

## HUNT v. McNAIR

At issue in *Hunt v. McNair, Governor of South Carolina, et al.*, (1973) was government support for religious institutions. When government, federal, state or local, undertakes to provide financial or other support for private postsecondary education, the question arises whether this support, insofar as it benefits religious institutions, constitutes government support for religion. If it does, such support would violate the establishment clause because government would have departed from its position of neutrality. In higher education law, *Tilton v. Richardson* (1971), *Hunt v. McNair* (1973), *Roemer v. Board of Public Works* (1976), and *Witters v. Washington Department of Services for the Blind* (1986) are known as the four cases that suggest that a wide range of postsecondary support programs can be devised compatibly with the establishment clause and that a wide range of religious institutions can be eligible to receive government support (Kaplin & Lee, 2007).

Two cases decided by the Supreme Court in 1971 provide the foundation for the modern law on government support for church related schools. *Lemon v. Kurtzman* (1971) invalidated two state programs providing aid for church related elementary and secondary schools, while *Tilton v. Richardson* (1971) held constitutional a federal aid program providing construction grants to higher education institutions, including those that are church related. The Court developed a three-pronged test for determining when a government support program passes muster under the establishment clause. The three prongs are: 1) the program's purpose must be secular, 2) its primary effect must be one that neither advances nor inhibits religion, and 3) the program must not foster excessive entanglement between state and religion.

Facts of the Case

The South Carolina Educational Facilities Authority Act established an Educational Facilities Authority, the purpose of which is to assist institutions for higher education in the construction, financing and refinancing of projects 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. 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. On January 6, 1970, Baptist College at Charleston, South Carolina, submitted to the Authority for preliminary approval for the issuance of revenue bonds which the college would use to complete its dining hall facilities. In return, the college would convey the project, without cost, to the authority, which would then lease the property back to the college. After payment in full of the bonds, the project would be reconvened to the college. The authority granted preliminary approval that same month. A South Carolina taxpayer sued state officials in the Common Pleas Court, Charleston County, South Carolina, for declaratory and injunctive relief against the operation of the South Carolina Educational Facilities Act insofar as it authorized a proposed financing transaction involving the state-created Educational Facilities Authority's issuance of revenue bonds for the benefit of the Baptist College at Charleston. The trial court denied relief, the Supreme Court of South Carolina affirmed, and after the United States Supreme Court vacated the judgment and remanded the case for reconsideration in light of intervening decisions (*Lemon v. Kurtzman*; *Tilton v. Richardson*), the

Supreme Court of South Carolina adhered to its earlier position. On appeal, the United States Supreme Court affirmed.

### The Court's Ruling

Justice Powell's opinion, expressing the views of six members of the court, held that the proposed transaction, under the three-pronged *Lemon* tests of purpose, effect, and entanglement did not violate the First Amendment's establishment clause. The court determined that the statute has a secular purpose in seeking to aid all institutions of higher education, whether or not they have religious affiliations. Using *Tilton* for its effect argument, the court concluded the Baptist College's operations were not oriented significantly toward sectarian rather than secular education, since there were no religious qualifications for faculty membership or student admission, and its percentage of Baptist students was roughly equal to the percentage of Baptists in that area of the state. The bond issuance would not have the primary effect of advancing or inhibiting religion, because the project would not include any buildings or facilities used for religious purposes. Finally, the transaction would not foster an excessive entanglement with religion merely because the college has a formalistic relationship or because the Authority might foreclose if the college should fail to make the prescribed rental payments or otherwise default in its obligations.

Justice Brennan, joined by Justices Douglas and Marshall, dissented on the ground that the act failed the entanglement test. Specifically, Justice Brennan argued that under this scheme the policing by the state can become so extensive that the state may well end up in complete control of the operation of the college. 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 religious activities of religious institutions and employs the organs of government for essentially religious purposes.

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### **Further Readings**

Kaplin, W. A., & Lee, B. A. (2007). *The law of higher education*. San Francisco, CA.: Jossey- Bass.

### **Legal Citations**

*Hunt v. McNair, Governor of South Carolina, et al.*, 413 U.S. 734 (1973).

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

*Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

*Tilton v. Richardson*, 403 U.S. 672 (1971).

*Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986).