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I. MUNICIPAL BOND FINANCING

In two similar decisions, *Robinson v. White*[1] and *Kaminski v. Higgins*,[2] the Supreme Court of South Carolina held that the use of business license taxes by municipalities to secure bonds issued for the construction of projects unrelated to those taxes, transgresses article VIII, section 7 of the South Carolina Constitution as an attempt to create "bonded debt" without an election as required by section 7.[3] The court thus halted the glacial extension of the special fund doctrine by establishing a moraine beyond the reach of municipalities.[4]

In *Robinson* the defendants, the Mayor and City Council of Greenville,[5] proposed to issue $5,500,000 of revenue bonds[6]

1. 256 S.C. 410, 182 S.E.2d 744 (1971) (3-2 decision).

2. 257 S.C. 222, 185 S.E.2d 365 (1971).

3. S.C. CONST. art. VIII, §7, reads in part as follows:

> No city or town in this State shall hereafter incur any bonded debt which, including existing bonded indebtedness, shall exceed eight per centum of the assessed value of the taxable property therein, and no such debt shall be created without submitting the question as to the creation thereof to the qualified electors of such city or town . . . and unless a majority of such electors . . . shall be in favor of creating such further bonded debt, none shall be created . . . .

4. The utility of the special fund doctrine lies primarily in circumventing the strictures of article X, section 11 of the South Carolina Constitution, which prohibit increasing the state debt without a favorable vote of two-thirds of the state's electors. If a fund is specifically earmarked to secure the payment of bonds issued, the election requirement is avoided notwithstanding the state's full faith, credit and taxing power are also pledged. State *ex rel.* Richards v. Moorer, 152 S.C. 455, 150 S.E. 269 (1929). The fund must be "reasonably sufficient" to pay the bond debt. Mims v. McNair, 252 S.C. 64, 165 S.E.2d 355 (1969) (fund providing 150% of annual debt owed is reasonably sufficient). The fund need not be created at the same time the bonds are issued and need not be related to the purpose for which the bond revenue is used. *See, e.g.*, State *ex rel.* Roddey v. Byrnes, 219 S.C. 485, 66 S.E.2d 33 (1951) (state sales tax pledged to secure school bonds). The latitude in financing encouraged by this doctrine had never been explicitly allowed or denied municipalities. *But cf.* Lillard v. Melton, 103 S.C. 10, 87 S.E. 421 (1915) (en banc decision).

5. Hereinafter designated "the City".

6. *See* S.C. CODE ANN. §§59-361 to -415 (1962), entitled "Revenue Bond Act for Utilities." Revenue bonds, which theoretically pay for themselves, do not constitute "bonded debt" within the ambit of the election requirement.

for the purpose of building two public parking garages. Pursuant to the provisions of the Off-Street Parking Facilities Act,[7] the City intended to apply revenue generated by the completed garages, as well as all other city parking revenue, to service the bond obligations; the City also intended to pledge as additional security moneys obtained from business license taxes under the express authorization of section 59-566.5(1A) of the Act.[8] The parties stipulated that revenue derived from both on and off-street parking would be insufficient to discharge the indebtedness, and that an anticipated $1,500,000 of business license taxes would necessarily be utilized over a ten year period to retire the bonds. The entire plan was to have been implemented without an election.

The plaintiff sought a declaratory judgment enjoining the allocation of business license taxes to such a project on the grounds that section 59-566.5(1A) of the Act was unconstitutional because it permitted the creation of "bonded debt" without the referendum mandatory under article VIII, section 7. In response the City contended, and Justice Bussey in his dissent agreed, that "bonded debt" signified "a *primary obligation* of the particular political subdivision involved, secured *primarily* by an ad valorem tax levied upon all the taxable property therein."[9] In their view, since the City's financing proposal would influence property taxes only indirectly, if at all, it did not occasion "bonded debt" and was therefore beyond the pale of the election requirement.

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7. S.C. CODE ANN. §§59-566 to -566.5 (1962), *as amended,* hereinafter referred to as "the Act".

8. 56 S.C. STAT. AT LARGE 788, §4 (1969) (codified at S.C. CODE ANN. §59-566.5(1A) (Cum. Supp. 1971)) reads in part:

> Further powers of municipalities as to bonds.
>
> . . . .
>
> (1A) Additionally secure the payment of the principal and interest of bonds issued pursuant to this article by a pledge of so much of the moneys as the municipality shall derive from business license taxes as may be necessary to pay the principal of and interest on any bonds issued under this article . . . .

9. 256 S.C. at 419, 182 S.E.2d at 748 (dissenting opinion). *See* Bolton v. Wharton, 163 S.C. 242, 245, 161 S.E. 454, 459 (1931) (municipal bond defined); *cf.* Briggs v. Greenville County, 137 S.C. 288, 135 S.E. 153 (1926). The majority offered no specific definition of "bonded debt", which led Justice Bussey to chide, "Our prior definition is too firmly and well established to be currently discarded without even discussion." 256 S.C. at 420, 182 S.E.2d at 749.

The plaintiff maintained, however, that without an election the City could not issue bonds payable out of a special fund, because the source of the fund, the business license assessment, was unrelated to the purpose for which the bond revenue was to be expended.[10] The gravamen of his argument was that the debt created by the bond issue would not be self-liquidating, since to the extent business license taxes were employed to service the debt, such taxes would have to be diverted from the city's general fund. With the general fund thus depleted, the defendants would have but two alternatives: either reduce the city budget and concomitantly curtail services, or levy additional ad valorem taxes to replenish the fund.[11] Therefore, the plaintiff argued that the financing plan was merely fiscal legerdemain, the taxpayer inevitably bearing the burden of the bond issue without having had an opportunity to approve it.

The majority of the court accepted this thesis and noted that the City was attempting "to do by indirection that which it could not do by direction."[12] The court delineated the purpose of the election provision embodied in article VIII, section 7 and found the abiding objective to be protection of the taxpayer.

Having thus struck the pitch for the opinion, the court explicitly distinguished *Robinson* from analogous decisions elucidating article X, section 11 of the Constitution with reference to state financing and the application of the special fund doctrine.[13] It dealt with *Robinson* as a case of first impression and chose to rely on a Colorado decision, *City of*

10. The plaintiff conceded that the direct relationship requirement was obsolete with regard to state bond issues, but he asserted that it was an accepted principle, if not an express rule of law, governing municipal bond financing. *See generally* Sullivan v. City Council of Charleston, 133 S.C. 189, 130 S.E. 876 (1925); Brownlee v. Brock, 107 S.C. 230, 92 S.E. 477 (1917); *and also* Roach v. City of Columbia, 172 S.C. 478, 174 S.E. 461 (1934) (revenue bonds); Cathcart v. City of Columbia, 170 S.C. 362, 170 S.E. 435 (1933) (same).

11. The defendants maintained that any increase in ad valorem taxes was remote, conjectural, and in no sense a primary obligation of the City.

12. 256 S.C. at 417, 182 S.E.2d at 747.

13. Cases cited note 4 *supra*.

Trinidad v. Haxby,[14] in which the court invalidated a financing plan nearly identical to that in *Robinson*.

Thus, after deciding that fiscal retrenchment by the City of Greenville in response to the proposed diversion of business license taxes was rather unlikely, the court stated that regardless of whether the City reduced its services or alternatively sought supplementary revenue, either from new sources or, as the plaintiff contended, from an increase in ad valorem taxes, the onus of the bond issue would ultimately fall "upon such a large segment of the people as to effectually be the obligation of taxpayers generally."[15] The court concluded that the City's financing proposal therefore engendered "bonded debt" within the purview of article VIII, section 7, and accordingly declared section 59-566.5(1A) of the Off-Street Parking Facilities Act unconstitutional for purporting to allow the issuance of bonds without the requisite election.

Four months later in *Kaminski v. Higgins* the court in a per curiam opinion clearly circumscribed the special fund doctrine in the area of municipal financing. By special enactment the General Assembly empowered the City of Georgetown to issue $300,000 of general obligation bonds for the purpose of constructing a combination police station and fire house.[16] The bonds were to be secured by a pledge of the business license taxes collected in the city and also by the city's full faith, credit and taxing power. The Act further authorized the issuance of bonds without electoral approval, provided no property taxes were pledged to pay for the bonds.[17] As is readily apparent, the legislature tried to cast this plan precisely in the mold of those approved under the special fund doctrine.[18]

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14. 136 Colo. 168, 315 P.2d 204 (1957). The dissenters, Bussey and Brailsford, JJ., found this case to be fragile authority because of "fundamental differences between the pertinent laws of that state and those of this state." 256 S.C. at 420, 182 S.E.2d at 749.

15. 256 S.C. at 418, 182 S.E.2d at 748.

16. 56 S.C. STAT. AT LARGE 3036 (1970), hereinafter referred to as "the Act".

17. *Id.* §1. Also included in the Act was a provision specifying that the business license tax fund should not be less than 150% of the amount needed to service the annual bond debt. *Id.* §10.

18. To this end the Act optimistically provided: "Such funds are therefore permitted under the special fund doctrine . . . ." *Id.* §1.

The plaintiff alleged that the Act was in violation of article VIII, section 7 of the South Carolina Constitution. In all essentials his argument echoed that of the plaintiff in *Robinson*. Kaminski emphasized that under the financing plan the pledged business license taxes would not be available to meet the city's general operating expenses, and that therefore the plan would eventually saddle the taxpayer with the cost of the bond issue without regard for the election requirement.

The trial court had ruled against the plaintiff on the authority of *Briggs v. Greenville County*[19] and *Mims v. McNair*.[20] In *Mims* an act authorizing the issuance of state capital improvement bonds secured by a designated fund, the state income tax, as well as the state's full faith, credit and taxing power, was held under the special fund doctrine to be exempt from the election provision in article X, section 11 of the Constitution.[21]

The supreme court, however, expressly rejected the obvious parallel between state and municipal financing programs and tersely established *Robinson* as the paradigm among decisions in the latter field. The court held the special fund doctrine "to be inapplicable to municipal bonds to be paid in substantial part from the pledge of revenues derived from business licenses, which, as here, were unrelated to the public improvement for which the bonds were authorized."[22]

II. ALCOHOLIC BEVERAGES

A. *Taxation*

The fundamental issue disputed in *Heublein, Inc. v. South Carolina Tax Commission*[23] was whether the power to regulate the transportation and sale of intoxicating beverages,

19. 137 S.C. 288, 135 S.E. 153 (1926). In this decision the court upheld the validity of road construction bonds issued by the county without an election under the authority of enabling legislation. The bonds were payable out of reimbursements made by the state to the county from gasoline and vehicle license taxes.

20. 252 S.C. 64, 165 S.E.2d 355 (1969).

21. *See* cases cited note 4 *supra*.

22. 257 S.C. at 225, 185 S.E.2d at 366.

23. 257 S.C. 17, 183 S.E.2d 710 (1971), *aff'd*, 41 U.S.L.W. 4093 (U.S. Dec. 18, 1972) (No. 71-879)

reserved to the states by the twenty-first amendment,[24] transcends the power to define due process standards for state taxation of interstate commerce, conceded to Congress under the commerce clause.[25] The South Carolina Supreme Court held, albeit obliquely, that the states' regulatory power is paramount.[26]

Heublein, a foreign corporation, challenged the state's right to levy a tax on its income resulting from sales of liquor in South Carolina. The plaintiff maintained that the imposition of the tax contravened Public Law 86-272,[27] enacted by Congress in 1959.[28] This statute prohibits a state tax assessment on a non-resident's net income derived within the state from interstate sales of tangible personalty, when the extent of the non-resident's business activities within the state is defined by, or does not exceed, certain "minimum contacts" synopsized as follows: the soliciting of orders, the sending of orders outside the state for acceptance or rejection, and the filling of orders *by shipment from without the state.*[29]

Heublein averred that its business activities in South Carolina were within the ambit of Public Law 86-272, and that consequently it was exempt from the state income tax. Moreover, the plaintiff contended that if its activities did not

24. U.S. CONST. amend. XXI, §2, reads: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

25. U.S. CONST. art. I, §8.

26. Since the repeal of prohibition the states have been allowed virtually unbridled authority in restricting the sale and distribution of alcohol, often by methods that would have amounted to unconstitutional interference with interstate commerce had other commodities been involved. *See, e.g.,* United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945) (especially concurring opinion of Frankfurter, J.).

27. Interstate Income Act §§101 *et seq.,* 15 U.S.C. §§381-4 (1970), hereinafter designated "Public Law 86-272" as in *Heublein.*

28. Public Law 86-272 was passed as a congressional rejoinder to the Supreme Court's holding that states could levy an income tax on corporations engaged in interstate commerce, provided the tax was not discriminatory and was apportioned to local activities within the state. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). It was held to be constitutional in 1964. International Shoe Co. v. Cocreham, 246 La. 344, 164 So.2d 314 (1964), *cert. denied,* 379 U.S. 902 (1964) (19 states as amici curiae in support of petition).

29. 15 U.S.C. §381(a)(1) (1970) (emphasis added).

conform to those described in the statute, such activities were involuntary, compelled by the plaintiff's compliance with article seven of the State Alcoholic Beverage Control Act,[30] which prescribes in purposeful detail the permissible method of importing and selling intoxicants in South Carolina. Pertinent provisions of article seven require distillers to appoint a resident of the state as a "producer representative" and to register him with the Tax Commission.[31] All shipments of liquor must be made directly to this representative and must be received by him within the geographic limits of the state; only then can any sale of liquor be completed by its distribution to purchasing wholesalers.[32] In effect, a producer is constrained to deliver liquor to itself in South Carolina prior to selling it within the state. Thus all sales are localized and thereby stripped of possible tax immunity under Public Law 86-272.

The plaintiff did not contest the state's power under the aegis of the twenty-first amendment to apply such regulations to the transportation of alcohol. Instead, it vigorously insisted that the twenty-first amendment does not authorize the state to levy an income tax pursuant to, and as the proximate consequence of, its regulatory power, when the tax is in derogation of a federal statute reinforced by the commerce clause, namely, Public Law 86-272.[33] Implicit in the plaintiff's contention was a denial of the state's power to alter the intrinsic character of interstate commerce for the purpose of imposing a tax.

The supreme court deflated this argument inferentially by establishing the primacy of the state's regulatory power. Without elaboration the court held that the statutory procedure governing the importation and sale of liquor "constitutes a valid exercise of the State's powers under the Twenty-first

30. S.C. CODE ANN. §§4-131 to -150 (1962).

31. *Id.* §§4-131(3), -138.

32. *Id.* §4-141.

33. Plaintiff depended heavily on *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp.*, 420 P.2d 894 (Okla. 1966), in which the court held that the state's attempt to justify an income tax as an alcohol regulation was ineffective for contradicting Public Law 86-272. In this case the relation of the tax to a scheme of regulation was tenuous at best.

See also Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), to the effect that the twenty-first amendment did not *pro tanto* repeal the power of Congress to regulate interstate commerce involving alcohol.

Amendment."[34] Thus, the issue was perfunctorily resolved for, as the court noted, the requirements of article seven "preclude the sale of alcoholic liquors in South Carolina through interstate sales,"[35] and therefore prevent the application of Public Law 86-272.

On appeal the United States Supreme Court approved and embellished this rationale holding that "South Carolina may, pursuant to an otherwise valid regulatory scheme, compel Heublein to undertake activities which take it beyond the protection of [Public Law 86-272]."[36] Avoiding conflict, the Court first determined that Congress did not intend Public Law 86-272 to inhibit valid state regulation of alcohol. The Court next found that the state statute localizing sales of liquor was reasonably related to legitimate state purposes,[36a] and was not designed merely to require a sufficient nexus for taxation.[36b] Thus, because the regulation was upheld, the tax incident to the regulation was similarly sustained.

B. Retail Licensing

In *Terry v. Pratt*[37] the court held that the statute[38] empowering the Alcoholic Beverage Control Commission to refuse to grant a retail liquor license because of the "unsuit-

34. 257 S.C. at 20, 183 S.E.2d at 712, *citing* State v. Kilgore, 233 S.C. 6, 103 S.E.2d 321 (1958). In *Kilgore* the court said, "[E]ach state has power, unfettered by the commerce clause, to regulate or prohibit the importation of intoxicating liquor for delivery or use within its borders." *Id.* at 8, 103 S.E.2d at 322. *Accord,* Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59 (1936).

35. 257 S.C. at 20, 183 S.E.2d at 712.

36. 41 U.S.L.W. at 4093.

36a. Localization of sales expedites record keeping and the maintenance of wholesale prices at the national minimum. *Id.* at 4095.

36b. Such disingenuous use of liquor regulations would fail for frustrating the objective of Public Law 86-272. *Id.*

37. 187 S.E.2d 884 (S.C. 1972).

38. S.C. CODE ANN. §4-53 (1962) provides in part:

> The Commission shall refuse to grant any license mentioned in this chapter if it shall be of the opinion that:
>
> . . . .
>
> (2) The store or place of business to be occupied by the applicant is not a suitable place . . . .

It should also be noted that the Commission has exclusive authority to grant or deny retail liquor licenses, *id.* §4-31(3), subject to review by the courts only on certiorari; *id.* §4-58.

ability" of the nature or location of a proposed store is not an unconstitutional delegation of legislative power.

The plaintiff had applied for a license to operate a liquor store in an unincorporated section of Anderson County; the Commission decided that the prospective store lacked adequate police protection[39] and was otherwise unsuitable.[40] In attacking this ruling, the plaintiff broached two kindred objections: that the ruling was arbitrary and capricious because unsupported by the evidence,[41] and that section 4-53(2) of the South Carolina Code was an unconstitutional delegation of legislative power, because the statutory procedure for granting licenses left to the Commission's absolute discretion the determination of the "suitability" of liquor store sites.[42]

Deciding the amorphous constitutional question[43] entailed pouring old wine into a new bottle, as the court relied extensively on past decisions.[44] The court also embraced the traditional test of constitutionality:

> [I]t is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which an administrative officer or body must conform, with a proper regard for the protection of the public interests . . . .[45]

In applying this test to *Terry*, the court found that while the General Assembly vested in the Commission the authority to grant or refuse liquor licenses, it simultaneously narrowed

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39. S.C. CODE ANN. §4-37 (1962) provides for retail liquor licensing in unincorporated communities and reads in part, "But the Commission shall not license a retail dealer in any locality unless the Commission is assured that such locality is under proper police protection."

40. *Id.* §4-53(2).

41. The court resolved this question against the plaintiff on the strength of testimony by the sheriff to the effect that plaintiff's store lacked police protection. *See* Record at 12.

42. S.C. CONST. art. III, §1, vests legislative power in the two branches of the General Assembly and tacitly forbids delegation of that power.

43. "It is undoubtedly true that legislative power cannot be delegated; but it is not always easy to say what is and what is not legislative power . . . ." 187 S.E.2d at 887, *quoting from* Port Royal Mining Co. v. Hagood 340 S.C. 519, 524, 9 S.E. 686, 688 (1889). The problem has often been compounded by semantic subtlety and gossamer distinctions.

44. *See, e.g.*, State *ex rel.* Richards v. Moorer, 152 S.C. 455, 469, 150 S.E. 269, 273 (1929); Cole v. Manning, 240 S.C. 260, 125 S.E.2d 621 (1962).

45. 187 S.E.2d at 887-8, *quoting from* Atlantic Coast Line R.R. v. South Carolina Pub. Serv. Comm'n, 245 S.C. 229, 234, 139 S.E.2d 911, 913 (1965).

the focus of that authority by requiring the Commission to deny a license unless it was assured that the site of a proposed store was under proper police protection and, pursuant to section 4-53(2), that the place of business to be occupied by the applicant was a suitable one. The court concluded that read *in pari materia* the legislative grant of authority and the limitations attendant to it "declared a legislative policy and established primary standards to govern the Commission in refusing an application for a license."[46] Therefore, the court held, "It follows that the delegation of the foregoing authority under Section 4-53(2), of the Code, was not an unconstitutional delegation of legislative power."[47]

III. EDUCATION

In *Hunt v. McNair*[48] the South Carolina Supreme Court reaffirmed the constitutionality of the Educational Facilities Authority Act,[49] a statute enabling the State Budget and Control Board, serving as the Educational Facilities Authority,[50] to issue revenue bonds to provide financing for institutions of higher learning. In accordance with the Act, the Baptist College of Charleston sought the issuance of $3,500,000 of bonds in order to discharge indebtedness accrued from the acquisition of equipment, improvements made to its physical plant, and also from its outstanding mortgage serial bonds. At no cost to the state the college proposed to convey virtually its entire campus to the Authority,[51] which in turn would issue state revenue bonds, then lease the facilities back to the college at a rental sufficient to retire the bonds, and upon retirement reconvey the property to the college. The advantage inuring to the college from this plan was the low rate of interest, and thus lower payments, resulting from the tax-free status of state bonds.

The plaintiff, as a citizen and taxpayer, originally assailed the Act on a panoply of constitutional grounds in a case

46. 187 S.E.2d at 888.

47. *Id.* Honestly.

48. 187 S.E.2d 645 (S.C. 1972), *prob. jur. noted,* 93 S. Ct. 223 (No. 71-1523).

49. S.C. CODE ANN. §§22-41 to -41.17 (Cum. Supp. 1971), hereinafter referred to as "the Act".

50. *Id.* §22-41.3, hereinafter referred to as "the Authority".

51. The court pointedly noted that two of the buildings not included in the property to be conveyed to the state were financed in part by federal loans.

considered by the court in 1970;[52] at that time the Act survived unscathed.[53] The United States Supreme Court, however, vacated and remanded the case for reexamination[54] guided by four novel Court decisions: *Lemon v. Kurtzman*,[55] *Robinson v. DiCenso*,[56] *Earley v. DiCenso*,[57] all consolidated in the same opinion, and *Tilton v. Richardson*.[58] These decisions were predicated upon the religion guarantees of the first amendment; thus, the question on remand as construed by the court was whether the Educational Facilities Authority Act offends the establishment clauses of the federal and state Constitutions.[59] The court held that it does not.

As a prologue to this decision the court detailed the several provisions embodied in the Act and the substantive rules adopted by the Authority designed to prevent the confluence of state and church interests. The court scrutinized the legislative objective of the Act, and found that the Act was intended solely to enhance the general welfare by offering "a measure of assistance . . . to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed . . . ."[60] The court concluded that such is a legitimate secular purpose, neither advancing nor

52. Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362 (1970), *noted in* 23 S.C.L. REV. 644, 645 (1971) (Survey of S. C. Law).

53. Amidst the plaintiff's other contentions, the assertion that the Act violated the establishment clause was not accorded much weight by the court, which concluded, "Having held that neither the credit of the State nor the property of the State is involved, it follows that this constitutional provision is not violated." 255 S.C. at 86, 177 S.E.2d at 370.

54. Hunt v. McNair, 403 U.S. 945 (1971) (mem.).

55. 403 U.S. 602 (1971) (Burger, C.J.), *noted in* 17 VILL. L. REV. 574 (1972); 40 FORD. L. REV. 371 (1971).

56. *Sub nom.* Lemon v. Kurtzman, 403 U.S. 602 (1971), *aff'g sub nom.* DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970).

57. *Id.* Earley, whose children attended parochial schools, was, among others, an intervenor-defendant in the action brought by DiCenso in the district court. The Supreme Court styled his appeal as a separate case in its collective opinion.

58. 403 U.S. 672 (1971).

59. *See* U.S. CONST. amend. I; S.C. CONST. art. I, §4. As the court noted, the language of these provisions is nearly identical and prohibits laws "respecting an establishment of religion."

60. S.C. CODE ANN. §22-41 (Cum. Supp. 1971).

inhibiting religion, and therefore in conformity with first amendment requirements.[61]

In turning its attention to the primary effect of the Act, the court noted by way of introduction: "The establishment clauses are intended to afford protection against sponsorship, financial support and active involvement of the government in religious activity."[62] To gauge the permissible level of government involvement, the court employed three of the Supreme Court decisions as benchmarks and analyzed them as follows.

In *Earley* and in *Robinson,* a Rhode Island statute authorizing salary supplements for teachers of secular subjects in non-public schools was held unconstitutional.[63] In *Lemon* a similar though more comprehensive Pennsylvania statute met the same fate.[64] Each statute contained an imposing body of regulations, and to ensure compliance, provided for state examination of the recipient teachers' methods, texts and other materials, as well as for periodic state auditing of the participating schools' financial records. The Supreme Court concluded that because of the pervasive and continuous surveillance necessary to enforce such regulations, the statutes in all three cases fostered excessive entanglement between government and religion.[65]

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61. In *School Dist. of Abington Tp. v. Schempp,* 374 U.S. 203 (1963), Mr. Justice Clark said:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. . . . [T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Id.* at 222.

See also Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947).

62. 187 S.E.2d at 648; *see* Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding tax exemptions for places of worship), *noted in* 49 N.C.L. REV. 342 (1971).

63. Salary Supplement Act of 1969, R.I. GEN. LAWS ANN. §§16-51-1 to -9 (Supp. 1971).

64. Nonpublic Elementary and Secondary Education Act of 1968, 24 PA. STAT. ANN. §§5601-5609 (Supp. 1971).

65. The "excessive entanglement" test was adopted by the Supreme Court as a corollary to the "purpose and primary effect" test in *Walz v. Tax Comm'n,* 397 U.S. 664 (1970), in an attempt to derive a viable and consistent standard. As Chief Justice Burger said, however, each establishment clause decision is in large part a value judgement. *Id.* at 669.

On the basis of this analysis, the court decided that *Hunt* was distinguishable from these cases and said:

> The surveillance on the part of the State, obviously abhorred by the [Supreme] Court, is not necessary under the proposed financing plan of the college. . . . 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.[66]

The court emphasized that pursuant to the Act the Authority intended to mortgage the college property to a trustee bank and, after leasing the property back to the college, to assign all rights under the lease to the trustee.[67] Thus, the trustee would assume responsibility for disbursing the bonds with the rental fees received from the college, "so that upon delivery of the bonds the interest of the Authority would, for all practical purposes, cease."[68]

In response to the plaintiff's contention that the broad, contingent language of the Act would inexorably mire the state in the administration of the college, the court concluded:

> A reading of the Act . . . indicates that the basic function of the Authority is to see that religion is not promoted on the leased premises, and that fees are charged sufficient to meet the bond payments. The decisions recognize that some involvement between church and State is not constitutionally obnoxious. It is a question of degree and each case must be judicially determined on its own facts . . . .[69]

The final issue before the court was whether the *Tilton* decision necessarily undermined the Act. In *Tilton* Connecticut taxpayers impugned the constitutionality of a statute authorizing federal grants to colleges for the construction of academic facilities.[70] Under one section of the statute the government retained a twenty-year interest in each project funded, and was entitled to a pro rata return of its grant if during that period the project was used for sectarian instruction or worship.[71] The United States Supreme Court abro-

66. 187 S.E.2d at 650-1.

67. *See* S.C. CODE ANN. §22-41.9 (Cum Supp. 1971).

68. 187 S.E.2d at 651.

69. *Id.*

70. Higher Education Facilities Act of 1963, 20 U.S.C. §§711 *et seq.* (1970).

71. Higher Education Facilities Act, Pub. L. No. 88-204, §404, 77 Stat. 363 (1963) (codified at 20 U.S.C. §754 (1970)).

gated this section because it found that federally funded structures would still have considerable value after twenty years and that the government, by eventually allowing unrestricted use of such structures, would thus be making contributions to religious institutions.[72]

As the court pointed out, however, the balance of the statute authorizing aid to chuch-supported colleges remained intact, since the Supreme Court excised only the inadequate twenty-year prohibition of religious use. Therefore, the court drew a distinction by noting first, that under the Educational Facilities Authority Act, a project used for sectarian purposes would be summarily excluded from the financing program;[73] and second, that pursuant to the rules adopted by the Authority, the eventual reconveyance of property to Baptist College would be effected by deed subject to the condition that no facility financed by the proceeds of state bonds was ever to be used for sectarian purposes, either by the college, or by any voluntary grantee of the college.[74] Because of these prophylactic provisions the court concluded that the implementation of the Act would not entail a state contribution to religion, and thus held that the decisive objection in *Tilton* was not applicable to *Hunt*.

IV. JUDICIAL APPORTIONMENT

O'Shields v. McLeod[75] was an action challenging the constitutionality of the South Carolina circuit court system. The crux of O'Shields' complaint was that because of gross population disparities among the state's sixteen judicial circuits, the quality of the administration of justice in overpopulated circuits was inferior to that in less populous circuits.[76] The

72. The Court held this section to be severable, and the remainder of the Act still obtains. *See* 403 U.S. at 683.

73. S.C. CODE ANN. §22-41.2(b) (Cum. Supp. 1971) renders ineligible for financing "any facility used or to be used for sectarian instruction or as a place of religious worship . . . or to be used primarily in connection with . . . a school or department of divinity for any religious denomination."

74. *See* 187 S.E.2d at 647-8 (rule no. 4).

75. 257 S.C. 477, 186 S.E.2d 408 (1972).

76. For an indication of the extent of the population imbalance, *see* Record at 31-3 and App. "F". Four circuits in the last 50 years have far exceeded the state's average rate of growth, the result being that population in the Seventh, Fifth, Ninth and Thirteenth Circuits varies from 31% to 87% respectively

plaintiff attacked the court system on multiple grounds, which were sustained by the trial court with one exception.[77] The supreme court, however, reversed emphatically.

O'Shields first argued that the population variance among the judicial circuits had historically been much less pronounced, and that the framers of the South Carolina Constitution envisioned equal population distribution being the template for maintaining and realigning the circuits. He therefore contended that article V, section 13 of the Constitution tacitly required all circuits to have substantially equal numbers of people.[78] Finding no support for this contention in the language of article V, the court routinely dismissed it.

The plaintiff next averred that citizens in overpopulated circuits were denied equal access to, and treatment within, the judicial process, and that such inequities amounted to invidious discrimination as contemplated by the equal protection clauses of both the federal[79] and state[80] Constitutions. To this the Attorney General responded that the "one man, one vote" principle was limited exclusively to situations in which government officials were popularly elected under conditions of malapportionment,[81] and he catalogued the decisions holding that there is no constitutional requirement that judges be allocated on the basis of population.[82] The supreme court, however, disposed of the question on different grounds, con-

above the median population figure of 157,000 per circuit. At the same time eight of the eleven circuits under the median are from 20% to 40% underpopulated. *Id.* at 32.

77. The plaintiff alleged that the collection of taxes to support the statewide circuit court system was unconstitutional because citizens in overpopulated circuits were not receiving fair value in return for their tax dollars. Neither the lower court nor the supreme court considered this question.

78. S.C. CONST. art. V, §13, reads in part:

> The State shall be divided into as many Judicial Circuits as the General Assembly may prescribe, and for each Circuit a Judge shall be elected by joint *viva voce* vote of the General Assembly, who shall hold his office for a term of four years . . . .

79. U.S. CONST. amend. XIV, §1.

80. S.C. CONST. art. I, §5.

81. Circuit judges, of course, are elected by the General Assembly. The plaintiff argued that this was a vicarious form of popular election and noted, perhaps portentously, that circuit solicitors are elected by the people.

82. *See, e.g.*, Kail v. Rockefeller, 275 F. Supp. 937 (E.D.N.Y. 1967); New York State Ass'n of Trial Lawyers v. Rockefeller, 267 F. Supp. 148 (S.D.N.Y. 1967).

cluding: "The respondent neither alleged nor offered to prove discriminatory rendition of judicial services; hence, the [trial] court's finding of a violation . . . in this respect is without support in the record."[83]

On the strength of the plaintiff's contentions, the trial court had also invalidated the statute authorizing the chief justice to provide for periodic interchange of circuit judges as an unconstitutional delegation of legislative power to the judiciary.[84] In reversing, the supreme court peremptorily disposed of the issue, deciding that since the plaintiff neither alleged nor proved that the rotation of circuit judges had prejudiced him, he "palpably lacked standing to question the statute's validity."[85]

The final question presented to the court was whether the General Assembly could create multi-judge circuits without offending the constitutional provisions governing the circuit court system embodied in article V, section 13.[86] The plaintiff sought this interpretation to clear the path for corrective relief, since he maintained that multi-judge circuits offered the best remedy for defects alleged to inhere in the circuit system. In its reapportionment order the trial court ruled that the creation of multi-judge circuits was constitutionally practicable. That conclusion, however, was enervated by the supreme court's holding that "[t]he courts of this State . . . are without authority to issue advisory opinions."[87]

Although *O'Shields* was decided on peripheral considerations, the court clearly indicated that the malapportioned circuit court system is immune to attack, at least on equal protection grounds, by stating:

83. 257 S.C. at 481, 186 S.E.2d at 409.

84. S.C. CODE ANN. §15-129 (1962) in essence authorizes the chief justice to form a roster of circuit judges and to "arrange a regular and continuous assignment and interchange of circuits among such judges . . . ." The plaintiff contended that this section was an unconstitutional transfer of legislative power in violation of S.C. CONST. art. V, §14, which reads: "Judges of the Circuit Courts shall interchange Circuits with each other, *and the General Assembly shall provide therefor.*" (Emphasis added).

85. 257 S.C. at 481, 186 S.E.2d at 409.

86. S.C. CONST. art. V, §13, provides in part, "[F]or each Circuit a Judge shall be elected . . . ." The question turned upon whether the term "a Judge" connoted only one judge or, as the trial court held, at least one judge.

87. 257 S.C. at 481, 186 S.E.2d at 409.

[T]he authority, and with it the duty and responsibility, to divide the State into appropriate judicial circuits is vested in the General Assembly by Article V, Section 13 of our Constitution. Thus, by organic law, the power to correct the present, lamentable imbalance in judicial circuits rests exclusively in that body, which is responsible directly to the people.[88]

ROBERT V. MATHISON, JR.

88. *Id.* In response to this mild exhortation as well as popular sentiment the General Assembly at this writing is considering a constitutional amendment that would eliminate many of the problems in the circuit court system. *See* Journal of the Senate, N. 101, S. 428, p. 22 (July 5, 1972).