jurisdiction under such circumstances implicated the guarantees of the Religion Clauses, the Court

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separated into two categories: excessive government regulation of religious institutions; and, government adjudication of internal religious disputes. *See id.* at 1357-58.

[82]*See id.* at 1357-58. The court stressed that when adjudicating unfair labor practices, the Board would be required to resolve the issues regarding the nature of religious philosophy, the intent of religious institutions administrators, and whether union animus or religious doctrine was the primary motivation of the religious institution's decision-making. *See id.* It was emphasized that "[t]he cumulative effect of these entanglements and others noted previously leave no doubt that the governmental power will infringe on religion and thus conflict with the [R]eligion [C]lauses." *Id.* at 1358.

[83]440 U.S. 490 (1979).

[84]*See id.* At the time that the Court decided this case, the Board had a policy of exercising jurisdiction over all "private, nonprofit, educational institutions" regardless of their sectarian or secular inclinations so long as the jurisdictional requirements were met. *Id.* at 497 (quoting 29 C.F.R. § 103.1 (1978)). This meant that the Board would exercise jurisdiction over religious organizations that are merely religiously affiliated but not those institutions that were "completely religious." *See id.* at 493.

[85]*See id.* at 492-93. The Board exercised its jurisdiction in this instance because it determined that the schools involved were not completely religious because they teach secular subjects in addition to the religious instruction. *See id.* at 495, n.7. The court rejected this argument as a disingenuous distinction. *See id.* at 495.

[86]*See id.* at 494.

[87]*See id.*

[88]*See id.*

avoided deciding the constitutional issues.[89] Instead, the Court ruled that the NLRA lacked any clear expression of congressional intent to include lay faculty members of church-operated schools "within the jurisdiction of the Board," and refused to extend the jurisdiction of the NLRB in the absence of clear Congressional intent.[90]

Although the United States Supreme Court held that the NLRB does not have jurisdiction over labor relations in parochial schools, a question remained as to whether a state labor relations board may assert jurisdiction without violating the First Amendment. The Second Circuit addressed this issue in *Catholic School Association v. Culvert*.[91] In *Culvert*, an association of Catholic high schools challenged the New York State Labor Relations Board's exercise of jurisdiction over labor relations with their lay teachers on the grounds that it violated the Religion Clauses of the First Amendment.[92]

The Second Circuit, unlike the district courts in Pennsylvania, found that the state labor board's exercise of jurisdiction did not pose any constitutional threat.[93] In so stating, the court reasoned that the Establishment Clause does not require absolute separation.[94] Moreover, the circuit court recognized that the exercise of jurisdiction by the labor board would result in "entanglements" between the government and the church, but not every entanglement would be considered "excessive."[95] The court reasoned that the extent of potential en-

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[89]*See id.* at 504.

[90]*See id.* The Court explained that the legislative history indicated that Congress generally did not contemplate parochial school employees, although, there was some congressional discussion indicating that these employees should be excluded from the Board's jurisdiction. *See id.* at 504-05. But the Court finally concluded that nothing in the legislative history indicated an affirmative intention that such employees be included within the Board's jurisdiction. *See id.* at 505.

[91]753 F.2d 1161 (2d Cir. 1984).

[92]*See id.* at 1164.

[93]*See id.*

[94]*See id.*

[95]*See id.* at 1167. The court reasoned that the "surveillance" that would occur would be neither continuing nor ongoing. *See id.* As such, it was not the type of "ongoing interference" proscribed by the Constitution. *See id.*; *see also* EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980) (holding that EEOC in-depth investigations into a religious college's hiring practices does not create a constant interference with religious practice).

tanglement between the state labor board and the high schools was not constitutionally proscribed because it was neither continuing nor pervasive.[96] The court emphasized that the potential entanglement was limited by the fact that the labor board lacked authority to question or investigate an employer's good faith intentions.[97]

The court also stressed that all labor board investigations were narrowly confined to those issues directly related to the unfair labor charge, thereby minimizing the possibility of harassing investigations.[98] Additionally, because the labor board's orders are not self-enforcing, the circuit court remarked that the schools will be afforded the opportunity to assert, and have adjudicated, any First Amendment defenses in a court of law.[99] Moreover, the court indicated that the labor board was merely empowered to require the parties to bargain in good faith regarding mandatory subjects.[100] The court therefore concluded that the Board's powers were purely secular as it had no authority to require or order the specifics of any agreement.[101]

To avoid offending the First Amendment Religion Clauses, the court warned that the Board may not inquire into whether the schools' asserted religious motivations for its actions are pretextual.[102] To ensure minimal interference by the state, the Board may only inquire into the schools' motivations behind an administrative decision where the decision would not have been made but for an illegal motivating factor.[103] For example, the court posited that the termination of a teacher may be based in part upon union animus, so

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[96]*See Culvert*, 753 F.2d at 1167.

[97]*See id.*

[98]*See id.*

[99]*See id.* For a discussion of the structure and functions of the NLRB see *supra* note 29.

[100]*See Culvert*, 753 F.2d at 1167. *Cf.* Caufield v. Hirsch, No. 76-279, 1977 WL 15572, *13 (E.D. Pa. 1977), *cert. denied*, 436 U.S. 957 (1978) (stating that the NLRB has essentially been granted a "judicially enforceable power" to obtain information from the parties).

[101]*See Culvert*, 753 F.2d at 1167. The court reasoned that just because the lay teachers are expected to serve as examples of the Catholic lifestyle does not render the terms and conditions of their employment religious affairs. *See id.* at 1168.

[102]*See id.*

[103]*See id.*

long as there were other legal motivating factors that were the primary motivation for the discharge.[104]

The Second Circuit also declared that the Board's exercise of jurisdiction did not violate the association's free exercise rights.[105] Noting that the schools are already subject to numerous generally applicable regulations,[106] the court found that subjecting the association to the Board's jurisdiction was not violative of the Free Exercise and Establishment Clauses because there was no direct, adverse effect on the high schools' religious beliefs.[107] Moreover, New York state had a compelling interest in protecting industrial peace and economic order as well as protecting the state's workers.[108] Therefore, there was no constitutional bar to the New York State Labor Board's exercise of jurisdiction.[109]

Similarly, in *Hill-Murray Federation of Teachers v. Hill-Murray High School*,[110] the Minnesota Supreme Court concluded that application of the Minnesota Labor Relations Act [hereinafter "MLRA"] to Catholic high school

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[104]*See id.* at 1169. The court did not believe that such a limitation created a "toothless tiger" because the Board still had the authority to determine whether a teacher is discharged solely for an unlawful reason. *See id.* at 1168.

[105]*See id.* at 1171. In making this determination the Second Circuit performed the balancing test articulated in *Sherbert* and *Yoder*. *See supra* Section III and accompanying text. The court stated that it analyzed the free exercise claim upon essentially the same basis as it did its Establishment Clause challenge. *See Culvert*, 753 F.2d. at 1169.

[106]The court explained that the free exercise of religion is not an absolute right. *See id.* The court declared "[f]reedom to believe is absolute. Freedom to act is not." *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940)). Examples of secular regulation of religious activities include regulations requiring autopsies and traffic-warning signs on slow-moving vehicles. *See* David Stewart, *Power Surge: Asserting Authority Over Congress in Religious Freedom Cases*, A.B.A.J., 46 (Sept. 1997).

[107]*See Culvert*, 753 F.2d at 1170. The court proclaimed that in order for a constitutional violation to be found, there must be a direct, demonstrable effect on one's religious beliefs. *See id.*

[108]*See id.* at 1171. The court established that there is a compelling public interest in guaranteeing employees the right to good faith collective bargaining. *See id.* (citing Cap Santa Vue, Inc. v. NLRB, 424 F.2d 883, 890 (D.C. 1970) and NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 42 (1937)).

[109]*See id.*

[110]487 N.W.2d 857, 863 (Minn. 1992).

teachers did not violate the First Amendment Religion Clauses.[111]

Specifically, the court concluded that the MLRA did not offend the Free Exercise Clause because the MLRA was a neutral regulation that did not intend to legislate religious activity.[112] The court conducted its free exercise analysis under the test announced by the United States Supreme Court in *Employment Division, Department of Human Resources of Oregon v. Smith*,[113] whereby the Supreme Court modified the *Sherbert/Yoder* free exercise test.[114] The *Smith* test established that the Free Exercise Clause is not offended by the application of "valid and neutral law[s] of general applicability" to religious behavior.[115] However, the Supreme Court stated that the Free Exercise Clause prohibits the application of a neutral regulation where there is a hybrid claim.[116] A hybrid claim, the Court wrote is when the Free Exercise Clause is implicated in conjunction with another constitutional protection.[117] In such a hybrid situation, the government would be required to justify the application of the challenged law by demonstrating a compelling reason for regulation.[118] Thus, applying the *Smith* test, the Minnesota Supreme Court found that the MLRA did not have the primary purpose of regulating religious activity and that a hybrid claim[119] had not been presented.[120] Consequently, the court concluded that Free Exer-

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[111]*See id.* at 864. The facts were similar to those in *Culvert* in that there was a state labor board enforcing the Act. *See Hill-Murray*, 487 N.W.2d at 859.

[112]*See id.* at 862.

[113]494 U.S. 872, 872 (1990) (holding that denying the applicants unemployment benefits due to workplace misconduct resulting from the ceremonial use of peyote did not violate the Free Exercise Clause).

[114]*See Hill-Murray*, 487 N.W.2d at 863.

[115]*Smith*, 494 U.S. at 879.

[116]*See id.* at 881.

[117]*See id.*

[118]*See id.* at 881-82.

[119]Hill-Murray High School argued that the compelling interest test in *Smith* should be applied because the application of the MLRA simultaneously implicated the parents' rights to educate their children. *See Hill-Murray*, 487 N.W.2d at 863. The court rejected Hill-Murray's argument that a hybrid claim was implicated, and declared that no hybrid claim arose in the case. *See id.*

[120]*See id.*

cise Clause was not offended.[121]

Despite its reluctance, the Minnesota Supreme Court then examined the case under the Establishment Clause.[122] The court declared: "[w]e believe that the church-labor relations issues presented are most appropriately analyzed under the [F]ree [E]xercise [C]lause and that the [E]stablishment [C]lause challenge raised by Hill-Murray is actually a free exercise question."[123] The court noted that the wall of separation between the church and state is not absolute.[124] Rather, the court pointed out that religious institutions, like Hill-Murray, are subject to several other neutral, generally applicable laws without violating the Establishment Clause.[125] The court added that the entanglement is minimal because although some decision-making power is taken away from the church, the state is not mandating the church's religious beliefs.[126] Thus, the court held that the state labor board's exercise of jurisdiction over church labor relations did not violate the Establishment Clause.[127]

IV. *SOUTH JERSEY* - THE NEW JERSEY SUPREME COURT EXPANDS RIGHTS OF CATHOLIC SCHOOL TEACHERS

Justice Coleman, writing for the majority, addressed the preliminary matter of subject matter jurisdiction.[128] The court concluded that state courts may

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[121]*See id.* Additionally, the Minnesota Supreme Court noted that to hold otherwise would create a law for Hill-Murray High School unto itself. *See id.*

[122]*See id.* at 863. The Minnesota Supreme Court's reluctance was based on the belief that the matter was clearly a free exercise claim, rather than an establishment claim. *See id.*

[123]*Id.*

[124]*See id.* at 863-64.

[125]*See id.* at 864. The court cited as examples zoning ordinances, fire codes and incorporation under state laws. *See id.*

[126]*See id.*

[127]*See id.*

[128]*See* South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 150 N.J. 575, 583-85, 696 A.2d 709, 713-14 (1997). The defendant schools argued that the states are preempted from acting on matters within the NLRA's purview unless the Board has declined or would decline to act. *See id.* at 583, 696 A.2d at 714 (citing Cooper v. Nutley Sun Printing Co., 36 N.J. 189, 175 A.2d 639 (1961) (holding that where the NLRB has declined to act because of an insubstantial effect on interstate

properly exercise jurisdiction over lay teachers in the diocesan elementary schools.[129] Justice Coleman remarked that the United States Supreme Court's decision in *NLRB v. Catholic Bishop*[130] established that the NLRA does not extend to cover lay faculty in church-run schools.[131] Thus, because the states are free to act where the federal government has not acted, the state's exercise of jurisdiction was proper.[132]

Next, the court addressed whether the fundamental right to organize, established in the New Jersey Constitution,[133] violated the Religion Clauses of the First Amendment.[134] The court opined that the extent of the state's interaction with the schools was limited to its certification of the union as the lay employees' bargaining representative.[135] Such interaction, the court concluded, was

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commerce, the state courts have jurisdiction over the controversy)). The court dismissed this argument as without merit. *See id.* at 584, 696 A.2d at 714.

The court labeled the preemption issue here as "choice-of-forum preemption," because the issue presented was whether the states had adjudicatory power over the issue. *See* South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary Sch., 290 N.J. Super. 359, 375, 675 A.2d 1155, 1163 (N.J. Super. Ct. App. Div. 1996). The court observed that the NLRA does not provide for exclusive federal jurisdiction, but remarked that the states are nevertheless prohibited from acting unless the NLRB refused or would refuse to exercise its jurisdiction. *See id.* The court iterated the United States Supreme Court's decision in *Catholic Bishop*, where the Court held that the NLRB was prohibited from exercising jurisdiction over lay teachers in church-run schools. *See id.* at 376, 675 A.2d at 1164. The New Jersey Supreme Court therefore concluded that state courts are free to exercise its authority in that matter. *See id.*

[129]*See id.* at 583-84, 696 A.2d at 713-14.

[130]440 U.S. 490 (1979); *see also supra* Section III and accompanying text.

[131]*See South Jersey*, 150 N.J. at 583-84, 696 A.2d at 713-14.

[132]*See id.*

[133]The provision of the Article I, section 1 of the New Jersey Constitution granting all private employees with the right to organize marks society's determination that such a right is so important as to elevate it to constitutional status. *See South Jersey*, 290 N.J. Super. at 585, 675 A.2d at 714.

[134]*See South Jersey*, 150 N.J. at 584, 696 A.2d at 714.

[135]*See id.* Additionally, the appellate division pointed out that many of the lay teachers at the defendant schools already had individual employment contracts. *See South Jersey*, 290 N.J. Super. at 394, 675 A.2d at 1173. The appellate court hence posited that the schools' concerns regarded collective, not individual, bargaining. *See id.*

merely incidental because the state in no way commanded, influenced, or determined the school's religious doctrines or philosophies.[136] In support, the court remarked that: "[i]t is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems," thus, minimizing any entanglements with religion.[137]

The New Jersey Supreme Court next determined that the case implicated both the Establishment and Free Exercise Clauses of the First Amendment.[138]

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[136]*See South Jersey*, 150 N.J. at 584, 696 A.2d at 714.

[137]*Id.* at 592, 696 A.2d at 718 (quoting Catholic High Sch. Ass'n of Archdiocese of New York v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985)) (internal quotation marks omitted).

[138]*See id.* at 586, 696 A.2d at 715. The court recognized that the schools' argument that the New Jersey Constitutional provisions interfered with its religious activity sounded more like a free exercise claim, yet the court decided that the argument may properly be analyzed under the Establishment Clause. *See id.* at 587, 696 A.2d at 715. The court reasoned that it is "[e]xcessive entanglement that burdens the free exercise of religion and may, under certain circumstances trigger application of the compelling state interest standard under a Free Exercise Clause analysis." *Id.* (quoting Agostini v. Felton, 117 S. Ct. 1997, 2014-15 (1997)). For those reasons, the court analyzed the present case under both the Free Exercise and Establishment Clauses. *See id.* Justice Coleman further explained that the United States Supreme Court has interpreted the Establishment Clause to prohibit not only the governmental creation of a church, but moreover the government support of one, any, or all religions. *See id.* at 588, 696 A.2d at 716 (citing Everson v. Board of Education, 330 U.S. 1, 15, 18 (1947)).

Conversely, the appellate division had concluded that the case involved only the Free Exercise Clause. *See South Jersey*, 290 N.J. Super. at 378, 675 A.2d at 1165. The appellate court explained that "[t]his case does not involve government support for religion but rather government's claimed encroachment on religious exercise and observance." *Id.* at 379, 675 A.2d at 1165. The appellate division recognized that there has been some "blurring" of the differentiation between the Establishment and Free Exercise Clauses, which caused many courts to analyze church-labor issues under both doctrines. *See id.* at 378, 675 A.2d at 1165.

Some commentators criticize the New Jersey Supreme Court's approach. Professor Douglas Laylock warns that:

> One obstacle to any coherent analysis of the religion clauses is the frequent failure to distinguish between them. Some courts have made no effort to do so. Other courts and commentators have drawn distinctions without a difference, elaborately discussing whether religion was burdened by the state under the free exercise clause, and then whether it was entangled with the state under the establishment clause, with no identifiable difference between "burden" and "entan-

Analyzing the Establishment Clause claim, the court recognized that requiring the schools to collectively bargain would create an excessive entanglement between the church and state.[139] The court proclaimed that the desire to avoid excessive entanglement "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[140] The court, however, emphasized that the United States Constitution does not prohibit all entanglements nor create an "impenetrable" wall of separation between church and state.[141] Justice Coleman stated that: "[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion."[142] The court stressed that the "entanglement must be 'excessive' before it runs afoul of the Establishment Clause."[143]

The court recognized that the Catholic school is a critical vehicle for the re-

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glement."

See Laylock, *supra* note 4, at 1378-79.

Moreover, the appellate division correctly pointed out, as did the district court in *Hill-Murray*, that:

> Government support for religion is an element of every establishment claim, just as a burden or restriction on religion is an element of every free exercise claim. Regulation that burdens religion, enacted because of the government's general interest in regulation, is simply not establishment. Magic words like 'entanglement' cannot make it so. Such regulation is properly challenged under the free exercise clause; courts that have analyzed the church labor relations cases in establishment clause terms have invoked the wrong provision.

South Jersey, 290 N.J. Super. at 379, 675 A.2d at 1165 (quoting Laylock, *supra* note 4, at 1394).

[139]*See South Jersey*, 150 N.J. at 590-91, 696 A.2d at 717.

[140]*Id.* at 591, 696 A.2d at 717 (quoting People v. Illinois *ex re.* McCollum v. Board of Educ., 333 U.S. 203, 212 (1948)).

[141]*See id.*

[142]*Id.* (quoting Agostini v. Felton, 117 S. Ct. 1997, 2015 (1997)). The court recognized that interaction between church and state is inevitable, and that society has always tolerated some level of involvement between the two. *See id.*

[143]*Id.* at 591, 696 A.2d at 717-18 (quoting Agostini v. Felton, 117 S. Ct. 1997, 2015 (1997)).

ligious instruction of the next generation.[144] Yet, the court proclaimed that the collective bargaining agreement between the unions and the high school lay teachers revealed that secular conditions of employment may be bargained for without compromising the integrity and purpose of the Catholic school.[145]

The court applied the *Lemon* test to its Establishment Clause analysis.[146] The court noted that the parties conceded that Article 1, Paragraph 19 of the New Jersey Constitution satisfied the first prong of the *Lemon* test because the provision had a secular purpose of promoting the economic welfare and collective bargaining rights of private employees.[147] The court stated that the primary purpose of the New Jersey constitutional provision was not to inhibit religion, but to affect private labor relations, thus satisfying the second prong of the test.[148]

Finally, analyzing the third prong of the *Lemon* test, the court posited that while some entanglements between the state and diocese may result in this setting, such entanglement would not rise to the level of excessive.[149] The court explained that the scope of collective bargaining must remain limited to secular terms and conditions of employment, and there would be no government involvement in other areas.[150] Consequently, the court concluded that, because the church-state entanglements were incidental, requiring the Catholic schools to collectively bargain with the lay teachers pursuant to Article I, Paragraph 19

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[144]*See id.* at 591-92, 696 A.2d at 718.

[145]*See id.*

[146]*See id.* at 588, 696 A.2d at 716.

[147]*See id.*

[148]*See id.* at 589, 696 A.2d at 716. The court also pointed out that the provision in the high school teacher's collective bargaining agreement, which preserved the Bishop's exclusive right to determine the schools' structures and policies, further insured that the bargaining relationship did not inhibit or impede the schools' religion. *See id.* at 590, 696 A.2d at 717.

[149]*See id.* at 592, 696 A.2d at 718. The United States Supreme Court held that only excessive entanglements between church and government are proscribed by the United States Constitution. *See* Agostini v. Felton, 117 S. Ct. 1997, 2015 (1997).

[150]*See South Jersey*, 150 N.J. at 592, 696 A.2d at 718. The court remarked "[i]t is a fundamental tenet of the regulation of collective bargaining that government brings private parties to the bargaining table and then leaves them alone to work through their problems." *Id.* (quoting Catholic High Sch. Ass'n of Archdiocese of New York v. Culvert, 753 F.2d 1161, 1167 (2d Cir. 1985)).

of the New Jersey Constitution did not violate the Establishment Clause.[151]

The court then addressed the free exercise issue.[152] Rejecting the schools' argument, the court remarked that the Free Exercise Clause is not absolute; and therefore, religions may be subjected to some "worldly burdens."[153] The court declared that although the Free Exercise Clause was intended to protect religion against government interference, it did not prohibit *all* state obstructions.[154]

In determining whether the State unconstitutionally burdened the religious beliefs of the schools, the court applied the *Smith* standard.[155] The court stated that a generally applicable regulatory law does not violate the Free Exercise Clause where the primary intent of the law is non-religious and its burden on religion is incidental.[156] The court further noted that the *Smith* analysis requires the courts to apply the compelling interest balancing test where there is a hybrid claim.[157]

Applying this standard, the court determined that Article I, Paragraph 19 of the New Jersey Constitution was a generally applicable law, with a non-secular

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[151]*See id.* at 593, 696 A.2d at 718.

[152]*See id.*

[153]*See id.* at 593-94, 696 A.2d at 718-19. The schools argued that applying the New Jersey constitutional provision to them, would force them to engage in collective bargaining, thereby infringing on their free exercise of religion. *See id.*

[154]*See id.* at 594, 696 A.2d at 719. The court reasoned that "[t]he Free Exercise Clause embraces both the 'freedom to believe and freedom to act.' The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Id.* (quoting Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (internal quotations omitted)).

[155]*See id.* at 597, 696 A.2d at 721 (citing Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 (1990)); For a discussion of the *Smith* test see *supra* note 52 and accompanying text. Relying on the United States Supreme Court's decision in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the New Jersey Supreme Court determined that *Smith* was the proper standard to apply when analyzing the free exercise challenge. *See South Jersey*, 150 N.J. at 597, 696 A.2d at 721.

[156]*See id.* at 595, 696 A.2d at 719-20 (citing Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872 , 885 (1990)); *see also* Section III.

[157]*See South Jersey*, 150 N.J. at 595, 696 A.2d at 720 (citing Employment Div., Dep't of Human Resources of Or. v. Smith, 494 U.S. 872, 881-82 (1990)); *see also* Section III.

purpose or intent.[158] Because the schools argued that the case also implicated the constitutional rights of free association and child rearing, the court applied the balancing test required for hybrid claims.[159] The court concluded that the State had a compelling interest in allowing parochial elementary school teachers, as private employees, to participate in collective bargaining regarding secular conditions of their employment because the right to organize is a fundamental right guaranteed by the New Jersey Constitution.[160] Moreover, the court stated that New Jersey has a compelling interest in preserving industrial peace and economic order.[161] Since the courts would be adjudicating any labor disputes between the parties, rather than a governing labor board, the court emphasized that the potential infringement by the State is minimized.[162] Thus,

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[158]*See id.* at 597, 696 A.2d at 721. The court pronounced that the primary purpose of the law was to promote the economic well being and general welfare of the State's work force. *See id.*

[159]*See id.* at 598-600, 696 A.2d at 721-22. The court dismissed the schools' argument that their free association rights were being violated. *See id.* at 598, 696 A.2d at 723. The court explained that the schools failed to present any argument supporting this claim in its briefs. *See id.* Moreover, the court concluded that employers do not enjoy a constitutional right to associate where their employees' right to organize is jeopardized. *See id.* at 598, 696 A.2d at 722.

The court also rejected the schools' argument that forcing the schools to engage in collective bargaining was violating the parental right of child rearing. *See id.* at 599, 696 A.2d at 722. The court declared that allowing the schools' lay teachers to unionize did not interfere with any parental decision making ability. *See id.*

[160]*See id.* at 600, 696 A.2d at 722.

[161]*See id.* This finding is similar to the Second Circuit's decision in *Culvert*. *See supra* Section III and accompanying text.

[162]*See South Jersey*, 150 N.J. at 600, 696 A.2d at 723. The court believed that the schools' concerns regarding the burdening of their free exercise rights was alleviated by the fact that there was no labor board regulating labor relations. *See id.* The court explained that the courts are better equipped to ensure that any potential interference with religious institutions' administration would be pursuant to the least restrictive means. *See id.*

The appellate division and the New Jersey Supreme Court were in agreement that federal jurisprudence traditionally prohibits courts from determining religious or doctrinal issues. *See id.* (quoting South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary Sch., 290 N.J. Super. 359, 390, 675 A.2d 1159, 1171 (N.J. Super. Ct. App. Div. 1996)). Both courts resolved that this prohibition does not preclude the courts from determining purely secular, legal issues although framed in the context of religious polity. *See id.* (quoting South Jersey Catholic Sch. Teachers Ass'n v. St. Teresa of the Infant Jesus Church Elementary Sch., 290 N.J. Super. 359, 390, 675 A.2d 1159, 1171 (N.J.

Justice Coleman concluded that even under the balancing test required for hybrid claims, the State's interest in guaranteeing private employees the fundamental right to organize and maintain economic order and peace outweighed any potential intrusion that collective bargaining would impose upon the defendant schools.[163] The court also held that Article I, Paragraph 19 of the New Jersey Constitution does not violate the Free Exercise Clause.[164]

Super. Ct. App. Div. 1996)). The appellate division explained:

> In such cases, courts must confine their adjudications to their proper civil sphere by accepting the authority of a recognized religious body in resolving a particular doctrinal question, while, where appropriate, applying neutral principles of law to determine disputed questions which do not implicate religious doctrine. . . . Nonetheless, our Court has stressed that neutral principles "must always be circumscribed carefully to avoid courts' incursions into religious questions that would be impermissible under the first amendment."

South Jersey, 290 N.J. Super. at 390, 675 A.2d at 1171 (quoting Elmora Hebrew Ctr., Inc. v. Fishman, 125 N.J. 404, 414-15, 593 A.2d 725 (1991)).

The appellate division acknowledged that there is some criticism of the application of neutral principles in this context. *See id.* For example, the appellate division cited Professor Laylock's argument that the courts are not versed in the subtleties of religious doctrine, and thus, are unequipped to appreciate the extent of the church's loss of religious autonomy. *See id.* (citing Laylock, *supra* note 4, at 1400, 1409 n.270). Nevertheless, the court concluded that the application of neutral principles in the present matter was appropriate. *See South Jersey*, 150 N.J. at 601, 696 A.2d at 723. Moreover, while the schools' concern regarding their religious autonomy was legitimate, it was outweighed by New Jersey's compelling interest in guaranteeing its work force the constitutional right to organize. *See id.*

[163]*See South Jersey*, 150 N.J. at 598, 696 A.2d at 721. As a final note, the court discussed the schools' argument that requiring the schools to collectively bargain with lay teachers who perform ministerial functions would infringe on the "precinct" of the church. *See id.* at 601, 696 A.2d at 723-24. The court defined ministerial employees as those employees whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual or worship." *Id.* at 601, 696 A.2d at 724 (quoting Welter v. Seton Hall Univ., 128 N.J. 279, 294, 608 A.2d 206, 214 (1992)). The court remarked that the "ministerial defense" is properly raised in the context of a free exercise challenge to the adjudication of an employment dispute or enforcement of an employment contract, not in the context of collective bargaining. *See id.* at 602, 696 A.2d at 724. Even in such a situation, the courts will adjudicate the issue so long as the underlying dispute does not involve a religious question. *See id.*

[164]*See id.*

V. CONCLUSION

While the guarantees of the First Amendment Religion Clauses cannot be used as a tool for individuals and organizations to gain advantage over others, or reprieve from generally applicable regulations, courts need to beware of offending the spirit of the Free Exercise and Establishment Clause in an overzealous desire to ensure absolute equal application of the law. As Justice Coleman remarked, the courts have traditionally recognized that government and religion function best when left to work in their own spheres, free from the interference of the other.[165] Thus, the intention of our Founding Fathers in drafting the Religion Clauses was to create a "wall of separation" between church and state.[166]

Unfortunately, the secularization of society has diminished the acceptance and understanding of religious institutions. This phenomena has not spared the courts. The New Jersey Supreme Court's decision in *South Jersey* effectively distinguished between permissible entanglements and those that are proscribed by the Free Exercise and Establishment Clauses. The line between church and state must be drawn with careful precision.

The New Jersey Supreme Court's decision in *South Jersey* illustrated that collective bargaining may occur in parochial schools, but only within the confines of the Religion Clauses. Thus, the New Jersey Supreme Court limited its decision in *South Jersey* to secular terms and conditions of employment. A problem remains, however, because the court failed to define "secular." Indeed, there is a connection between conditions of employment and classroom curriculum.[167] Therefore, by neglecting to offer any guidance on where the line between secular and religious should be drawn, the court opened the floodgates, inviting future litigation.[168]

Although the adjudication of such disputes by courts, rather than labor boards, will be less intrusive, it is not necessarily less burdensome. In order to lessen this burden, the courts must require the unions representing lay faculty

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[165]*See id.* at 591, 696 A.2d at 717.

[166]*See* Laylock, *supra* note 4.

[167]*See* Caufield v. Hirsch, No. 76-279, 1977 WL 15572, at *15 (E.D. Pa. 1977), *cert. denied*, 436 U.S. 957 (1978).

[168]Justice O'Connor recognized the difficulty involved in allowing the courts to determine the distinctions between central and peripheral issues of religious polity. *See* Employment Div., Dep't. of Human Resources of Or. v. Smith, 494 U.S. 872, 907 (1990) (O'Connor, J., concurring). Justice O'Connor warned: "[t]he distinction between questions of centrality and questions of sincerity and burden is admittedly fine . . . ." *Id.*

in parochial schools to agree to certain provisions in collective bargaining agreements that preserve the religious institutions' autonomy. Additionally, the religious institutions should maintain the authority to independently determine those issues most closely tied to curriculum and religious doctrine. Otherwise, religious schools will continue to be burdened by defending unlimited actions by unions challenging religious schools' employment decisions, many of which are motivated solely by religious doctrine. This situation would necessarily burden the schools' free exercise rights by requiring the schools to defend their administrative and philosophical decisions.

While the First Amendment should not be used to absolve individuals and institutions from obeying the law, a growing regulatory state should not be used as an excuse to override the principles of the Religion Clauses, which are necessary to the proper functioning of church and state in one society.[169]

[169]*See* City of Boerne v. Flores, 117 S. Ct. 2157, 2185 (1997) (O'Connor, J., dissenting) (stating "it is no way anomalous to accord heightened protection to a right identified in the text of the First Amendment.")