10-1972

Hunt v. McNair

Lewis F. Powell Jr.

7/20/72 - JHW This was "noted" 10/13 (I see no threat to freedom of religion) or Dismiss Affirm

This a church/state case involving an interpretation of Lemon v. Kurtzman.

A S.C. statute authorizes issuance of Revenue Bonds to finance private colleges under certain circumstances. DISCUSS

Here a Baptist College conveyed its assets to a State Authority, which leased them back to College. The Authority issued Bonds to finance capital improvements. Authority had no control over operation of College.

No. 71-1523
Hunt v. McNair
~~Cert~~ to Sup. Ct. of S. Caro.

Sup. Ct. of S.C. ~~[illegible]~~ upheld the scheme.

Appeal

This case, which ~~k~~ involves serious First Amendment questions under the ~~[illegible]~~ religious ~~[illegible]~~ clause, was initially held for consdieration in Lemon v. Kurtzman, 403 U.S.602 and then remanded to the Supreme Court of South Carolina for reconsideration in light of the Court's decision in Lemon and its companion cases. The S.C. court has now ~~[illegible]~~ reconsidered and its decision is appealed.

South Carolina passed an Act to provide financing for institutions of higher learning through the state's issuance of revenue bonds ~~[illegible]~~
The overall ~~purpose~~ purpose of the Act is to permit colleges to borrow funds advantageously ~~[illegible]~~ by using the State's income tax free basis as ~~[illegible]~~ relates to the issuance of bonds.

The resp., Baptist College of Charleston, ~~a South Carolina~~ ~~[illegible]~~

has petitioned the state revenue bond Authority under the Act seeking the preliminary approval of the Authority for the issuance of 3 and a half millllion dollars in revenue bonds so that the college may pay off certain outstanding indebtedness incurred in the purchase of certain equipment and trailers, purchase school equipment and make other capital improvements, and refund certain other indebtedness.

In accordance with the provisions of the Act, the College proposes to convey substantially all its campus to the state of S.C. at no cost. The Authority would then lease the property so conveyed back to the College under a lease agreement whereby the College would be obligated to operate and maintain it as an institution of higher learning and to pay to the Authrity rentals in such amount as to meet the principal and interest as they become due on the proposed revenue bonds.

The question, of course, is whether the advantages the Baptist College derives from use of the states power to issue low interest revenue bonds(low interest because interest and dividends from the bonds are tax-free to bondholders) so entangles the state in the administration of the College as to violate the First Amendment. In Lemon, an action was brought against state officials by Penn. residents challenging the constitutionality of a statute which provided for state reimbursement of non-public elementary and secondary schools for the cost of teacher's salaries, textbooks, and instructional materials in certain specified secular subjects, but prohibiting reimbursement for any course that contained any subject matter expressing any religious teaching or training. The Court held that the Penn. statute was unconstitutional under the religion clause

of the First Amendment as fostering excessive entanglement between govt. and religion. In so holding, The Court considered a wide variety of factors including (1) the religious purpose and operation of elementary and secondary schools (2) the enhancement of the process of religious indoctrination resulting from the impressionable age of the children enrolled, particularly in elementary schools (3) the necessity of state surveillance to insure that teachers who were subject to control by religious organizations, observed the restrictions to teach only purely secular subjects (4) the state's examination of the parochial schools finamcial records to determine which expenditures were religious and which were secular. One thing should be pointed out: under Lemon, the Court devised a stringent "entanglement test based on multiple factors but it did not outlaw entirely state aid to parochial schools.

The South CArolina court was thus left with the task of applying to the state aid process described above the test enunciated by the Court in Lemon. It upheld the aid on the ground that the "state plays a passive and very limited role in the implementation of the Act, serving principally as a mere conduit through which institutions may borrow funds for the purposes of the Act of a tax-free basis. There is in no sense a banking relationship between the Authority and institutions which utilize the Act." The court concluded that the state would not become too entangled in the administration of the College, claiming that the basic function of the Authrity is "to see that religion is not promoted on the leased premises, and that fees are charged sufficient to

meet the bond payments."

Appellants challenge this interpretation of the Act, stating that the "Authority is under strong motivation, both because of its duty to the bondholders and its duty to the state, to be at all times concerned with the College and its financial condition."

I do not think the South Carolina court's characterization of the Act an unreasonble one, though admittedly, under this Act there is the temptation for the State to supervise the College's operations to make certain its obligations to bondholders might be met. But the financing here does not appear to be in the sensitive area of textbooks and teacher's salaries as in Lemon. As a realistic matter, I do not believe this arrangement really threatens state-chruch separation and I also do not think the Court wants to take anotther case of this nature so soon after Lemon.

AFFIRM JHW

c. 10/13/1972

71-1523

Sally - Give to Larry - who will no doubt turn over to you & Spencer

Justice Powell:

Here are my relists for the conference this Friday. In most cases I have written a full cert note and wish to stand by what I have said. A good many of these cases were relisted to allow Douglas to write. I do not think you need to read over all the cert notes as you voted correctly the first time and would not wish to change your vote. I saw no case where you had a substantial question you wish me to consider. I give you these cases merely for your convenience. After you have finished, if you give them to Larry, they can then be included in the cert book for conference.

JHW

DISCUSS

Larry - I've reviewed these & they can be put in Book for Fri. Cf.

Conf. 10/13/72

Court ..... *Voted on*....., *19*...

Argued ....., *19*... *Assigned* ....., *19*... No. 71-1523

Submitted ....., *19*... *Announced* ....., *19*...

HUNT

vs.

RELIST

McNAIR

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

No. 71-1523 HUNT v. McNAIR

Argued 2/21/73

Sinkler argued State is a mere "conduit" – with the Trustees performing all of the functions.

Figg.

Baptist College controlled by Baptist Convention

State takes conveyance of prop & leases it back.

State itself can require College.

This may be persuasive with me

Makes good argument as to entanglement in view of right of Board to fix rates & fees – A 41, 42

Snukler

Case of national importance.
This suit for declaratory judg.

This is not ordinary type of self-liq. revenue bond issue of '30 & '40.

This is analogous to industrial rev. bond issue.

Once ctt is made, Trustee Bank steps in & takes over. It enforces rights & remedies of bondholders.

Trust Indenture not in record.

See Rules & Reg. of the Authority.

Object of statute is secular.

State is simply a conduit

Tilton case decided after this complaint was filed.

→ No student is required to take any religious course. Admission to college is open — as to students & faculty

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No bonds have been issued under this statute.

Notes on No. 71-1523, Hunt v. McNair
WCK
February 21, 1973

As I explained yesterday, this field is a new one for me, and I come to it without strong predispositions regarding whether assistance of the kind at issue here violates the Establishment Clause. It may be useful for you, as it was for me, to go quickly through the major Establishment Clause cases decided prior to Lemon and Tilton. In Everson v. Board of Education, 330 U.S. 1(1947), the Court upheld a state statute providing bus transportation for parochial school children. In Board of Education v. Allen, (392 U.S. 236(1968)) the Court upheld the loan of textbooks on secular subjects to parochial school children. And in Walz v. Tax Comm'n, 397 U.S.664(1970), the Court held that the granting of a property tax exemption to religious institutions did not violate the Establishment Clause, although it heavily emphasized the strong historical roots of such exemptions. I do not find much guidance for the present case in Everson or Allen--both involved direct payments or services to children and both were clearly non-sectarian. Nor do I find much guidance in Walz. In a sense, Walz cuts both ways--the Court did allow some aid to the institutions rather than to students but relied in large part on the history of tax exemptions. The absence of such a history in the present case weighs in against the state claim.

Excellent memo., although I'm not sure I agree with Bill's conclusion

I.

With these cases to the side,then, the problem turns primarily on the interpretation of Lemon v. Kurtzman, 403 U.S. 602(1971), and of Tilton v. Richardson, 403 U.S. 672(1971). In Lemon, The Chief wrote the Court's opinion. At issue there were two state educational acts. The Rhode Island act authorized state officials to subsidize the salaries of certain teachers in certain nonpublic elementary schools in an amount not to exceed 15% pf the teacher's salary. Under the terms of the statute, the teacher had to agree not to teach courses in religion and to use only teaching materials which are used in public schools. The school in which the teacher teaches had to be one at which per-pupil expenditures on the secular aspects of education did not exceed those in the average public school. The Pennsylvania act authorized state officials to reimburse nonpublic schools for teacher's salaries, textbooks and instructional materials in certain secualr subjects. Textbooks and materials were subject to approval by state officials, and the nonpublic schools' accounting was subject to state audit.

The opinion summarized the prior cases and stated the "tests":

> "Three . . . tests may be gleaned fom our cases. 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'." at 613

Evaluating the Rhode Island program in terms of these tests, the Court first examined the nature of the elementary schools in question, noting that the school buildings contained religious symbols throughout, that religion was taught directly for about thirty minutes per day, that there were religiously oriented and apparently compulsory extracurricular activities, that two-thirds of the teachers were nuns, and that the atmosphere was heavily religious. The Court quoted the district court's finding that the schools were "a powerful vehicle for transmitting the Catholic faith to the next generation", at 616. "[T]he considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authoriites in order to ensure that state aid supports only secular instruction." at 616. The Court pointed out that principals and nuns were appointed by religious orders and bishops and that teachers were hired by parish priests, and mentioned that a school handbook stated that "religious formation is not limited to formal courses; nor is it restricted to a single subject area." In striking down the statute, though, the Court did not assume that the schools would be unable to separate religious from secular, but relied on the fact that the state would be forced,

in order effectively to police the use of the funds, to evaluate school programs in terms of religious or secular content, not only to insure that teachers abide by their commitments but to ascertain whether a nonpublic school spends less per pupil on secular instruction than does the average public school.

The Court's analysis of the Pennsylvania program was much briefer because it relied heavily, by implication, on its analysis of the Rhode Island statute. The Court stated:

> The history of government grants of a continuing cash [redacted] subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular, the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." at 621-22.

The Court closed with two other points. The [redacted] first was that the very fact that aid to parochial schools was becoming a political football made the degree of entanglement greater. The other was that Walz could be distinguished on the ground that the property tax exemption was unlikely to be a first step toward greater involvement since it represented 200 years of consistent practice.

The thrust of the Chief's opinion in Lemon is,

I think, that where the state deals with a heavily religious institution, the Establishment Clause is all but inevitably violated because in order to insure that public money is not being spent for religious purposes a State must become entangled in the operation of the religious institution.

Douglas, with whom Black and Marshall joined, wrote a concurrence which contains a number of interesting tidbits about parochial education and the views of Jefferson but is otherwise not helpful. Justice Brennan wrote a concurrence, which I will discuss below, and Justice White concurred as to the Pennsylvania statute, but dissented as to the Rhode Island statute, and I will discuss this opinion below also.

II

In Tilton, the Chief wrote a plurality opinion, which was joined by Harlan, Stewart and Blackmun. That case involved the constitutionality of Title I of the Higher Education Facilities Act of 1963, a federal act. The Act authorized construction grants to nonpublic institutions of higher education, but excluded from eligibility any building to be used for religious instruction or worship. The Commissioner of Education required applicant institutions to agree not to use any facilities constructed with Title I money for any religious purpose, the agreement to continue for twenty years on

pain of forfeiture. "During the 20-year period, the statutory restrictions are enforced by the Office of Education primarily by way of on-site inspections." at 675.

Again applying the three-pronged test, the opinion found that the purpose of the legislation was secular. The opinion then measured the primary effect of the aid on those four institutions whose receipt of aid was challenged in that case.

> "The institutions presented evidence that there had been no religious services or worship in the federally financed facilities, that there are no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes." at 680.

Although there was evidence that certain institutional manuals placed religious restrictions on what might be taught, there was other evidence that these restrictions were not enforced in practice. Because it might have the primary effect of fostering religion, however, the opinion invalidated the 20-year limitations on the no-religious-use covenant, while finding that the primary effect of the statute as a whole would not be to promote religion. As to the third prong of the test, the degree of state entanglement, the [redacted] opinion distinguished the colleges involved there from the elementary schools involved in Lemon.

> "There is substance to the contention that college students are less impressionable and less suseeptible to religious indoctrination."

and

> "Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines."

While acknowledging that all four colleges required students to take courses in theology, the opinion concluded that"religious indoctrination is not a substantial purpose or activity" of these colleges. The need for surveillance was correspondingly reduced:

> "the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial audits, and no governmental analysis of an institution's expenditures on secular as distinguished from religious activities." at 688.

The Act was held to be constitutional.

Justice White supplied the fifth vote. His opinion addressed all three of the Pennsylvania, Rhode Island, and federal statutes. While I have some difficulty understanding how he would analyse the problem presented, I infer that he would approve more aid than would the Chief. White dissented as to the Rhode Island statute, and in so doing pointed out that the district court make express findings that "on the evidence before it none of the teachers involved mixed religious and secular instruction". at 666. This finding, and the fact that the Court [redacted]

chose to ignore it in favor of a sort of composite model of the Catholic elementary school, confirmed his feeling that the degree of entanglement was no greater in Rhode Island than under the federal statute. He notes, interestingly, that in Tilton, the Chief looked specifically at the evidence before the Court on four specific schools rather than look to a sort of composite religious college. He notes too that the federal enforcement regime might well involve fully as much inspection as the state scheme. For reasons which are not entirely clear, his solution would have been to uphold both.

Justice Brennan would have ruled all three statutes unconstitutional. His opinion shares White's recognition that the Chief was distorting the facts in order to create an appearance of a sharp disjunction between the state and federal programs. His test would be whether the program is in fact a subsidy to a sectarian institution. In his view, it is obvious that the giving of aid to a religious institution for use in secular pursuits frees the institution to spend more of its own resources on religious matters. In his view, Allen and Everson are distinguishable because the aid there ran directly to the students rather than to the institutions; Walz is distinguishable on historical grounds.

In Tilton, finally, Douglas, with whom Brennan and Marshall joined, dissented. Again, the opinion is not very helpful.

III.

What, then, is the state of the law after Lemon and Tilton? The Chief's entanglement theory had seven votes in Lemon(although three of the seven also concurred), but only four votes in Tilton. Lemon, then, would seem to be gospel, and Tilton only the Chief's commentary on the gospel. The problem in the present case is to define the Tilton exception to the general Lemon rule that aid to a specifically religious institution is proscribed by the Establishment clause. The exception has at least these components: 1) that the institution be a college or university; 2) that the degree of surveillance be minimal.

Here, the papers before us are not particularly helpful in defining the nature of the institution. We do know that it is a college, but we do not know what sort of college, and there presumably are colleges(and I would guess that some of them are Baptist colleges) which have a very heavy religious program. We do know, though, that only 60% of the student body is Baptist, Appendix at 39.

I would have thought [redacted], in view of the Lemon opinion's heavy emphasis on the nature of the institutions being aided, and Tilton's reservation of judgment as to colleges other than the four before it, that the South Carolina court would have given us more information. If the Court affirms the judgment, this lack of information will make it very difficult to state affirmatively that religion does not pervade the college. And since, under the Chief's approach, the degree of presumed entanglement corresponds to to degree of religious emphasis, it is difficult here to ascertain the degree of presumed entanglement.

It may be, however, that the terms of the statute are so inartfully drawn that the Court simply cannot conclude that there is not grave potential for actual as opposed to presumed entanglement. On page 41 of the Jurisdictional Statement, for example, is the following statement of powers:

> "The authority may fix, revise, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by each project."

And at J.S. page 36, the authority is given power:

> "to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the use of a project undertaken for such participating institution for higher education."

Furthermore, the performance of these duties is not

simply discretionary at the option of the authority, but may be compelled at the instance of any holder of revenue bonds. J.S., page 43.

In addition to these financial responsibilities, the authority requires that the institution execute a covenant to not use the leased land or facilities thereon for religious pruposes. J.S. 49. Furthermore,

> "Each Lease Agreement shall contain a provision permitting the Authority or any agent of the Authority to conduct such inspections as may be necessary to determine whether the leased premises, or any portion thereof . . . is being used or has been used for sectarian instruction or as a place of religious worship ...." J.S., at 49.

And in, these responsibilities may be enforced at the instance of any taxpayer of South Carolina. J.S., at 49.

While the state(the authority) may constitute a bank as its agent for these purposes, or more exactly as a trustee for the bondholders, I do not think that this insulates the state from legal responsibility, as,I think, is demonstrated by the fact that the device would not suffice in the case of the construction of a church. Surely, the Pennsylvania and Rhode Island schemes would not have been saved by the designation of a trustee to administer the state programs.

In short, my present view is that the South Carolina scheme violates the Establishment Clause. While a lawyer might say that the chances of deep

entanglement are not as a practical matter very great, the face of the statute and the regulations confers great and continuing responsibility on the state for the supervision of the college's financial practices and the [redacted] monitoring of its program. We do not have a history of noninvolvement under this statute to overcome this broad statement of powers, nor do we even have strong findings that the atmosphere at the college is overwhelmingly secular.

I apologize for the length of this memo and its probable disorganization, but I did not think that the standards were comprehensible apart from a detailed look at Lemon and Tilton.

Log 10/2/72

Court S.C. Supreme Ct.
Argued ....., 19...
Submitted ....., 19...
Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 71-1523

RICHARD W. HUNT, Appellant

vs.

ROBERT E. McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

5/22/72 Appeal filed.

Relist for possible writing by Brennan and Douglas

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
.....	.....	.....	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....
Rehnquist, J.	.....	.....	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....
Powell, J.	.....	.....	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....
Blackmun, J.	.....	.....	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....
Marshall, J.	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
White, J.	.....	.....	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....
Stewart, J.	.....	.....	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....
Brennan, J.	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Douglas, J.	.....	.....	.....	✓	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Burger, Ch. J.	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

No. 71-1523 Hunt v. McNair Conf. 2/23/73

Affirm 5-4

DOUGLAS, J. Reverse

MARSHALL, J. Reverse

BRENNAN, J. Reverse

Sectarian institutions
— financial support.

BLACKMUN, J. Reverse (tentative)
Tilton not controlling

STEWART, J. Affirm

POWELL, J. Affirm

WHITE, J. Affirm

REHNQUIST, J. Affirm

MEMO: C.J. Affirm
This case is closely to Tilton than to Lemon

4/7/73 secular sectarian

Memo to Bill - must look at court.

Hunt v. McNair

(Notes on Review of Bell's 1st Draft

1. Cite N.J. Case? See ~~Amicus~~ Amicus Brief

2. Liberal Arts college
   Curriculum
   Degrees
   No dummy degrees

3. Do we cite & quote from
Abington Tp. School District v. Schempp 374 U.S. 203 (1963) (See 9/5th E - p 23)

4. Financial contribution by Baptist?
(How many students?) $224,000 - A 20

5. Bill have you looked at earlier opinion of S/Ct of S.C.?

6. College receives no "financial support from the State of S.C." - A 16.

7. ~~Ex~~ Enrollment - 1548 students, plus 900 night students - A 20 (95% from S.C. A 24

8. Allegation that college is ~~no~~ "non-sectarian" (¶ 4 of Answer, A 22)

9. Not under control of any group other

Cir to Remedy:

See lower Ct Op - 30.

31 - All conductors of Act met - only issue in concl. of Act

Authorities & new pronouncements of this kind are widely used in varying contexts, ~~primarily offer to fund~~ to fund specific revenue producing projects, ~~in a manner which qualifies the issue for~~ The advantages, in terms of the lower interest rates ~~of~~ resulting from the ~~exemption~~ incentive of tax ~~advantage~~ under present law and also in the avoidance of implicating state credit, are obvious.

MEMORANDUM

TO: Mr. William C. Kelly, Jr. DATE: April 7, 1973

FROM: Lewis F. Powell, Jr.

Hunt v. McNair - WCK's draft of April 6

I placed on your desk your first draft, which I am afraid I have "messed up" considerably.

Although I have accepted your basic approach and analysis as sound and reasoned with your usual perceptivity, I do think it necessary to strengthen our opinion in the following respects:

1. I have attempted, by riders, to convey a somewhat clearer picture of the College, and particularly of the revenue bondsfinancing with which we are concerned. It is important, I think, for the factual setting to be somewhat more particularized that your draft.

2. Bearing in mind Justice Douglas' circulated opinion of last October (in which he emphasized that "the state's credit is employed in aid" of financing the College, and referred to the state as being "a banker", it is desirable to make it crystal clear by a full quotation from the Act and otherwise - that the state's credit is in no way implicated.

3. Although I have not undertaken to depart from your Lemon three-part analysis, I doubt that it is fully applicable (if, at all) to this type of case. For the reasons summarized in my Rider A, p. 7 (to be added either as a note or inserted in the text at some appropriate place),

the "state aid" involved in this case is different from that in any case previously before the Court. As I argued at the Conference, and as held by both the New Jersey and South Carolina courts, all that the state has done is provide a "conduit" or render a service. I consider this quite different in principle from lending or granting money or extending credit. Indeed, the people who buy the bonds - induced to do so by the tax advantage - put up the entire cost of the "aid" rendered these educational institutions.

Obviously we would have a closer case if the college here were in fact a sectarian institution. Possibly, no such institution may be rendered any service of this kind by the state - although all sorts of other public services (police, fire, utilities, etc.) have traditionally been rendered churches as well as church schools. But we need not decide this question, as this Baptist college is not shown by the record to be sectarian in much more than name and the indirect control through the election of the Board of Trustees. Incidentally, I am certain that under general corporate law in South Carolina the board - elected for five-year terms - owes their primary duty to the welfare of the college without regard to the Baptist church or whomever may have elected them.

In any event, I want to emphasize the uniqueness of the "aid" here involved, and not to equate it irrevocably with other types of aid

which have been before the Court.

4. Our decision will be of little value unless it enables "bond counsel" to give an unqualified opinion as to the validity of the bonds to be issued. Therefore, I think your understandable caution - in using carefully hedged language at the beginning and end of the opinion - goes a bit too far. I doubt that bond counsel, if this language is retained, could give an unqualified opinion that bonds issued pursuant to this particular application would be valid. I think we must go at least that far, as certainly it is my view - and I believe is the view of the majority of the Court.

* * * * *

If you have an opportunity to review my riders over the weekend, we can confer during the morning on Monday. If we are fairly close together, then you can have a chambers copy printed during my absence. It will be a bit difficult for either of us to visualize the full opinion in its present form, and so a printed chambers copy may facilitate our progress.

I am aware that there is some overlap among my own riders, and also with what was in your first draft. I simply have not had the time to try to clean these up.

Attached to this memo are three riders which I dictated, but did not use. They may be a bit repetitive. Or you may find some place for them.

L. F. P., Jr.

WCK
April 11, 1973
Hunt v. McNair

1. Larry has read and edited this draft, and I have made changes to respond to his suggestions.

2. I attach 1) your memo of April 7; 2) carbons of your riders; and 3) the old version of page 17 with your notes on it.

3. As you will see, I have incorporated in Part I your riders numbered 1-4, with the exception of your footnote * 3A(see rider 3), which I have omitted for reasons we have already discussed.

4. In addition, I have reorganized Part I in an effort to make it less choppy.

5. Your rider 5 appears in the discussion of state purpose on page 7 of the draft. I have omitted proposed footnotes ** (because I did not think it added anything to the central point and because I doubted there would be any dispute about the number of students in the college) and *** (because I did not think it appropriate to quote this from the complaint).

6. With minor changes, your rider 6 appears on page 10 of the draft as footnote 7. I have rewritten the last sentence in a way which I think sharpens our point.

7. An altered version of your rider 7 appears on page nine of the draft as the last sentence of the paragraph which continues over from page 8. I changed the sentence to drop "functions as a religious entity"

because I did not think that that phrase was helpful or particularly meaningful.

8. Rider 8 appears as footnote 8 on page 12. I have omitted a good protion of the rider because I did not think that we had a satisfactory basis for making these assertions. The lack of record support for them is a particularly sensitive point since we rely elsewhere in the opinion on the four corners of the record. I have substituted a reliance on Tilton in order to preserve your point.

9. I did not use the other riders, other than the Allen quotation regarding the importance of private schools.

10. I have done two things to former page 17. The first was to drop the distinction between the trustee and the Authority. The trustee is chosen by the State and is an agent of the State for the purpose of operating the College. Because, when we talked about this before, we agreed that we could not rely on the distinction between the Authority and the trustee, I thought it better not to slip it in near the end of the opinion without explanation.

The other change I made was to move the discussion of the Industrial Revenue Bond Act to page 13(this was Larry's suggestion). I agree with him that it fits more smoothly into the discussion there. As

it stood before, in Part III, it seemed awkward.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 17, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

Please join me.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 17, 1973

Re: No. 71-1523, Hunt v. McNair

Dear Lewis,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 17, 1973

RE: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I plan to write a dissent in this case. I am inclined, however, to think it is related to the Religion Clause cases argued this week and also to the Levitt cases, No. 72-269, et al. I,therefore, will defer writing the dissent until after I know what the outcome of the other cases will be. I hope that this doesn't mean I'll have to hold you up too long.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

April 19, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I shall await the dissent of Bill Brennan before voting in this one.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 25, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I join your opinion in this case. I may write a concurrence but shall await the dissent before deciding to do so.

Sincerely,

Byron

Mr. Justice Powell

Copies to Conference

May 4, 1973

71-1523 HUNT v. McNAIR

TO THE CONFERENCE:

It came to my attention today that in 1972, after I came on the Court, the Virginia legislature adopted an "Educational Facilities Authority Act" which is quite similar (if not substantially identical) to the South Carolina Act involved in this case. This Virginia enactment was not a surprise as the new Constitution, effective July 1, 1971,* contained a provision (Article 10, Section 11) authorizing the legislature to "provide for a state agency or authority" to assist educational institutions in borrowing money for construction of educational facilities, provided that the primary purpose of the institution is "not to provide religious training or theological education" and provided further that "the Commonwealth shall not be liable for any debt created by such borrowing."*

I did not know until today, however, that Washington and Lee University (of which I am a Trustee) had any interest in borrowing money through the use of such a state-created authority. In a talk with the Assistant to the President there, I was informed that there have been some recent discussions of financing a proposed new dormitory complex in this manner. This is still in the "discussion stage," no decision has been made, and indeed the Virginia Authority is not yet a functioning entity.

Washington and Lee University is strictly non-sectarian, although many years ago it was of Presbyterian origin. Its board of trustees is self-perpetuating, it is privately endowed, it derives no support from any religious faith or organization, has no religious requirements

---

*I served on the constitutional revision commission.

*Virginia has a very strong "Establishment" clause in its Constitution, Section 16 of the Virginia Bill of Rights having been attributed primarily to Thomas Jefferson.

as to courses, students, or faculty members. It does offer some courses in religion, on an elective basis, as a part of a broad, liberal arts curriculum.

As the only issue before us in Hunt v. McNair is the challenge to the South Carolina Act on the ground that it infringes the Establishment Clause of the First Amendment, our decision in McNair would not be applicable to Washington and Lee University. I suppose it could be said, nevertheless, that the similarity of the new Virginia statute and the possible interest of Washington and Lee in revenue bond financing of a new dormitory thereunder, might give me a bias in favor of this type of legislation even with respect to a Baptist college such as that involved in Hunt v. McNair.

I personally do not feel disqualified to participate in this case. But I bring these facts to the attention of the Conference, and would welcome and abide by the views of my Brothers. As I do not have a Court yet, there is no possibility of this case coming down prior to our next Conference. I can receive your views and we can discuss this further, if need be, at the May 11 Conference.

Sincerely,

May 4, 1973

71-1523 HUNT v. McNAIR

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Sincerely,

71-1523

May file on McNeil

WASHINGTON AND LEE UNIVERSITY
LEXINGTON, VIRGINIA 24450

May 4, 1973

FRANK A. PARSONS
ASSISTANT TO THE PRESIDENT

MAY 7 1973

The Honorable Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the U.S.
Supreme Court Building
Washington, D. C. 20543

Dear Mr. Powell:

Enclosed you will find copies of the Act of the General Assembly which established the Virginia College Building Authority, the draft of a statement of policies and procedures provided us by the Authority's consultants, and a memorandum which I prepared for Mr. Howe of Wheat, First Securities, Inc., at his request following our discussions with him and Mr. Ashton on April 27.

The notes and underscores in the draft statement are President Huntley's marks made upon his first reading of the original from which this copy was made.

I told President Huntley of your call and interest in the Virginia College Building Authority, and he is pleased that you may have an opportunity to examine these materials prior to the Board meeting. He has asked me to obtain from our Law Librarian information about the pending South Carolina case for his review.

Should you have any further questions requiring answers that I may be able to provide or seek, please don't hesitate to call on me.

With kindest personal regards and best wishes,

Sincerely,

Frank

Frank A. Parsons

Cc: President Huntley

[RE PARSONS TO POWELL, MAY 4, 1973]

File on McNair

(Va Education)

VIRGINIA COLLEGE BUILDING AUTHORITY

CONTENTS

DRAFT OF:

DRAFT 4/5/73

VIRGINIA COLLEGE BUILDING AUTHORITY

STATEMENT OF POLICY AND PROCEDURES

The Virginia College Building Authority (the Authority) has been duly created and organized under Section 23-30.25 of the Code of Virginia of 1950, as amended, as a public body corporate and as a political subdivision and agency and instrumentality of the Commonwealth of Virginia.

The Authority is authorized under the Educational Facilities Authority Act (Chapter 3.3, Title 23, Code of Virginia of 1950, as amended) (the Act) to assist institutions for higher education in the Commonwealth (Institutions) in the acquisition, construction, financing and refinancing of Projects. In particular, the Act authorizes the Authority to issue revenue bonds and notes for any of its corporate purposes, payable solely out of its revenues; to fix, charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a Project; to mortgage and pledge its revenues and any Project for the benefit of the holders of its bonds; and generally to do all things necessary or convenient to carry out the purposes of the Act.

The Authority has received requests from certain Institutions for assistance in acquiring, constructing and financing Projects and anticipates that similar requests may

hereafter be received from other Institutions. The Authority has determined that prior to making any commitment to assist any Institution it is desirable to set forth the following statement of policies and procedures to serve as a guideline for its operations:

1. In accordance with the Act, the following procedures shall control and limit the operations of the Authority:

a) The Authority shall assist only nonprofit educational institutions in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education.

b) The Authority will assist in financing only those educational facilities which meet the definition of "Project" contained in the Act, i.e.,

> ". . . a structure or structures suitable for use as a dormitory or other multi-unit housing facility for students, faculty, officers or employees, a dining hall, student union, administration building, academic building, library, laboratory, research facility, classroom, athletic facility, health care facility, maintenance, storage or utility facility and other structures or facilities related to any of the foregoing or required or useful for the instruction of students or the conducting of research or the operation of an institution for higher education, including parking and other facilities or structures essential or convenient for the orderly conduct of such institution for higher education, and

shall also include landscaping, site preparation, furniture, equipment and machinery and other similar items necessary or convenient for the operation of a particular facility or structure in the manner for which its use is intended . . ."

c) The Authority shall not assist in financing any items the costs of which are customarily deemed to result in a current operating charge or any facility used or to be used for sectarian instruction or as a place of religious worship or any facility used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination.

2. Within the limitations set forth above and pursuant to the Act, the Authority will undertake the acquisition and construction of Projects for lease and ultimate transfer to the Institutions desiring to take advantage of the provisions of the Act, and will finance such Projects, to the extent not financed by the contributions of the institutions, by the issuance of its revenue bonds, notes and other obligations payable solely from and secured by a pledge of all rentals, revenues, receipts and income to be derived from or in connection with, and mortgages on, such Projects.

3. All bonds of the Authority, regardless of their date of issue and the manner in which the proceeds of their sale are applied, shall be issued on a parity basis and shall

have the same right, lien and preference to all the rentals, revenues, receipts and income of the Authority derived from or in connection with Projects financed by the Authority. There will be no preference, priority or distinction of certain obligations of the Authority over any other obligations. This requirement shall not, however, prevent the Authority from applying moneys received by it for the payment of all of its administrative, financing, legal and related expenses.

4. Before committing itself to provide financial assistance to any Institution, the Authority shall first obtain from the Institution and submit to the Council of Higher Education for Virginia such data descriptive of the Project, the need therefor, the proposed financing plan and the financial resources of the Institution as will permit the Authority and the Council of Higher Education for Virginia, in conjunction with the State Division of Engineering and Buildings, to evaluate the need, financial feasibility and overall merit of the Project. In considering whether to assist an Institution in the financing of a Project, the Authority shall take into consideration, but shall not be required to accept, any recommendations of the Council of Higher Education for Virginia or the State Division of Engineering and Buildings.

5. Since the success of the Authority in carrying out its purposes must necessarily depend in large measure upon the continuing financial prosperity of the Institutions it assists, it is recognized that the Authority may not be able to give financial assistance to every Institution requesting it or to give assistance to the degree requested in all instances. Each Institution applying for assistance from the Authority must therefore demonstrate to the satisfaction of the Authority that it can fully perform all of its contractual obligations under its lease with the Authority. Furthermore, no application shall be accepted unless the applicant can show to the satisfaction of the Authority that unencumbered revenues derived from reasonably collectible tuitions and income from investments and unrestricted endowment and the gross receipts to be derived from the use of or for the services furnished by the Project to be financed will equal not less than three times the average annual amount payable by the Institution to the Authority under its lease with the Authority.

6. The Authority shall not assist in the acquisition, construction, financing or refinancing of any Project begun prior to July 1, 1972, provided however that the Authority may assist in the financing of alterations, enlargements, reconstruction and remodeling of existing educational facilities and

reimburse Institutions for legal, engineering, architectural or other preliminary costs or costs of real property incurred or acquired prior to July 1, 1972, if such costs were incurred or acquired in connection with a Project financed by the Authority.

7. The Authority, in its sole discretion, shall determine whether to assist a particular Institution, whether to assist in the financing of a particular Project and the priority for undertaking the financing of Projects.

8. This statement of the Authority shall not under any circumstances be considered as constituting a contractual agreement with the holders of any bonds, notes or other obligations to be issued by the Authority, or with any Institution, or with any other person.

BASIC STRUCTURE OF FINANCINGS

The Authority will issue its revenue bonds on a parity basis without any preference, priority or distinction of certain of its obligations over any other of its obligations. All rentals, revenues, receipts and income shall be applied and pledged to the repayment of all bonds and no bonds will be issued separately by the Authority solely on the credit of one Institution. The Authority believes that only by utilizing this pooling of security approach will it be able to fully perform its purpose of providing financial assistance to the many and varied Institutions of the Commonwealth.

1. Master and Supplemental Indenture

All revenue bonds of the Authority will be issued under a master Indenture which will require the assignment of all rentals of Projects to Institutions and other revenues received by the Authority and the mortgage of all Projects to a Trustee for the equal benefit of all those who become holders of the bonds. The Trustee will be a Virginia bank. The master Indenture will contain general provisions for the form, details, payment, redemption and conditions of issuance of the bonds, the application of bond proceeds and the Authority's revenues, mandatory lease provisions, and the investment of funds by the Trustee. It will provide for the establishment and funding of a debt service reserve fund (DSRF), defind what

constitutes a default on the part of the Institutions and the Authority, and provide for remedies in the event of a default. The master Indenture will also provide that each separate series of bonds will be issued under a Supplemental Indenture which will set forth the specific terms of the series, e.g., the amount, date, and denominations of the bonds, the interest rate, maturity schedule and redemption provisions.

2. Lease Requirements

The bonds of the Authority will be payable solely out of the rental payments received under leases of Projects with participating Institutions and, in the event an Institution should default in such payments, out of the DSRF. The rental for each Project shall be in an amount not less than 110% of the average annual debt service requirements of the bonds issued therefor over their amortization period, plus an amount sufficient to cover the proportionate share of the Trustee's annual fees and expenses. All leases will be net leases and will provide for the payment by the Insitution of all costs and expenses of operation, maintenance, repair or replacement of the Project and will require the Institution to maintain adequate insurance against fire and other casualty.

3. Debt Service Reserve Fund

As previously noted, the master Indenture will establish the DSRF which will equally and ratably secure all revenue bonds

of the Authority. With respect to each Project, there will be deposited to the credit of the DSRF out of the bond proceeds an amount equal to 110% of the average annual debt service requirement of the bonds issued thereunder. Thereafter, all amounts received in connection with the rental of the Project remaining each year after meeting the debt service requirement for that year will be deposited to the credit of the DSRF until the balance to the credit of the Project is equal to two years' annual rental on the Project. Once two years' rental has been accumulated in the DSRF to the credit of the Project, all rentals in excess of the annual debt service requirement will be returned to the relevant Institution.

In the event an Institution defaults in making rental payments on a Project, the deficiency will be made up out of the balance standing to the account of that Project in the DSRF and, if the amount of the deficiency should exceed such balance, the excess shall be charged on a proportionate basis against the balances standing in the DSRF to the credit of all other Projects. When and to the extent that the amounts so withdrawn from the DSRF are recovered from the Institution responsible therefor, such amounts shall be deposited to the DSRF in the proportions withdrawn. After all bonds issued on account of a Project are paid in full, the balance remaining in the DSRF to the credit of that Project shall be returned to the relevant Institution.

4. Expenses

All costs incurred in connection with the issuance of the Authority's bonds, e.g., printing, bond counsel fees, underwriting and financial advisors' fees, rating agency fees, and the Trustee's acceptance fee, will be payable out of bond proceeds. Continuing expenses, such as the Trustee's annual fee, will be payable by the participating Institution as additional rent. The administrative expenses of the Authority will be payable from income earned on investment of the DSRF.

EXAMPLE OF AN AUTHORITY FINANCING

I. University A plans to build, over a two year construction period, a building estimated to cost $5,000,000.

II. Bank B will make a loan to the Authority for the construction period at a 5% rate of interest since the interest is tax exempt.

(a) The Bank Loan

Estimated building cost	$5,000,000
Debt service reserve fund (DSRF) (estimated)	537,031
Interest during the construction period (estimated)	553,703
Total Bank Loan	$6,090,734

(b) The full amount of the loan is taken down at the outset and invested until necessary for progress payments. It is assumed that: 1) the funds will be expended evenly over the two year construction period with payments made semi-annually; 2) the funds are invested at a 7% rate of interest; and 3) the Authority's administrative expenses are $25,000 per year.

6 Mos.	Unexpended Funds	Less: Interest Semi-Annual	Plus: Investment Income	Less: Disbursements (Including Administrative Fee)
1st	$6,090,734	$152,268	$213,176	$1,262,500
2nd	4,889,142	152,268	171,120	1,262,500
3rd	3,645,494	152,268	127,592	1,262,500
4th	2,358,318	152,268	82,541	1,262,500
Balance in DSRF at end of construction				1,026,091

(c)(1) Cost of building at end of construction period, including interest during construction $5,609,072

Annual debt service required on twenty year issue of $5,850,000 at 6% assumed rate of interest 510,000

(2) Plus 10% to create one year rent reserve at 110% of annual debt service 51,000

(3) DSRF required initially $ 561,000

Proceeds of $5,850,000 bond sale after expenses (2 1/2%)	5,703,750
Plus balance remaining in DSRF	1,026,091
Total proceeds from financing	$6,729,841
Less: Repayment of bank loan and funding of DSRF	$6,651,734
Balance*	$ 78,107

Year	Rental	DSRF	Income on DSRF (7%)	Administrative Expense	To DSRF***
1	$561,000	$ 639,107	$44,737	$25,000	$ 70,737
2	561,000	709,844	49,689	25,000	75,689
3	561,000	785,533	54,987	25,000	80,987
4	561,000	866,520	60,656	25,000	86,656
5	561,000	953,176	66,722	25,000	92,722
6	561,000	1,045,898	73,213	25,000	99,213**
7-20	561,000	1,122,000**	78,540	25,000	104,540

* These funds would be added to the DSRF to accelerate the accumulation of the two year DSRF.

** At this point DSRF is fully funded and excess is returned to University A. From the 8th through the 20th year annual rentals would continue at $561,000, but they would be reduced by return to University A of the earnings on the DSRF and the 10% excess payment. This would make the effective rental during this period $456,460. After the 20th year, the DSRF would be repaid to University A and the title to the project would pass to University A.

*** Income on DSRF less Administrative Expenses plus 10% to create one year rent reserve at 110% of debt service.

Year	Annual Rental	Bonds Retired	Interest at 6.00%	Principal and Interest	Bonds Outstanding	DSRF Beginning Balance	Earnings on DSRF at 7.00%	Less Administrative Expense Fee	DSRF Ending Balance	Available to Reduce Rental
1	$561,000	$160,000	$351,000	$511,000	$5,690,000	$ 639,107	$ 44,737	$ 25,000	$ 708,844	$ --
2	561,000	165,000	341,400	506,400	5,525,000	708,844	49,619	25,000	788,063	--
3	561,000	180,000	331,500	511,500	5,345,000	788,063	55,164	25,000	867,727	--
4	561,000	190,000	320,700	510,700	5,155,000	867,727	60,741	25,000	955,168	--
5	561,000	200,000	309,300	509,300	4,955,000	955,168	66,862	25,000	1,050,730	--
6	561,000	210,000	297,300	507,300	4,745,000	1,050,730	73,551	25,000	1,150,581	28,581
7	561,000	225,000	284,700	509,700	4,520,000	1,122,000	78,540	25,000	1,229,240	107,240
8	561,000	240,000	271,200	511,200	4,280,000	1,122,000	78,540	25,000	1,225,340	103,340
9	561,000	255,000	256,800	511,800	4,025,000	1,122,000	78,540	25,000	1,224,740	102,740
10	561,000	270,000	241,500	511,500	3,755,000	1,122,000	78,540	25,000	1,225,040	103,040
11	561,000	285,000	225,300	510,300	3,470,000	1,122,000	78,540	25,000	1,226,240	104,240
12	561,000	300,000	208,200	508,500	3,170,000	1,122,000	78,540	25,000	1,228,040	106,040
13	561,000	320,000	190,200	510,200	2,850,000	1,122,000	78,540	25,000	1,226,340	104,340
14	561,000	340,000	171,000	511,000	2,510,000	1,122,000	78,540	25,000	1,225,540	103,540
15	561,000	360,000	150,600	510,600	2,150,000	1,122,000	78,540	25,000	1,225,940	103,940
16	561,000	380,000	129,000	509,000	1,770,000	1,122,000	78,540	25,000	1,227,540	105,540
17	561,000	405,000	106,200	511,200	1,365,000	1,122,000	78,540	25,000	1,225,340	103,340
18	561,000	430,000	81,900	511,900	935,000	1,122,000	78,540	25,000	1,224,640	102,640
19	561,000	455,000	56,100	511,100	480,000	1,122,000	78,540	25,000	1,225,440	103,440
20	561,000	480,000	28,800	508,800	-0-	1,122,000	78,540	25,000	1,227,740	--
Average				$510,150						

APPLICATION FOR SERVICES
VIRGINIA COLLEGE BUILDING AUTHORITY

I. _____ _____
Name of Institution County

_____
Official Business Address

_____
City State Zip Code

II. DESCRIPTION OF PROPOSED PROJECT:

New Building(s) On		Add. to	Alt. to	
New Site	Present Site	Existing Building(s)	Existing Building(s)	Other*

* Other _____

Location of Proposed Project

_____
Street or Highway Route City or Town County

III. COST DATA (Estimated) - Continued

	1. Cost of Addition	2. Cost of Alternations	3.** Total Cost
A. STRUCTURE COST*:_____			
_____			
1. General	$_____	$_____	$_____
2. Heating	$_____	$_____	$_____
3. Plumbing	$_____	$_____	$_____
4. Electrical	$_____	$_____	$_____
5. Test Borings	$_____	$_____	$_____
6. Provision for Water	$_____	$_____	$_____
7. Other Structure Costs:			
_____	$_____	$_____	$_____
8. Sub-total Structure	$_____	$_____	$_____
B. Architect's Fee	$_____	$_____	$_____
C. Movable Furniture and Equipment	$_____	$_____	$_____
D. Sub-total	$_____	$_____	$_____

* Complete a separate Cost Data Sheet, Items "A" - "D" for each separate building involved.

** Complete only Column 3 for new building.

III. COST DATA (Estimated) - Continued

E1. Cost of Acquiring Site* (Include purchase price plus all other costs and fees incidental to acquisition of site)	$_____	$_____	$_____
E2. Pre-planning Costs	$_____	$_____	$_____
E3. Other Costs**	$_____	$_____	$_____
E4. Total (Line D + E Items)	$_____	$_____	$_____

F. Additional Cost

1. Contingencies - 2% of Total	$_____
2. Administrative & Inspection	$_____
3. Total "F" Items	$_____

* Please answer these questions:

1. Does the site include existing buildings? _____

2. If answer to question "1" is "yes":

   a. What year were such buildings acquired by your College? _____

   b. If there any outstanding indebtedness applicable to such buildings? _____

   _____

   c. Does the cost of acquiring site as shown include any funds intended to repay such outstanding indebtedness? _____. If so, how much? $_____

   d. Are there any of these buildings to which you do <u>not</u> contemplate additions or renovations under this project? _____.

** Not applicable at time of original application.

III. COST DATA (Estimated) - Continued

G. Total Cost of Project (Sub-total plus Line F3) $_____

H. Less Contributions* $_____

I. Adjusted Total Cost of Project $_____

Desired Period of Amortization _____ Years

J. Financing Costs (Do Not Complete To Be Estimated By Authority)

1. Capitalized Reserve (Line I x) $_____

2. Bond Discount and Miscellaneous - (% of Line I)** $_____

3. Capitalized Interest $_____

4. Total "J" Items $_____

K. Total Amount to be Financed Through Authority (Line I + Line J4) $_____

L. Estimated Annual Rental*** $_____

Interest Rate used in Determining Estimated Annual Rental _____.

* SHOW TOTAL OF CASH GRANTS ONLY. DO NOT INCLUDE IN THIS TOTAL ANY FEDERAL LOANS; SUCH LOANS WILL BE PART OF THE TOTAL AMOUNT FINANCED BY VCBA BONDS WITH SUCH BONDS SOLD DIRECTLY TO THE FEDERAL AGENCY, OR BY INTEREST SUBSIDY BY THE FEDERAL AGENCY. (SHOW THE BREAKDOWN OF GRANTS AND FEDERAL LOANS AT PART IV, PAGE 5 OF THIS APPLICATION.)

** INCLUDES COST OF BOND DISCOUNT, BOND COUNSEL, FINANCIAL ADVISOR, TRUSTEE, PRINTING AND ADVERTISING.

*** THE AUTHORITY CHARGES THE INSTITUTION EXACTLY THE SAME INTEREST RATE IT PAYS ON THE BONDS USED TO FINANCE THE PROJECT AS DETERMINED WHEN THE BONDS ARE SOLD. HOWEVER, IN ORDER FOR THE AUTHORITY TO CONSIDER AND PROCESS THE APPLICATION IT IS NECESSARY TO PROVIDE AN ESTIMATED RENT BASED ON A MAXIMUM INTEREST RATE AND SHORTEST PERIOD OF AMORTIZATION. NEVERTHELESS, THE RENT SET FORTH IN THE LEASE WILL BE BASED UPON THE ACTUAL INTEREST RATE.

IV. Contribution and Federal Aid Data

A. Private and Federal Grants

IDENTIFY EACH ITEM COMPRISING TOTAL CONTRIBUTION LISTED ABOVE AT LINE "H". (IF A FEDERAL GRANT IS INVOLVED, THE INSTITUTION MUST SUBMIT, WITH THIS APPLICATION, A COPY OF AN APPROVED GRANT AGREEMENT BEFORE THE CONTRIBUTION CAN BE CONSIDERED AS DECREASING THE AMOUNT TO BE FINANCED BY THE AUTHORITY. FURTHERMORE, THE INSTITUTION MUST BE PREPARED ON BID OPENING DAY FOR CONSTRUCTION CONTRACTS TO PAY OVER TO THE AUTHORITY, IN CASH, OR IN DEPOSIT IN A CUSTODIAL ACCOUNT UNDER CONTROL OF THE AUTHORITY SECURITIES, IN THE AMOUNT OF ALL GRANTS, BOTH PRIVATE AND FEDERAL LISTED AS CONTRIBUTIONS AT LINE "H" ABOVE. IT WILL THEN BE THE RESPONSIBILITY OF THE INSTITUTION TO REIMBURSE ITSELF BY OBTAINING THE GRANT FUNDS AS THEY BECOME AVAILABLE.)

B. Federal Loans - LIST ONLY FEDERAL LOANS FOR WHICH YOU HAVE AN APPROVED LOAN AGREEMENT FOR THIS PROJECT. A COPY OF THE APPROVED LOAN AGREEMENT MUST BE SUBMITTED WITH THIS APPLICATION. DO NOT INCLUDE SUCH LOANS AS A CONTRIBUTION AT LINE "H" ABOVE, SINCE VCBA BONDS WILL BE ISSUED AND SOLD TO THE FEDERAL AGENCY IN THE AMOUNT AND AT THE RATE IN THE APPROVED LOAN AGREEMENT.

ARCHITECT'S CERTIFICATION

This is to certify that the estimated costs of the items comprising the total structure cost are considered to be realistic and have been made according to accepted architectural practices for developing preliminary estimates.

_____

Signature of Architect Date

_____

Address

_____

City Zip Code

_____

Telephone Number

(SEAL)

CERTIFICATION:

This certifies that the Board of Trustees of the _____
College or University

By Resolution dated _____ 19____ authorized the filing of this Application and that the information herein is correct to the best of my knowledge and belief.

(SEAL)

_____
Secretary of Board of Trustees

_____ 19 _____

_____
Address

_____ _____
City Zip Code

ADDRESSES:
(No Signature required)

_____
Telephone

Chairman of Board of Trustees:

_____ _____
Name Street

_____
City Zip Code

_____
Telephone Number

President of College or University

_____ _____
Name Street

_____
City Zip Code

_____
Telephone Number

Business Manager, College or University

_____ _____
Name Street

_____
City Zip Code

_____
Telephone Number

EXHIBIT "A"

Schedule of Enrollment

Include actual full-time enrollment during the regular academic term (September - June) for the 5 year period immediately preceding this application; and projected full-time enrollment during the regular academic term (September - June) for the 5 year period immediately following this application.

* * *

Academic Year	Graduate	Undergraduate	Total
Actual			
1.			
2.			
3.			
4.			
5.			
Projected			
1.			
2.			
3.			
4.			
5.			

EXHIBIT "B"

Schedule of Tuition and Fees

Include actual annual fees (two semesters) being charged in the current year, and projected annual fees (two semesters) to and including either (a) the first year in which the initial rental to this Authority is due, or (b) (in the case of revenue producing projects, such as dormitories, dining facilities, or parking facilities) the first year in which income from all such facilities in the project are anticipated, whichever shall be later.

Actual

Current Year	Tuition	Room and Board	Other(specify)
	$	$	$

Projected

Year	Tuition	Room and Board	Other(specify)
	$	$	$

(The above form may be altered so long as the data is presented in a brief schedule form, appropriately footnoted if necessary.)

EXHIBIT "C"

Statement of outstanding indebtedness

(As of end of most recent full fiscal year)

Description	Date of Obligation	Amount Issued	Amount Retired	Amount Outstanding	Annual Debt Service*
		$	$	$	$
	Total	$____	$_____	$_____	$_____

*Required annual payments for principal and interest.

EXHIBIT "D"

Annual Fiscal Report

(As of end of each of the three most recent fiscal years, to include:)

Balance Sheet

Statement of Changes in Funds

Statement of Cash Receipts and Disbursements

Opinion of Auditors

EXHIBIT "E"

Budget Survey

	Actual	Projected				
	Current Year	First Year Following Current Year	Second Year Following Current Year	Third Year Following Current Year	Fourth Year Following Current Year	Fifth Year Following Current Year
	19__19__	19__19__	19__19__	19__19__	19__19__	19__19__
GROSS STUDENT TUITION*	$	$	$	$	$	$
UNRESTRICTED ENDOWMENT INCOME	$	$	$	$	$	$
UNRESTRICTED GIFTS AND GRANTS	$	$	$	$	$	$
GROSS PROJECT RECEIPTS**	$	$	$	$	$	$

* DEDUCT THEREFROM AMOUNT OF TUITION SPECIFICALLY PLEDGED FOR SECURITY OF OUTSTANDING DEBTS. PLEASE INDICATE BY FOOTNOTE THE EXTENT OF ANY SUCH PRIOR PLEDGE MADE ON ACCOUNT OF A FEDERAL LOAN.

** PROJECTS INVOLVING DORMITORIES WILL SHOW OCCUPANCY CHARGES AS RECEIPTS. PROJECTS INVOLVING CLASSROOM FACILITIES, GYMNASIUM, ETC. WILL NORMALLY NOT SHOW PROJECT RECEIPTS.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 7, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

It sounds as if Washington and Lee's borrowing under the Virginia Act which you describe in your memorandum of May 4th would not, even under the most sweeping arguments of the proponents of the Establishment Clause argument, violate that clause. The only conceivable argument as to Washington and Lee's interest in the outcome of this decision, then, would be that if Virginia cannot make this aid available to "sectarian" as well as to "non-sectarian" colleges, it might repeal it altogether. This is so speculative and remote that I certainly don't feel you should disqualify yourself.

Sincerely,

Bill

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

May 7, 1973

Dear Lewis:

I have your memo on 71-1523, Hunt v. McNair. I see no reason whatsoever for your disqualification to sit in the case.

WOD

William O. Douglas

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 7, 1973

RE: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I can see no possible reason for your disqualifying yourself in the above for the reason mentioned in your memorandum of May 4.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 7, 1973

No. 71-1523, Hunt v. McNair

Dear Lewis,

Based upon the information contained in your thoughtful memorandum of May 4, I see no reason whatever why you should disqualify yourself in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 7, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

This is in response to your memorandum of May 4.

I see no reason why you should disqualify in this case.

Sincerely,

H.A.B.

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 8, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I see no reason why you should disqualify yourself in this case.

Sincerely,

T.M.

Mr. Justice Powell

cc: The Conference

Hunt v. McNair

Take a look at the opinion to see whether we have quoted the language in Tilton v. Richardson, 403 U. S. 672 at 685 on the difference between secondard and higher education. This is an excellent quote and at least should be put in a footnote to McNair.

I should also consider adding a note to theeeffect that the South Carolina Court held - if it did (I must check) that the Act was not questioned as to nonreligious schools. No such question was presented in this Court, but I believe the South Carolina Court dealt with the point.

L. F. P., Jr.

lfp/ss 5/28/73

MEMORANDUM

TO: Mr. William C. Kelly, Jr. DATE: May 28, 1973

FROM: Lewis F. Powell, Jr.

Hunt v. McNair and Committee v. Nyquist

Larry and I agree that we would like for you to be the chambers "editor" of Nyquist.

In addition to your generally recognized qualifications, I would like you to undertake this to be sure that our opinions in McNair and Nyquist harmonize in every respect.

L. F. P., Jr.

cc: Mr. Larry A. Hammond

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1973

Re: No. 71-1523, Hunt v. McNair

Dear Lewis,

I see no reason why the opinion should be reassigned in this case.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1973

Dear Lewis:

As respects your memo of June 4th relative to Hunt v. McNair I see no possible reason for you to recuse yourself. I voted the other way in the case. But I would be the last to say you had a "conflict".

William O. Douglas

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1973

RE: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I see no reason whatever for you to recuse yourself.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

June 4, 1973

No. 71-1523 Hunt v. McNair

MEMORANDUM TO THE CONFERENCE:

This supplements my note to the Conference of May 4.

At a recent meeting of the Board of Trustees of Washington and Lee University, the possibility of financing several campus buildings through the Authority created under the Educational Facilities Authority Act of Virginia was discussed. The proper officers of the University were authorized to continue discussions with the Authority with the view of determining whether financing in this manner is feasible and advantageous to W. & L. If the answers prove to be affirmative, I think W. & L. will - perhaps by next fall - utilize the Authority.

In other respects, the situation outlined in my note of May 4 remains the same. I was in error, however, in saying that W. & L. was at one time of "presbyterian origin". I am now informed that it always has been strictly independent of church and state.

I regret botering the Conference with what essentially is my problem. As McNair comes to us only because of the Establishment Clause issue, I see no conflict. Yet, especially in view of the Court's division in this case, I would respect and defer to any differing view. If any Justice would prefer that the opinion be reassigned, I will recuse myself.

L. F. P., Jr.

lfp/ss

MEMORANDUM

To: William C. Kelly, Jr. Date: June 5, 1973

From: Lewis F. Powell, Jr.

No. 71-1523 Hunt v. McNair

Here is my desk copy of the first draft, on which you will note suggested changes or questions on the three pages indicated.

In addition, what would you think of adding a note to the effect that the South Carolina Court held (as I believe it did) that the validity of the Act was not questioned as to nonsectarian schools.

Justice Brennan told me yesterday that he expected to have his dissent this week. After we have seen it, and decided whether it requires a reply, we can recirculate.

I believe you have checked already to be sure that the language in McNair is consistent with that in Nyquist. I think that it is, but we should be meticulous about this.

L.F.P., Jr.

lfp/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 5, 1973

PERSONAL

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I contemplate joining you and will do so for the record before Friday. I want to see how this case and your Nyquist affect my Levitt.

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 6, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

I certainly see no reason why you should disqualify yourself in this case.

Sincerely,

WHR

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 7, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

This is in response to your note of June 4. I see no reason for the opinion to be reassigned.

Sincerely,

H.A.B

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 12, 1973

Re: No. 71-1523 - Richard W. Hunt v. Robert E. McNair, et al

Dear Lewis:

Please join me.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Bill:

Please join me in your dissenting opinion.

Sincerely,

T.M.

Mr. Justice Brennan

cc: Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 15, 1973

Dear Bill:

Please join me in your dissent in 71-1523, Hunt v. McNair.

William O. Douglas

Mr. Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

Re: No. 71-1523 - Hunt v. McNair

Dear Lewis:

Please join me in your opinion.

I have been troubled about what you define on page 12 as the "closer issue," namely, the possible involvement in day-to-day financial and policy decisions. I was tempted to consider the rate and fee power as unconstitutional and to remand to have the state court consider severability. What you have done, however, seems about all that can be done on this sparse record. Thus, with some uneasiness, I join.

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Brennan, J.

Circulated: 10-6-72

Recirculated:

SUPREME COURT OF THE UNITED STATES

RICHARD W. HUNT *v.* ROBERT E. McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71-1523. Decided October —, 1972

MR. JUSTICE BRENNAN, dissenting.

I dissent from the dismissal because, contrary to the Court's holding, this appeal presents a substantial constitutional question.

The constitutional question presented is whether South Carolina's assistance to the Baptist College at Charleston under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible support by the State for this sectarian institution.* The test to which I adhere for determining such questions is whether the arrangement between the State

*This case was initially decided by the Court of Common Pleas for Charleston County, South Carolina, which upheld against First Amendment attack the validity of the South Carolina Educational Facilities Authority Act, whereby the State Budget and Control Board, acting as the Authority, is authorized to assist financing for institutions of higher learning by its issuance of revenue bonds secured by a mortgage on the project so financed. The judgment of that court was affirmed by the Supreme Court of South Carolina on October 22, 1970. *Hunt* v. *McNair*, 255 S. C. 71, 177 S. E. 2d 362 (1970). Appellant appealed to this Court and on June 28, 1971, we vacated the judgment of the Supreme Court of South Carolina and remanded for "reconsideration in light of this Court's decisions in *Lemon* v. *Kurtzman*, *Earley* v. *DiCenso*, and *Robinson* v. *DiCenso*, [403 U. S. 602]; and *Tilton* v. *Richardson*, [403 U. S. 672]." *Hunt* v. *McNair*, 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina again affirmed the judgment of the Court of Common Pleas, *Hunt* v. *McNair*, — S. C. —, 187 S. E. 2d 645 (1972), and today this Court dismisses appellant's appeal on the ground that the case does not present a substantial constitutional question.

and the Baptist College is foreclosed under the Establishment Clause of the First Amendment because among

> "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to secure governmental ends, where secular means would suffice." *Abington School District* v. *Schempp,* 374 U. S. 203, 294–295 (1963) (concurring opinion); *Walz* v. *Tax Commission,* 397 U. S. 664, 680–681 (1970) (concurring opinion).

It is obvious that under that test there is a substantial question whether South Carolina's statutory scheme is constitutional.

The statute authorizes a financing arrangement between the Authority and the Baptist College at Charleston, a South Carolina educational corporation operated by the South Carolina Baptist Convention. In accordance with the provisions of the Act, the College would convey a substantial portion of its campus to the Authority, with the Authority then leasing the property so conveyed to the College at an agreed rental. The Authority would then issue revenue bonds of South Carolina in the amount of $3,500,000.00, which bonds would be payable, principal and interest, from the rent to be received by the Authority under the lease. The proceeds of the sale of the bonds would be used to pay off outstanding indebtedness of the College and to construct additional buildings and facilities for use in its higher education operations. When the bonds and interest are paid in full, the Authority would be obligated to convey title to the project and campus properties to the College free and clear of all liens and encumbrances. But this is not a mere mortgage arrangement. The Authority is also empowered, *inter alia,* to determine the location and character of any project; to construct,

maintain, manage, operate, lease as lessor or lessee, and regulate the same; to enter into contracts for the management and operation of such project; to establish rules and regulations for the use of the project or any portion thereof; and to fix and revise from time to time rates, rents, fees and charges for the use of a project and for the services furnished or to be furnished by a project or any portion thereof. In other words, the College turns over to the state agency control of substantial parts of the fiscal operation of the school—its very life-blood. This involves the State in a policing of the affairs of the College that presents the substantial question whether this plan differs in any material aspect from those the Court struck down in *Lemon* v. *Kurtzman, Earley* v. *DiCenso,* and *Robinson* v. *DiCenso,* 403 U. S. 602 (1971). See *Sanders* v. *Johnson,* 319 F. Supp. 421, 431–432, aff'd, 403 U. S. 955 (1971).

Indeed, the many powers reserved to the Authority by the South Carolina statute also create substantial questions whether this statute could survive the "impermissible entanglement" test applied by the plurality in *Lemon, Earley,* and *Robinson, supra,* and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). By providing the College with the opportunity to issue tax-exempt bonds under the State's name and then retaining the power to oversee the use of the proceeds and the terms of repayment of such bonds, surely the statute presents a substantial question whether the State employs the organs of government for essentially religious purposes and creates an "intimate continuing relationship or dependency between government and religiously affiliated institutions." *Tilton, supra,* at 688 (plurality opinion of BURGER, C. J.).

I would note probable jurisdiction and set the case for oral argument.

Cert may be granted. Attach to Cert Note

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Douglas, J.

RICHARD W. HUNT *v.* ROBERT E. McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

Circulated: _____

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

Recirculated: 10-12

No. 71-1523. Decided October —, 1972

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE MARSHALL concurs, dissenting.

The dismissal of this appeal for want of a substantial federal question is a break with our constitutional traditions. For South Carolina is allowed to finance a religious school through the use of state revenue bonds. Today the state finances a Baptist school. But the same principle would apply to Mormon schools, where Mormons are politically in control of a State, to Catholic schools where the Catholic voice is dominant, or to any other religious school whose sponsors have sufficient political "clout." The race will now be on with a bitter battle among religionists to obtain state aid for their private schools. The casualties will be not merely minority religious groups nor nonbelievers who fear the mixture of sectarian ideas and civil administration of state affairs but those who deeply believe that when a church becomes dependent on and involved with a State, the secularization of a creed may ensue. Financial control usually means pervasive control; and churches that seek state aid today may be whipsawed by state politics tomorrow.

These are problems that the Establishment Clause of the First Amendment was sought to avoid. As stated in *Walz* v. *Tax Commission*, 397 U. S. 664, 668, the "establishment" of a religion in the mind of the Framers "connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."

Under the South Carolina Educational Facilities Authority Act the State's credit is employed in aid of private

not so

sectarian institutions of learning. The Authority established by the Act may issue state revenue bonds for the benefit of an institution of higher learning on terms that require the recipient institution to convey title to the financed facilities to the Authority for the duration of the bond repayment period. Here, a proposed loan to the Baptist College at Charleston would be financed through state revenue bonds that would issue after the school had conveyed a substantial portion of the campus to the Authority. Reconveyance to the college would occur upon payment in full of the bonds and interest subject to a condition that the facilities so financed not be used by the college or by any voluntary grantee of the college for sectarian instruction or as a place of worship. Liability of the State results from the Authority's obligation to the bondholders to set fees and rentals at levels sufficiently high to insure adequate revenues to meet bond obligations or, more indirectly, through the State's need to preserve its credit rating.

Under the test suggested by *Walz* there is "sponsorship" of a sectarian institution by the State. Financing of it is an umbilical cord that ties church and State together into an ongoing relationship.

The "financial support" mentioned in *Walz* is not restricted to secular activities of the church school. The revenue bonds of the State permit refinancing of current indebtedness some of which was incurred for sectarian purposes.

The "active involvement" of the State in the activities of the church school is vital to the scheme. There will be continuing supervision of the use to which buildings are put not only during the time that title rests with the State, but also in perpetuity.

During the years when the bonds remain outstanding, the Authority has the power and the obligation to see that the fees charged by the college for the use of the financed facilities are adequate to meet the repayment obligations to bondholders. That entails an on-going

supervision of the College's financial wellbeing and control of the fees which it charges. Such an oversight of an agency of a church is an entanglement in the affairs of a sectarian institution that is repugnant to the Establishment Clause. As in *Lemon* v. *Kurtzmann,* 403 U. S. 602, 619, "comprehensive, discriminating, and continuing state surveillance will eventually be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."

A religious school operates on one budget. Money not spent for one purpose becomes available for other purposes. A banker—here the State—who exercises surveillance of the budget of the religious school may therefore insist to the religious group that it cut down on its religious courses if the bonds are to be paid. Surveillance means the entanglement with the church that the First Amendment was designed to avoid. That entanglement may be a heavy cross for the devout to carry, for with it comes an intrusion of civil authority into ecclesiastical problems that Madison warned against in his *Remonstrance.**

I would note this appeal and put the case down for oral argument.

---

*"We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may devide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority." Memorial and Remonstrance Against Religious Assessments, reprinted 397 U. S. 664, 719, 720.

(1)

The College has applied to the Authority for the issuance of revenue bonds pursuant to the provisions of the Act, and proposes to convey without cost to the state a substantial portion of its campus (the Project) to the Authority. It will then lease the property so conveyed back to the College under a lease agreement pursuant to which the College will be obligated to operate and maintain the Project property and to pay to the Authority rentals in an amount sufficient to meet the payments of principal and interest as they become due on the proposed revenue bonds. The Authority would issue the bonds and make the proceeds available to the College for the Project purposes. After repayment in full of the bonds, the Project would be reconveyed to the College.

The Act is quite explicit that the bonds shall not be obligations of the state:

> "(K) Revenue bonds issued under the provisions of this section shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political ~~xxxx~~ subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." South Carolina Code ~~xxxxx~~ Ann. § 22-41(10) cum. supp. 1971

(4)

In accordance with the Act, the proposal contemplates that simultaneously with the execution of the lease agreement, the Authority and the trustee bank would enter into a ~~xxxxxxxxxx~~ Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the ~~xxxx~~ Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix B, p. 50.

(Bill: I think there should be an additional reference with respect to the mortgage on the property but I could not put my finger on it.)

(5)

The College and other private institutions of higher education provide these benefits to the state.* As of the school year 1969-70, there were 1,548 regularly enrolled students, in addition to approximately 600 night students.** It is also undisputed that 95% of the students at the College are residents of South Carolina who are thus receiving a college-level education without "any financial support from the State of South Carolina." ***

*In Allen, this Court commented on the importance of the role of private education in this country:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competency and experience." Allen, supra, 392 U.S. 236 at ____.

**Paragraph 11 of the Application to the Authority, which is not questioned, App. 20. The application further shows that ~~enrollment~~ enrollment has been increasing at a rapid rate.

*** App., p. 16.

(6)

Consider adding the substance of a note, referenced to the point indicated on p. 7, as follows:

It is to be noted that the "state aid" involved in this case is different significantly from that before the Court in our previous Establishment Clause cases. We have here no expenditure of publicfunds, either by grant or loan, no reimbursement by a state for expenditures made by a private or parochial school or college, and no extending or committing a state's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and security upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." Clayton v. Kervick, 56 N. J. 523, 530-531, 267 A. 2d 503,

506-507 (1970). The South Carolina Supreme Court, in its opinion below, described the role of the state as that of a "mere conduit" ___ S. C. ____. As we conclude that the primary effect of this Act neither advances nor inhibits religion for the other reasons stated in this opinion, we need not consider whether the "three test" standard of Lemon invariably applies to the type of "aid" presently before the Court.

7

On the record in this case there is no basis to conclude that the College functions as a religious entity or that its operations are oriented significantly towards sectarian rather than secular education.

(8)

Consider adding a footnote at point indicated, as follows:

The gravity of the entanglement problem is also related, of course, to the extent to which the particular institution is in fact church related. Although the record in this case is abbreviated and not free from ambiguity, the burden is on appellant and he has failed to show much more than a formalistic church relationship. There are many colleges throughout the country and especially in some of the southern states, that were organized by religious denominations and are still legally controlled by trustees designated by a secular denominational body, as is true in this case. The trend in such colleges, especially in recent years, has been away from religious emphasis or indoctrination and toward the providing of conventional college level education leading to A. B. and B. S. degrees, with a broadly based curriculum which may include relatively few, if any, courses oriented to the particular denomination which founded the college. So far as the record

in this case goes, there is no showing that Baptist college places any special emphasis on Baptist denominational or any other secular type of education. As noted above, both the faculty and student body are open to persons of all (or no) religious faiths.

Consider adding the following as a note at some appropriate place:

The Supreme Court of South Carolina expressly found that the bonds to be issued by the ~~xx~~ Authority will "not [be] a debt or obligation of the state". That court also unequivocally concluded that: "There is no cost to the state incident to the entire plan of financing." Jurisdictional Statement, p. 19.

Consider adding a footnote as follows:

There is nothing presented by this case which resembles the cumulative impact of the entangelment described in Lemon as follows:

> "A comprehensive, discriminating and continuing state surveillance will be inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."
> 403 U. S. at ____.

~~Consider adding a footnote as follows~~

The following excerpt from the lower court opinion (the Court of Common Pleas for Charleston County) might be added to a note at some appropriate place:

> "Since it is conceded that the only remedies of the bondholders in the event of default is to pursue the rights of the authority to collect from its lessee and if need be, to foreclose the Trust Indenture and have the property sold, the state's credit can never be adversely affected." Appendix 37.
>
> * * *
>
> "I find that the credit of the state can in no way be considered as aiding in any way the Baptist College at Charleston." Appendix 40.

lfp/ss Rider A, p. (Hunt) 4/7/73

~~xxxxx~~

Consider adding a footnote as follows:

In Allen, this Court commented on the importance of the role of private education in this country:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the Court decisions has been a recognition that private education has played and is playing a significant and valuable xxxx role in raising national levels of knowledge, competency and experience." Allen, supra 392 U. S. 236 at ___.

would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us or any indication in the record that the Authority, rather than the trustee, would be required to take any action. ~~We hold only that in its present posture, the College's financing proposal does not force excessive entanglement between the State and religion.~~

III. To test the constitutionality of the Act as applied to a proposed - rather than an actual issue of revenue bonds,

~~As we have emphasized throughout,~~ this case comes to us in a declaratory judgment action, ~~an awkward posture. Because,~~ as the court below pointed out, _____S.C., at _____; 187 S.E.2d, at 651, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, the ~~Act~~ appears to confer broad power and responsibility on the Authority. Yet specific provisions of the Act, the Rules and Regulations of the Authority, and the College's proposal before us,

Hunt v. McNair, No. 71-1523
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April 9, 1973

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MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S.C. CODE ANN. §§ 22-41 et seq. (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston. The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S.C. 71, 177 S.E.2d 362(1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in Lemon v. Kurtzman, 403 U.S. 602(1971); Earley v. DiCenso, 403 U.S. 602(1971); Robinson v. DiCenso, 403 U.S. 602(1971); and Tilton v. Richardson, 403 U.S. 672(1971). 403 U.S. 945(1971). On remand, the Supreme Court of South Carolina adhered to its earlier position.

I.

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority(the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . .", S.C.CODE ANN. § 22-41.4(Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used of to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S.C.CODE ANN. § 22-41.2(b)(Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. —, infra.

While revenue bonds [redacted] ~~issued by [redacted]~~ are issued by the Authority [redacted] to be used in connection with a project, the Act is quite explicit that the [redacted] bonds shall not be obligations of the State, directly or indirectly:

> "(K) Revenue bonds issued under the provisions of this section shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement to the effect that neither the State of South Carolina nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political [redacted] subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S[redacted] Carolina Code [redacted] Ann. § 22-41(10)(Cum. Supp. 1971).

Furthermore, since all of the expenses of the Authority [redacted] must be paid from the revenues of the various projects in which it participates, S.C.CODE ANN. [redacted] § 22-41.5(Cum. Supp. 1971), none of the general revenues of South Carolina will be used to support

On January 6, 1973, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, [redacted] the Authority would issue revenue bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College.

The Authority granted preliminary approval [redacted] on January 16, 1970, 255 S.C., at 76; 177 S.E.2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of [redacted] capital improvements and $200,000 would be applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the state, to market the bonds at a significantly lower rate of interest than the educational institution (would be forced to pay if it) borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religion denomination." _____S.C., at _____; 187 S.E.2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II.

The Court has recently had occasion to synthesize the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause:

"Three . . . tests may be gleaned from our cases. 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 entanglement with religion'." Lemon v. Kurtzman, supra, 403 U.S., at 613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A.

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South

the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "(A) It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein."

S.C.CODE ANN. §22.41(Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State. As of the academic year 1969-70, there were 1,548 students enrolled in the College, in addition to approximately 600 night students. Of these students, 95 % are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B.

To identify "primary effect", we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the

proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affilation has consistently been rejected. E.g., Bradfield v. Roberts, 175 U.S. 291 (1899); Walz v. Tax Comm'n, 397 U.S. 664(1970); Tilton v. Richardson, supra. Stated another way, the Court has ~~firmly rejected~~ not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that all functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In Tilton v. Richardson, supra, the Court refused to strike down a direct

Connecticut. MR. CHIEF JUSTICE BURGER, for a plurality, concluded that [redacted] despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open [redacted] that possibiilty for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." 403 U.S., at 682.

Appellant has introduced no evidence in the present case [redacted] placing the [redacted] College is such a category. [redacted]

It is true that the [redacted] members of the College Board of Trustees are elected by [redacted] South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and the the charter of the College may be amended only [redacted]

What little there is in the record concerning the College establishes that there are no religious qualification for faculty membership or student admission, and that only 60% of the College [redacted] student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S.C., at 85; 177 S.E.2d, at 369. On the record in this case there is no basis to conclude [redacted] that the College's operations are [redacted] oriented significantly towards sectarian rather than secular education.

Nor[redacted]can we conclude that the proposed transaction will place the Authority in the position of providing direct support for religious activities. The scope of the Authority's power to assist institutions of higher education extends only to "projects", and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back [redacted] is the same as that being financed, but in any event it too must be part of the project and subject to the same prohibition against [redacted] use for religious purposes. In addition, as we have indicated, every lease agreement must contain a clause forbidding religious use and another [redacted] allowing inspections to enforce

C.

The final [redacted] question posed by this case is whether under the [redacted] arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in Lemon and the plurality opinion in Tilton are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies [redacted] in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in Lemon relied on the "substantial religious character of these church-related" elementary schools. MR. CHIEF JUSTICE BURGER's opinion for the plurality in Tilton [redacted] 403 U.S., at 616. [redacted] placed considerable emphasis on the [redacted] fact that the federal aid there [redacted] approved would be spent in a college setting:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related [redacted] colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." 403 U.S., at 687.

Although MR. JUSTICE WHITE [redacted] saw no such clear distinction,

the legislation here challenged." 403 U.S., at 664.

A majority of the Court in Tilton, then, concluded that on the facts of that case inspection was to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in Tilton

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act

"(g) generally, to fix and revise from time to time and charge and collect rates, rents, fees

person, partnership, association or corporation or other body public or private in respect thereof;

(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the use of a project undertaken for such participating institution for higher education. . . . " S.C. Code Ann. § 22-41.4 (1971 Cum. Supp.).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

The opinion of the South Carolina Supreme Court, however, reflects a narrow interpretation of the practical operation of these powers.[6] According to that court,

"Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management, and administration of the College. We do not so construe the Act. . . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." ___ S.C. at ___; 187 S.E.2d at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services.

Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, (b) to impose an adequate schedule of charges and fees in order to provide adequate revenues with which to operate and maintain the said facilities and to make the rental payments . . . . " [redacted] Appendix, p. 18.

In short, under the proposed Lease Agreement, neither the [redacted] Authority nor a trustee bank would [redacted] be permitted in taking action unless the College fails to make the prescribed rental payments or otherwise defaults on its obligations. Only if the College refused to meet rental payments or was unable to do so

would the Authority or the trustee be obligated to take further action. In that event, the Authority or the trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges and fees. It may be argued that only the former would be consistent with the Establishemnt Clause, but we do not now have that situation before us.

III.

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed--rather than an actual--issuance of revenue bonds. As the Court below pointed out, _____S.C., at _____; 187 S.E.2d, at 651, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. Yext specific provisions of the Act, the Rules and Regulations of the Authority, and the

all as interpreted by the South Carolina Supreme Court, delimit narrowly those otherwise untrammeled provisions, and no evidence has been submitted by appellant to undermine this narrowing. Accordingly, we affirm [redacted] the holding of the court below that the Act is constitutional as interpreted and applied in this case.

FOOTNOTES

1. At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that Clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

2. As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds...." 255 S.C., at 75; 177 S.E.2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

> "(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for capital improvements, and (iii) to finance the completion of the dining

3. Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing...." 26 U.S.C. § 103(a)(1).

4. Rule 4 relating to the Lease Agreement provides in part that:

> "If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condidtion that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." _____S.C., at _____; 187 S.E.2d, at 647-648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

> "The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." _____S.C., at ____; 187 S.E. 2d, at 648. See note _____ infra.

5. In Board of Education v. Allen, 392 U.S. 236 (1968), this Court commented on the importance of the role of private education in this country:

> "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competency and experience." 392 U.S., at 247.

6 Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See note ____, ante. Appellant's reliance on Tilton v. Richardson, supra, in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally-financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

~~6. In summarizing the role of the state in the proposed transaction, the court stated~~

The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a state for expenditures made by a ~~private or~~ parochial school or college, and no extending or committing of a state's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." Clayton v. Kervick, 56 N. J. 523, 530-531, 267 A. 2d 503,

506-507(1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit". _____S.C., at _____; 187 S.E. 2d, at 650-651. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion, for the other reasons stated in this opinion, we need not decide whether, as appellee argues, (Appellee's Brief, p. 14,) the present case is controlled by the decision in Walz v. Tax Comm'n, supra, where this Court upheld a property tax exemption which included religious institutions.

Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, and he has failed to show more than a formalistic church relationship. As Tilton established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record [redacted] here [redacted] is concerned, there is no showing that the Collge places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any(or no) religious affiliation.

71-1523

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which the College would be forced to pay on the open market.

Under the Act, the Authority would be accorded certain powers over the project, including the powers [redacted] to determine the fees to be charged for the use of the project and to establish regulations for its use. (See pp. , ante.) Rules adopted by the Authority prescribe that every lease agreement must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." ~~Appendix, pp. 47a~~ ___ S.C., at ___; 187 S.E.2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the authority to conduct inspections, [redacted] and any reconveyance to the College must contain a restriction against use for sectarian purposes. 64

The proposal contemplates that simultaneously with the execution of the lease agreement, the Authority and a (trustee) bank would enter into a Trust Indenture, which "shall mortgage the right, title and interest of the Authority in and to the Lease Agreement". Jurisdictional Statement, Appendix (B) p. 50.

On January 6, 1970, the College submitted its proposal to the Authority for preliminary approval and indicated that it would present specific forms for a Lease Agreement and a Trust Indenture if preliminary approval was forthcoming. Appendix, pp. 16-21.

The Authority granted preliminary approval on January 26, 1970, 255 S.C., at 76; 177 S.E. 2d, at 365, but no final terms have been set.

would the Authority or the trustee be obligated to take further action. In that event, [redacted] the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, [redacted] charges and fees. [redacted] It may be that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us. We hold only that in its present posture, the College's financing proposal does not [redacted] force excessive entanglement between the State and religion.

III.

As we have emphasized throughout, this case comes to us in an awkward posture. Because, as the court below pointed out, [redacted] — S.C., at —; ~~Jurisdictional Statement, Appendix A, p. 26a~~, ~~the~~ 187 S.E.2d, at 651), the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, the Act appears to confer broad [redacted] power and responsibility on

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religion denomination." _____ S.C. at_____; 187 S.E.2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide

[redacted] that

simultaneously with the execution of the lease agreement, the Authority and the trustee bank would enter into a [redacted] Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the [redacted] Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends

71-1523

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/ At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that Clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

FOOTNOTE TO HUNT, PAGE 2a

2 As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds...." 255 S.C., at 75; 177 S.E.2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

> "..., (i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements,* and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000."

Appendix, p. 49.

FOOTNOTE TO HUNT, PAGE 2a

3a Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing . . . ." 26 U.S.C. § 103(a)(1).

FOOTNOTE TO HUNT, PAGE THREE.

4 Rule 4 relating to the Lease Agreement

provides in part that:

> "4. If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination."

~~Jurisdictional Statement, Appendix B, p. 49.~~ ___ S.C., at ___; 187 S.E.2d, at 647-648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

> "The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof."

~~Jurisdictional Statement, Appendix B, pp. 44-45.~~ ___ S.C., at ___; 187 S.E.2d, at 648.

See note ___, ~~page~~ infra.

FOOTNOTE TO HUNT, PAGE TEN.

5 Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See note , ante. Appellant's reliance on Tilton v. Richardson, supra, in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally-financed project after 20 years.

[redacted] In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assitance of the Authority nor as to volutary trasnferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only

FOOTNOTE TO HUNT, PAGE FOURTEEN

6/ In summarizing the role of the state in the proposed transaction, the court stated:

"The State plays a passive and very limited role in the implementation of the Act, serving principally as a mere conduit through which institutions may borrow funds for the purposes of the Act on a tax-free basis." ~~Jurisdictional Statement, Appendix A, p. 26.~~

— S. C., at —; 187 S. E. 2d, at 650-651.

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

[April —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22–41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the "College").[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Earley* v. *DiCenso,* 403 U. S. 602 (1971); *Robinson* v. *DiCenso,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

earlier position. —— S. C. ——, 187 S. E. 2d 645 (1972). We now hold that the Act is constitutional.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . .", S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination," S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. ——–——, *infra*.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement

> to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. § 22–41.10 (Cum. Supp. 1971).

Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Cum. Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1970, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue the bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76; 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of capital improvements and $200,000 would be

applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Ap-

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[2] As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds. . . ." 255 S. C., at 75; 177 S. E. 2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

"(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000." (Emphasis in original.) App., p. 49.

[3] Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing. . . ." 26 U. S. C. § 103 (a)(1). For state income tax purposes, gross income does not include interest "upon obligations of the United States or its possessions or of this State or any political subdivision thereof . . . ." S. C. Code Ann. § 65–253 (4) (Cum. Supp. 1971).

pendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." — S. C., at —; 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution

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[4] Rule 4 relating to the Lease Agreement provides in part that:

"If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." — S. C., at —; 187 S. E. 2d, at 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." — S. C., at —; 187 S. E. 2d, at 648. See n. 6, *infra*.

of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II

This Court has recently had occasion to synthesize the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause:

> "Three . . . tests may be gleaned from our cases. 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 entanglement with religion.'" *Lemon* v. *Kurtzman, supra,* 403 U. S., at 612–613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its

true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." 392 U. S., at 247.

enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g., Bradfield* v. *Roberts,* 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970); *Tilton* v. *Richardson, supra.* Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that all functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson, supra,* the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." 403 U. S., at 682.

Appellant has introduced no evidence in the present case placing the College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations." 403 U. S., at 686. What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S. C., at 85; 177 S. E. 2d, at 369. On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.

Nor can we conclude that the proposed transaction will place the Authority in the position of providing direct support for religious activities. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a clause forbidding religious use

and another allowing inspections to enforce the agreement.[6] For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.[7]

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[6] Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See n. 4, *ante*. Appellant's reliance on *Tilton* v. *Richardson*, *supra*, in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick*, 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." — S. C., at —; 187 S. E. 2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellee argues, Appellee's Brief, p. 14, the importance of the tax exemption in the South Carolina

C

The final question posed by this case is whether under the arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER'S opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

> "'Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." 403 U. S., at 687.

Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the result, stating:

> "It is enough for me that . . . the Federal Government [is] financing a separable function of over-

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scheme brings the present case under *Walz* v. *Tax Comm'n, supra,* where this Court upheld a local property tax exemption which included religious institutions.

riding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton,* then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton.*[8]

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

> "(g) [g]enerally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;
>
> "(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the

[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen, supra,* 392 U. S., at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

> use of a project undertaken for such participating institution for higher education. . . ." S. C. Code Ann. § 22-41.4 (Cum. Supp. 1971).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

As the South Carolina Supreme Court pointed out, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, — S. C., at —; 187 S. E. 2d, at 651, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. The opinion of that court, however, reflects a narrow interpretation of the practical operation of these powers.

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." — S. C., at —; 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, [and] (b) to impose an adequate schedule of charges and fees in order to provide adequate reve-

> nues with which to operate and maintain the said facilities and to make the rental payments . . . ." App., p. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal—all as interpreted by the South Carolina Supreme Court—confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

Chambers Draft

SUPREME COURT OF THE UNITED STATES

No. 71–1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

[April —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22–41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston.[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Earley* v. *DiCenso,* 403 U. S. 602 (1971); *Robinson* v. *DiCenso,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

earlier position. —— S. C. ——, 187 S. E. 2d 645 (1972). We now hold that the Act is constitutional.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . .", S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. ——–——, *infra*.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "(K) Revenue bonds issued under the provisions of this section shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement

> to the effect that neither the State of South Carolina nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. § 22–41 (10) (Cum. Supp. 1971).

Furthermore, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Cum. Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1973, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue revenue bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76; 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of capital improvements and $200,000 would be

applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Appendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

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To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in

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Nor can we conclude that the proposed transaction will place the Authority in the position of providing direct support for religious activities. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a clause forbidding religious use and another allowing inspections to enforce the agreement.[6] For these reasons, we are satisfied that imple-

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[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick*, 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." — S. C., at —; 187 S. E. 2d, at 650–651. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion for the other reasons stated in this opinion, we need not decide whether, as appellee argues, Appellee's Brief, p. 14, the present case is controlled by the decision in *Walz* v. *Comm'n*, *supra*, where this Court upheld a property tax exemption which included religious institutions.

gree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER'S opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

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Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the result, stating:

> "It is enough for me that . . . the Federal Government [is] financing a separable function of overriding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton,* then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the

College is any more an instrument of religious indictrination than were the colleges and universities involved in *Tilton*.[8]

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

> "(g) generally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;
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These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

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[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

The opinion of the South Carolina Supreme Court, however, reflects a narrow interpretation of the practical operation of these powers. According to that Court,

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." —— S. C., at ——; 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, (b) to impose an adequate schedule of charges and fees in order to provide adequate revenues with which to operate and maintain the said facilities and to make the rental payments . . . ." App., p. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only

the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. As the Court below pointed out, —— S. C., at ——; 187 S. E. 2d, at 651, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. Yet specific provisions of the Act, the Rules and Regulations of the Authority, and the College's proposal, all as interpreted by the South Carolina Supreme Court, delimit narrowly those otherwise untrammeled provisions, and no evidence has been submitted by appellant to undermine this narrowing. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

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~~Chambers Draft~~

SUPREME COURT OF THE UNITED STATES

No. 71–1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

[April —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22–41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the "College").[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Earley* v. *DiCenso,* 403 U. S. 602 (1971); *Robinson* v. *DiCenso,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

earlier position. —— S. C. ——, 187 S. E. 2d 645 (1972). We now hold that the Act is constitutional.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . .", S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. ——–——, *infra*.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "~~(K)~~ Revenue bonds issued under the provisions of this ~~section~~ chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement

to the effect that neither the State of South Carolina nor the authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. ~~§ 22-41.(10)~~ (Cum. Supp. 1971).

Furthermore, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Cum. Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1970, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue ~~revenue~~ bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76; 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of capital improvements and $200,000 would be

applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Appendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used

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[2] As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds. . . ." 255 S. C., at 75; 177 S. E. 2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

"(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000." App., p. 49. [Emphasis in original].

[3] Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing. . . ." 26 U. S. C. § 103 (a)(1). For State income tax purposes, gross income does not include interest "upon obligations of the United States or its possessions or of this State or any political subdivision thereof. . . ." S.C. Code Ann. §65-253(4)(Cum. Supp. 1972)

for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any ~~religion~~ denomination." — S. C., at —; 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in

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[4] Rule 4 relating to the Lease Agreement provides in part that: "If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." — S. C., at —; 187 S. E. 2d, at 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." — S. C., at —; 187 S. E. 2d, at 648. See n. —, *infra*.

and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II

This ~~The~~ Court has recently had occasion to synthesize the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause:

> "Three . . . tests may be gleaned from our cases. 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 entanglement with religion.'" *Lemon* v. *Kurtzman, supra,* 403 U. S., at ~~613~~ 612-613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of

their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, ~~competency~~ competence, and experience." 392 U. S., at 247.

before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g., Bradfield* v. *Roberts,* 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970); *Tilton* v. *Richardson, supra.* Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

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[and]

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only

the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds.

The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal--all as interpreted by the South Carolina Supreme Court--confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

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SUPREME COURT OF THE UNITED STATES

No. 71-1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

June ~~April~~ —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22-41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the "College").[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971); *Earley* v. *DiCenso*, 403 U. S. 602 (1971); *Robinson* v. *DiCenso*, 403 U. S. 602 (1971); and *Tilton* v. *Richardson*, 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

earlier position. — S. C. —, 187 S. E. 2d 645 (1972). We ~~now hold that the Act is constitutional.~~ affirm.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . .", S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination," S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. ——–——, *infra*.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement

> to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. § 22–41.10 (Cum. Supp. 1971).

Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Cum. Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1970, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue the bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76; 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of capital improvements and $200,000 would be

applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Ap-

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[2] As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds. . . ." 255 S. C., at 75; 177 S. E. 2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

"(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000." (Emphasis in original.) App., p. 49.

[3] Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing. . . ." 26 U. S. C. § 103 (a)(1). For state income tax purposes, gross income does not include interest "upon obligations of the United States or its possessions or of this State or any political subdivision thereof . . . ." S. C. Code Ann. § 65–253 (4) (Cum. Supp. 1971).

pendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." — S. C., at —; 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution

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[4] Rule 4 relating to the Lease Agreement provides in part that:

"If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." — S. C., at —; 187 S. E. 2d, at 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." — S. C., at —; 187 S. E. 2d, at 648. See n. 6, *infra*.

of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II

This Court has recently had occasion to synthesize the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause:

> "Three . . . tests may be gleaned from our cases. 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 entanglement with religion.'" *Lemon* v. *Kurtzman, supra,* 403 U. S., at 612–613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its

true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." 392 U. S., at 247.

enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g., Bradfield* v. *Roberts*, 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n*, 397 U. S. 664 (1970); *Tilton* v. *Richardson*, *supra*. Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that ~~all~~ functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson*, *supra*, the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." 403 U. S., at 682.

a substantial portion of its

Appellant has introduced no evidence in the present case placing the College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations." 403 U. S., at 686. What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S. C., at 85; 177 S. E. 2d, at 369. On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.

the religious as opposed to the secular activities of the College,

Nor can we conclude that the proposed transaction will place the Authority in the position of providing direct support for religious activities. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a clause forbidding religious use

and another allowing inspections to enforce the agreement.[6] For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.[7]

[6] Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See n. 4, *ante*. Appellant's reliance on *Tilton* v. *Richardson*, *supra*, in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick*, 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." — S. C., at —; 187 S. E. 2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellee argues, Appellee's Brief, p. 14, the importance of the tax exemption in the South Carolina

C

The final question posed by this case is whether under the arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER'S opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

> "'Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." 403 U. S., at 687.

Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the result, stating:

> "It is enough for me that . . . the Federal Government [is] financing a separable function of over-

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scheme brings the present case under *Walz* v. *Tax Comm'n, supra,* where this Court upheld a local property tax exemption which included religious institutions.

riding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton,* then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton.*[8]

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

> "(g) [g]enerally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;
>
> "(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the

[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen, supra,* 392 U. S., at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

> use of a project undertaken for such participating institution for higher education. . . ." S. C. Code Ann. § 22-41.4 (Cum. Supp. 1971).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

As the South Carolina Supreme Court pointed out, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, — S. C., at —; 187 S. E. 2d, at 651, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. The opinion of that court, however, reflects a narrow interpretation of the practical operation of these powers.

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." — S. C., at —; 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, [and] (b) to impose an adequate schedule of charges and fees in order to provide adequate reve-

> nues with which to operate and maintain the said facilities and to make the rental payments . . . ." App., p. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal—all as interpreted by the South Carolina Supreme Court—confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

Brennan, J.

SUPREME COURT OF THE UNITED STATES

Circulated: 6-11-73

No. 71-1523

Recirculated: _____

Richard W. Hunt, Appellant, v. Robert E. McNair, Governor of South Carolina, et al. } On Appeal from the Supreme Court of South Carolina.

[June —, 1973]

Relies primarily on his previous dissents. Does emphasize entanglement.

Assumes, without discussion, that College is sectarian.

Renewed 6/11

MR. JUSTICE BRENNAN, dissenting.

The question presented in this case is whether South Carolina's assistance to the Baptist College at Charlestown under the South Carolina Educational Facilities Authority Act constitutes constitutionally impermissible aid by the State for this sectarian institution.[1] The test to which I adhere for determining such questions is whether the arrangement between the State and the Baptist College is foreclosed under the Establishment Clause of the First Amendment because among

> "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to secure governmental ends, where secular means would suffice." *Abington School District* v. *Schempp*, 374 U. S. 203, 294–295 (1963) (BRENNAN, J., concurring); *Walz* v. *Tax Commission*, 397 U. S. 664, 680–681 (1970) (BRENNAN, J., concurring); *Lemon*

[1] No one denies that the Baptist College at Charlestown is a "sectarian" institution—*i. e.*, one "in which the propogation and advancement of a particular religion are a function or purpose of the institution." *Tilton* v. *Richardson*, 403 U. S. 672, 659 (1971) (separate opinion of BRENNAN, J.).

v. *Kurtzman*, 403 U. S. 602, 643 (1971) (*Lemon I*) (separate opinion of BRENNAN, J.).

Because under that test it is clear to me that the State's proposed scheme of assistance to the Baptist College is violative of the Establishment Clause, I dissent.

The act authorizes a financing arrangement between the Authority [2] and the Baptist College at Charlestown, a South Carolina educational corporation operated by the South Carolina Baptist Convention. Under that arrangement, the College would convey a substantial portion of its campus to the Authority, and the Authority would lease back the property to the College at an agreed rental. The Authority would then issue revenue bonds of the State of South Carolina in the amount of $3,500,000.00, which bonds would be payable, principal and interest, from the rents paid by the College to the Authority under the lease. The proceeds of the sale of the bonds would be used to pay off outstanding indebtedness of the College [3] and to construct additional buildings and facilities for use in its higher education operations. Upon payment in full of the principal and interest on the bonds, the arrangement requires that the Authority reconvey title to the campus properties to the

[2] The South Carolina Educational Facilities Authority is composed of the members of the State Budget and Control Board, who are the Governor, the State Treasurer, the State Comptroller General, the Chairman of the Finance Committee of the State Senate, and the Chairman of the Ways and Means Committee of the State House of Representatives. The act states that "all the functions and powers of the Authority are hereby granted to the State Budget and Control Board as an incident of its functions in connection with the public finances of the State." S. C. Code Ann. § 22-41.2 (D) (Cum. Supp. 1971).

[3] This outstanding indebtedness pertains to certain unspecified "capital improvements." App., p. 49. Thus, it may be that the indebtedness was incurred for improvements to facilities used for religious purposes.

College free and clear of all liens and encumbrances. The arrangement does not, however, amount merely to a mortgage on the campus property. The Authority is also empowered, *inter alia*, to determine the location and character of any project financed under the act; to construct, maintain, manage, operate, lease as lessor or lessee, and regulate the same; to enter into contracts for the management and operation of such projects; to establish rules and regulations for the use of the project or any portion thereof; and to fix and revise from time to time rates, rents, fees and charges for the use of a project and for the services furnished or to be furnished by a project or any portion thereof. In other words, the College turns over to the State Authority control of substantial parts of the fiscal operation of the school—its very life's blood.

It is true that the act expressly provides that State financing will not be provided for

> "any facility used or to be used for sectarian instruction or as place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

And it is also true that the Authority, pursuant to granted rule-making power, has adopted a rule requiring that each lease agreement contain a covenant

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." Jurisdictional Statement, p. 49.

But policing by the Authority to ensure compliance with these restrictions is established by a provision required to be included in the lease agreement allowing the Authority to conduct on-site inspections of the facilities financed under the act.

Thus, it is crystal clear, I think, that this scheme involves the State in a degree of policing of the affairs of the College far exceeding that called for by the statutes struck down in *Lemon I, supra.* See also *Johnson* v. *Sanders,* 319 F. Supp. 421 (Conn. 1970), aff'd, 403 U. S. 955 (1971). Indeed, under this scheme the policing by the State can become so etxensive that the State may well end up in complete control of the operation of the College, at least for the life of the bonds. The College's freedom to engage in religious activities and to offer religious instruction is necessarily circumscribed by this pervasive state involvement forced upon the College if it is not to lose its benefits under the Act. For it seems inescapable that the content of courses taught in facilities financed under the agreement must be closely monitored by the State Authority in discharge of its duty to ensure that the facilities are not being used for sectarian instruction. The Authority must also involve itself deeply in the fiscal affairs of the College, even to the point of fixing tuition rates, as part of its duty to assure sufficient revenues to meet bond and interest obligations. And should the College find itself unable to meet these obligations, its continued existence as a viable sectarian institution is almost completely in the hands of the State Authority. Thus, this agreement, with its consequent state surveillance and ongoing administrative relationships, inescapably entails mutually-damaging Church-State involvements. *Abington School District* v. *Schempp, supra,* 374 U. S., at 295 (BRENNAN, J., concurring); *Lemon I, supra,* 403 U. S., at 649 (separate opinion of BRENNAN, J.).

In support of its contrary argument, the Court adopts much of the reasoning of the plurality opinion in *Tilton* v. *Richardson*, 403 U. S. 672 (1971). I disagreed with that reasoning in *Tilton* because, as in this case, that reasoning utterly failed to explain how programs of surveillance and inspection of the kind common to both cases differ from the Pennsylvania and Rhode Island programs invalidated in *Lemon I*. What I said in *Tilton* is equally applicable to the present case:

> "I do not see any significant difference in telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island's telling the Catholic school teacher [in *Lemon I*] not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university." 403 U. S., at 660 (separate opinion of BRENNAN, J.).

In any event, *Tilton* is clearly not controlling here. The plurality opinion in *Tilton* was expressly based on the premise, erroneous in my view, that the Federal Higher Education Assistance Act contained no significant intrusions into the everyday affairs of sectarian educational institutions. Thus, it was said in the plurality opinion:

> "[U]nlike the direct and continuing payments under the Pennsylvania program [in *Lemon I*], and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities." 403 U. S., at 688.

But under the South Carolina scheme, "continuing financial relationships or dependencies," "annual audits," "government analysis," and "regulation and surveillance" are the core features of the arrangement. In short, the South Carolina statutory scheme as applied to this sectarian institution presents the very sort of "intimate continuing relationship or dependency between government and religiously affiliated institutions" that in the plurality's view was lacking in *Tilton*. *Ibid.*

Nor is the South Carolina arrangement between the State and this College any less offensive to the Constitution because it involves, as the Court asserts, no "direct" financial support to the College by the State. The Establishment Clause forbids far more than payment of public funds directly to support sectarian institutions. It forbids any official involvement with religion, whatever its form, which tends to foster or discourage religious worship or belief. The cases are many in which we have struck down on establishment grounds state laws that provided, not direct financial support to religious institutions, but various other forms of assistance. *McCollum* v. *Board of Education,* 333 U. S. 203 (1948) ("release time" program); *Engel* v. *Vitale,* 370 U. S. 421 (1962) (prayer reading in public schools); *Abington School District* v. *Schempp,* 374 U. S. 203 (1963) (Bible reading in public schools). Moreover, any suggestion that the constitutionality of a statutory program to aid sectarian institutions is dependent on whether that aid can be characterized as direct or indirect is flatly refuted by the Court's decisions today in *Committee for Public Education* v. *Nyquist,* — U. S. — (1973), and *Sloan* v. *Lemon,* — U. S. — (1973). In those cases, we went behind the mere assertion that tuition reimbursement and tax exemption programs provided no direct aid to sectarian schools and concluded that the "substantive

impact" of such programs was essentially the same as a direct subsidy from the State.

The South Carolina arrangement has the identical constitutional infirmities. The State forthrightly aids the College by permitting the College to avail itself of the State's unique ability to borrow money at low interest rates, and the College, in turn, surrenders to the State a comprehensive and continuing surveillance of the educational, religious, and fiscal affairs of the College. The conclusion is compelled that this involves the State in the "essentially religious activities of religious institutions" and "employ[s] the organs of government for essentally religious purposes." I therefore dissent and would reverse the judgment of the Supreme Court of South Carolina.

Pp. 8, 9

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 71–1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

[June —, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22–41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the "College").[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Earley* v. *DiCenso,* 403 U. S. 602 (1971); *Robinson* v. *DiCenso,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

earlier position. —— S. C. ——, 187 S. E. 2d 645 (1972). We affirm.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . .", S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. ——–——, *infra*.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement

> to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. § 22–41.10 (Cum. Supp. 1971).

Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Cum. Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1970, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue the bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76; 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of capital improvements and $200,000 would be

applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Ap-

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[2] As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds. . . ." 255 S. C., at 75; 177 S. E. 2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

"(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000." (Emphasis in original.) App., p. 49.

[3] Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing. . . ." 26 U. S. C. § 103 (a)(1). For state income tax purposes, gross income does not include interest "upon obligations of the United States or its possessions or of this State or any political subdivision thereof . . . ." S. C. Code Ann. § 65-253 (4) (Cum. Supp. 1971).

pendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." — S. C., at —; 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution

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[4] Rule 4 relating to the Lease Agreement provides in part that:

"If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." — S. C., at —, 187 S. E. 2d, at 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." — S. C., at —; 187 S. E. 2d, at 648. See n. 6, *infra*.

of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II

This Court has recently had occasion to synthesize the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause:

> "Three . . . tests may be gleaned from our cases. 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 entanglement with religion.'" *Lemon* v. *Kurtzman, supra,* 403 U. S., at 612–613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its

true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." 392 U. S., at 247.

enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g., Bradfield* v. *Roberts,* 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970); *Tilton* v. *Richardson, supra.* Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson, supra,* the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." 403 U. S., at 682.

Appellant has introduced no evidence in the present case placing the College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations." 403 U. S., at 686. What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S. C., at 85; 177 S. E. 2d, at 369. On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.

Nor can we conclude that the proposed transaction will place the Authority in the position of providing the religious as opposed to the secular activities of the College. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a

clause forbidding religious use and another allowing inspections to enforce the agreement.[6] For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.[7]

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[6] Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See n. 4, *ante*. Appellant's reliance on *Tilton* v. *Richardson*, *supra*, in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick*, 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." — S. C., at —; 187 S. E. 2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellee argues, Appellee's Brief, p.

C

The final question posed by this case is whether under the arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER'S opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

> "'Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education.'" 403 U. S., at 687.

Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the result, stating:

> "It is enough for me that . . . the Federal Government [is] financing a separable function of over-

14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz* v. *Tax Comm'n, supra*, where this Court upheld a local property tax exemption which included religious institutions.

> riding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton*, then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton*.[8]

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

> "(g) [g]enerally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;
>
> "(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the

[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen*, *supra*, 392 U. S., at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

> use of a project undertaken for such participating institution for higher education. . . ." S. C. Code Ann. § 22-41.4 (Cum. Supp. 1971).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

As the South Carolina Supreme Court pointed out, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, — S. C., at —; 187 S. E. 2d, at 651, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. The opinion of that court, however, reflects a narrow interpretation of the practical operation of these powers.

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." — S. C., at —; 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, [and] (b) to impose an adequate schedule of charges and fees in order to provide adequate reve-

> nues with which to operate and maintain the said facilities and to make the rental payments . . . ." App., p. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal—all as interpreted by the South Carolina Supreme Court—confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

Pp 8, 9

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

No. 71-1523

Circulated: _____

Recirculated: JUN 12 1973

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pendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." —— S. C., at ——; 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution

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[4] Rule 4 relating to the Lease Agreement provides in part that: "If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." —— S. C., at ——, 187 S. E. 2d, at 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." —— S. C., at ——; 187 S. E. 2d, at 648. See n. 6, *infra*.

of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II

This Court has recently had occasion to synthesize the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause:

> "Three . . . tests may be gleaned from our cases. 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 entanglement with religion.'" *Lemon* v. *Kurtzman, supra,* 403 U. S., at 612–613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its

true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." 392 U. S., at 247.

enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g., Bradfield* v. *Roberts,* 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970); *Tilton* v. *Richardson, supra.* Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson, supra,* the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." 403 U. S., at 682.

Appellant has introduced no evidence in the present case placing the College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations." 403 U. S., at 686. What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S. C., at 85; 177 S. E. 2d, at 369. On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.

Nor can we conclude that the proposed transaction will place the Authority in the position of providing the religious as opposed to the secular activities of the College. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a

clause forbidding religious use and another allowing inspections to enforce the agreement.[6] For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.[7]

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[6] Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See n. 4, *ante*. Appellant's reliance on *Tilton* v. *Richardson*, *supra*, in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick*, 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." — S. C., at —; 187 S. E. 2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton*, we need not decide whether, as appellee argues, Appellee's Brief, p.

C

The final question posed by this case is whether under the arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER's opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

> "'Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education.'" 403 U. S., at 687.

Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the result, stating

> "It is enough for me that . . . the Federal Government [is] financing a separable function of over-

14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz* v. *Tax Comm'n, supra,* where this Court upheld a local property tax exemption which included religious institutions.

riding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton*, then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton*.[8]

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

"(g) [g]enerally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;

"(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the

[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen*, *supra*, 392 U. S., at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

> use of a project undertaken for such participating institution for higher education. . . ." S. C. Code Ann. § 22-41.4 (Cum. Supp. 1971).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

As the South Carolina Supreme Court pointed out, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, — S. C., at —; 187 S. E. 2d, at 651, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. The opinion of that court, however, reflects a narrow interpretation of the practical operation of these powers.

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." — S. C., at —; 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, [and] (b) to impose an adequate schedule of charges and fees in order to provide adequate reve-

> nues with which to operate and maintain the said facilities and to make the rental payments . . . ." App., p. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal—all as interpreted by the South Carolina Supreme Court—confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

Here on appeal from the Supreme Court of South Carolina, this case involves the validity of a state statute which creates an Educational Facilities Authority - with power to issue revenue bonds on behalf of higher educational institutions for the financing of buildings and other facilities not used for religious purposes.

The Baptist College at Charleston proposes to issue bonds through the Authority, and the Act is here challenged as violative of the Establishment Clause of the First Amendment on theground that the College is controlled by the Baptist Church.

The revenue bonds to be issued will be sold to the public, secured by a mortgage on the campus buildings and facilities which may not, under the terms of the Act, be used for sectarian instruction or religious worship.

It is nevertheless contended that the primary effect of financing through the Authority will be to advance religion, and also will result

in excessive entanglement.

The statute expressly provides that neither the State nor the Authority is obligated, directly or indirectly, to pay the principal of or interest on the bonds. Nor is the taxing power of the State pledged or implicated in any way. And all expenses of the Authority must be paid solely from the revenues of the projects. The danger of entanglement, as defined in our prior cases, is remote as the Authority's right to interfere in the affairs of the College does not become operative unless there is a default.

We also note that the purposes of the statute are clearly secular, and its benefits are available to all institutions of higher education in the State.

For reasons stated more fully in the opinion, we conclude that there is no violation of the Establishment Clause, and affirm the judgment below.

Mr. Justice Brennan has filed a dissenting opinion in which

LFP/gg 6-20-73

No. 71-1523 HUNT v. McNAIR

Here on appeal from the Supreme Court of South Carolina, this case involves the validity of a state statute which creates an Educational Facilities Authority. The Authority is authorized to issue revenue bonds on behalf of higher educational institutions for the financing of buildings and other facilities not used for religious purposes.

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We also note that the purposes of the statute are clearly secular, and its benefits are available to all institutions of higher education in the State. We conclude that there is no violation of the Establishment Clause, and affirm the judgment below.

Mr. Justice Brennan has filed a dissenting opinion in which Mr. Justice Douglas and Mr. Justice Marshall have joined.

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LFP/gg 6-20-73

No. 71-1523 HUNT v. McNAIR

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The Act expressly provides that neither the State nor the Authority is obligated, directly or indirectly, to pay the principal of or interest on the bonds. Nor is the taxing power of the State pledged or implicated in any way. And all expenses of the Authority must be paid solely from the revenues of the projects. The danger of entanglement, as defined in our prior cases, is remote as the Authority's right to intervene in the affairs of the College does not become operative unless there is a default.

We also note that the purposes of the statute are clearly secular, and its benefits are available to all institutions of higher education in the State. We conclude that there is no violation of the Establishment Clause, and affirm the judgment below.

Mr. Justice Brennan has filed a dissenting opinion in which Mr. Justice Douglas and Mr. Justice Marshall have joined.

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HUNT *v.* McNAIR, GOVERNOR OF SOUTH CAROLINA, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

No. 71-1523. Argued February 21, 1973—Decided June 25, 1973

In this action for injunctive and declaratory relief appellant challenges the South Carolina Educational Facilities Act as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds benefiting a Baptist-controlled college. The Act establishes an Educational Facilities Authority to assist (through the issuance of revenue bonds) higher educational institutions in constructing and financing projects, such as buildings, facilities, and site preparation, but not including any facility for sectarian instruction or religious worship. Neither the State nor the Authority is obligated, directly or indirectly, to pay the principal of or interest on the bonds; nor is the State's taxing power pledged or implicated. All expenses of the Authority also must be paid solely from the revenues of the projects. The Authority gave preliminary approval to an application submitted by the college, only 60% of whose students are Baptists. As subsequently modified, the application requests the issuance of revenue bonds to be used for refinancing capital improvements and completing the dining hall. Under the statutory scheme the project would be conveyed to the Authority, which would lease it back to the college, with reconveyance to the college on full payment of the bonds. The lease agreement would contain a clause obligating the institution to observe the Act's restrictions on sectarian use and enabling the Authority to conduct inspections. The provision for reconveyance would restrict the project to nonsectarian use. The trial court denied appellant relief, and the State Supreme Court affirmed. After this Court had vacated the judgment and remanded the case for reconsideration in the light of *Lemon* v. *Kurtzman*, 403 U. S. 602, and other intervening deci-

Syllabus

sions, the State Supreme Court adhered to its earlier decision. *Held:* The Act as construed by the South Carolina Supreme Court does not, under the guidelines of *Lemon* v. *Kurtzman, supra,* at 612–613, violate the Establishment Clause. Pp. 6–14.

(a) The purpose of the Act is secular, the benefits of the statute being available to all institutions of higher education in the State, whether or not they have a religious affiliation. Pp. 6–8.

(b) The statute does not have the primary effect of advancing or inhibiting religion. The college involved has no significant sectarian orientation and the project must be confined to a secular purpose, with the lease agreement, enforced by inspection provisions, forbidding religious use. Pp. 8–10.

(c) The statute does not foster an excessive entanglement with religion. The record here does not show that religion so permeates the college that inspection by the Authority to insure that the project is not used for religious purposes would necessarily lead to such entanglement. The Authority's statutory power to participate in certain management decisions also does not have that effect, in view of the narrow construction by the State Supreme Court, limiting such power to insuring that the college's fees suffice to meet bond payments. Absent default, the lease agreement would leave full responsibility with the college regarding fees and general operations. Pp. 11–14.

258 S. C. 97, 187 S. E. 2d 645, affirmed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion in which DOUGLAS and MARSHALL, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 71–1523

Richard W. Hunt, Appellant,
v.
Robert E. McNair, Governor of South Carolina, et al.

On Appeal from the Supreme Court of South Carolina.

[June 25, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

Appellant, a South Carolina taxpayer, brought this action to challenge the South Carolina Educational Facilities Act (the "Act"), S. C. Code Ann. §§ 22–41 *et seq.* (Cum. Supp. 1971), as violative of the Establishment Clause of the First Amendment insofar as it authorizes a proposed financing transaction involving the issuance of revenue bonds for the benefit of the Baptist College at Charleston (the "College").[1] The trial court's denial of relief was affirmed by the Supreme Court of South Carolina. 255 S. C. 71, 177 S. E. 2d 362 (1970). This Court vacated the judgment and remanded the case for reconsideration in light of the intervening decisions in *Lemon* v. *Kurtzman,* 403 U. S. 602 (1971); *Earley* v. *DiCenso,* 403 U. S. 602 (1971); *Robinson* v. *DiCenso,* 403 U. S. 602 (1971); and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). 403 U. S. 945 (1971). On remand, the Supreme Court of South Carolina adhered to its

[1] At various points during this litigation, appellant has made reference to the Free Exercise Clause of the First Amendment, but has made no arguments specifically addressed to violations of that clause except insofar as this Court's approach to cases involving the Religion Clauses represents an interaction of the two clauses.

earlier position. 258 S. C. 97, 187 S. E. 2d 645 (1972). We affirm.

I

We begin by setting out the general structure of the Act. The Act established an Educational Facilities Authority (the "Authority"), the purpose of which is "to assist institutions for higher education in the construction, financing and refinancing of projects . . . .", S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971), primarily through the issuance of revenue bonds. Under the terms of the Act, a project may encompass buildings, facilities, site preparation and related items, but may not include

> "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination." S. C. Code Ann. § 22–41.2 (b) (Cum. Supp. 1971).

Correspondingly, the Authority is accorded certain powers over the project, including the powers to determine the fees to be charged for the use of the project and to establish regulations for its use. See pp. ———, *infra*.

While revenue bonds to be used in connection with a project are issued by the Authority, the Act is quite explicit that the bonds shall not be obligations of the State, directly or indirectly:

> "Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefor from revenues. All such revenue bonds shall contain on the face thereof a statement

> to the effect that neither the State of South Carolina nor the Authority shall be obligated to pay the same or the interest thereon except from revenues of the project or the portion thereof for which they are issued and that neither the faith and credit nor the taxing power of the State of South Carolina or of any political subdivision thereof is pledged to the payment of the principal of or the interest on such bonds. The issuance of revenue bonds under the provisions of this act shall not directly or indirectly or contingently obligate the State or any political subdivision thereof to levy or to pledge any form of taxation whatever therefor or to make any appropriation for their payment." S. C. Code Ann. § 22–41.10 (Cum. Supp. 1971).

Moreover, since all of the expenses of the Authority must be paid from the revenues of the various projects in which it participates, S. C. Code Ann. § 22–41.5 (Cum. Supp. 1971), none of the general revenues of South Carolina is used to support a project.

On January 6, 1970, the College submitted to the Authority for preliminary approval an application for the issuance of revenue bonds. Under the proposal, the Authority would issue the bonds and make the proceeds available to the College for use in connection with a portion of its campus to be designated a project (the "Project") within the meaning of the Act. In return, the College would convey the Project, without cost, to the Authority, which would then lease the property so conveyed back to the College. After repayment in full of the bonds, the Project would be reconveyed to the College. The Authority granted preliminary approval on January 16, 1970, 255 S. C., at 76; 177 S. E. 2d, at 365.

In its present form, the application requests the issuance of revenue bonds totaling $1,250,000, of which $1,050,000 would be applied to refund short term financing of capital improvements and $200,000 would be

applied to the completion of dining hall facilities.[2] The advantage of financing educational institutions through a state created authority derives from relevant provisions of federal and South Carolina state income tax laws which provide in effect that the interest on such bonds is not subject to income taxation.[3] The income tax exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing.

Because the College's application to the Authority was a preliminary one, the details of the financing arrangement have not yet been fully worked out. But Rules and Regulations adopted by the Authority govern certain of its aspects. See Jurisdictional Statement, Ap-

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[2] As originally submitted by the College and approved by the Authority, the proposal called for the issuance of "not exceeding $3,500,000 of revenue bonds. . . ." 255 S. C., at 75; 177 S. E. 2d, at 364. As indicated by a stipulation of counsel in this Court, the College subsequently secured a bank loan in the amount of $2,500,000 and now proposes the issuance of only $1,250,000 in revenue bonds under the Act, the proceeds to be used:

"(i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000." (Emphasis in original.) App., p. 49.

[3] Gross income for federal income tax purposes does not include interest on "the obligations of a State, a Territory, or a possession of the United States, or any political subdivision of any of the foregoing. . . ." 26 U. S. C. § 103 (a)(1). For state income tax purposes, gross income does not include interest "upon obligations of the United States or its possessions or of this State or any political subdivision thereof . . . ." S. C. Code Ann. § 65-253 (4) (Cum. Supp. 1971).

pendix C, pp. 47–51. Every lease agreement between the Authority and an institution must contain a clause

> "obligating the Institution that neither the leased land, nor any facility located thereon, shall be used for sectarian instruction or as a place of religious worship, or in connection with any part of the program of a school or department of divinity of any religious denomination." 258 S. C., at 101; 187 S. E. 2d, at 647.

To insure that this covenant is honored, each lease agreement must allow the Authority to conduct inspections, and any reconveyance to the College must contain a restriction against use for sectarian purposes.[4] The Rules further provide that simultaneously with the execution

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[4] Rule 4 relating to the Lease Agreement provides in part that:

"If the Lease Agreement contains a provision permitting the Institution to repurchase the project upon payment of the bonds, then in such instance the Lease Agreement shall provide that the Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination." 258 S. C., at 101–102; 187 S. E. 2d, at 647–648.

The Rule goes on to allow the institution to remove this option in the case of involuntary sales:

"The condition may provide, at the option of the Institution, that if the leased premises shall become the subject of an involuntary judicial sale, as a result of any foreclosure of any mortgage, or sale pursuant to any order of any court, that the title to be vested in any purchaser at such judicial sale, other than the Institution, shall be in fee simple and shall be free of the condition applicable to the Institution or any voluntary grantee thereof." 258 S. C., at 102; 187 S. E. 2d, at 648. See n. 6, *infra*.

of the lease agreement, the Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a forecloseable mortgage lien on the Project property including a mortgage on the "right, title and interest of the Authority in and to the lease agreement." Jurisdictional Statement, Appendix C, p. 50.

Our consideration of appellant's Establishment Clause claim extends only to the proposal as approved preliminarily with such additions as are contemplated by the Act, the rules, and the decisions of the courts below.

II

As we reaffirm today in *Committee for Public Education and Religious Liberty* v. *Nyquist, ante,* the principles which govern our consideration of challenges to statutes as violative of the Establishment Clause are three.

> "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 entanglement with religion.'" *Lemon* v. *Kurtzman, supra,* 403 U. S., at 612–613.

With full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three "tests": purpose, effect, and entanglement.

A

The purpose of the statute is manifestly a secular one. The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation. While a legislature's declaration of purpose may not always be a fair guide to its

true intent, appellant makes no suggestion that the introductory paragraph of the Act represents anything other than a good faith statement of purpose:

> "It is hereby declared that for the benefit of the people of the State, the increase of their commerce, welfare and prosperity and the improvement of their health and living conditions it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities; that it is essential that institutions for higher education within the State be provided with appropriate additional means to assist such youth in achieving the required levels of learning and development of their intellectual and mental capacities; and that it is the purpose of this section to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein." S. C. Code Ann. § 22.41 (Cum. Supp. 1971).

The College and other private institutions of higher education provide these benefits to the State.[5] As of the academic year 1969–1970, there were 1,548 students

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[5] In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), this Court commented on the importance of the role of private education in this country:

"Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience." 392 U. S., at 247.

enrolled in the College, in addition to approximately 600 night students. Of these students, 95% are residents of South Carolina who are thereby receiving a college education without financial support from the State of South Carolina.

B

To identify "primary effect," we narrow our focus from the statute as a whole to the only transaction presently before us. Whatever may be its initial appeal, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected. *E. g., Bradfield* v. *Roberts,* 175 U. S. 291 (1899); *Walz* v. *Tax Comm'n,* 397 U. S. 664 (1970); *Tilton* v. *Richardson, supra.* Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends.

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. In *Tilton* v. *Richardson, supra,* the Court refused to strike down a direct federal grant to four colleges and universities in Connecticut. MR. CHIEF JUSTICE BURGER, for the plurality, concluded that despite some institutional rhetoric, none of the four colleges was pervasively sectarian, but held open that possibility for future cases:

> "Individual projects can be properly evaluated if and when challenges arise with respect to particular recipients and some evidence is then presented to show that the institution does in fact possess these characteristics." 403 U. S., at 682.

Appellant has introduced no evidence in the present case placing the College in such a category. It is true that the members of the College Board of Trustees are elected by the South Carolina Baptist Convention, that the approval of the Convention is required for certain financial transactions, and that the charter of the College may be amended only by the Convention. But it was likewise true of the institutions involved in *Tilton* that they were "governed by Catholic religious organizations." 403 U. S., at 686. What little there is in the record concerning the College establishes that there are no religious qualifications for faculty membership or student admission, and that only 60% of the College student body is Baptist, a percentage roughly equivalent to the percentage of Baptists in that area of South Carolina. 255 S. C., at 85; 177 S. E. 2d, at 369. On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education.

Nor can we conclude that the proposed transaction will place the Authority in the position of providing aid to the religious as opposed to the secular activities of the College. The scope of the Authority's power to assist institutions of higher education extends only to "projects," and the Act specifically states that a project "shall not include" any buildings or facilities used for religious purposes. In the absence of evidence to the contrary, we must assume that all of the proposed financing and refinancing relates to buildings and facilities within a properly delimited project. It is not at all clear from the record that the portion of the campus to be conveyed by the College to the Authority and leased back is the same as that being financed, but in any event it too must be part of the Project and subject to the same prohibition against use for religious purposes. In addition, as we have indicated, every lease agreement must contain a

clause forbidding religious use and another allowing inspections to enforce the agreement.[6] For these reasons, we are satisfied that implementation of the proposal will not have the primary effect of advancing or inhibiting religion.[7]

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[6] Appellant also takes issue with the Authority's rule allowing a purchaser at an involuntary sale to take title free of restrictions as to religious use. See n. 4, *ante*. Appellant's reliance on *Tilton* v. *Richardson, supra,* in this respect is misplaced. There, the Court struck down a provision under which the church-related colleges would have unrestricted use of a federally financed project after 20 years. In the present case, by contrast, the restriction against religious use is lifted not as to the institution seeking the assistance of the Authority nor as to voluntary transferees, but only as to a purchaser at a judicial sale. Because some other religious institution bidding for the property at a judicial sale could purchase the property only by outbidding all other prospective purchasers, there is only a speculative possibility that the absence of a use limitation would ever afford aid to religion. Even in such an event, the acquiring religious institution presumably would have had to pay the then fair value of the property.

[7] The "state aid" involved in this case is of a very special sort. We have here no expenditure of public funds, either by grant or loan, no reimbursement by a State for expenditures made by a parochial school or college, and no extending or committing of a State's credit. Rather, the only state aid consists, not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality (the Authority) through which educational institutions may borrow funds on the basis of their own credit and the security of their own property upon more favorable interest terms than otherwise would be available. The Supreme Court of New Jersey characterized the assistance rendered an educational institution under an act generally similar to the South Carolina Act as merely being a "governmental service." *Clayton* v. *Kervick,* 56 N. J. 523, 530–531, 267 A. 2d 503, 506–507 (1970). The South Carolina Supreme Court, in the opinion below, described the role of the State as that of a "mere conduit." 258 S. C., at 107; 187 S. E. 2d, at 650. Because we conclude that the primary effect of the assistance afforded here is neither to advance nor to inhibit religion under *Lemon* and *Tilton,* we need not decide whether, as appellee argues, Appellee's Brief, p.

C

The final question posed by this case is whether under the arrangement there would be an unconstitutional degree of entanglement between the State and the College. Appellant argues that the Authority would become involved in the operation of the College both by inspecting the project to insure that it is not being used for religious purposes and by participating in the management decisions of the College.

The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution. In finding excessive entanglement, the Court in *Lemon* relied on the "substantial religious character of these church-related" elementary schools. 403 U. S., at 616. MR. CHIEF JUSTICE BURGER'S opinion for the plurality in *Tilton* placed considerable emphasis on the fact that the federal aid there approved would be spent in a college setting:

> "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education." 403 U. S., at 687.

Although MR. JUSTICE WHITE saw no such clear distinction, he concurred in the result, stating:

> "It is enough for me that . . . the Federal Government [is] financing a separable function of over-

14, the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz* v. *Tax Comm'n, supra*, where this Court upheld a local property tax exemption which included religious institutions.

riding importance in order to sustain the legislation here challenged." 403 U. S., at 664.

A majority of the Court in *Tilton,* then, concluded that on the facts of that case inspection as to use did not threaten excessive entanglement. As we have indicated above, there is no evidence here to demonstrate that the College is any more an instrument of religious indoctrination than were the colleges and universities involved in *Tilton.*[8]

A closer issue under our precedents is presented by the contention that the Authority could become deeply involved in the day-to-day financial and policy decisions of the College. The Authority is empowered by the Act:

> "(g) [g]enerally, to fix and revise from time to time and charge and collect rates, rents, fees and charges for the use of and for the services furnished or to be furnished by a project or any portion thereof and to contract with any person, partnership, association or corporation or other body public or private in respect thereof;
>
> "(h) to establish rules and regulations for the use of a project or any portion thereof and to designate a participating institution for higher education as its agent to establish rules and regulations for the

[8] Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church-related, cf. *Board of Education* v. *Allen, supra,* 392 U. S., at 248, and he has failed to show more than a formalistic church relationship. As *Tilton* established, formal denominational control over a liberal arts college does not render all aid to the institution a violation of the Establishment Clause. So far as the record here is concerned, there is no showing that the College places any special emphasis on Baptist denominational or any other sectarian type of education. As noted above, both the faculty and the student body are open to persons of any (or no) religious affiliation.

> use of a project undertaken for such participating institution for higher education. . . ." S. C. Code Ann. § 22–41.4 (Cum. Supp. 1971).

These powers are sweeping ones, and were there a realistic likelihood that they would be exercised in their full detail, the entanglement problems with the proposed transaction would not be insignificant.

As the South Carolina Supreme Court pointed out, the Act was patterned closely after the South Carolina Industrial Revenue Bond Act, 258 S. C., at 107; 187 S. E. 2d, at 651, and perhaps for this reason appears to confer unnecessarily broad power and responsibility on the Authority. The opinion of that court, however, reflects a narrow interpretation of the practical operation of these powers.

> "Counsel for plaintiff argues that the broad language of the Act causes the State, of necessity, to become excessively involved in the operation, management and administration of the College. We do not so construe the Act. . . . [T]he basic function of the Authority is to see . . . that fees are charged sufficient to meet the bond payments." 258 S. C., at 108; 187 S. E. 2d, at 651.

As we read the College's proposal, the Lease Agreement between the Authority and the College will place on the College the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for particular services. Specifically, the proposal states that the Lease Agreement

> "will unconditionally obligate the College (a) to pay sufficient rentals to meet the principal and interest requirements as they become due on such bonds, [and] (b) to impose an adequate schedule of charges and fees in order to provide adequate reve-

> nues with which to operate and maintain the said facilities and to make the rental payments . . . ." App., p. 18.

In short, under the proposed Lease Agreement, neither the Authority nor a trustee bank would be justified in taking action unless the College fails to make the prescribed rental payments or otherwise defaults in its obligations. Only if the College refused to meet rental payments or was unable to do so would the Authority or the trustee be obligated to take further action. In that event, the Authority or trustee might either foreclose on the mortgage or take a hand in the setting of rules, charges, and fees. It may be argued that only the former would be consistent with the Establishment Clause, but we do not now have that situation before us.

III

This case comes to us as an action for injunctive and declaratory relief to test the constitutionality of the Act as applied to a proposed—rather than an actual—issuance of revenue bonds. The specific provisions of the Act under which the bonds will be issued, the Rules and Regulations of the Authority, and the College's proposal—all as interpreted by the South Carolina Supreme Court—confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement between the State and religion. Accordingly, we affirm the holding of the court below that the Act is constitutional as interpreted and applied in this case.

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
							3/5/73	
join 1 & P 6/12/73	joining W J B ~~WOD~~ 6/15/73	will dissent 1st draft 6/11/73 2nd draft dissent with TM joining 3rd draft 6/18/73	join L F P 6/14/73	join L F P 4/25/73 may write concurrence	await dissent join W J B 6/12/73	~~dissent~~ join L F P 6/18/73	circulated 4/16/73 1st draft 2nd draft 6/12/73	join L F P 4/17/73
						Decided June 25, 1973		
						No. 71-1523 Hunt v. McNair		