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# THE FIRST AMENDMENT AND THE LABOR RELATIONS OF RELIGIOUSLY-AFFILIATED EMPLOYERS

DAVID L. GREGORY\*

CHARLES J. RUSSO\*\*

*"You have the right to form a union, but I won't recognize it. I would never cede authority to a union; I would see this place close down first." Bishop Michael A. Saltarelli, D.D., Roman Catholic Diocese of Wilmington, Delaware (during meeting with faculty and staff of St. Mark's High School).<sup>1</sup>*

## I. INTRODUCTION

In 1979, in *NLRB v. Catholic Bishop*,<sup>2</sup> the United States Supreme Court ap-

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<sup>1</sup> *Here We Go Again!*, THE SPIRIT OF '76, Feb. 1998, at 1.

<sup>2</sup> 440 U.S. 490 (1979). For extensive commentary on the decision, see generally Ashby D. Boyle II, *Fear and Trembling at the Court: Dimensions of Understanding in the Supreme Court's Religion Jurisprudence*, 3 SETON HALL CONST. L.J. 55 (1993); Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & LAB. L. 185 (1996); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); Whitney Ellenby, *Divinity vs. Discrimination: Curtailing the Divine Reach of Church Authority*, 26 GOLDEN GATE U.L. REV. 369 (1996); Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581 (1995); Carl H. Esbeck, *Government Regulation of Religiously Based Social Services: The First Amendment Consideration*, 19 HASTINGS CONST. L.Q. 343 (1992); David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992); Michael E. Hartmann, *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*, 6 CORNELL J. L. & PUB. POL'Y 553 (1997); Treaver Hodson, Comment, *The Religious Employer Exemption Under Title VII: Should a Church Define Its Own Activities?*, 1994 BYU L. REV. 571 (1994); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335 (1995); John O. McGinnis, *The Bar Against Challenges to Employment Discrimination Consent Decrees: A Public Choice Perspective*, 54 IOWA L. REV. 1507 (1994); John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV.

parently feared that judicial inquiry into, and scrutiny of, the labor and employment relations in religiously-affiliated institutions posed too great a risk of the government's unconstitutional excessive entanglement into the internal theological matters of the particular religiously-affiliated schools. The Court's First Amendment jurisprudence invoked the First Amendment rights of the religiously-affiliated schools/employers, essentially giving carte blanche to religiously-affiliated employers to conduct their labor and employment relations and personnel practices, effectively exempt from their employees' legal challenges.

The following year, in *NLRB v. Yeshiva University*,<sup>3</sup> the Court found that col-

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567 (1992); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996); Matthew S. Steffey, *Redefining the Modern Constraints of the Establishment Clause: Separable Principles of Equality, Subsidy, Endorsement and Church Autonomy*, 75 MARQ. L. REV. 903 (1992); Elisabeth S. Wendorff, *Employment Discrimination and the Clergywomen: Where the Law has Feared to Tread*, 3 S. CAL. REV. L. & WOMEN'S STUD. 135 (1993); David J. Overstreet, Note, *Does the Bible Preempt Contract Law?: A Critical Examination of Judicial Reluctance to Adjudicate a Cleric's Breach of Employment Contract Claim Against a Religious Organization*, 81 MINN. L. REV. 263 (1996); Bernard Roberts, Note, *The Common Law Sovereignty of Religious Lawfinders and the Free Exercise Clause*, 101 YALE L.J. 211 (1991).

<sup>3</sup> 444 U.S. 672 (1980). For extensive commentary on the decision, see generally James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 BUFF. L. REV. 435 (1997); James Atleson, *Law and Union Power: Thoughts on the United States and Canada*, 42 BUFF. L. REV. 463 (1994); R. Bales, *A New Standard for Title VII Opposition Cases: Fitting the Personnel Manager Double Standard Into a Cognizable Framework*, 35 S. TEX. L. REV. 95 (1994); Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. REV. 687 (1997); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563 (1996); Patrick S. Bryant, Project, *NYBRID Employees: Defining and Protecting Employees Excluded from the Coverage of the National Labor Relations Act*, 41 VAND. L. REV. 601 (1988); Anne Marie Cook et al., *Constitutional Law —Universidad Central De Bayamon v. National Labor Relations Board: Jurisdiction Over Religious Colleges and Universities —The Need for Substantive Constitutional Analysis*, 62 NOTRE DAME L. REV. 255 (1987); Marion G. Crain, *Building Solidarity Through Expansion of NLRA Coverage: A Blueprint for Worker Empowerment*, 74 MINN. L. REV. 953 (1990); Charles B. Craver, *Rearranging Deck Chairs on the Titanic: The Inadequacy of Modest Proposals to Reform Labor Law*, 93 MICH. L. REV. 1616 (1995); Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397 (1992); Peter D. DeChiara, *Rethinking the Managerial-Professional Exemption of the Fair Labor Standards Act*, 43 AM. U. L. REV. 139 (1993); Edward M. Dicato, *Employee Involvement Teams Under the National Labor Relations Act: Do They Inherently Conflict?*, 1990 DET. C.L. REV. 691 (1990); Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. L.J. 117 (1996); Reinhold Fahlbeck, *The Demise in Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law*, 15 BERKELEY J. EMP. & LAB. L. 307 (1994); George Feldman, *Workplace Power and Collective Activity: The Supervisory and Managerial Exclusions in Labor Law*, 37 ARIZ. L. REV. 525 (1995); Julius G. Getman & Jacqueline W. Mintz, *Foreword: Academic Free-*

dom in a Changing Society, 66 TEX. L. REV. 1247 (1988); David L. Gregory, *Br(e)aking the Exploitation of Labor Law?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1 (1997); David L. Gregory, *The Employment Relation of the Law Professor in the Consent Decree Era*, 30 GA. L. REV. 259 (1995); David L. Gregory and Raymond T. Mak, *Significant Decisions of the NLRB, 1984: The Reagan Board's 'Celebration' of the 50th Anniversary of the National Labor Relations Act*, 18 CONN. L. REV. 7 (1985); Michael C. Harper, *Reconciling Collective Bargaining with Employee Supervision of Management*, 137 U. PA. L. REV. 1 (1988); Johnathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, 12 LAB. L.J. 165 (1996); Richard H. Hiers, *Academic Freedom in Public Colleges and Universities: O Say, Does That Star-Spangled First Amendment Banner Yet Wave?*, 40 WAYNE L. REV. 1 (1993); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993); Scott Kasker, *Exploring Saturn: An Examination of the Philosophy of "Total" Labor-Management Cooperation and the Limitations Presented by the NLRA*, 5 LAB. L.J. 703 (1989); Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. REV. 39 (1988); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988); Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986); Douglas Laycock, *Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Authority*, 81 COLUM. L. REV. 1373 (1981); Arthur S. Leonard, *A New Common Law of Employment Termination*, 66 N.C. L. REV. 631 (1988); Andrew A. Lipsky, Comment, *Participatory Management Schemes, the Law, and the Workers' Rights: A Proposed Framework of Analysis*, 39 AM. U. L. REV. 667 (1990); Charles J. Morris, *NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct*, 137 U. PA. L. REV. 1673 (1989); Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. CIN. L. REV. 1379 (1995); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993); David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990); David M. Rabban, *Distinguishing Excluded Managers From Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775 (1989); Stephen I. Schlossberg & Stephen M. Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 3 LAB. L.J. 11 (1987); Edward Silver & Joan McAvoy, *The National Labor Relations Act at the Crossroads*, 56 FORDHAM L. REV. 181 (1987); Audrey Anne Smith, Comment, *The Future of Labor-Management Cooperation Following Electromation and E.I. DuPont*, 35 SANTA CLARA L. REV. 225 (1994); Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C. L. REV. 987 (1989); Daniel W. Srsic, *Collective Bargaining by Physicians in the United States and Canada*, 15 COMP. LAB. L.J. 89 (1993); *Status of Nurses as "Supervisors" Under the National Labor Relations Act: NYMED Inc.*, 38 B.C. L. REV. 323 (1997); Katherine Van Wezel Stone, *Labor and Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73 (1988); Clyde W. Summers, *Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy*, 16 COMP. LAB. L.J. 467 (1995); Clyde W. Summers, *The Privatization of Personal Freedoms and Enrichment of Democracy: Some Lessons From Labor Law*, 1986 U. ILL. L. REV. 689 (1986); Clyde W. Summers, *Worker Participation in*

lege faculty generally are supervisors or managers, and not "employees," within the meaning of the National Labor Relations Act. Thus, college faculty are not able to bargain collectively with their university employers regarding their hours, wages, and terms and conditions of employment.<sup>4</sup>

The ramifications of these decisions continue to be pernicious and profound, often having a dramatic debilitating influence on the labor and employment rights of faculty members, especially those teaching in religiously-affiliated schools, colleges, and universities. We have examined manifestations of these problems in various cases<sup>5</sup> and have proposed methods for workers in these institutions to more effectively assert labor rights. Such methods prescribe, in some contexts, the workers to invoke the moral teaching of the particular religion with which their employer professes affiliation.<sup>6</sup> At the same time, we recog-

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*Sweden and the United States: Some Comparisons from an American Perspective*, 133 U. PA. L. REV. 175 (1984); Martha S. West, *Gender Bias in American Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994); David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1 (1998); Kenneth W. Brothers, Note, *Church Affiliated Universities and Labor Board Jurisdiction: An Unholy Union Between Church and State?*, 56 GEO. WASH. L. REV. 558 (1998); Ben M. Germana, Note, *Protecting Managerial Employees Under the National Labor Relations Act*, 91 COLUM. L. REV. 405 (1991); Ieuan G. Mahony, Note, *Title VII and Academic Freedom: The Authority of the EEOC to Investigate College Faculty Tenure Decisions*, 28 B.C. L. REV. 559 (1987); Susan G. Miller, Note, *Constitutional Law – Government Agency Jurisdiction Over Church-Operated Universities and the Establishment and Free Exercise Clauses – Universidad Central De Bayamon v. National Labor Relations Board*, 60 TEMP. L.Q. 189 (1987); Patrick Nagle, Note, *Yeshiva's Impact on Collective Bargaining in Public-Sector Higher Education*, 20 J.C. & U.L. 383 (1994); Douglas Sorrelle Streitz & Jennifer Allynson Hunkler, Note, *Teaching or Learning: Are Teaching Assistants Students or Employees?*, 24 J.C. & U.L. 349 (1997).

<sup>4</sup> For an interesting recent development, see Courtney Leatherman, *NLRB May End Its Oppositions to Unions for Private-College Professors*, THE CHRONICLE OF HIGHER EDUCATION, Jan. 8, 1998, at A14.

<sup>5</sup> See David L. Gregory, *Religious Harassment in the Workplace: An Analysis of the EEOC's Proposed Guidelines*, 56 MONT. L. REV. 119 (1995); David L. Gregory, *Government Regulation of Religion Through Labor and Employment Discrimination Laws*, 22 STETSON L. REV. 27 (1992); David L. Gregory, *The Role of Religion in the Secular Workplace*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 749 (1990); David L. Gregory, *The First Amendment Religion Clauses and Labor and Employment Law in the Supreme Court, 1984 Term*, 31 N.Y.L. SCH. L. REV. 1 (1986); Charles J. Russo and David L. Gregory, *Some Reflections on the Catholic University's Tenure Prerogatives*, 43 LOY. L. REV. 181 (1997).

<sup>6</sup> See David L. Gregory, *Catholic Social Teaching On Work*, 49 LAB. L.J. 912 (1998); David L. Gregory, *Br(e)aking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1 (1997); David L. Gregory, *Dorothy Day's Lessons for the Transformation of Work*, 14 HOFSTRA LAB. L.J. 57 (1996); David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119 (1988); David L. Gregory and Charles J. Russo, *Overcoming NLRB v. Yeshiva University by the*

nize the compelling and fundamentally important nature of religiously-affiliated institutions, not merely as part of the social and economic infrastructure in this country, but, most critically, as manifestations of authentic religious ministries which fully deserve legitimate First Amendment protection.

Upon the twentieth anniversary of the problematic *Catholic Bishop* decision, we assess these core tensions between the important prerogatives of the religiously-affiliated institutional employers and the human, civil, and labor rights of their employees. Initially, we review the background leading up to the recent decisions of the highest courts of New York and New Jersey. These decisions suggest that it is possible to reconcile these tensions and to protect the fundamental rights of both employers and workers.<sup>7</sup> We then situate these recent state court decisions within the larger architecture of *Catholic Bishop*. This suggests how these recent cases may positively reconfigure the labor and employment relations dynamics of religiously-affiliated institutions, while simultaneously respecting their authentic religious mission, and ministry, as well as their necessary managerial prerogatives. While our analysis is primarily, but not exclusively, from our perspective as Roman Catholic professors teaching at Catholic universities, it effectively applies to most major religiously-affiliated institutional employers and their employees.

## II. A BRIEF HISTORY OF LABOR RELATIONS IN ROMAN CATHOLIC SCHOOLS

The evolution of collective bargaining via teachers' unions, a relatively recent phenomenon in the history of Catholic education in the United States,<sup>8</sup> began shortly after the rapid spread of collective bargaining in the public schools. In 1962, President Kennedy's Executive Order 10988,<sup>9</sup> which established a federal policy recognizing governmental employees' unions, provided a major impetus behind teachers' unions and collective bargaining. This Order gave national expression to a mood that had emerged a few years earlier. In 1958, New York City permitted public employees to participate in collective bargaining for the first time, and Wisconsin, in 1959, became the first state to mandate collective bargaining for municipalities.<sup>10</sup> Since the early 1960s, the trend toward collective bargaining in the public sector, including education, has grown rapidly; today, at least thirty-five states expressly have adopted labor relations statutes for teachers.<sup>11</sup>

Collective bargaining initiatives by teachers' unions in Roman Catholic schools, the largest and most organized segment of church-operated schools in

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*Implementation of Catholic Labor Theory*, 41 LAB. L.J. 55 (1990).

<sup>7</sup> See discussion *infra* Part IV.

<sup>8</sup> For a history of Catholic education in the United States, See HAROLD A. BEUTOW, OF SINGULAR BENEFIT: THE STORY OF CATHOLIC EDUCATION IN THE UNITED STATES (1970).

<sup>9</sup> See ANTHONY M. CRESSWELL, ET AL., TEACHERS, UNIONS, AND COLLECTIVE BARGAINING IN PUBLIC EDUCATION 149 (1980).

<sup>10</sup> For a review of the background leading up to unions, see *id.*; see also CHARLES T. KERCHNER & DOUGLAS E. MITCHELL, THE CHANGING IDEA OF A TEACHERS' UNION (1988).

<sup>11</sup> See James A. Rapp, 4 EDUC. L., Table T 11 Collective Bargaining Statutes (1996).

the United States,<sup>12</sup> began concurrently in high schools in large urban centers in the northeast and midwest, most notably in Brooklyn, Philadelphia, and Chicago.<sup>13</sup> Although the move to unionization in the Brooklyn Diocese progressed smoothly, with the first bargaining sessions taking place between the Lay Faculty Association and the Diocese in the Spring of 1967,<sup>14</sup> the same could not be said for the Archdioceses in Philadelphia and Chicago.<sup>15</sup> In fact, on April 17, 1967, the first "strike" in American Catholic education history lasted for twenty minutes in Philadelphia before the Association of Catholic Teachers and the employing Archdiocese reached an agreement.<sup>16</sup> Four days later, teachers in three Catholic schools in Chicago went on apparently unrelated strikes, lasting from one day to several weeks, and which led to the firing of twenty-three striking teachers in one of the schools in May 1967.<sup>17</sup> Although teachers in Chicago formed the Catholic Archdiocesan Teachers Federation (CATF) in January 1968, the Archdiocese has refused to organize the CATF as a bargaining agent for the teachers.<sup>18</sup>

In light of the many social justice initiatives flowing from the Second Vatican Council,<sup>19</sup> the National Catholic Education Association (NCEA) conducted a self-study of emerging trends in Catholic education.<sup>20</sup> In response to a question asking whether "90% of all dioceses will have teacher associations that will bargain with the [school] board or diocese," 8% of respondents answered that collective bargaining was likely to occur within five years, 70% that it was likely by 1980, and 12% by 1985; only 1% were of the opinion that this was never likely to take place.<sup>21</sup> Moreover, almost 60% of respondents considered the growth of collective bargaining desirable, while less than 30% considered its ex-

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<sup>12</sup> Although the number of schools in operation and the percentage of students they serve has dropped dramatically since the 1960s, "[t]he largest system of private schools in the United States is operated by the Roman Catholic Church and includes 8,351 schools in 1993-94, serving 2,516,000 students." National Center for Educational Statistics, U.S. Dep't of Educ., *PRIVATE SCHOOLS IN THE UNITED STATES: A STATISTICAL PROFILE*, 1993-94 16 (1997). Further, even though they are often described as a "system," Catholic schools are more analogous to loose groups of largely autonomous institutions where individual principals wield significant authority. See Peter J. Clifford, *Teacher Collective Action*, 27 *CATHOLIC HSQ* 5, 5-7 (1969).

<sup>13</sup> See Clifford, *supra* note 12, at 5.

<sup>14</sup> See *id.* at 5-6.

<sup>15</sup> See M. SCATENA, *The Development of Collective Bargaining in The Catholic Secondary Schools of The Commonwealth of Pennsylvania*, at 58 (1984) (unpublished Ph.D. dissertation, University of Pittsburgh).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See Peter J. Sullivan, *CATHOLIC INSTITUTIONS*, at 124 (1985).

<sup>19</sup> For a good, brief review of the significance of the Council, see Richard P. McBrien, *Vatican Council II*, in *HARPER COLLINS ENCYCLOPEDIA OF CATHOLICISM* 1299 (Richard P. McBrien, ed., 1995).

<sup>20</sup> See *Catholic Educators Predict Changes*, *NAT'L CATH. REP.*, Nov. 13, 1970.

<sup>21</sup> See *id.* at 9, col. 1.

pansion undesirable.<sup>22</sup>

Teachers' unions in Catholic secondary schools meanwhile grew at a steady, if unspectacular, pace. By 1973, 25 of 145 responding dioceses reported the existence of recognized teachers' associations or unions.<sup>23</sup> However, a study conducted in the summer of 1979, shortly after *Catholic Bishop*, revealed that the growth of unions had slowed to the extent that only 27 of 162 Roman Catholic school systems reported having teachers' organizations.<sup>24</sup>

### III. NLRB V. CATHOLIC BISHOP

The status of unions in Catholic schools received substantial support when, in 1975, the NLRB asserted jurisdiction over union-organizing activities in companion cases in Catholic secondary schools in Chicago<sup>25</sup> and Ft. Wayne-South Bend.<sup>26</sup> The schools, however, refused to comply with the Board order directing them to recognize and bargain with the unions. The schools appealed to the Seventh Circuit, which ruled that the Board improperly exercised its discretion in light of the religious nature of the schools, and that related First Amendment considerations precluded the NLRB from asserting its jurisdiction.<sup>27</sup> The NLRB, in turn, appealed to the Supreme Court which granted *certiorari* in February 1978.<sup>28</sup>

In the interim, the teachers' movement took another step forward in December 1977, when delegates of lay teachers from seven Catholic Church dioceses, representing 3,300 teachers, met in Philadelphia to form the National Association of Catholic School Teachers (NACST).<sup>29</sup> The NACST expressed hopes of becoming an organization with a membership of 25,000 to 30,000 teachers.<sup>30</sup>

On March 24, 1979, the Supreme Court handed down its 5-4 decision in *NLRB v. Catholic Bishop*,<sup>31</sup> which was destined to become a landmark in the history of teachers' labor organizations and labor-management relations in Roman Catholic schools. In *Catholic Bishop*, a closely divided Court affirmed that the NLRB lacked jurisdiction to mandate bargaining between teachers and their

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<sup>22</sup> See *id.*

<sup>23</sup> NCEA Symposium: *Unionism in Catholic Schools*, 6 ORIGINS 277, at 287 (1976).

<sup>24</sup> See JOHN AUGENSTEIN, *TEACHER UNIONS, THE COURTS AND CATHOLIC SCHOOLS IN CONTEMPORARY ISSUES IN CATHOLIC HIGH SCHOOLS* 77 (1981).

<sup>25</sup> See *NLRB v. Catholic Bishop*, 224 N.L.R.B. 1221 (1976). This case involved two high schools identified as "minor seminaries," wherein students began studies for the priesthood in the Roman Catholic Church.

<sup>26</sup> *Diocese of Ft. Wayne-South Bend, Inc.*, 224 N.L.R.B. 1226 (1976). This case involved five Roman Catholic high schools, wherein no special attention was paid to preparing students for the priesthood.

<sup>27</sup> See *Catholic Bishop v. NLRB*, 559 F.2d 1112 (7th Cir. 1977).

<sup>28</sup> 434 U.S. 1061 (1978).

<sup>29</sup> See SULLIVAN, *supra* note 18, at 84.

<sup>30</sup> See Askin, *Catholic Schools in, Unions Mostly Out*, NAT'L. CATH. REP., Aug. 13, 1982, at 13, col. 1.

<sup>31</sup> 440 U.S. 490 (1979).



Roman Catholic secondary school employers.<sup>32</sup>

Writing for the Court, Chief Justice Burger framed two issues for consideration: first, whether Congress intended to grant the NLRB jurisdiction over teachers in church-operated schools; and, second, if it did, whether such an action violated the constitutionally sensitive questions arising from the First Amendment religion clauses.<sup>33</sup> However, Burger then sidestepped the First Amendment issue by applying the longstanding principle which the Court first enunciated in *Murray v. Schooner Charming Betsy*,<sup>34</sup> which directs the courts not to construe legislation as violating the Constitution if the courts can dispose of cases on other grounds.<sup>35</sup> Consequently, Burger reviewed the legislative history of the National Labor Relations Act and its amendments and concluded that there was no affirmative congressional intent to extend the NLRB's jurisdiction to church-operated schools.<sup>36</sup> In reaching his decision, Burger was clearly influenced by the Court's desire to avoid having "to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses."<sup>37</sup>

In a brief dissent, Justice Brennan maintained that because the Court erroneously interpreted the NLRA, the Court should have extended NLRB jurisdiction and the NLRA to protect lay teacher employees of church-operated schools.<sup>38</sup> Brennan, however, did not further pursue any constitutional law-based rationale because the majority chose not to do so.<sup>39</sup>

*Catholic Bishop* adversely affected the potential for more viable labor relations in Catholic schools in several ways. First, absent positive, tangible mechanisms in state law, it created a void by leaving teachers without legal recourse to a neutral third-party to settle labor disputes. Second, it challenged the leadership of the American Catholic Church to take the initiative to establish structures and procedures to fill this void. Unfortunately, despite the promise of *Economic Justice For All*,<sup>40</sup> the Church has yet to provide an adequate response to its labor

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<sup>32</sup> See *id.* at 507.

<sup>33</sup> See *id.* at 491.

<sup>34</sup> 2 Cranch 64 (1804).

<sup>35</sup> See *id.*

<sup>36</sup> See *Catholic Bishop*, 440 U.S. at 504-06.

<sup>37</sup> *Id.* at 507.

<sup>38</sup> See *id.* at 508 (Brennan, J., dissenting).

<sup>39</sup> See *id.*

<sup>40</sup> *Economic Justice For All* is the 1986 pastoral letter of the Catholic Bishops in the United States regarding Catholic social teaching and the American economy. In this letter, the American Bishops explicitly and eloquently recognize the rights of workers at all church institutions to organize and bargain collectively. This supplemented more than a century of Papal encyclical teachings supporting workers' rights to organize and bargain collectively. See United States National Conference of Catholic Bishops, *ECONOMIC JUSTICE FOR ALL: PASTORAL LETTER ON CATHOLIC SOCIAL TEACHING AND THE UNITED STATES ECONOMY* 176 (1986). The relevant passage reads, "All church institutions must also recognize the rights of employees to organize and bargain collectively with the institution through whatever association or organization they freely choose." *Id.* From Pope Leo XIII's *On the Condition of the Working Class* in 1891 to Pope John Paul II's *On Social*

relations lacunae created by *Catholic Bishop*. If anything, in light of the post-*Economic Justice for All* environment of the past decade, Catholic Church leaders working as Catholic school employers often appear oblivious to the Church's own eloquent teachings on workers' rights, including teachers employed in Catholic schools, to join labor unions and to engage in collective bargaining.<sup>41</sup>

*Catholic Bishop* has had a profound chilling effect on labor rights, especially in Catholic schools.<sup>42</sup> While available data on collective bargaining in these schools are somewhat inconclusive,<sup>43</sup> the NACST, the single largest Catholic

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*Concern* in 1987, papal teachings have consistently and explicitly supported workers' rights to organize and bargain collectively. See David L. Gregory and Charles J. Russo, *Overcoming NLRB v. Yeshiva University by the Implementation of Catholic Labor Theory*, 41 LAB. L.J. 51 (1990) (discussing these documents); David L. Gregory, *Catholic Social Teaching On Work*, 49 LAB. L.J. 912 (1998).

<sup>41</sup> Of course, several members of the Catholic hierarchy are principled and forthright champions of workers' rights. These church leaders include John Cardinal O'Connor, Archbishop of New York, who has publicly and forcefully supported health care workers and striking newspaper workers. Most recently Cardinal O'Connor intervened to facilitate the reinstatement of Jeanne Hearty, a Catholic teacher terminated precipitously from her teaching job at St. Columbanus Parish School near Peekskill, New York, within the Archdiocese of New York. Ms. Hearty was terminated for marrying a divorced Episcopalian who had not annulled his previous marriage. Subsequent to her termination, it was ascertained that Ms. Hearty's husband did not need a formal annulment, but merely a lesser certificate regarding his prior marriage for the Catholic teacher to marry him without violating Catholic Church canon law. Consequently, Ms. Hearty and Monsignor Patrick J. Keenan signed a new employment contract, returning Ms. Hearty to her duties as a fifth grade teacher at the Catholic elementary school in September, 1998. See, Joseph Berger, *School Rehires Teacher Fired Over Marriage*, N.Y. TIMES, July 3, 1998, at B7.

Of course, The Archdiocese of New York has not uniformly been the most enlightened employer, as cases highlighted in this essay demonstrate. For example, Thomas Gumbleton, Auxiliary Bishop of the Archdiocese of Detroit, has supported labor initiatives throughout his entire priesthood, the most recent of which was the striking newspaper workers in Detroit.; Bishop Gumbleton may be the single most consistent supporter of labor rights of any Bishop in the hierarchy of the Catholic Church in the United States today. Thomas Hobart, Bishop of Albany, New York, is Co-Chair of the New York State Labor-Religion Coalition. Workers' perceptions of other members of the hierarchy are more ambivalent. Rita Schwartz, President of the Association of Catholic Teachers in the Archdiocese of Philadelphia, for example, calls Cardinal Anthony J. Bevilacqua an "enigma." See Philadelphia's Bevilacqua: The Pastor-Prince Paradox, NAT'L CATH. REP., June 19, 1998, at 3. Arguably, the Catholic Church's single greatest champion of workers' rights is Pope John Paul II, author of the great Papal encyclical, LABOREM EXERCENS (On Labor) (1981), and champion of the Solidarity labor and social movement in Poland.

<sup>42</sup> See NLRB v. Bishop Ford Ctr. Cath. High Sch., 623 F.2d 818 (2d Cir. 1980), cert. denied 450 U.S. 996 (1981) (finding NLRA is not applicable to lay teachers in Catholic Church-affiliated schools). But see, NLRB v. Hanna Boys Ctr., 940 F.2d 1295 (9th Cir. 1991) (finding NLRB-supervised union-representation election proper for non-teaching employees in a Catholic school).

<sup>43</sup> In its most recent report, the National Catholic Education Association (NCEA) indicates that 23% of schools report that at least some of their teachers are represented by

School teachers' organization (representing some 5,000 teachers in 21 affiliated unions, mostly in the Northeast),<sup>44</sup> originally hoped to marshal 25,000 to 30,000 teachers.

The available statistical data do not fully assess or reflect the legal status of bargaining, and often the lack thereof, in Roman Catholic schools. Although collective bargaining has certainly declined since *Catholic Bishop*, legal and theological issues, conflicts, and possibilities for progress remain in such a state where bargaining may continue.<sup>45</sup> For example, in *Catholic High Sch. Ass'n v. Culvert*,<sup>46</sup> the Second Circuit held that the First Amendment did not prohibit the New York State Labor Relations Board (NYSLRB) from asserting jurisdiction in a conflict between lay teachers and the Catholic schools in which they were employed.<sup>47</sup> The Second Circuit distinguished *Catholic High School Association* from *Catholic Bishop* on the ground that, unlike the NLRA, which evidenced no intent to bring Church-operated schools within the jurisdiction of the NLRB, the New York State Labor Relations Act was amended explicitly in 1968 to bring employees of educational or religious associations within its purview.<sup>48</sup> Accordingly, the federal court of appeals dismissed the schools' First Amendment chal-

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some type of negotiating group. With the exceptions of New England and the Plains states, however, most regions of the country have reported scant growth of unions. More precisely, the NCEA offered comparisons on the percentages of schools with bargaining representation in 1985-86 and 1993-94. These data reveal the following:

Region	1985	1993-93
New England	8	41
Midwest	50	46
Great Lakes	19	18
Plains	12	32
Southeast	4	0
West/Far West	6	8

The report also notes that the majority of teachers "are represented by a diocesan or district group, or by another local group in affiliation with the National Association of Catholic School Teachers, rather than by a local union affiliated with the NEA or the AFT." Michael J. Guerra, DOLLARS AND SENSE: CATHOLIC HIGH SCHOOLS AND THEIR FINANCES, (1995) at 14.

<sup>44</sup> See Jeff Archer, *Catholic Teachers Start Union in St. Louis*, EDUCATION WEEK, Oct. 9, 1996, at 6. This article also indicates that there are about twenty-five locals affiliated with the NACST. The organization lists twenty-one affiliates based on the names listed in NACST's April 1998 Newsletter. See *id.*

<sup>45</sup> The most recent group of Catholic school teachers organized in St. Louis. See Archer, *supra* note 44, at 6. See also Samuel Autman, *Catholic Teachers Won, and So Did the Church*, ST. LOUIS POST DISPATCH, Mar. 8, 1998, at B1.

<sup>46</sup> 753 F.2d 1161 (2d Cir. 1985).

<sup>47</sup> See *id.* at 170. See also Jeff Archer, *Parochial Teachers Take Lead on Strike Front*, EDUCATION WEEK, Sept. 10, 1997, at 3 (reporting on a teachers' strike in Philadelphia, home to the country's second largest Catholic school system).

<sup>48</sup> See *Cath. High Sch. Ass'n v. Culvert*, 753 F.2d at 1165, n.2.

lenges and permitted the NYSLRB to retain jurisdiction over such disputes.<sup>49</sup>

Following *Catholic High School Association*, at least two additional labor disputes involving Roman Catholic secondary schools were brought successfully before the NYSLRB. In *In re St. John's Preparatory Sch. and Lay Faculty Ass'n*,<sup>50</sup> the NYSLRB found that the school unlawfully refused to bargain in good faith with the teachers' labor association, that the school's unfair labor practices precipitated the ensuing strike, and that the school acted improperly in dismissing seventy-six striking teachers in September 1984.<sup>51</sup>

A second case, involving a 1981 strike at 'Christ the King High School in Middle Village, New York City, in which ninety-six teachers were dismissed under circumstances similar to those at St. John's Preparatory School, was also recently resolved in favor of the teachers.<sup>52</sup>

#### IV. CHANGING THE CONSTITUTIONAL AND THE LABOR RELATIONS ARCHITECTURE: SOME POSITIVE DEVELOPMENTS FROM NEW YORK AND NEW JERSEY COURTS

##### A. *Christ the King Regional High School v. Culvert*<sup>53</sup>

In March 1987, the New York Court of Appeals unanimously affirmed that the NYSLRB could enforce its orders regarding a Catholic secondary school employer, requiring it to bargain in good faith with the union and reinstate certain teachers whom the school, as employer, had dismissed from employment.<sup>54</sup> According to the court, compliance with the mandates of secular labor law did not violate the Catholic school's First Amendment rights.<sup>55</sup> The court held that the NYSLRB could compel the Catholic school's good faith bargaining because First Amendment protection from excessive government involvement into the Catholic Church's internal theological matters does not summarily preclude government regulation of the secular aspects of the school's labor relations.<sup>56</sup>

Christ the King Regional High School, a Roman Catholic secondary school located in Queens, New York City, employs lay and religiously-affiliated faculty and teaches secular and religious subjects.<sup>57</sup> Historically, the Roman Catholic Diocese of Brooklyn operated the school, but in 1976, responsibility and title were conveyed to the school per se, contingent upon its continuing to operate as a

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<sup>49</sup> See *id.* at 1171.

<sup>50</sup> 49 SERB 51.

<sup>51</sup> See *id.*

<sup>52</sup> See *New York State Employment Relations Bd. v. Christ the King Reg'l High Sch.*, 660 N.Y.S. 2d 359 (N.Y. App. Div. 1997).

<sup>53</sup> 815 F.2d 219 (2d Cir. 1987), *cert. denied*, 108 S.Ct. 102 (1988) (earlier history of this litigation). 47 SLRB No. 115 (NY 1988).

<sup>54</sup> See *id.* at 222-23.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.* at 224-25.

<sup>57</sup> See *id.* at 220.

Roman Catholic-identified institution.<sup>58</sup> In 1976, a union began representing the lay faculty, but it failed repeatedly to negotiate with the school's administrative management regarding the collective bargaining agreement terms.<sup>59</sup> These repeated failures to achieve a labor contract precipitated a strike in 1981; the school fired all striking workers and summarily ended labor negotiations.<sup>60</sup>

The NYSLRB pursued alleged employer violations of the New York labor law, including failure to bargain in good faith and improper discharge without reinstating striking employees.<sup>61</sup> In federal court, the school challenged the state Board's jurisdiction as preempted by the NLRA and as unconstitutionally intrusive on the school's First Amendment rights.<sup>62</sup> The district court rejected this complaint, and the Second Circuit affirmed it on the preemption issue only.<sup>63</sup> An administrative law judge (ALJ) confirmed the NYSLRB's complaint, and the Board brought suit to have the ALJ decision enforced under New York State Labor Law § 707.<sup>64</sup> The school moved to dismiss the petition on constitutional law defense claims.<sup>65</sup>

The New York Court of Appeals granted the Board's petition and denied the school's motion to dismiss, affirming the decision of the Appellate Division.<sup>66</sup> New York has thus articulated an enlightened, necessary flexibility in First Amendment religion jurisprudence, for the purposes of the intersection of the secular labor law regime with the labor relations of the Catholic school: "The First Amendment's metaphorical wall of separation between church and state does not per se prohibit appropriate governmental regulation of secular aspects of a religious school's labor relations operations."<sup>67</sup>

The Court of Appeals held that the NYSLRB's inquiry did not impinge on the school's First Amendment right to the free exercise of religion.<sup>68</sup> The court explained that the New York State Labor Relations Act is neutral in theory and in fact, with no implication of adverse or unconstitutional restriction on religious beliefs or activities.<sup>69</sup> Relying on the Supreme Court's decision in *Department of Human Resources v. Smith*,<sup>70</sup> the court concluded that since the intent of the state labor law was not directed toward religion, and the effect of the state labor board's compelling good faith negotiation only incidentally affected religion,

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<sup>58</sup> See *id.* at 220, n.1.

<sup>59</sup> See *Christ the King Reg'l High Sch.*, 815 F.2d. at 220.

<sup>60</sup> See *id.*

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 221; *Christ the King Reg'l High Sch. v. Culvert*, 644 F. Supp. 1490.

<sup>63</sup> See *Christ the King Reg'l High Sch. v. Culvert*, 815 F.2d at 221-23.

<sup>64</sup> See *New York State Employment Relations Bd. v. Christ the King Reg'l High Sch.*, 660 N.Y.S. 2d 359, 361 (N.Y. App. Div. 1997).

<sup>65</sup> See *id.* at 361-62.

<sup>66</sup> See generally *id.*

<sup>67</sup> *Id.* at 366.

<sup>68</sup> See *id.* at 363.

<sup>69</sup> See *id.*

<sup>70</sup> 494 U.S. 872 (1990).

there was no violation of the First Amendment per se. The court noted, however, that there could be violations in other cases, depending on the particular facts.<sup>71</sup>

The court also held that the labor law did not violate the Establishment Clause of the First Amendment.<sup>72</sup> Distinguishing the case at hand from *N.L.R.B. v. Catholic Bishop*,<sup>73</sup> in that statutory interpretation was not at issue, the court explained that labor law simply imposes secular regulations on such contract terms as wages and working conditions.<sup>74</sup> It reasoned that the mere possibility of such regulations interfering with religion was not sufficient to prevent the labor law's useful application.<sup>75</sup>

The New York Court of Appeals mentioned briefly that the Labor Board could compel the reinstatement of a teacher who was expelled for "unchristian behavior," in light of the school's failure to present any evidence of an inherent religious motive for firing the particular faculty member.<sup>76</sup> Thus, mere invocation of the institutional employer's religious affiliation will no longer be sufficient to avoid summarily further scrutiny into its labor relations by the secular state's administrative or judicial instruments.<sup>77</sup>

**B. *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School***

Within six weeks of the New York Court of Appeals decision in *Christ the King*, the Supreme Court of New Jersey likewise ruled that lay teachers in religious schools can pursue their right to unionize, mandated by the State Constitution, and can engage in collective bargaining with respect to secular aspects of their employment without any violation of the Religion Clauses of the Constitution.<sup>78</sup> In *South Jersey Cath. Sch. Teachers Org. v. St. Teresa of the Infant Jesus Elementary Sch.*,<sup>79</sup> the court unanimously held that the lay teachers had the enforceable right to unionize and negotiate, provided that the scope of the labor negotiations only incidentally effect the institutional employer's First Amendment free exercise of religion.<sup>80</sup>

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<sup>71</sup> *Christ the King Reg'l High Sch.*, 660 N.Y.2d at 363.

<sup>72</sup> *See id.* at 363.

<sup>73</sup> 440 U.S. 490 (1979).

<sup>74</sup> *See Christ the King Reg'l High Sch.*, 660 N.Y.2d at 364.

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> *See id.* at 366.

<sup>78</sup> *See South Jersey Cath. Sch. Teachers Org. v. St. Teresa of the Infant Jesus Elementary Sch.*, 696 A.2d 709 (N.J. 1997).

<sup>79</sup> *Id.*

<sup>80</sup> *See id.* at 712. *See also* *Muhitch v. St. Gregory the Great Roman Cath. Church and Sch.*, 659 N.Y.S.2d 679 (NY App. Div. 1997) (affirming a trial court's refusal to dismiss a teacher's claim that her contract with the Catholic elementary school was not renewed in retaliation for her union membership).

St. Teresa is one of a number of elementary schools operated by the Catholic Diocese of Camden, New Jersey, all of which employ a number of lay teachers.<sup>81</sup> The South Jersey Catholic School Teachers Organization is an organization of non-clerical lay teachers which a majority of the lay faculty elected as the bargaining representative.<sup>82</sup> Subsequently, the union sought recognition from the Diocese as the bargaining representative.<sup>83</sup> However, a Board of Pastors, acting as agents for the Diocese, informed the union that its recognition was contingent upon the signing of a document entitled, "Minimum Standards for Organizations Wishing to Represent Lay Teachers in a Parish or Regional Catholic Elementary School in the Diocese of Camden"<sup>84</sup> ("Minimum Standards"). The "Minimum

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<sup>81</sup> See South Jersey Cath. Sch. Teachers Org., 696 A.2d at 713.

<sup>82</sup> See *id.*

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* The "Minimum Standards" document contained non-negotiable standards. For examples of "Minimum Standards"/"morality"/"good conduct"/"Catholic identity" clauses:

In September 1997, an eight day teachers' strike occurred in the Catholic schools of the Archdiocese of Philadelphia, their first walkout in twenty-one years. Negotiations broke down between the archdiocese and the Association of Catholic Teachers over issues such as the "Catholic identity" clause requiring 1,000 teachers to attend Mass and religious events during in-service days. See Philadelphia: Bevilacqua: The Pastor-Prince Paradox, NAT'L CATH. REP., June 19, 1998, at 1, 3.

The Minimum Standards Document referred to in *South Jersey Cath. Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, has a preamble acknowledging the Catholic Church's respect for the dignity of labor and its rights. It then relates the role of Catholic elementary schools and teachers in Christian education, highlighting the responsibility of teachers to impart Christ's message through their teachings and their lives. It suggests that because of the unique nature of the Catholic School, no civil authorities should intervene in labor or employment disputes between it and its workers. Instead, it requires these matters to be handled by the Church and its laws, insisting that unions elected by the teachers will not be recognized.

Moral Standard requirements in employment contracts of religious employers will not necessarily prevent civil courts from investigating statutory claims of discrimination. See e.g., *Gallo v. Salesian Society*, 676 A.2d 580 (1996) (holding that a state's interest in preventing age and gender discrimination against a lay teacher in a Catholic school did not constitute a substantial burden on constitutional religious protections even when principles of Christianity were written into the employment contract); *Welter v. Seton Hall University*, 128 N.J. 279 (1991) (holding that the civil courts had proper jurisdiction over the grievance of discharged nuns who performed no ministerial duties). In fact, the Supreme Court permits investigation of a religious employer's doctrinal principles largely to prevent them from serving as a pretext for statutory violations. See *Ohio Civil Rights Comm'n v. Dayton Christian Sch.*, 477 U.S. 619 (1986) (holding that the Civil Rights Commission could investigate a Christian school's termination of a lay teacher because she was pregnant and therefore not permitted to work as per her contracted statement of faith).

When discrimination is found to be based on legitimate religious principles, however, the First Amendment generally denies jurisdiction to civil courts. See *Sabatino v. Saint*

Standards" vested complete and final authority to dictate the outcome of disputes in the Board of Pastors and prohibited the union from assessing dues or collecting agency fees from non-union members.<sup>85</sup> The union refused to accept the standards.<sup>86</sup> When the Diocese failed to recognize the teachers' union, the union brought suit based on Article 1, Section 19 of the New Jersey State Constitution, which expressly grants public and private workers the constitutional right to organize.<sup>87</sup> The union claimed that its union acceptance of the proposed standards would have amounted to prematurely bargaining away a number of lay teachers' rights.<sup>88</sup> The schools, however, argued that compelling them to bargain with the union would have violated the Free Exercise and Establishment Clauses of the First Amendment.<sup>89</sup>

The Supreme Court of New Jersey modified and affirmed the judgment of the Appellate Division, remanding the case for further proceedings.<sup>90</sup> The court held that the lay elementary school teachers had an enforceable state constitutional right to unionize and bargain collectively, but limited the scope of this constitutional right to the secular terms and conditions of employment.<sup>91</sup>

The court commenced its reasoning with a comparison to *NLRB v. Catholic Bishop*.<sup>92</sup> The court recognized that this decision supported only federal NLRB jurisdiction, and distinguished the New Jersey Constitution section from that decision because of its express language.<sup>93</sup> It further explained that because the court implements New Jersey's constitutional provisions, and not a state labor

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Aloysius Parish, 288 N.J. Super. 233 (1996) (holding that a Catholic school's choice to hire a nun instead of a lay person for principal despite the lay person's incumbency is a decision that embodies religious principles and thus outside the jurisdiction of a civil court). This is because the activities of legitimately religious entities cannot be scrutinized by courts clearly unable to comprehend a decision based on a particular faith. *See e.g.*, Little v. Wuerl, 929 F.2d 944 (1991) (holding that termination of a Catholic school teacher who remarried without obtaining a nullification could be justified by constitutionally protected religious mores and did not violate Title VII).

Moral Standards clauses primarily serve two separate purposes in determining the constitutional rights surrounding a religiously-affiliated institutional employer's hiring practices. First, they can be used to indicate that the religious doctrine inherent in a grievant's job is sufficient to satisfy the ministerial exemption of a civil rights statute. Second, they can serve as evidence that the employer and its actions are of a religious character such that secular, judicial investigation of its hiring practices would violate the First Amendment. While Moral Standards clauses are relevant in both cases, in neither case are they determinative of the outcome of an action filed against a religiously-affiliated employer.

<sup>85</sup> *See South Jersey Cath. Sch. Teachers Org.*, 696 A.2d at 713.

<sup>86</sup> *See id.*

<sup>87</sup> *See id.*

<sup>88</sup> *See id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See id.* at 724.

<sup>91</sup> *See South Jersey Cath. Sch. Teachers Org.*, 696 A.2d at 712.

<sup>92</sup> *See id.* at 714.

<sup>93</sup> *See id.*



board, a less comprehensive supervision of religion is involved and there is more assurance that First Amendment protection of religion will be recognized and honored.<sup>94</sup> The court concluded that since the NLRB did not preempt the State Constitution, its enforcement was constitutional, and would not interfere with First Amendment constitutional rights.<sup>95</sup>

The court considered the enforcement of the state provision under the Establishment Clause, applying the excessive entanglement test of *Lemon v. Kurtzman*.<sup>96</sup> Both parties agreed that the provision served the secular purpose of advancing economic welfare through the right to organize and bargain; thus, the first *Lemon* prong was quickly satisfied. The court further noted that the provision was not primarily directed at inhibiting religion, but rather at requiring private employers to bargain.<sup>97</sup> This allowed the provision to pass the second *Lemon* test prong, bolstered by the observation that the Diocese has a history of voluntarily engaging in bargaining if it was truly threatening.<sup>98</sup> The court also found that the constitutional provision did not violate the excessive entanglement prong, because it only required negotiation over wages and benefits.<sup>99</sup> The State would not decide or impose upon the employers the specifics of the final labor agreement and neutral criteria would be used to insure that religion was neither advanced nor inhibited.<sup>100</sup> Thus, the court asserted that since the *Lemon* requirements were satisfied, the Establishment Clause was not violated.

The court also determined that the provision did not infringe upon the free exercise of rights of the Catholic school as employer.<sup>101</sup> Applying the test set forth in *Smith*, the court maintained that since the constitutional provision was a generally applicable regulatory law, intended to encourage the rights of employees to bargain but not to regulate religion, and since it only incidentally burdened the free exercise of religion, it was not an unconstitutional encroachment on the free exercise rights of the Catholic school as employer.<sup>102</sup> The court further concluded that even if the school's claim met the hybrid exception to *Smith*, New Jersey has a compelling interest in labor relations peace that justifies imposing collective bargaining obligations upon the Catholic Church-affiliated schools.<sup>103</sup>

Of course, other recent decisions continue to conform reflexively to the one-dimensionality of *Catholic Bishop*.<sup>104</sup> Nevertheless, these two important 1997 decisions of the high courts of New York and New Jersey demonstrate the more enlightened possibilities of avoiding the one dimensional jurisprudential reflexiv-

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<sup>94</sup> See *id.*

<sup>95</sup> See *id.*

<sup>96</sup> 403 U.S. 602, 612-13 (1971).

<sup>97</sup> See *South Jersey Cath. Sch. Teachers Org.*, 696 A.2d at 716.

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* at 718.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.* at 721.

<sup>102</sup> See *id.*

<sup>103</sup> See *South Jersey Cath. Sch. Teachers Org.*, 696 A.2d at 721-22.

<sup>104</sup> See *Catholic Bishop*, 696 A.2d at 709, 717.

ity of *Catholic Bishop. Christ the King* and *St. Teresa* point the way to an enlightened integration of workers' labor rights with authentic autonomous theological prerogatives of religiously-affiliated institutional employers seeking to require teachers to comply with the fundamental moral norms and teachings of the particular religion.<sup>105</sup>

## V. DISCUSSION

The so called non-negotiable "Minimum Standards" clauses at issue in *St. Teresa* have very interesting theological, jurisprudential, labor relations, and educational implications. Broadly analogous to the ministerial exemptions recognized under Title VII,<sup>106</sup> it is fully understandable that management in religiously-affiliated schools would expect personnel to accept and adhere to core Catholic beliefs and to be dedicated to transmitting the Catholic faith's values and traditions to its students. At the very least, such administrators should have the freedom to hire teachers and staff members who respect the religion's teachings, even if the employees' personal beliefs differ. For example, it is reasonable to expect that female teachers in Catholic schools will not indiscriminately and consensually become unwed mothers, or that teachers will not openly proselytize for Darwinistic materialism, capital punishment, or abortion. Clearly, Church leaders neither want to, nor should they have to, relinquish either their essential beliefs or their fundamental managerial rights through collective bargaining, since such negotiations or responsibilities would vitiate the core values at the heart of a religiously-affiliated institution. Nevertheless, in light of the particularly non-negotiable "Minimum Standards," which the Diocese summarily demanded, this was not the path that the union sought to pursue in *St. Teresa*.

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<sup>105</sup> See *Association of Cath. Teachers v. Pennsylvania Labor Relations Bd.*, 692 A.2d 1039 (Pa. 1997) (holding that since teachers and librarians in Catholic Schools are not "public employees" within the scope of the Pennsylvania Public Employee Relations Act, they are not entitled to the Act's protections of rights to organize as a union or to bargain collectively with their employer). But see *Central Catholic Educ. Ass'n. v. Archdiocese of Portland*, 891 P.2d 1318 (Or. Ct. App. 1995) (affirming that the diocese was subject to the jurisdiction of the NLRB); *Hill-Murray Federation of Teachers v. Hill-Murray High Sch.*, 487 N.W. 2d 857 (Minn. S.C. 1992) (holding that lay employees of religiously affiliated school were subject to Minnesota Labor Relations Act, the application of which did not violate their First Amendment Protections).

<sup>106</sup> For example, the Catholic Church may refuse to ordain and employ an atheist non-Catholic as a priest. Although beyond the labor relations scope of this article, other recent decisions allow negligent hiring and retention claims to proceed, even though the tort claims are based upon the conduct of a cleric of the religion. See *Smith v. Privette*, 495 S.E.2d 395 (1998) (holding that tort claims can proceed since they do not require the court to "interpret or weigh church doctrine"). See also *Dobrota v. Free Serbian Orthodox Church*, 952 P.2d 1190 (1998) (finding that the First Amendment precludes a secular court from deciding a dispute between priest and church about termination of employment, but the court can compute and award damages subsequent to the ecclesiastical court's decisions for the priest since the latter does not require the civil court to become enmeshed in religious doctrine).

The inflexible attitude of Church leadership in *St. Teresa* and *Christ the King*, let alone *Catholic Bishop*, was theologically scandalous.<sup>107</sup> If leaders in the Roman Catholic schools expect their staff, students, and parents to follow the moral precepts of Church teachings, expressed through authentic pronouncements of the Papal encyclicals, the Magisterium, and the national conferences of Bishops, they first must themselves practice what they preach. How is it that despite more than a century of unequivocal social teaching recognizing the dignity of all workers, including those in Church-affiliated institutions to organize and bargain collectively, some persons in Church leadership positions seek recourse to secular civil law to trump Church teaching? If the Church, as a major employer in the United States, is going to give effective witness to the social and moral teachings that it eloquently professes, then it must do more than provide pro-forma lip-service to the rights of its employees who wish to organize and bargain collectively.

If anything, the "Minimum Standards" provision under consideration in *St. Teresa* effectively vitiated some of the employees' basic employment rights, while simultaneously repudiating Church teachings. Rather than summarily opposing women and men who staff their schools and imposing economic hardship on them, Church leaders have a serious moral obligation to work towards implementing the dictates of teachings such as *Economic Justice For All*, especially as it relates to the right to collective bargaining.<sup>108</sup> "Minimum Standards" good moral conduct provisions should not be allowed to trump automatically, and thus preclude summarily, collective bargaining under the one-dimensional approach of *Catholic Bishop*.

The Church leaders' argument in *St. Teresa* that bargaining would threaten Church autonomy and would infringe upon the Church's relationship with ministerial employees was wholly specious. To the extent that ecclesiastical leaders cooperated with their employees by effectively implementing Church teachings on workers' labor rights, they would give very powerful witness to the ways in

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<sup>107</sup> Title VII exempts "a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1(a). At the same time, "it shall not be an unlawful employment practice for a school, college, or other educational institution . . . to hire and employ employees of a particular religion if . . . the curriculum of such school, college, university, or other educational institution . . . is directed toward the propagation of a particular religion." 42 U.S.C. § 2000e-2(e)(2). Further, Title VII exempts hirings, dismissals, or classifications based on religion where "religion . . . is a bona fide occupational qualification [BFOQ] reasonably necessary to the natural operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1). See Charles J. Russo and David L. Gregory, *Some Reflections on the Catholic University's Tenure Prerogatives*, 43 LOYOLA U. L. REV. 181, 182 nn. 3-4 (1997).

<sup>108</sup> For a thoughtful retrospective on *Economic Justice For All*, see Rembert G. Weakland, "Economic Justice For All" Ten Years Later, *America*, Mar. 22, 1997, at 8. It is interesting that the author, the Archbishop of Milwaukee, focused primarily on broad social issues, but paid scant attention to labor relations.

which the Church's social teaching can effectively triumph over the narrow positivism of the civil law. In fact, in *St. Teresa*, the Supreme Court of New Jersey pointed out that the contract that the diocese had with its high schools contained carefully crafted language limiting the scope of bargaining to the terms and conditions of employment, while allowing the school to preserve managerial prerogatives.<sup>109</sup>

In an era of school reform where teacher empowerment is designed to give faculties greater voice in the daily exercise of their professional duties, a positive response from Church leaders can further serve as a powerful example of the effectiveness of shared decision making.<sup>110</sup> By entering into labor contract negotiations with teachers' unions over terms and conditions of their employment, dedicated lay teachers who staff the schools can be made full partners in the enterprise of educating children.

Church leaders' reliance on the Supreme Court's narrow construction to preclude the jurisdiction of the NLRB over teachers in religiously affiliated institutions ignores the First Amendment rights of these educators. Maintaining the shattered edifice of *Catholic Bishop* heightens the pernicious irony of the reliance on federal law by some officials within the Church to deny teachers the right of association that state courts, at least in New York and New Jersey, have recently, and wisely, safeguarded.

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<sup>109</sup> The agreement with the high schools read, in part:

B. The subjects covered by this Agreement are wages, benefits and other terms and conditions of employment.

C. Excluded from the scope of negotiations are the following:

Decisions involving educational policies and/or ecclesiastical considerations involving religious-moral qualifications.

F . . . . [N]othing in the agreement shall be considered as interfering in any way with the function and duties of the Diocese insofar as they are canonical or religious.

I. The Organization recognizes the sole right and duty of the Bishop . . . to see that the schools are operated in accordance with the philosophy of Catholic education, the doctrine, the teachings, the laws and norms of the Catholic Church.

South Jersey Cath. Teachers v. St. Teresa of the Infant Jesus Church Elementary School, 696 A.2d 709, 716-17 (N.J. 1997).

<sup>110</sup> There is still some support for teachers in Catholic schools in their fight to organize and bargain collectively. See *Labor Priest: Catholic Teachers Need Union*, AMERICA, Oct. 31, 1998, at 5.

