

THE IMPACT OF SCHOOL VOUCHERS ON EMPLOYMENT LAW: STATE REGULATORY INTERFERENCE WITH PRIVATE RELIGIOUS SCHOOLS

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I. INTRODUCTION

The current American educational system is divided into two fundamentally distinct parts: private education (mostly, though not exclusively, religious) and public education.¹ While public education is a State action, subject to strict constitutional controls, private education bypasses many of these checks in its educational procedures, especially if the private institution is associated with a religious doctrine or institution.² This system is generally cognizable in the classic instance where a private school is presented as an alternative source of education, wherein parents and students voluntarily opt out of the State-provided public education in favor of the private institution. In this situation, the State's constitutional obligation to grant a public education is nullified by the choice of the student not to accept the proffered education.³

With the creation and possible growth in the area of school vouchers, wherein the State grants payments or tax credits to parents placing their students in private institutions, the State's interest may change dramatically.⁴ In providing vouchers, the State is arguably

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¹ Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1400 (2003).

A fundamental tenet of constitutional law posits an "essential dichotomy" between public and private, with only public or government actors being subject to constitutional restraints. With rare exception, the Constitution "erects no shield against merely private conduct, however discriminatory or wrongful." The reigning constitutional paradigm thus strictly compartmentalizes society into public and private spheres, and does not acknowledge any substantial blurring between the two.

Id.

² *Id.*; Eric A. DeGross, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363 (2003).

³ Joe Price, *Educational Reform: Making the Case for Choice*, 3 VA. J. SOC. POL'Y & L. 435, 488 (1996) ("The program neither dictates nor even encourages parents to select public or private schools, or vice-versa. It is parents, therefore, who make the decision as to which school their children will attend, based on the unique needs and interests of each child and on the reputation and record of each school.").

⁴ Metzger, *supra* note 1, at 1389-90.

granting an alternative to its own public schools, while, to some unknown degree, keeping the student's education under the aegis of the State's constitutional duty to provide education.⁵ This may serve to increase the State's interest in assuring the education of students and consequently allow greater State regulation of teacher certification, labor rights of educators, and the acceptance and dismissal of students in otherwise seemingly totally private institutions. Ultimately, school voucher programs may allow the State to impose additional direct statutory and agency regulations on private institutions.

Part II of this article will discuss the current distinctions between public and private religious schools from a constitutional and statutory standpoint, focusing on how State regulatory interests allow for imposition into religious schools, notwithstanding the effect of vouchers on lay teacher employment unions and collective bargaining (the discussion of which illustrates most effectively the general trajectory in this regard), teacher certification requirements, and discrimination in employment. Part III will discuss how these distinctions may be compromised by the introduction of school vouchers and the resulting increases in state regulatory interests. Part IV asks the question of whether this potential additional governmental regulation is in the best interests of the State, the private schools, or the student.⁶

II. THE CURRENT STATE OF EMPLOYMENT LAW CONCERNING STATE INTERFERENCE WITH PRIVATE RELIGIOUS SCHOOLS

In *Pierce v. Society of Sisters*,⁷ the Supreme Court ruled that a state cannot act to bar students from attending private educational institutions in lieu of attending State-provided public schools.⁸ Later cases added that while such private institutions may not be barred, they

Under voucher plans, the government provides a set amount of public funding per student to help cover tuition at private or out-of-district public schools. Overwhelmingly, students obtaining vouchers enroll in sectarian schools. Until recently, only a few publicly-funded voucher plans had been implemented. But voucher use seems likely to increase in light of the Supreme Court's recent decision in *Zelman v. Simmons-Harris* [536 U.S. 639 (2002)], which upheld Cleveland's voucher plan against an Establishment Clause challenge.

Id.

⁵ *Id.* at 1395 ("Rather than government withdrawal, the result is a system of public-private collaboration, a 'regime of mixed administration' in which both public and private actors share responsibilities.").

⁶ The arguments presented here for and against applying increased state regulations to private schools because of voucher programs should not be read as advocating or protesting the existence or use of vouchers as a general concept. That argument is outside the scope of this article and deserves a proper long-form discussion.

⁷ *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).

⁸ *Id.* at 534-35.

may be made subject to some degree of State regulation narrowly tailored to satisfy the State's regulatory interest in the employment of the school's staff and the education of its students.⁹ However, the amount of regulation has always been ruled to be far below the amount allowed in public education, which, as a creation of the State, may be fully regulated. Private schools maintain a degree of separation as a result of their private status.¹⁰

This disparity is more pronounced when discussing parochial or religiously based schools. Once religion is introduced into the arrangement, the State must begin to grapple with both the Free Exercise Clause and the Establishment Clause in any regulation they seek to enforce.¹¹ As the vast majority of private schools have some form of religious affiliation, the impact of these clauses on private school regulation is of utmost importance.¹² The Court has long held that the imposition of government into religion is inherently harmful to both the Church and the State.¹³ In analyzing these cases under the Establishment Clause, *Lemon v. Kurtzman* affords the most useful analytical framework.¹⁴ There the Court clearly lays out the test for determining whether a state regulation unduly acts in concert with religion. The *Lemon* test includes three prongs. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"¹⁵ The first prong analyzes whether the State's interest in the regulation is of a valid and secular nature.¹⁶ The second prong analyzes whether the actual effect of the statute would result in the State advancing or inhibiting religion.¹⁷ The third prong requires, "that the regulation in question not result in excessive entanglement of the government with matters of religion."¹⁸ In a simplified form, the test requires balancing the State's secular interest in the regulation

⁹ See *Runyon v. McCrary*, 427 U.S. 160, 177 (1976); *Norwood v. Harrison*, 413 U.S. 455, 461-62 (1973); *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J., concurring).

¹⁰ Metzger, *supra* note 1, at 1400.

¹¹ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .").

¹² *Id.*

¹³ *Lee v. Weisman*, 505 U.S. 577, 609 (1992) (Blackmun, J., concurring) ("We have believed that religious freedom cannot exist in the absence of a free democratic government, and that such a government cannot endure when there is a fusion between religion and the political regime.").

¹⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

¹⁵ *Id.* at 612-13 (citations omitted).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ DeGroff, *supra* note 2, at 375; see also *Lemon*, 403 U.S. at 612-13.

(assuming the interest truly is secular and not a deliberate interference with religion), taking into account other regulatory alternatives to achieve the same interest, with the amount of interference with or endorsement of religion that will result, which the court may not seek alternatives for.

The *Lemon* test, and the freedom of religion clauses in the First Amendment in general, are not designed to fully segregate the State and the Church.¹⁹ Instead, it is designed to ensure, “that no religion be sponsored or favored, none commanded, and none inhibited.”²⁰ The test thus acts to allow the State to breach the wall of separation only in those cases where the State’s actions impede religious freedom and religious establishment, and only to the extent necessary.²¹ A functionally identical test was created in *Wisconsin v. Yoder*²² regarding the Free Exercise Clause cases, which, quoting a summary from the later case of *Catholic High School Association v. Culvert*,²³ requires a balancing of, “whether: (1) the claims presented were religious in nature and not secular; (2) the State action burdened the religious exercise; and (3) the State interest was sufficiently compelling to override the constitutional right of free exercise of religion.”²⁴ However, the Court decision in *Employment Division v. Smith*²⁵ has served to negate the impact of *Yoder*.²⁶ *Smith* held that any facially neutral state regulation in regards to its impact on free exercise, irregardless of the burdens it imposes on free exercise, is constitutional.²⁷ It is important to keep in mind the *Yoder* balancing test, due to the intense lack of comfort the Court has shown with the *Smith* bright-line test. In the case of *Church of Lukumi*

¹⁹ N.Y. State Employment Relations Bd. v. Christ the King Reg’l High Sch., 682 N.E.2d 960, 965 (N.Y. 1997).

The Supreme Court has made it clear, when discussing the Establishment Clause, that “total separation is not possible in an absolute sense, [for] some relationship between government and religious organizations is inevitable.” The [Second Circuit Court of Appeals] further explained that “the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship.”

Id. (citations omitted).

²⁰ *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970); DeGross, *supra* note 2, at 374.

²¹ DeGross, *supra* note 2, at 377 (“Legislation that unduly burdened the exercise of religious beliefs was considered unconstitutional unless the state could demonstrate ‘a compelling state interest in the regulation of a subject within the state’s constitutional power to regulate.” (citing *Sherbert v. Verner*, 374 U.S. 398, 403 (1963)).

²² *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

²³ *Catholic High Sch. Ass’n v. Culvert*, 753 F.2d 1161, 1165 (2d Cir. 1985).

²⁴ *Id.* at 1169; *see also* *Yoder*, 406 U.S. at 221.

²⁵ *Employment Div. v. Smith*, 494 U.S. 872 (1990).

²⁶ *See id.* at 890.

²⁷ *Id.*

Babalu Aye v. City of Hialeah,²⁸ the dicta of the various Justices (including Justice Scalia, who wrote *Smith*) indicates a strong desire to move away from the *Smith* test in the future.²⁹ If the Court were to break with *Smith*, a test like that created in *Yoder* is a likely starting point for the creation of a new balancing test.

In discussing the application of these tests to the expansion of state regulations on private schools, it is difficult to fully decide how the courts will come out in any particular case, as the decisions are often split amongst the circuits. Yet some general tenets do tend to hold steadfast. Courts have almost always granted that the State has a sufficient interest in private education such that it can extend *some* forms of regulation based solely on the State's interest in ensuring that a school's students are receiving a sufficient education.³⁰ For this singular interest, the State can require basic accreditation and educational standards compliance.³¹ However, these accreditation standards must be of a minimal character, narrowly tailored to accomplish only the State's interest in ensuring a basic level of education.³² When Ohio issued a more stringent accreditation requirement on religious schools, the state supreme court, in *State ex rel. Nagle v. Olin*,³³ ruled that the requirement was overly burdensome and thus unconstitutional.³⁴ With

²⁸ *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

²⁹ *Id.* at 559 (Scalia, J., concurring). Scalia stated,

Nor, in my view, does it matter that a legislature consists entirely of the purehearted, if the law it enacts in fact singles out a religious practice for special burdens. Had the ordinances here been passed with no motive on the part of any councilman except the ardent desire to prevent cruelty to animals (as might in fact have been the case), they would nonetheless be invalid.

Id.

³⁰ DeGross, *supra* note 2, at 379-80 ("States have a substantial interest in ensuring that all children receive an adequate education. They, therefore, have the right to regulate the manner in which private schools perform their basic educational function, and may require such schools to meet certain minimum standards No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught and that nothing be taught which is manifestly inimical to the public welfare."). *Id.* (citation omitted); see e.g., *Wolman v. Walter*, 433 U.S. 229, 240 (1977); *Levitt v. Comm. for Pub. Educ.*, 413 U.S. 472, 479 (1973).

³¹ DeGross, *supra* note 2, at 381.

³² *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972).

³³ *State ex rel. Nagle v. Olin*, 415 N.E.2d 279 (Ohio 1980).

³⁴ *Id.* at 288

[U]ntil such time as the State Board of Education adopts minimum standards which go no further than necessary to assure the state's legitimate interests in

this basic framework, the following examples should be illustrative of the distinctions and the disparities that exist between public and religious schools.

A. Unionization and Collective Bargaining

Private employees are currently protected statutorily in their collective bargaining actions under the National Labor Relations Act ("NLRA"). The Supreme Court has ruled that—the NLRA or comparable statutes notwithstanding—workers are permitted by the freedom of assembly clause to form unions.³⁵ However, without some form of statutory provision, an employer is not required to engage in any form of bargaining with the union.³⁶ The NLRA requires private employers to participate in good faith collective bargaining with all employees. Most states have adopted a rule for public employees based on the NLRA to some degree, requiring good faith bargaining about select issues, though the State has significant authority to limit the scope of the negotiations.³⁷ However, for the most part, a state cannot mandate a decision or resolution in a collective bargaining dispute, it may only require that the two parties sit down in good faith.³⁸

In most states, public school teachers receive something less than the NLRA basis of employment rights, with the actual degree of bargaining power varying from state to state. Religious school teachers receive virtually no protection through federal law, though recent state decisions have actually served to bolster their protection to be nearly

the education of children in private elementary schools, the balance is weighted, *ab initio*, in favor of a First Amendment claim to religious freedom.

DeGross, *supra* note 2, at 382.

³⁵ *Developments in the Law—Public Employment*, 97 HARV. L. REV. 1611, 1676 (1984) ("When Congress enacted the National Labor Relations Act (NLRA) in 1935, it exempted public employers—governments and their agencies—from the obligation to engage in collective bargaining."); *see, e.g.*, *Smith v. Ark. State Highway Employees, Local 1315*, 441 U.S. 463, 464-65 (1979) (per curiam); *Elfbrandt v. Russell*, 384 U.S. 11, 15-17 (1966).

³⁶ *Developments in the Law—Public Employment, supra* note 35, at 1617; *see, e.g.*, *Smith*, 441 U.S. at 465 ("[T]he First Amendment does not impose any affirmative obligation on the government to listen, to respond or, in this context, to recognize the association and bargain with it.").

³⁷ *Developments in the Law—Public Employment, supra* note 35, at 1617. The subject matter most often restricted by these statutes relate to terms and conditions outside the matters of wages and hours.

³⁸ *See Catholic High Sch. Ass'n v. Culvert*, 753 F.2d 1161, 1167 (2d Cir. 1985) ("It 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."); *N.Y. State Employment Relations Bd. v. Christ the King Reg'l High Sch.*, 682 N.E.2d 960, 965 (N.Y. 1997).

equal to that of other private school teachers.³⁹ Under federal law, religious school teachers may unionize through their constitutional right to assemble, but their employer has no statutory duty to pay attention to their requests, making collective action virtually ineffective.

In *NLRB v. Catholic Bishop of Chicago*,⁴⁰ the Supreme Court held that the National Labor Relations Board (“NLRB”) could not assert jurisdiction over a private parochial school to require the school to engage in collective bargaining with the school’s lay teachers’ union.⁴¹ In making this determination, the Court ruled that allowing the NLRB to assert jurisdiction under the National Labor Relations Act in dealing with a religious institution violated the Establishment Clause of the First Amendment.⁴² The Court did not go into depth in explaining its determination in this case; it simply held that allowing jurisdiction would go against prior precedent concerning both the NLRB and the First Amendment.⁴³

Catholic Bishop, though never overturned by the Supreme Court, has been roundly criticized and marginalized by state courts. In *South Jersey Catholic School Teachers Organization v. St. Teresa of the Infant Jesus Church Elementary School*,⁴⁴ New Jersey ruled that *Catholic Bishop* was a case of statutory interpretation, not constitutional analysis; thus,, under New Jersey state law, the New Jersey version of the NLRB could assert jurisdiction under the New Jersey version of the

³⁹ See, e.g., *Catholic High Sch.*, 753 F.2d at 1167; *S. Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch.*, 696 A.2d 709, 714 (N.J. 1997); *Hill-Murray Fed’n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 862 (Minn. 1992).

⁴⁰ *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

⁴¹ *Id.* at 504. The religious school teachers referenced throughout this article are restricted to lay teachers and their interests. Members of the clergy who also act as teachers are subject to much lower protections and pose issues outside of the scope of the immediate discussion.

⁴² *Id.* at 500.

⁴³ *Id.* at 499.

The Board thus recognizes that its assertion of jurisdiction over teachers in religious schools constitutes some degree of intrusion into the administration of the affairs of church-operated schools. Implicit in the Board’s distinction between schools that are “completely religious” and those “religiously associated” is also an acknowledgment of some degree of entanglement. Because that distinction was measured by a school’s involvement with commerce, however, and not by its religious association, it is clear that the Board never envisioned any sort of religious litmus test for determining when to assert jurisdiction. Nevertheless, by expressing its traditional jurisdictional standards in First Amendment terms, the Board has plainly recognized that intrusion into this area could run afoul of the Religion Clauses and hence preclude jurisdiction on constitutional grounds.

Id.

⁴⁴ *St. Teresa*, 696 A.2d 709 (N.J. 1997).

NLRA to engage in exactly the kind of intervention barred in *Catholic Bishop*.⁴⁵ The *St. Teresa* court stated that the United States Supreme Court in *Catholic Bishop* specifically avoided the constitutional issues implicit in State regulation of religious institutions and, in so doing, left the analysis completely under existing constitutional doctrine.⁴⁶ On both counts, which were based on the Free Exercise and Establishment Clauses, the court found, under the respective balancing tests, that the school's prior practices of granting some collective bargaining rights to teachers could be used as evidence to show that the religious interests of the school were not substantially harmed by the regulation requiring collective bargaining.⁴⁷ In analyzing the claims, the court noted that the regulations were generally applicable to all employees, and did not infringe on the rights of religious employers any more than other secular employers; thus the regulations fell within the same secular compelling governmental interest of insuring the usage of collective action by employees.⁴⁸ Similarly, in *Catholic High School Association v. Culvert*,⁴⁹ the Second Circuit held that so long as the assertion of jurisdiction only "has an indirect and incidental effect on employment decisions in parochial schools involving religious issues, this minimal intrusion is justified by the State's compelling interest in collective bargaining."⁵⁰

Lastly and most notably, in *Hill-Murray Federation of Teachers v.*

⁴⁵ *Id.* at 714.

Defendants' reliance on *Catholic Bishop* is misplaced. That case was decided strictly on statutory interpretation grounds. The Court ruled that in the absence of "an 'affirmative intention of the Congress clearly expressed'" that teachers in church-operated schools should be covered by the NLRA, the NLRB did not have jurisdiction to "require church-operated schools to grant recognition to unions as bargaining agents for their teachers."

Id. (citations omitted).

⁴⁶ *Id.*

⁴⁷ *Id.* at 716-17.

The Diocese's past history of collective bargaining with lay high-school teachers strongly suggests that bargaining over some secular terms and conditions of employment can be achieved without either advancing or inhibiting religion. . . . Indeed, the agreement between the Diocese and the elected representative for the lay high-school teachers preserves the Bishop's exclusive right to structure the schools and their philosophies. Thus, bargaining collectively over similar secular terms and conditions of employment for lay elementary school teachers would not inhibit defendants' religion by interfering with issues of structure and indoctrination.

Id.

⁴⁸ *Id.* at 721-22.

⁴⁹ *Catholic High Sch. Ass'n v. Culvert*, 753 F.2d 1161, 1167 (2d Cir. 1985).

⁵⁰ *Id.* at 1171.

Hill-Murray High Sch.,⁵¹ the Minnesota Supreme Court held that, because the Minnesota Labor Relations Act contained a list of exclusions, the fact that religious school teachers were not included in that list indicated a desire for the statute to include them in its protections.⁵² The *Hill-Murray* court went on to state:

[T]he right to free exercise of religion does not include the right to be free from neutral regulatory laws which regulate only secular activities within a church affiliated institution. . . . [The religious school] receives limited public funds, is incorporated under state laws, and is subject to governmental regulation of fire codes, zoning ordinances, and compulsory student attendance. In analyzing an excessive entanglement claim, the “character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and the religious authority” is scrutinized. . . . The [F]irst [A]mendment wall of separation between church and state does not prohibit limited governmental regulation of purely secular aspects of a church school’s operation.⁵³

Thus, *Hill-Murray* seems to expand the question of undue interference with the free exercise of religion beyond pure statutory construction and into the realm of analyzing the functional effects of the religious interference in the form of a balancing test, comparing the State’s secular interest in a regulation to the level of interference with the free exercise of religion. The State, under this test, having a regulatory interest in the secular aspect of insuring free and fair collective bargaining in the private sector, must balance any possible religious interferences stemming from the regulation.⁵⁴ In striking this balance, the court judges the nature of the religious doctrine the regulation arguably interferes with and makes a determination on the materiality of the actual conflict between the regulation and the religious doctrine.⁵⁵

⁵¹ *Hill-Murray Federation of Teachers v. Hill-Murray High School*, 487 N.W.2d 857 (Minn. 1992).

⁵² *Id.* at 862.

⁵³ *Id.* at 863-64.

⁵⁴ *Id.*

⁵⁵ *Id.* at 865.

[W]e take note that the Catholic Church has a long history of support for labor unions and the right of workers to organize for the purposes of collective bargaining. We do not believe that *Hill-Murray* is arguing that recognition of labor unions is against Catholic doctrine. What *Hill-Murray* is essentially arguing is that the separation of church and state prohibits the state, via the Bureau, from telling *Hill-Murray* what to do vis-à-vis their employees. The separation of church and state is a constitutional liberty that is subject to balancing by compelling state interests; “the liberty of conscience . . . shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.” MINN. CONST. art. I, § 16.

This indicates a significant move towards a more functional view of accidental governmental interferences with religion, far removed from the formal line drawing of *Catholic Bishop*. The courts are now able to actually make determinative judgments on the value of religious doctrine when construing the free exercise impact of facially secular state regulations.⁵⁶ In *Hill-Murray*, the Minnesota Supreme Court asserted its independent power to determine a religious institution's view of its own religious doctrine, and then balance that view with the court's conception of the secular interest in the regulation.⁵⁷ This is particularly worrisome on First Amendment grounds, but for the purposes of the discussion at hand, it indicates a shift away from hard and fast rules regarding arguably secular statutory schemes and their impact on religious organizations.

In comparison, public school teachers are not covered by the NLRA and are thus not under the jurisdiction of the NLRB.⁵⁸ This is due to an express exemption in the NLRA for public employees.⁵⁹ However, each state has enacted some form of statutory framework under which public school teachers can be protected for their collective bargaining actions and union activities.⁶⁰ The rationale behind exempting public employees is the fear that public employees engaged in collective bargaining will either harm the independent decision making powers of the government, or engage in general strikes of such a character as to be inherently harmful to the public interest.⁶¹ These restrictions were significantly lessened once it became clear that the benefits of responsible collective action, such as ensuring fair treatment and conditions for workers, far outweighed the fears of irresponsible collective action.⁶² However, it still remains the law in all states that public school teachers do not possess a

Id.

⁵⁶ *Id.* at 865-66.

⁵⁷ *Id.* at 857, 867 ("The state's interests in promoting the peace and safety of industrial relations, the recognition of the statutory guarantees of collective association and bargaining, and the first amendment protection of the right of association outweigh the minimal infringement of Hill-Murray's exercise of religious beliefs.").

⁵⁸ *Developments in the Law—Public Employment*, *supra* note 35, at 1676 ("When Congress enacted the National Labor Relations Act (NLRA) in 1935, it exempted public employers—governments and their agencies—from the obligation to engage in collective bargaining.").

⁵⁹ *Id.*

⁶⁰ *Id.* at 1677; *see, e.g.*, 5 U.S.C. § 7101(a) (1982); N.J. STAT. ANN. § 34:13A-2 (West Supp. 1983-1984); OR. REV. STAT. § 243.656 (1981); Pa. Labor Relations Bd. v. State Coll. Area Sch. Dist., 337 A.2d 262, 266 (Pa. 1975); *see also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 224 (1977) ("The desirability of labor peace is no less important in the public sector.").

⁶¹ *Id.* at 1676-77.

⁶² *Id.* at 1677.

general right to strike with legal protections.⁶³ Most states that grant public sector bargaining still restrict the scope of acceptable bargaining subjects to specific topics that are generally related directly to wages and employment circumstances.⁶⁴

Ensuring that teachers have an avenue to petition their schools for better wages, hours, and conditions (which may include educational resources and lower class sizes) is of the utmost importance to the public school system. The best schools are those that employ the best teachers who are placed in the best circumstances to perform their jobs. Teachers' unions and additional labor protections serve both of these prongs: (1) the protection and support of the union can help create a situation where the prospect of public school teaching becomes a more attractive employment option for more qualified individuals and (2) a union's judicious use of the power of collective action and bargaining can exert sufficient pressure on school boards and public opinion, and consequently serve to compel better conditions for both teachers and students. Without this pressure to improve, it is quite possible that public education could digress even further into the deadlock of mediocrity, forcing the government to seek means to revitalize the entire public school body.

B. Teacher Certification

A public school board can institute basically any form of certification requirement for its teachers, though most states have statutory requirements that a public school teacher must meet. These statutory requirements do not, for the most part, apply to private educators. The Court in *Pierce* ruled that the State does have a sufficient regulatory interest to implement *some* regulations on private teacher certification but failed to state exactly what restrictions those may be, other than to say the State may require, "that teachers shall be of good

⁶³ *Id.* at 1701.

⁶⁴ David J. Strom & Stephanie S. Baxter, *From the Statehouse to the Schoolhouse: How Legislatures and Courts Shaped Labor Relations for Public Education Employees During the Last Decade*, 30 J.L. & EDUC. 275, 292-94 (2001). For example, [A Michigan statute allowed bargaining], but it also limited the scope of bargaining in nine areas. Among the most significant restrictions were prohibitions on bargaining over: [1] subcontracting for non-instructional support services; [2] the beginning of the school year and the length of the school day; [3] the use of volunteers in the schools; and [4] decisions concerning the use of experimental or pilot education programs including staffing and the use of technology in such programs. As a result of these amendments, any contract provision containing a prohibited subject of bargaining would be unenforceable.

Id.

moral character and patriotic disposition.⁶⁵ Later courts have consistently held that this state regulation must be less stringent than that utilized to ensure proper certification of public school teachers, and instead that the decision of what qualifications make teachers acceptable must be, to a large extent and beyond a fairly low regulatory floor, left up to the particular private institution.

In *New Life Baptist Church Academy v. East Longmeadow*,⁶⁶ the United States Court of Appeals for the First Circuit held that a city ordinance, requiring all parochial schools to provide functionally equivalent secular education as public schools, was constitutional. The ordinance required both a showing that the schools' teachers were properly qualified to provide education and a report by the school to show that their secular curriculum was in proper compliance.⁶⁷ In so holding, the court stated that, because the State had a compelling interest in ensuring proper secular education of all students,⁶⁸ a regulation governing only the secular aspects of the education could be held constitutional, assuming the regulation is the least restrictive means to achieve the compelling interest.⁶⁹

Similarly, in *Fellowship Baptist Church v. Benton*,⁷⁰ the United States Court of Appeals for the Eight Circuit held constitutional an ordinance requiring all children to be placed, until eighth grade, in a public school or one offering an equivalent secular education, with private schools having to submit reports to ensure their compliance with the equivalency requirements and to ensure that their teachers were properly certified.⁷¹ The court held that, regarding the ordinance's interference with parochial schools, "[there is] clear authority, [and] even a duty, for some state intervention into private religious schools to ensure the State's interests are being met."⁷² The court applied the *Yoder* accidental interference balancing test, finding that the reporting requirements and the mandate for functionally equivalent secular education constituted only a minor interference with religious exercise but comprised a substantial interest to the State.⁷³

⁶⁵ *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925); see also *Farrington v. Tokushige*, 273 U.S. 284 (1927); DeGross, *supra* note 2, at 387.

⁶⁶ *New Life Baptist Church Acad. v. E. Longmeadow*, 885 F.2d 940 (1st Cir. 1989).

⁶⁷ See generally *id.*

⁶⁸ *Id.* at 945.

⁶⁹ *Id.* at 946-47.

⁷⁰ *Fellowship Baptist Church v. Benton*, 815 F.2d 485 (8th Cir. 1987).

⁷¹ See generally *id.*

⁷² *Id.* at 491.

⁷³ *Id.*

While there may be some debate over the precise language to be used in defining the standard of review in free exercise cases, we have no difficulty

C. Employment Discrimination

Public schools do not fall under any statutory exceptions to Title VII⁷⁴ and may be held liable for discrimination on the basis of age, sex, race, and disability under the normal procedures afforded to private employees.⁷⁵ Additionally, public schools must act to protect the First Amendment rights of its teachers, within the reasonable limits imposed by their contractual relationship with the State.⁷⁶

In addition to possessing the power to set lower standards for inclusion in the school as an educator, private schools generally maintain almost full discretion in deciding the identity, character, and behavior of its student body and faculty. Unless the school has an explicit contract to the contrary, private institutions are under no obligation to protect any student or faculty member's First Amendment or other constitutional rights. It may fire a teacher or discipline a student purely for their religious beliefs or political speech.⁷⁷ In *Rendell-Baker v. Kohn*, a private school teacher was fired for stating her opinions in a dispute over staff hiring decisions.⁷⁸ The Court found that such a discharge was legal, as the private school did not extend First Amendment protections to its employees.⁷⁹

There are significant restrictions on discrimination in religious schools, but only through basic statutory discrimination on employment grounds, where the interference with religion is deemed to be outweighed by the State's interest in preventing specific forms of discrimination. For example, in *Dole v. Shenandoah Baptist Church*, the Fourth Circuit found that a religious school's teacher salary provision, which granted additional "head-of-household" bonuses to all male teachers (regardless of marital status), violated the Fair Labor Standards Act ("FLSA").⁸⁰ The court rejected the argument of the religious school that the imposition of the FLSA would interfere with the

upholding the reporting requirements in this case. As the district court determined, the burden on plaintiff principals' religious beliefs—if one exists at all—is very minimal and is clearly outweighed by the state's interest in receiving reliable information about where children are being educated and by whom.

Id. (citations omitted).

⁷⁴ 42 U.S.C. § 2000e (2005).

⁷⁵ *Id.*; see, e.g., *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977).

⁷⁶ See, e.g., *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415-16 (1979); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960).

⁷⁷ Metzger, *supra* note 1, at 1403 ("While public schools must respect the First Amendment rights of teachers and students, private schools theoretically can fire employees and expel students who question how the school is run.").

⁷⁸ *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

⁷⁹ *Id.* at 837-38.

⁸⁰ *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

institution's free exercise of religion.⁸¹ In making this determination, the court reviewed the record of the evidence and the statement of school administrators to determine that:

The pay requirements at issue do not cut to the heart of Shenandoah beliefs. Although Shenandoah's head-of-household pay supplement was grounded on a biblical passage, church members testified that the Bible does not mandate a pay differential based on sex. They also testified that no Shenandoah doctrine prevents Roanoke Valley from paying women as much as men or from paying the minimum wage.⁸²

Much like the decision in *Hill-Murray*, it seems worrisome to allow judges to make determinations of a religious nature, though at least here the determination was basically made through direct evidence of the unfounded nature of the policy.⁸³ Thus, it appears that substantive employment requirements do apply directly to religious employers.

However, religious employers are directly excluded from liability from Title VII under Title VII § 702.⁸⁴ In *Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,⁸⁵ the Supreme Court upheld § 702 even though the religious institution in this case fired an employee for failing to show that he was a member of the church the institution was connected to.⁸⁶ In holding the statute constitutional, the Court noted that providing exceptions and exclusions to religious employers did not inherently conflict with the Establishment Clause.⁸⁷ Instead, this exception served only to unburden the free exercise of religion from statutory restrictions, and thus advanced a constitutional interest through which the Court could act.⁸⁸

III. AN ANALYTICAL SURVEY OF THE POTENTIAL IMPACT OF SCHOOL VOUCHERS ON STATE INTERFERENCES WITH PRIVATE RELIGIOUS SCHOOLS

The introduction of school vouchers impacts the public/private distinction in school regulation to a profound extent. *San Antonio Independent School District v. Rodriguez* stands for the proposition that

⁸¹ *Id.* at 1393.

⁸² *Id.* at 1397.

⁸³ *Id.*

⁸⁴ 42 U.S.C. § 2000e-1(a) (2005); see e.g., *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

⁸⁵ *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987).

⁸⁶ *Id.* at 334.

⁸⁷ *Id.*

⁸⁸ *Id.* at 335-37 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence.").

there is no fundamental constitutional right to a public education.⁸⁹ The case and its holding are generally deemed to be historical curiosities, with the case being functionally overturned.⁹⁰ Both the cases surrounding and including *Brown v. Board of Education* make it clear that not only is a proper free public education a service the State is compelled to provide to its citizens, but it actually is one of the most important requirements for the preservation and growth of our nation.⁹¹ The case of *Goss v. Lopez* holds that when a state imposes a compulsory attendance statute and a requirement for provision of public education (as almost all states have done), all students affected by that statute are entitled to due process and equal protection under the Fourteenth Amendment.⁹² Therefore, once a state provides a guarantee of education to children by statute, it is under a constitutional duty to provide the same protection of that grant to each and every student, or face a violation of equal protection.⁹³

When private schools are genuinely private, the state interest in ensuring a proper education is comparatively low. Arguably, the basic act of attending a private school is in effect opting out of the proffered public education of the State in favor of an education provided by a private institution.⁹⁴ The private school students may be designated as a class that has chosen to voluntarily exempt themselves from their statutory and constitutional rights under the State's created duty to provide a public education.⁹⁵ Thus, the only real regulatory interest in the private institution is to ensure that they comply with other private

⁸⁹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 1 (1973).

⁹⁰ *Id.* at 35 ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.")

⁹¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Id.

⁹² *Goss v. Lopez*, 419 U.S. 565 (1975).

⁹³ *Id.*

⁹⁴ Metzger, *supra* note 1, at 1395.

⁹⁵ *Id.*

business statutes and that their graduates are educated in such a way as not to dilute the opportunities of public school students. There is no constitutional duty to ensure that these private school students are receiving an adequate education. The belief is that the educational interests are served to a sufficient degree by the free marketplace, since only by offering a qualitatively equal, if not superior, education will parents choose to pay tuition so that their children attend a private school over the free public education offered by the State. While the State can impose the minor regulations on private education expressed previously, in this context there is really only a negligible state regulatory interest to be promoted and no express duty on the State to compel their protection of students.

Once the issue of vouchers in any form enters the picture, the State's regulatory interest is dramatically shifted. Instead of parents choosing private education as an opt out of the State's public education plan, the State is giving money to parents to use private school as an alternative to the public schools.⁹⁶ Thus it may be argued that, by issuing vouchers to attend qualifying private schools, the State is promising that the education the private school provides is to the standard required by the State's duty to provide a free public education; in effect privatizing a portion of the State's educational duties.⁹⁷ If this is the case, all aspects of the educational process in the voucher school fall under an increased state regulatory interest, approaching the state interest inherent in the public education system.⁹⁸ At that point, the state interest moves into ensuring that the actual education provided by the private institution is up to the standards required in providing Court mandated public education.⁹⁹ In so doing, this may trigger a situation where "courts may hold that such nominally private action in fact constitutes state action for constitutional purposes. More frequently, the actions described may run afoul of legislative, regulatory, or contractual requirements, and the government may itself police the conduct of its private partners to ensure they adhere to constitutional prohibitions."¹⁰⁰

⁹⁶ Price, *supra* note 3, at 438.

⁹⁷ This is to be distinguished from the phenomenon of charter schools, which act as privately run public schools. Charter schools operate as a private entity outside the rules of the school board as the result of a contract with the state or county. While there are certainly corollary issues affecting both forms of schools in a similar manner, this article does not address this issue directly. Metzger, *supra* note 1, at 1389.

⁹⁸ Some would argue that this increased interest exists even without vouchers. DeGross, *supra* note 2, at 391 ("[Some] have suggested that private schools perform an essentially public function in educating children, and that the state therefore has a substantial interest in determining what is taught.").

⁹⁹ Metzger, *supra* note 1, at 1403-04.

¹⁰⁰ *Id.* at 1404 (footnote omitted).

For nonreligious private schools, the imposition of additional regulatory schemes is a simple life, liberty, or property restriction on private action, which requires a highly deferential rational basis test. This test would be clearly met by the State's interests in ensuring the proper education of private school students, which is being promoted by the imposition of increased teacher certification requirements. Also, the test would be met by the State's interest in preventing discrimination in public accommodations, which is served by prohibiting discrimination by private schools who receive state funded vouchers.

The issue becomes increasingly muddled as it relates to religious teachers in private religious schools. At what point does a state certification requirement impede a private religious organization from freely exercising their religion in allowing for their preferred speakers to speak to the children attending the religious school? Does the State's creation and support of a certification requirement give de facto authorization to the school's religious purpose in its teaching and thus become a violation of the Establishment Clause? These are difficult questions to answer, especially in light of the increased state interest through vouchers.¹⁰¹ Generally, the State has been required to stay out of the business of regulating who can and who can not act as clergy or religious instructors in churches.¹⁰² In that private capacity, it makes perfect sense to exclude the State from interfering in this most necessarily insulated of endeavors.¹⁰³ However, once the State's interest shifts as a result of the delegation of education to these religious institutions, it becomes a contentious issue regarding whether the State can impose facially neutral, but potentially forceful, regulations, such as educational qualifications and certification requirements of teachers acting as both agents of the State for public education and private agents for a religious entity.¹⁰⁴

Analogous situations are rare and it is difficult to foresee how the Court will apply existing standards to accommodate this new situation and new State interest. However, a crude attempt to apply the *Lemon* balancing test lends itself to an interesting discussion and perhaps the most illuminating example of the complications inherent in this new

¹⁰¹ See generally DeGroff, *supra* note 2, at 379-80.

¹⁰² 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, 264 (1996).

¹⁰³ *Id.* at 291 ("[T]he relationship between clergy and religious organizations is so highly ecclesiastical that any governmental intrusion would result in an intolerable level of contact between church and state.").

¹⁰⁴ See generally *Goss v. Lopez*, 419 U.S. 565 (1975); Sean T. McLaughlin, *Some Strings Attached? Federal Private School Vouchers and the Regulation Carousel*, 24 WHITTIER L. REV. 857, 888 (2003).

aspect of the interaction between the conflicting and overlapping interests of the State, private enterprise, and religious institutions. *Lemon* concerned direct state aid to parochial schools, which the Court held to be an unconstitutional establishment of religion, unless the aid is narrowly tailored to accommodate the secular regulatory interest of the governing state.¹⁰⁵ Here, the concern is whether applying direct regulations on a parochial school may also be deemed to violate the Establishment Clause of the First Amendment.

In functional analysis, the *Lemon* test serves to first balance the State's nonreligious interest in imposing the regulation, considering any regulatory alternatives that impose lower interferences with religion against the current scheme's interference with religion.¹⁰⁶ The State's nonreligious regulatory interest here may be extremely high. The State will likely be under a duty to insure the proper education of voucher students as quasi-public school students, notwithstanding the religious nature of the private school. Assuming the voucher system itself is valid, the regulatory alternatives to ensure proper education are virtually nonexistent. If it is shown that the State has a duty to ensure the quality of the education at the schools it provides vouchers for, the State's interest may likely rise to a degree representing a compelling governmental interest. The actual aid to the religious organization by imposing these regulations is simply the fear that doing so represents the State providing implicit support to the religious message represented by the school. In comparison with the state interest in education (and avoiding the imposition of liability), this Establishment Clause complaint would probably fail. There is an additional possible challenge under the case of *Hunt v. McNair*,¹⁰⁷ which found that some "institutions are, 'pervasively sectarian' [and] that any aid to them, even when limited to a secular function of the organization, would nevertheless constitute an Establishment Clause violation because any aid, no matter how limited, would nevertheless support the pervasive sectarian function."¹⁰⁸

Whatever the case is that implicates the First Amendment issue, it all becomes moot unless a party is able to show that the imposition of the vouchers themselves represent a state action upon which a plaintiff can sue the State for the actions of the private voucher school, placing the school under a duty to ensure that the private voucher school maintains

¹⁰⁵ Price, *supra* note 3, at 469 ("The *Lemon* test thus incorporates the Court's prohibition of all state aid or support of religion by permitting only aid to parochial schools which supports or benefits the secular purpose or functions of the school.").

¹⁰⁶ See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹⁰⁷ *Hunt v. McNair*, 413 U.S. 734 (1973).

¹⁰⁸ Price, *supra* note 3, at 470 (quoting *McNair*, 413 U.S. at 743).

a specific standard of educational care.¹⁰⁹ The test for state action has two distinct prongs:

[F]irst, whether “the [challenged] deprivation . . . [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible[;]” and second, whether “the party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor.”¹¹⁰

Courts have rarely found that government contracts create state action, but here, where the State is expressly delegating through contract its own constitutional duty, it is easy to imagine a different outcome.¹¹¹ It is illustrative to see how the imposition of vouchers into the analytical equation can shift the State’s regulatory interest in the aforementioned areas.

A. Unionization and Collective Bargaining

As stated, many state courts have held that the compelling governmental regulatory interest in protecting collective bargaining can overcome a First Amendment claim so long as the statute is genuinely secular in nature and narrowly tailored to protect the State’s interest with the minimum possible interference or support of religious institutions. The Supreme Court, though, has not explicitly altered its formalistic stance from *Catholic Bishop*. However, assuming that the current trend holds, a future holding by the Supreme Court would likely adopt a more functional analysis of the issue, and expand the NLRA to encompass religious school teachers. If this is the case, it appears likely that the Court will adopt a balancing test of the regulatory interest versus the interference with religious institutions and beliefs.

It seems likely that given the situation and duties created by vouchers, the Court will find that the regulatory interest of the State is extremely high and thus would have to balance that with the interference caused by the specific statute. The NLRA has been the basic framework of the state statutes allowed in *Culvert*, *Hill-Murray*, and *St. Theresa*, and thus the actual interference exhibited with religious beliefs under the NLRA would likely be deemed to be minor. This is especially likely since cases such as *Hill-Murray* have allowed the Court to make its own determinations as to the contrasting religious interest, which may or may not conform with the stated religious interests and beliefs of

¹⁰⁹ See Metzger, *supra* note 1, at 1412 (discussing Supreme Court analysis of state action doctrine).

¹¹⁰ *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982)).

¹¹¹ *Id.* at 1419-20 (“No doubt, the Supreme Court will clamp down when it perceives an effort by government to evade its constitutional obligations.”).

the religious institution.¹¹² It is thus likely that the Court, in a modern voucher case, would find that the newly heightened state interest would serve to overcome the minor to moderate imposition on religious interests.

B. Teacher Certification

Foremost among the concerns regarding the increased State interest created by vouchers is the potential for imposition of greater regulation on the issuance of teacher certifications to private school educators. The current requirements for private school teachers are sufficient to satisfy the relatively low governmental interest in insuring that students in private schools, obtaining state high school diplomas, are sufficiently educated to maintain the value and esteem of the State's public school graduates.¹¹³ In the newer voucher systems, the State's interest arguably shifts to ensuring that the private educators are of the same caliber as that required by public educational institutions, and that the entire State sponsored educational system provides a functionally similar education, both in terms of content and quality.

Some have argued that the cases of *Benton* and *New Life Baptist Church* seem to allow states using voucher programs to institute more stringent teacher certification requirements, so long as the requirements are narrowly tailored to the secular purpose of ensuring effective education in voucher schools.¹¹⁴ In these two cases, a state regulation to require functionally equivalent education in private parochial schools was held to be valid under the compelling governmental interest test.¹¹⁵ The courts in both cases indicated that so long as the statute actually served to equalize the secular education received among private and public schools, the states had compelling interests in ensuring education.¹¹⁶

The Supreme Court has never directly addressed the issues created by these appellate level decisions and has never said that ensuring an adequate education for all private students falls within the narrow confines of the compelling governmental interest test. However, the state regulatory interests in question are directly affected by the introduction of vouchers. If it is the case that states are delegating public education to

¹¹² *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 865 (Minn. 1992).

¹¹³ *See State ex rel. Douglas v. Faith Baptist Church of Louisville*, 301 N.W.2d 571, 597 (Neb. 1981) ("[I]t goes without saying that the State has a compelling interest in the quality and ability of those who are to teach its young people.").

¹¹⁴ *McLaughlin*, *supra* note 104, at 890-91.

¹¹⁵ *New Life Baptist Church Acad. v. E. Longmeadow*, 885 F.2d 940, 944-45 (1st Cir. 1989); *Fellowship Baptist Church v. Benton* 815 F.2d 485, 490-91 (8th Cir. 1987).

¹¹⁶ *See New Life Baptist Church*, 885 F.2d at 940; *Benton*, 815 F.2d at 485.

private actors by providing vouchers, it seems only logical that the most likely issues that would fall under an expanded compelling governmental interest would be those that most directly effect the educational quality of private educational institutions, which would include the requirements aimed at insuring that educators are properly qualified to provide education. In light of this duty, and the balancing tests of *Yoder* and *Lemon*, which require the narrow tailoring of any regulation to address the secular interest without unduly interfering with religious practices, a teacher certification requirement seems like the most logical regulation. It is directly addressed to the secular interest in question and, properly drafted, can serve to address the State's regulatory interest with the least possible interference with religion. Requiring all teachers to have a specific level of qualification should not serve to unduly interfere with the free exercise of religion, and a court utilizing the *Hill-Murray* means of analyzing religious beliefs would very likely find that there exists no religious dogma that speaks against having properly educated educators.¹¹⁷

C. *Employment Discrimination*

There is no more troubling issue in discussing voucher programs than discrimination in schools. The fight for equal treatment in public education was so hard-fought and so painful to the nation that the idea of fighting such a war again, especially in the context of religion, is genuinely worrisome. At the same time, because we as a society have fought so stringently for equality in education and educational employment, there is a strong desire to maintain that which we have earned.

The difficulty here is that freedom of religion is a systemic value of American society, arguably behind only the freedom to vote and freedom of speech in importance. Thus, any regulation combating discrimination is going to face a far more stringent interference element of a balancing test than the other issues discussed above. As state courts have held, religious values have relatively little to say about the morality of collective bargaining with employers over wages and employment conditions.¹¹⁸ On the other hand, religious principles have a great deal to say about whom one chooses to hire to perform a job. This is the basis for the general Title VII exclusion for religious employers and it is not likely to vanish in the near future, as all challenges to its validity have fallen on deaf ears in the Supreme Court.¹¹⁹ However, religious values have a

¹¹⁷ *Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch.*, 487 N.W.2d 857, 863-64 (Minn. 1992).

¹¹⁸ *See id.* at 865.

¹¹⁹ *See Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*

great number of fundamental tenets that weigh strongly upon the legal definitions of discrimination.

In *Kohn*, the Court held that a school's firing of a teacher for exercising speech was constitutional under the First Amendment despite the fact that the religious school in question was almost entirely funded through public government monies.¹²⁰ The Court considered this form of payments to be analogous to a government contract, which carries no First Amendment burdens.¹²¹ *Kohn's* holding has not permeated to other holdings, but it still does not seem to be the case that the State's interest in protecting the full First Amendment free speech rights of teachers would be encompassed by its duty to provide an adequate public education. It is one thing to protect the right of employees under the NLRA to petition their employers for more favorable working conditions. That serves simply to ensure that teachers are given adequate considerations in improving the entire school community, thus assisting the State regulatory interest of education. It is quite another thing for the State to step into a religious institution and require compliance with every tenet of free speech as a condition of their voucher contract. That would appear to create substantial interferences with the institution's free exercise rights under the *Yoder* test.¹²² The State has only a de minimus interest in fully protecting the speech of teachers; thus, in a balancing test, such a requirement would likely be found to be unconstitutional.

IV. A SHORT DISCUSSION OF THE OBJECTIVES OF SCHOOL VOUCHERS AND THE IMPACT OF STATE ACTION ON VOUCHER PROGRAMS

Acting under a presumption that a state issuing vouchers can impose additional regulations on private schools, the question immediately becomes whether the State *should* exert this power. Just because a state has the power to impose a law does not mean that enacting such a law is the best course of action. The immediate concern for any state seeking to impose these regulations is the almost certain deluge of lawsuits to protest its passage. This is a significant impediment both in terms of cost and time for the State. Assuming that the State is willing to consider such regulations notwithstanding the threat of litigation, such regulations should still be looked at extremely critically because there is the alternate source of regulation through imposition of the Court. If, as discussed previously, the courts were to find that the State has a duty to ensure the same level of educational

v. *Amos*, 483 U.S. 327, 334 (1987).

¹²⁰ *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

¹²¹ *Id.*

¹²² *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972).

quality and opportunities in qualifying voucher schools, the State may be compelled to enact these regulations to fulfill their duty. In that case, the State must take the same issues into consideration in deciding the scope of the proposed regulation to fulfill its duty.

The basis for utilizing vouchers to fund current public school students transferring to private educational institutions is based on the real or perceived crisis of American public education. It is currently perceived by the public at large and by numerous politicians that the American public education system is in shambles and cannot adequately compete with the educational systems present in competing nations. Such a belief is certainly not unfounded. One need only look at the situation surrounding Ohio's voucher system—where a state court found that the Cleveland schools were in such poor shape that the school district was ordered to effectively shut down—to understand that this nation has some public schools in dire need of assistance and some students whose educational needs cannot be met by these schools. The use of vouchers is designed to allow a private institution to provide a better education option to parents and students who feel their public school is unable to perform its educational duties as well as a private school.¹²³ It is commonly perceived¹²⁴ that private schools are far more effective in their educational mission.¹²⁵ As the public schools are run and regulated by the State, the question arises why the same entity that has been unable to successfully administer public schools should be in the business of regulating private enterprises that are performing to a higher standard. Thus, it may be argued that any additional imposition of the State into private educational institutions would be destructive; such an imposition may fundamentally harm the continued success of private schools.¹²⁶

¹²³ *Giacomucci v. Se. Delco Sch. Dist.*, 742 A.2d 1165, 1167 (Pa. Commw. Ct. 1999).

In adopting the Plan, the School District identified the following reasons for the Plan: "Whereas, we believe that parents have a fundamental right to control the education of their children, and that to more fully exercise this right, parents should be given more direct, individual control over their education dollars. We believe that school choice plays an essential part in improving the quality of education for *all* Southeast Delco students. It will empower parents and help them choose the school that *they* feel is best for their children. The resulting increased competition to attract and keep students will spur school improvement in both the public and private sectors and benefit the entire community."

Id. (citation omitted).

¹²⁴ Some statistics tend to bear out this perception, though not to the degree commonly spoken of when vouchers are invoked in public discourse as a recommended option.

¹²⁵ Of course, they had better be, or parents would not choose to pay the tuition fees when public schools are available for basically free.

¹²⁶ Price, *supra* note 3, at 457-58 ("The freer schools are from external control—the

The opposing argument would state that because vouchers have the ability to fundamentally shift what private education stands for in qualifying institutions, state regulation may become required to supply the type of education needed to adequately fulfill the State's duties. Private schools, as they existed prior to vouchers, are a select group of interested individuals. The parents usually are more active in the education of their children, which is only logical as they want to ensure their investment is warranted. If the school is religiously based, the religious institution is interested in the education of its students to ensure that the alumni are able to go forth and succeed in the outside world and to help the faith. Whether or not the school is religiously based, the administration is always interested in the educational achievements of its students, since it is concerned with ensuring that the school continues to attract paying students.¹²⁷ These groupings of interested parties serve to ensure that the private school maintains and perhaps improves upon its educational mission by exerting constant pressure on teachers and students.

Absent these forces, it is unknown how a private school will be affected. Will the parents, divested of an economic investment, forgo some of their personal involvement?¹²⁸ Without the type of interests that separate public education from private education, will private schools begin to deteriorate in the same manner that some public schools have? Just as public schools have the potential to fall to the bottom levels of compliance with laws because of the lack of strong incentives, it may be that private schools will also lose their incentive to ensure academic excellence. In that situation, it is possible that the education provided by private religious schools will dip below a constitutional baseline, requiring states to enact regulations to ensure that they do not become exposed to liability for failure to provide a constitutionally required public education under the Fourteenth Amendment.

more autonomous, the less subject to bureaucratic constraint—the more likely they are to have effective organizations.” (quoting JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS, AND AMERICA'S SCHOOLS* 187 (1990)).

¹²⁷ “[D]ecisions about educational content and quality become a personal rather than collective responsibility, thereby creating schools that, in essence, are private communities of like-minded families.” Metzger, *supra* note 1, at 1392 (discussing public charter schools, but the basic principle is exactly the same).

¹²⁸ This should in no way be read as an indictment of public school parents. Instead, it is simply a reflection of the fact that a higher percentage of private school parents are intimately involved with their child's education than public school parents. It is only logical that much of this has some connection with the economic investment. An alternate explanation is that parents willing to pay this money are already more concerned with their child's education and would be just as active in a public school setting. However, the question of what happens when a new set of parents are introduced through vouchers is mostly unaffected by the previous analysis.

Another interesting argument suggests that once private schools begin to look more like public institutions some of the benefits to society that stem from their private status will begin to evaporate. For example, private entities are subject to tort liability for damages, while public schools are generally not liable for damages.¹²⁹ Thus, it may be beneficial to maintain some aspect of voucher schools' private aspects to provide recourse to potential plaintiffs seeking redress.¹³⁰

Additionally, it is unknown exactly how the introduction of competition into the provision of public education will affect public education as we know it. More notably, many proponents of public education worry that the amount of funding for public education will decrease, and this will almost certainly limit the potential for public schools to improve.¹³¹ While this is a strong argument against the imposition of vouchers, it is also an argument in support of the proposition that, if the government is going to create and allow vouchers, it must keep itself involved to ensure that the private institutions are performing to the standards expected of them.

It does not take much foresight to see the basic impetus for seeking a voucher system. Allowing private enterprises to compete for government monies takes advantage of the benefits of the free market system of innovation and expertise, while allowing the State to spend its resources on making a better public school system for the remaining students.¹³² It also forces the public school system to compete in that marketplace, for good or for ill, as discussed above. The belief is that by imposing a competitive element into education, the providers of both

¹²⁹ Metzger, *supra* note 1, at 1404 (“[P]reserving a private actor’s nongovernmental status arguably better ensures accountability because it offers more opportunities for individuals to recover money damages, from which public entities and employees are frequently immune.”).

¹³⁰ *Id.*

¹³¹ Strom & Baxter, *supra* note 64, at 275.

Rather than improve the existing public education system, proposals for vouchers and tax credits simply provide a means to leave the system altogether. Further, although charter schools are generally public schools, a charter school still operates outside the existing public school system and its impact on public school employees may be similar to situations where work is sub-contracted to a private entity. Many state legislatures attempt to place the blame for failing schools on teachers and as such, they enact laws restricting bargaining rights and altering tenure protection. To the extent that many of these ‘reforms’ have been legislative, education employees, like other workers, have had to fight union dues initiatives that attempt to radically restrict the extent to which employees and their unions participate in the political process.

Id.

¹³² Metzger, *supra* note 1, at 1408 (“Privatization holds the potential to yield more efficient and innovative government programs, by allowing the government to harness private expertise, flexibility, and market competition to its advantage.”).

public and private schools will be forced to innovate and excel in order to survive.¹³³ As other proposed and tested methods of reversing the steady decline of public education, such as increased funding, have failed,¹³⁴ the implementation of this proven successful educational system stands out as an attractive option to investigate.¹³⁵

However, religious schools typically oppose additional state regulations on the premise that such regulations inherently serve to impede and restrict the religious organization's freedom to direct and control its religious mission.¹³⁶ Additionally, the current trend in several states is directed at reducing the government's role in regulating private education.¹³⁷ With the overall success rates in terms of graduation and college attendance of students from private education, the need for regulation at this juncture seems tenuous at best. Moreover, states would certainly prefer to avoid the extensive contests that are sure to result from any intrusion on private schools without at least having a sufficient regulatory interest to justify the regulation. Only about half of the states have a mandatory accreditation policy for private educational institutions, and many of those states provide an exemption for religious

¹³³ Price, *supra* note 3, at 438.

¹³⁴ *Id.* at 445-46.

[E]mpirical evidence collected over the last twenty years clearly demonstrates that simply pouring more money into the educational system does not improve educational performance. 'Much of the current concern about the performance of our schools is motivated by the fact that student performance has actually fallen during a period in which we have continually increased our spending on schools Real expenditures per pupil have risen steadily and dramatically over the past two decades. Specifically, after allowing for inflation, expenditures per pupil more than doubled between 1966 and 1989; this corresponds to a 3.5% compound annual growth rate. At the same time, performance as measured by Scholastic Aptitude Test ("SAT") scores fell to a level significantly below the mid-1960's levels.

Id. (footnotes omitted) (quoting Eric A. Hanushek, *When School Finance "Reform" May Not Be Good Policy*, 28 HARV. J. ON LEGIS. 423, 426-28 (1991)).

¹³⁵ *Id.* at 486 ("Such [policies] would allow the public schools to adopt the internal organizational and management changes that could make them effective competitors and would force them to compete with private schools in a system where all parents have a choice among all schools.").

¹³⁶ DeGroff, *supra* note 2, at 387.

Religiously affiliated schools, especially the smaller evangelical Christian schools, typically oppose mandatory certification, both because of its perceived impact on key mission-driven personnel decisions and because of the practical difficulties of finding and attracting teachers whose views are harmonious with the church and whose qualifications are acceptable to the state.

Id.

¹³⁷ *Id.* at 395-96.

schools.¹³⁸ Even granted the introduction of voucher policies, the general trend toward allowing the free market to take its course is unlikely to cease unless the State develops a strong interest in reinserting itself into the situation. As vouchers are a fairly recent innovation, it seems wise for the State to avoid significant interference until it becomes clear that vouchers cannot achieve their designated goals without stronger governmental action in the regulation of voucher schools.

¹³⁸ *Id.* at 398.