VOLUME 38, NUMBER 4 WINTER 2018

MUNICIPAL FINANCE JOURNAL

The State and Local Financing and Municipal Securities Advisor

Editor: W. Bartley Hildreth
Georgia State University

CRI
Civic Research Institute

Tax-Exempt Financing of Sectarian Institutions Following the Supreme Court's Decision in *Trinity Lutheran Church of Columbia, Inc. v. Comer*

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A fundamental role of bond counsel in a bond transaction is to provide an unqualified opinion regarding the validity of debt under state and federal law. The determination that debt is valid requires consideration of laws that apply to the particular type of transaction. In transactions benefiting religious organizations, courts have historically interpreted federal and state constitutional provisions that limit government involvement with religion using the tests applied by the United States Supreme Court in Hunt v. McNair. *Bond counsel must be versed in these tests to make a meaningful determination regarding the validity of a bond issue involving a sectarian institution. The purpose of this article is to assist bond counsel in making that determination by identifying and examining trends in court*

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I. INTRODUCTION

A fundamental role of bond counsel in a bond transaction is to provide an unqualified opinion regarding the validity of debt under state and federal law. The determination that debt is valid requires consideration of laws that apply to the particular type of transaction. In transactions benefiting religious organizations, courts have historically interpreted federal and state constitutional provisions that limit government involvement with religion using the tests applied by the United States Supreme Court (the "Court") in *Hunt v. McNair*.[1] Bond counsel must be versed in these tests to make a meaningful determination regarding the validity of a bond issue involving a sectarian institution. The purpose of this article is to assist bond counsel in making that determination by identifying and examining trends in court opinions dealing with sectarian institutions. The Court's recent opinion in *Trinity Lutheran Church of Columbia v. Comer*[2] suggests that jurisprudence in this field is still evolving.

Part II of this article describes the typical transaction structure that governmental entities use to assist sectarian organizations in a conduit bond financing. Part III summarizes the federal constitutional framework laid out in the Establishment Clause and the Free Exercise Clause of the First Amendment and in the Fourteenth Amendment of the United States Constitution relating to governmental aid to sectarian organizations. Part IV describes how federal constitutional limitations have historically been applied based on the Court's tests originating in *Lemon v. Kurtzman*[3] and *Agostini v. Felton*[4] and applied in the bond financing area in *Hunt*. Part IV also defines the term "pervasively sectarian," based on court interpretations. Part V explores the development of federal jurisprudence since *Hunt* based in part on the suggestion recited in footnote 7 of that case and later discussions in *Mitchell v. Helms*[5] and in the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit") decision in *Steele v. Industrial Development Board of Metropolitan Government Nashville*[6] (which held that bond financings are not the equivalent of direct government support). Part V also includes a discussion of the *Trinity Lutheran*

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[1] *Hunt v. McNair*, 413 U.S. 734 (1973).

[2] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

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

[4] *Agostini v. Felton*, 521 U.S. 203 (1997).

[5] *Mitchell v. Helms*, 530 U.S. 793 (2000).

[6] *Steele v. Indus. Dev. Bd.*, 301 F.3d 401 (6th Cir. 2002), *cert. denied*, 537 U.S. 1188 (2003).

Church decision. Part VI evaluates footnote 7 of the *Hunt* case concerning indirect government aid in the context of municipal bond financings. Part VII addresses the history of state law limitations imposed on government aid to sectarian organizations and provides examples of such limitations. The article concludes with a summary of this still uncertain area of law that poses particular challenges for bond attorneys.

II. TYPICAL TRANSACTION STRUCTURE

Municipal bond financings for religious institutions usually take the form of a "conduit issuer" financing, although the matters addressed in this article can also arise in transactions that do not involve a conduit issuer. In a typical conduit issuer transaction, a state or political subdivision thereof or an "on behalf of issuer" issues bonds and loans the proceeds of such bonds to a nongovernmental organization (the "borrower") under the terms of a loan agreement.[7] The terms of the bonds are established by a resolution adopted by the issuer, in an indenture of trust between the issuer and a bond trustee or in an agreement among the issuer, the borrower, and a bond trustee or bond purchaser. The borrower agrees to repay the loan in such amounts and on such dates as will be sufficient to repay the bonds when due. The loan repayments are pledged or assigned to the bondholders, and the borrower often provides additional security to the bondholders, such as a pledge of its revenues or a mortgage. The full faith and credit and taxing powers of the conduit issuer are not typically available to pay the bonds, and no assets of the issuer (except for the right to receive payments under the loan agreement) are pledged to bondholders. This financing structure may vary from state to state depending on the provisions of the applicable conduit bond laws.

Interest on municipal bonds, whether issued in a conduit financing or otherwise, may be tax exempt if applicable requirements of the Internal Revenue Code of 1986, as amended (the "Internal Revenue Code"), are satisfied. Interest may also be exempt for state income tax purposes. The tax-exempt nature of the bonds results in a lower cost of financing and is

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[7] Transaction structures vary from state to state depending on applicable state statutes and jurisprudence and may include, for example, the installment sale or lease of bond-financed property to the borrower, instead of a loan of the proceeds of the financing. Installment purchase or lease payments received by the conduit issuer are used to repay the financing source in such structures. As with loan structures, a conduit issuer may secure installment sales or leases with, for example, mortgages or assignments of revenue of the borrower. See, e.g., Assoc. for Govt'l Leasing & Finance, Fifty State Survey, Governmental Leasing: Surveys of Legislation and Case Law in the Fifty States, Federal Tax Law and Federal Securities Law (2012 Edition). References in this article to "loans" include loans, installment sales, leases, and similar financing structures.

a principal reason a borrower may seek to have tax-exempt bonds issued on its behalf.

III. FEDERAL CONSTITUTIONAL FRAMEWORK

The First Amendment of the United States Constitution states in relevant part that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The first clause, providing that Congress shall make no law respecting an establishment of religion, is designated as the Establishment Clause. According to the Court in *Walz v. Tax Commission*,[8] the Establishment Clause was intended to afford protection against "three main evils . . . : 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[9] The second clause, providing that Congress shall make no law prohibiting the free exercise thereof, is designated as the Free Exercise Clause. The Free Exercise Clause and the Establishment Clause apply to the states under the Fourteenth Amendment to the United States Constitution.[10] The Court's decision in *Hunt* is the only Court decision addressing the application of the Establishment Clause to the issuance of municipal bonds by a state or local conduit issuer for the benefit of a religious institution. No Court decision has separately addressed the application of the Free Exercise Clause in municipal bond financing circumstances.

As discussed in more detail in Part VII, most state constitutions include provisions that forbid direct government aid to educational institutions with a religious affiliation. These provisions are commonly referred to as "Blaine Amendments." Although the scope of such constitutional provisions varies from state to state, the provisions may limit the ability of a state or a political subdivision conduit issuer to issue bonds to finance the facilities of a religious institution.

IV. FIRST AMENDMENT TESTS IN *LEMON*, *HUNT*, AND *AGOSTINI*

The Court's current Establishment Clause jurisprudence is most notably represented by *Lemon*—decided in 1971—and by *Agostini*—decided in 1997. However, the Court's analysis of municipal bond financing begins with *Hunt*, which was decided in 1973. The following provides a brief

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[8] *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664 (1970).

[9] *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

[10] See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); and *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947); see also *Cal. Statewide Cmtys. Dev. Auth. v. All Persons Interested*, 152 P.2d 1070 (Cal. 2007).

summary of significant Establishment Clause jurisprudence, beginning with *Lemon*.

Lemon v. Kurtzman

In *Lemon*, the Court articulated a three-part test for determining whether a law violates the Establishment Clause by analyzing whether such law (1) has a secular legislative purpose, (2) has a principal or primary effect of advancing or inhibiting religion, and (3) fosters an excessive entanglement between government and religion.[11] This test, commonly known as the "*Lemon* Test," remains the foundational analysis used in examining the constitutionality of municipal bond financings for sectarian organizations.[12] In *Lemon*, the Court found that a state statute providing a salary supplement to teachers in nonpublic schools violated the Establishment Clause[13] based on the excessive entanglement between the government and religion.[14] Funding additional teacher compensation requires state certainty "that subsidized teachers do not inculcate religion" through "comprehensive, discriminating, and continuing state surveillance" to ensure Establishment Clause compliance.[15] The Court took the position that, "unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts [would] involve excessive and enduring entanglement between state and church" and necessarily require continuous monitoring of teacher instruction.[16]

Hunt v. McNair

The Court has only once considered whether a municipal bond transaction satisfies the *Lemon* Test. In *Hunt*, the Court used the *Lemon* Test to uphold a conduit bond financing arrangement between a South Carolina public authority and a Baptist-controlled college. The Court found that the authority's approving action was based on a secular purpose because the authority's enabling statute was intended to promote education in all institutions of higher education regardless of religion.[17] The Court explained that the government aid satisfied the remaining *Lemon* prongs, emphasizing

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[11] *Lemon*, 403 U.S. at 612–613.

[12] See, e.g., Martha Ratnoff Fleisher, Establishing Bonds Between Church and State: The Issuance of Tax-Exempt Bonds for Religious Institutions, 2 First Amend. L. Rev. 199, 206–207 (2004).

[13] *Lemon*, 403 U.S. at 625.

[14] *Id*. at 614.

[15] *Id*. at 619.

[16] *Id*.

[17] *Hunt v. McNair*, 413 U.S. 734, 746 (1973).

that the college was not a "pervasively sectarian" institution.[18] Consistent with this ruling (although not in the context of municipal bonds), the Court had previously determined in *Roemer v. Board of Public Works*[19] and *Tilton v. Richardson*[20] that state aid could not fund institutions that "are so 'pervasively sectarian' that secular activities cannot be separated from sectarian ones, and . . . that if secular activities can be separated out, they alone may be funded."[21]

While the Court in *Hunt* analyzed the transaction utilizing the *Lemon* Test, it expressed uncertainty that the sort of aid involved in a conduit bond financing should be subject to the same scrutiny as general expenditures. The Court suggested that "the 'state aid' involved in [the] case [was] of a very special sort. . . . [T]he only State aid consist[ed] not of financial assistance directly or indirectly which would implicate public funds or credit, but the creation of an instrumentality . . . through which educational institutions may borrow funds on the basis of their own credit and the security of their own property."[22] As Part V of this article describes, this suggestion underlies much of the recent jurisprudence relating to pervasively sectarian institutions.

Agostini v. Felton

The *Lemon* Test was modified by *Agostini*, where the Court folded the "excessive entanglement" prong into the "primary effects" prong. Under the new "*Lemon-Agostini* Test" with the combined primary effects prong, a court considers whether (1) the law has a secular legislative purpose, (2) the action results in governmental indoctrination, (3) the action defines its recipients by reference to religion, and (4) the action creates an excessive entanglement between the government and religion.[23]

The proper "primary effects" analysis must, according to the Court, focus on whether the allocation criteria underlying the government's actions favor or disfavor religion.[24] In *Agostini*, the Court held that a "federally funded

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[18] *Id*. at 743–744.

[19] *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1967).

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

[21] *Roemer*, 426 U.S. at 755; *see also Tilton*, 403 U.S. at 686–687.

[22] *Hunt*, 413 U.S. at 745 n.7. It should be noted that the Court in *Hunt* addressed a financing structure involving a loan agreement in which the borrower owned the property. In financing structures involving installment sales or lease structures, title to the financed property may remain with the conduit issuer until the termination of the financing structure. So long as the borrower has what is known as tax ownership of the property in question for the life of the financing, tax-exempt debt may be issued on its behalf if it otherwise qualifies.

[23] *Agostini v. Felton*, 521 U.S. 203, 234 (1997); see also *Cal. Statewide Cmtys. Dev. Auth. v. All Persons Interested*, 152 P.2d 1070, 1082 (Cal. 2007).

[24] *Id*. at 231.

program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present" within New York's Title I program.[25] The Court in *Agostini* found this program distinguishable from *Lemon* due to the program's purpose of providing disadvantaged students, enrolled in both private and public schools, remedial education to prevent failure to meet state academic performance standards.[26] The Court found that the program did "not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement."[27] Furthermore, the primary effect of the program neither favored nor disfavored any religion (or no religion at all), and was made available to both religious and secular beneficiaries on a nondiscriminatory basis.[28] Notably, even incidental benefits to religion, as was the case in *Agostini*, resulting from a neutral and nondiscriminatory program have been held not to violate the Establishment Clause.[29]

The Pervasively Sectarian Standard

The Court in *Hunt* applied a "pervasively sectarian" standard in determining whether an organization is subject to heightened review under the *Lemon* Test in connection with a municipal bond financing. A pervasively sectarian institution, according to the Court, is one where "a substantial portion of its functions are subsumed in the religious mission."[30] To determine the second prong of the *Lemon* Test—whether the primary effect of the act advanced or inhibited religion—the Court in *Hunt* focused on the institution's religious nature.[31] The Court found that the college was not pervasively sectarian even though the members of the College Board of Trustees were elected by the South Carolina Baptist Convention (the "Convention"), the approval of the Convention was required for certain financial transactions, the charter of the college could be amended only by the Convention, and 60% of the college student body was Baptist.[32] The Court reasoned that because there were no religious qualifications for

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[25] *Id*. at 234–235.

[26] *Id*. at 233–234.

[27] *Id.* at 234.

[28] *Id.* at 231.

[29] *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 661–662 (1980) (State statute providing payments to nonpublic schools, including of costs incurred in complying with state-mandated requirements, found not to violate the First and Fourteenth Amendments).

[30] *Hunt v. McNair*, 413 U.S. 734, 743 (1973).

[31] *Id*. at 743.

[32] *Id*. at 743–745.

faculty membership or student admissions, and because the percentage of Baptist students was "roughly equivalent" to the percentage of Baptists in that geographical area, there was "no basis" to conclude that the college was pervasively sectarian.[33] According to *Hunt*, an institution's student admissions guidelines, the religious qualifications of teachers, and the extent to which religious coursework is required are also relevant factors in determining whether the institution is pervasively sectarian.[34]

In *Tilton*, the Court suggested that a pervasively sectarian school is one where the religiosity "permeates the secular education" provided.[35] The Court did not start with the assumption that all religiously affiliated schools are pervasively sectarian.[36] Rather, in demonstrating the proper analysis of the pervasively sectarian standard, the Court examined the "individual project" being funded and then evaluated whether that project possessed sectarian attributes.[37] The Court suggested that attributes of a pervasively sectarian organization include: (1) imposing religious restrictions on admissions; (2) requiring attendance at religious activities; (3) compelling obedience to the doctrines and dogmas of the particular faith in question; (4) requiring instruction in theology and doctrine; and (5) propagating a particular religion in every way possible.[38] The Court also listed the following attributes contributing to the sectarian nature of an institution:

> Two of the five federally financed buildings involved in this case are libraries. The District Court found that no classes had been conducted in either of these facilities and that no restrictions were imposed by the institutions on the books that they acquired. . . . The third building was a language laboratory at Albertus Magnus College. The evidence showed that this facility was used solely to assist students with their pronunciation in modern foreign languages—a use which would seem peculiarly unrelated and unadaptable to religious indoctrination. Federal grants were also used to build a science building at Fairfield University and a music, drama, and arts building at Annhurst College. . . . [C]ourses at these institutions are taught according to the academic requirements intrinsic to the subject matter and the individual teacher's concept of professional standards. Although appellants introduced several institutional documents that stated certain religious restrictions on what could be taught, other evidence showed

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[33] *Id.*

[34] *Id.*

[35] *Tilton v. Richardson*, 403 U.S. 672, 681 (1971).

[36] *Id.*

[37] *Id.* at 682.

[38] *Id.*

> that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination. All four institutions, for example, subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of University Professors and the Association of American Colleges.[39]

The issue in *Tilton* was whether a federal statute that authorized grants and loans to institutions of higher education for the construction of a wide variety of academic facilities violated the Establishment Clause or the Free Exercise Clause.[40] To determine whether the statute reflected a secular legislative purpose (the first prong of the *Lemon* Test), the Court stated that "the crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."[41]

In *Roemer*, the State of Maryland offered monetary grants to private universities on the condition funds were not used for sectarian purposes.[42] The Court stated that non-mandatory religious services, along with additional factors, led to a finding that the institution was not "pervasively sectarian," and applied the *Lemon* Test analysis to determine the grants as constitutionally permissible.[43]

Other courts have also used similar criteria to determine whether a particular institution is pervasively sectarian. The Supreme Court of Virginia in *Virginia College Building Authority v. Lynn*,[44] a case relating to the issuance of tax-exempt revenue bonds to finance a new college campus, applied the pervasively sectarian standard in a two-step analysis (1) questioning whether the institution is pervasively sectarian and (2) considering whether "the unique nature of the aid is nonetheless permitted without offending the Establishment Clause."[45] In this case, the court found that Regent University was pervasively sectarian after considering the following factors:

> (1) whether the institution is formally affiliated with a church and the amount of institutional autonomy it enjoys apart from the church with which it is affiliated; (2) whether one of the purposes of the institution

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[39] *Id*. at 681–682.

[40] *Id*. at 674–675.

[41] *Id*. at 679.

[42] *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 740 (1967).

[43] *Id*. at 760.

[44] *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682, 697 (Va. 2000).

[45] The court reached this two-step analysis by noting that some governmental aid involved pervasively sectarian schools, but was found to not violate the Establishment Clause because the nature of the aid (the bond-financing assistance) was dispositive, irrespective of the nature of the institution. *Id*. at 695.

> is the indoctrination of religion and whether the institution's activities reflect such a purpose or exert dominating religious influence over the academic curriculum; (3) whether the institution reflects an atmosphere of academic freedom; (4) the institution's policy on classroom prayer or other evidence of religion entering into elements of classroom instruction; (5) the existence and utilization of religious qualifications for faculty membership or student admission; and (6) the religious composition of the student population and faculty.[46]

The Court in *Mueller v. Allen*[47] found that tax deductions for expenses incurred in sending children to parochial schools did not have the primary effect of advancing sectarian aims and did not violate the Establishment Clause.[48] In concluding that a constitutional violation did not exist, the Court found the following factors "particularly significant": (1) the tax deduction at issue was "only one among many deductions . . . such as those for medical expenses . . . and charitable contributions . . . available under the Minnesota tax laws,"[49] (2) "the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools,"[50] (3) "the Establishment Clause objections are 'reduced' by channeling whatever assistance [the deduction] may provide to parochial schools through individual parents,"[51] (4) "[t]he historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case,"[52] and (5) "private educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate."[53]

The Court further considered the relevance of a pervasively sectarian institution in *Zobrest v. Catalina*[54] where petitioners, a deaf child and his parents, filed suit after respondent school district refused to provide a sign-language interpreter to accompany the child to classes at a Roman Catholic high school.[55] The Court noted: "We have consistently held that

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[46] *Id*. at 697.

[47] *Mueller v. Allen*, 463 U.S. 388 (1983).

[48] *Id*. at 402.

[49] *Id*. at 396.

[50] *Id*. at 397.

[51] *Id*. at 399.

[52] *Id*. at 400.

[53] *Id*. at 401.

[54] *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

[55] *Id.* at 3.

government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[56] Here, the Court primarily relied on two factors to find that there was not an Establishment Clause violation: (1) the service at issue is "part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the [Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq.], without regard to the 'sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends;"[57] and (2) because a sign-language interpreter does nothing more than "accurately interpret whatever material is presented to the class as a whole," the interpreter "will neither add to nor subtract from that environment."[58]

The Court has repeatedly upheld public-assisted financing for sectarian schools (including bond financing and other types of financial assistance), especially in instances where it was simple to trace funds between secular and non-secular uses. As set forth in *Lemon*, the entanglement of religion in a program "arises because of the religious activity and purpose of the church-affiliated schools, especially with respect to children of impressionable age in the primary grades, and the dangers that a teacher under religious control and discipline poses to the separation of religious from purely secular aspects of elementary education in such schools."[59] The Court typically is less concerned with religious indoctrination of college-aged students, based on the notion that these students are capable of independent thinking and are less susceptible to religious influence.[60] Additionally, a number of cases, including *Roemer*, *Hunt*, and *Tilton*, all draw a distinction between the religious nature found in colleges as compared to primary or secondary schools.[61] The Court in *Tilton* found that "[t]here are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools."[62] Potential Establishment Clause violations receive additional scrutiny if elementary or secondary schools are involved due to the age and vulnerable nature of students attending these institutions. "Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than

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[56] *Id*. at 8.

[57] *Id*. at 10.

[58] *Id*. at 13.

[59] See *Lemon v. Kurtzman*, 403 U.S. 602, 603 (1971); see also *id.* at 616.

[60] *Tilton v. Richardson*, 403 U.S. 672, 686 (1971).

[61] *Hunt v. McNair*, 413 U.S. 734, 746 (1973).

[62] *Tilton*, 403 U.S. at 685.

in primary and secondary schools that religion will permeate the area of secular education"[63] (and such facts are typically considered a factor in a constitutional analysis). Even considering the susceptible nature of the students attending elementary and secondary schools, coupled with the Court's previous cautions as set forth above, in its most recent Establishment Clause jurisprudence, as discussed below in *Mitchell v. Helms*, the Court held that a federal program lending funds to local education agencies for distribution to both public and private schools was constitutional.[64]

V. DECLINE OF THE PERVASIVELY SECTARIAN STANDARD

The jurisprudence relating to governmental aid of sectarian organizations has continued to evolve since *Lemon*, *Hunt*, and *Agostini*. Indicative of this evolution is the criticism that has been leveled against the "pervasive sectarianism" inquiry under the *Lemon-Agostini* Test. The argument in footnote 7 of the *Hunt* opinion has also lent support to the proposition that certain types of governmental aid may be so general as to avoid any concern about governmental entanglement, although whether the underlying rationale of this argument applies to municipal bonds is still unclear.

Mitchell v. Helms

In *Mitchell*, the Court's plurality opinion (published in 2000) referred to the pervasive sectarianism inquiry as a test with a "shameful pedigree,"[65] "born of bigotry [that] should be buried now"[66] and offered several reasons to "formally dispense" with the test.[67] The Court noted that, at the time of the decision, no aid program had been struck down because of the test since 1985.[68] In fact, between 1985 and 2000, there were several cases where aid programs assisting pervasively sectarian schools were upheld.[69] The *Mitchell* Court explained that the important part of the constitutional analysis was whether the recipient adequately furthered the government's secular purposes and that the nature of the recipient should not matter.[70] In other words, government indoctrination cannot take place if the government aid

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[63] *Id*. at 687.

[64] *Mitchell v. Helms*, 530 U.S. 793, 801 (2000).

[65] *Id*. at 828.

[66] *Id*. at 829.

[67] *Id*. at 826.

[68] *Id*.

[69] *Id*.; *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

[70] *Mitchell*, 530 U.S. at 827.

is available to "religious, irreligious and areligious . . . alike" because the aid is neutrally available.[71] This holding effectively replaced the pervasively sectarian limitation with a neutrality approach as the dominant analytical starting point for determining whether government aid is constitutional. According to the plurality opinion:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. . . . [I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose . . . , then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.[72]

The plurality opinion stated that, in addition to being unnecessary, an inquiry into an aid recipient's religious views was offensive.[73] There are several examples of precedent that prohibit governments from discriminating in the distribution of public benefits based on religious affinity or status; therefore, discriminating against pervasively sectarian institutions in the distribution of government aid would be problematic.[74] The plurality opinion of the *Mitchell* Court also found that the Establishment Clause does not require the exclusion of pervasively sectarian schools from government aid programs and that doing so would bring back to life religious hostility and bigotry from the late nineteenth century.[75]

Footnote 7 to *Hunt*

In *Hunt*, the Court applied the *Lemon* Test to conclude that a bond financing transaction for a college with 60% Baptist students did not offend the Establishment Clause. Notwithstanding its application of the *Lemon* Test, the Court included a footnote ("footnote 7") that has been significant in the evolution of First Amendment jurisprudence. Footnote 7 states:

> 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,

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[71] *Id*. at 809.

[72] *Id*. at 809–810.

[73] *Id*. at 828.

[74] *Id*.

[75] *Id*.

> 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 . . . 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.' . . . The South Carolina Supreme Court . . . described the role of the State as that of a 'mere conduit.' . . . 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 . . . the importance of the tax exemption in the South Carolina scheme brings the present case under *Walz* . . . where this Court upheld a local property tax exemption which included religious institutions.[76]

In footnote 7, the Court recognized the possibility that there may be certain types of aid that are so indirect as to not lead to government entanglement with religion in violation of the principles underlying the *Lemon* Test.

Steele stands for the line of cases concluding that financial assistance, including in the form of tax-exempt financing and tax exemptions, involving pervasively sectarian institutions is constitutional simply because the government aid is sufficiently indirect.[77] *Steele* involved the $15 million municipal bond financing of David Lipscomb University for the renovation of campus facilities. According to the findings in the lower court, the university qualified as a pervasively sectarian institution because the university integrated Christian perspectives into the curriculum and promoted spiritual growth in its students.[78] Opponents of the financing initiated an Establishment Clause challenge that ended in a decision by the Sixth Circuit in favor of the university. The Sixth Circuit held that, even though the university was pervasively sectarian, the United States Constitution did not prohibit tax-exempt financing because the government in such transactions serves as a mere conduit.[79] This government aid, according to the Sixth Circuit, is no different from religiously neutral tax exemptions or fire and police protection afforded to houses of religious worship.[80] Courts

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[76] *Hunt v. McNair*, 413 U.S. 734, 745 n.7 (1973).

[77] See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Witters v. Wash. Dep't of Servs for Blind*, 474 U.S. 481, 486–487 (1983); *Mueller v. Allen*, 463 U.S. 388, 399 (1983); *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 674 (1970).

[78] *Steele v. Indus. Dev. Bd.*, 301 F.3d 401, 418 (6th Cir. 2002).

[79] *Id.* at 414.

[80] See *Walz*, 397 U.S. at 676.

previously found tax exemptions constitutional in prior cases involving government aid to religious institutions. Unlike direct financial aid, the issuer's actions in tax-exempt financing transactions constitute no more than mere indirect transactional assistance. As the Court in *Hunt* explained, the issuer is "an instrumentality . . . 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."[81] The Sixth Circuit concluded that "the nature of the institution is not the relevant inquiry in [a tax-exempt financing transaction]."[82] The Court denied certiorari.[83]

Trinity Lutheran v. Comer

In *Trinity Lutheran,* the recent 2017 case not involving bond financing, seven of the Court's justices agreed that the State of Missouri stood in violation of the Free Exercise Clause when it denied a state subsidy for playground resurfacing to a pre-school because the pre-school, which otherwise qualified for the grant, was affiliated with and operated by a church. The resurfacing subsidy would have reimbursed the church for a portion of the cost of replacing the playground's hazardous gravel surface with a safer surface of recycled tire rubber.[84] The seven justices voting in favor of the subsidy for the church-affiliated pre-school wrote four opinions with no single opinion gaining an unqualified majority. The various opinions of these seven justices suggest that the result in *Trinity Lutheran* was substantially driven by the particular facts of the case before the Court and that an attempt to read the case more broadly may be inappropriate.[85]

Many bond counsel might have wished that the Court would have addressed the impact of the Establishment Clause on these facts. However, as *Trinity Lutheran* was briefed and argued to the Court, the Establishment Clause was not at issue. While the pre-school could be classified as pervasively sectarian, the subsidy offered by Missouri could readily be characterized as a general government service similar to police and fire protection; one that operated, in the words of Justice Stephen Breyer's concurring opinion, "to secure or to improve the health and safety of

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[81] *Hunt*, 413 U.S. at 745 n.7.

[82] *Steele*, 301 F.3d at 416.

[83] *Steele v. Indus. Dev. Bd. of Metro. Gov't Nashville*, 537 U.S. 1188 (2003).

[84] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

[85] Justice Sotomayor, joined by Justice Ginsberg, wrote a dissenting opinion in which she chastised the Court for making the case appear too simple: "To hear the Court tell it, this is a simple case about recycling tires to resurface a playground." *Id.* at 2027 (Sotomayor, J., dissenting). While the dissenting justices viewed the stakes as much higher and the Court's ruling as a slight on its previous precedents concerning the beneficial separation of church and state, the *Trinity Lutheran* decision is nonetheless a very narrow holding. *Id.* at 2024 n. 3.

children." As Chief Justice John Roberts observed during oral argument, the State of Missouri had already acknowledged in its brief that "there was no Establishment Clause problem here." Further, the parties in *Trinity Lutheran* agreed that the Establishment Clause did not prevent the state from including the church in the subsidized playground resurfacing program. Accordingly, the only issue before the Court was whether the Missouri policy of excluding otherwise qualified sectarian institutions from these subsidies violated the Free Exercise Clause by denying the church a public benefit solely on account of its religious identity. Notably, the parties did not ask the Court to reconsider its decision in *Locke v. Davey*,[86] where the Court upheld against a Free Exercise Clause challenge decision of the State of Washington, which refused to issue a general fund-based scholarship for ministerial training.[87]

Because the majority of the justices apparently viewed the *Trinity Lutheran* decision as factually limited, it is important to understand the factual underpinnings of the case.[88] To encourage the use of recycled materials, Missouri awarded a limited number of state subsidies to qualified applicants who sought funds to resurface school playgrounds. The program was funded by a fee imposed on new tire sales. The resurfacing grants were administered pursuant to a competitive process that evaluated each application under criteria such as the poverty level of the surrounding community and the applicant's plan to promote recycling. Trinity Lutheran Church operates a pre-school on its property. The school is open to children of any religion. Trinity Lutheran Church pointedly did not claim that it was entitled to a state subsidy. Rather, it asserted its right to participate in the state-funded program "without having to disavow its religious character."[89]

Trinity Lutheran Church applied for the playground resurfacing grant to provide a safer playground surface for students of the pre-school and for children in the local community who used the playground during non-school hours. The church's application ranked fifth out of forty-four applicants. Fourteen grants were awarded under the program. Despite its high ranking, the church's application was rejected because the State of Mis-

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[86] *Locke v. Davey*, 540 U.S. 712 (2004).

[87] *Trinity Lutheran*, 137 S. Ct. at 2025 (Thomas, J., concurring).

[88] While it is not the purpose of this article to provide an exhaustive analysis of the First Amendment Establishment and Free Exercise clauses, it is worth noting that the multi-level analysis applied by the Court's past precedents on the parameters of the First Amendment religion clauses derives from a factually dependent analysis of the "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels." *Id.* at 2019. From the standpoint of the clarity and certainty required of the bond counsel opinion, it is difficult to extrapolate legal certainty from such fact-based (and limited) analyses.

[89] *Id.* at 2015.

souri "had a strict and express policy of denying grants to any applicant owned or controlled by a church, sect or other religious entity" based on the provisions of Article I, Section 7, of the Missouri Constitution (Missouri's Blaine Amendment), which provides "[t]hat no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion . . . ."[90]

Because the seven justices voting against Missouri's strict withholding of government assistance to religious institutions did not uniformly agree on a single opinion, an evaluation of *Trinity Lutheran*'s scope and import for bond practice requires a "decisional roadmap." The Court's principal opinion was delivered by Chief Justice Roberts, who in footnote 3 to his opinion limited his decision to the church's particular claim of playground resurfacing discrimination.[91] This opinion was joined in full by Justices Anthony Kennedy, Samuel Alito, and Elena Kagan, who endorsed the opinion's limiting footnote. This restrictive reading of the *Trinity Lutheran* decision is supported by the opinions of Justices Clarence Thomas and Neil Gorsuch, who concurred in the result but specifically did not join the limiting footnote 3, indicating that they favored a broader ruling.[92] Also offering his view that the *Trinity Lutheran* decision is narrowly focused is the opinion of Justice Breyer who, concurring only in the judgment, "find[s] relevant, and would emphasize the particular nature of the 'public benefit' at issue" as a matter of Missouri's discriminatory exclusion of the church from, as noted above, a "general program designed to secure or to improve the health and safety of children."[93] In Justice Breyer's view, the government denial of safe playground resurfacing is analogous to a denial of ordinary police and fire protection. Because the faith-based withholding of such general public benefits of safety is not within the purpose of the First Amendment, Justice Breyer "would leave the application of the Free Exercise Clause to other kinds of public benefits to another day."[94]

In sum, even assuming that the concurring opinions of Justices Thomas and Gorsuch demonstrate that they would have applied the *Trinity Lutheran* decision more broadly, at least five of the seven justices who concurred in the result made clear their limited view of the decisional import of Chief

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[90] *Id*. at 2017 (quoting Mo. Const. of 1875, art I, § 7 (1945)).

[91] *Id.* at 2024 n.3. ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.")

[92] *Id*. at 2025–2026 (Thomas, J., concurring).

[93] *Id*. at 2026–2027 (Breyer, J., concurring).

[94] *Id*. at 2027.

Justice Roberts' opinion.[95] Based on this analysis, the *Trinity Lutheran* decision would appear to provide little, if any, support for a change in the prevailing test for evaluating whether bond counsel can confidently provide a bond opinion as to the validity of municipal bond financings for pervasively sectarian institutions.

VI. ASSESSMENT OF INDIRECT GOVERNMENT AID IN THE CONTEXT OF MUNICIPAL BOND ISSUANCES

In considering whether a municipal bond financing could violate the Establishment Clause as a result of the advancement of religion by, or the excessive entanglement of the sectarian organization with, the government issuer, it is necessary to identify the differences between bond financing and other forms of aid and understand the significance of those differences. To do so, one must first look at the rights and obligations of the government when it issues conduit bonds.

What does it mean to say that the bonds are an obligation of the government? The answer will likely depend on the purpose of the inquiry. There are at least four perspectives that one might consider in answering this question: state law, securities law, federal and state tax law, and the economic reality of the financing.

The constitutional problem in issuing conduit bonds is one of state law validity. If the bond issuance is unconstitutional, the legal authority for the issuance of the bonds is lacking and the bonds would be invalid. Bonds that are invalid would not be enforceable in accordance with their terms, may not be exempt from securities law registration, and would not be tax exempt.

Most state laws involving conduit issuers distinguish between bonds and a general obligation to repay the debt reflected by the bonds. Conduit bonds are generally considered the issuer's bonds, but the issuer is under no obligation to pay debt service on the bonds except to the extent the issuer receives payments from the conduit borrower. An issuer's bonds are subject to a variety of state law requirements that may include limitations on interest rate, permitted investment restrictions, purposes for which the bonds may be issued, maturity, principal amount, purchase price, security provisions, conflict of interest disclosure rules, and public notice and hearing

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[95] The justices who seemingly gave a very narrow interpretation of the *Trinity Lutheran* holding are Chief Justice Roberts and the three justices (Kennedy, Alito, and Kagan) whose joinder in the opinion was unqualified, including their unqualified joinder in the limiting footnote 3, and Justice Breyer, whose opinion emphasizes the constitutional impropriety of withholding a general public health and safety benefit solely for faith-based reasons. Accordingly, five of the nine justices who heard the *Trinity Lutheran* case agreed that the holding was a limited one.

requirements. Each of these requirements may place restrictions on the conduit borrower that could result in entanglement. For example, a state law limiting investments to federal securities or prohibiting bond proceeds from being spent on working capital or inventory may necessitate that the government make inquiry post-issuance into the manner in which the proceeds have been used.[96] However, if the government unit issuing the bonds has no general obligation to make payments on the bonds, and as a result the bonds are not considered a debt of the government, one can conclude that no public funds are used to provide aid to the borrower.[97]

This state law distinction is relevant in assessing the extent to which the government could be considered as being entangled with the borrower resulting in a limitation on the free exercise of religion or advancing religion through providing indirect aid. One can distinguish aid in the form of providing hot lunches, textbooks, and shredded tires (as was the case in *Trinity Lutheran*) from the issuance of bonds because, for the most part, there is no ongoing relationship between the issuer and the borrower after lunches, books, and shredded tires are provided, while there may be continuing obligations of both the issuer and the borrower in the case of a bond financing. The extent of the entanglement will depend in each instance on the particular requirements imposed by the state law and by the conduit issuer. The extent of such an entanglement could be a factual inquiry determined on a case-by-case basis.

While the bonds may not be the debt of the issuer for state law purposes, federal securities law still considers the bonds to be securities of the issuer. As such, an issuer cannot eliminate its legal obligations and insulate itself from securities law liability by merely disavowing responsibility. A Government Finance Officers Association handbook on municipal bond disclosure[98] observes that it may be prudent for conduit issuers to undertake a review of the basic disclosure documents and ask questions as suggested by the language of the disclosure document. A representation in the offering document that the conduit issuer makes no representation as to the accuracy or adequacy of the information provided is not a guaranty that the conduit issuer will not face claims from regulators or investors if the conduit borrower's disclosure is defective. Such an inquiry could potentially entangle the issuer with the borrower and affect the borrower's free exercise of religion.

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[96] In many conduit financings, however, this type of monitoring is assigned to the bond trustee or is an obligation of the conduit borrower.

[97] It is possible that some government funds might be used to support the conduit issuer, but such support presumably would be neutral.

[98] Robert Dean Pope, Making Good Disclosure: The Role and Responsibilities of State and Local Officials Under the Federal Securities Laws (2001).

No similar duty and liability would be found in the type of government aid or benefit programs represented by *Trinity Lutheran*.

Under federal tax law, obligations issued by or on behalf of a state or political subdivision may be tax-exempt. It is well-settled that, in the case of conduit bonds, the tax law treats the government entity as "the issuer."[99] As issuer, the government has certain rights and responsibilities. In the event that the tax-exempt status of a bond issue is challenged, it is the issuer and not the conduit borrower that has standing before the Internal Revenue Service to defend the tax exemption or tax credit status.[100] Investors generally expect that the issuer will covenant to undertake the defense of their bonds' tax benefits, although the issuer generally will look to the conduit borrower to prosecute and pay for the defense as well as indemnify the issuer for its expenses. In addition, the Internal Revenue Service procedures treat the issuer, but not the conduit borrower, as having the rights of confidentiality afforded to taxpayers.[101] But with that treatment comes responsibility. One telling case is *Harbor Bancorp v. Commissioner*,[102] in which conduit bonds were ostensibly issued to finance housing but were, in reality, invested in guaranteed investment contracts at yields in excess of the bond yields, the profits stripped off and pocketed and the housing never constructed. Certain participants in the financing were subsequently convicted of criminal violations, including fraud, and incarcerated. The issuer of the bonds, Riverside County Housing Authority, disclaimed responsibility as having been merely a conduit. The United States Tax Court had a different view in finding that:

> [A]s between it and the Federal Government, the Housing Authority should bear responsibility for what happened. The Housing Authority issued the Bonds and selected those who were responsible for implementing their issuance and applying the proceeds. Congress clearly wanted bond issuers to be responsible for meeting the requirements for tax exemption. The Housing Authority certified that the Bonds would qualify for tax exemption. Like any other local government bond issuer, the Housing Authority was responsible for paying any amount required by section 148(f)(2), regardless of whether it intended to generate the excess described in section 148(f)(2).

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[99] See *Fairfax Cty. Econ. Dev. Auth. v. Comm'r*, 77 T.C. 546 (1981).

[100] IRM 4.81.1, Examining Process, Tax Exempt Bonds (TEB) Examination Program and Procedures, Tax Exempt Bonds Examination Process Overview.

[101] Internal Revenue Service, Understanding the Tax Exempt Bonds Examination Process, *https://www.irs.gov/tax-exempt-bonds/understanding-the-tax-exempt-bonds-examination-process* (last updated Oct. 18, 2016); see also James L. Raybeck, *Essay: IRS Examinations of Tax-Exempt Bonds: An Agent's Perspective*, 4 Tenn. J. Bus. L. 259, 264 (2003).

[102] *Harbor Bancorp v. Comm'r*, 105 T.C. 260 (1995).

> It has thus far chosen not to do so. Unfortunately for its bondholders, the statutorily required result of this choice is that the interest on the Bonds is not exempt from Federal taxation. . . . Even if there may now be a higher level of consciousness among state and local bond issuers and their counsel about the levels of due diligence required, reasonableness is an objective and normative standard. By any such standard, the Riverside Housing Authority and its counsel were egregiously and inexcusably lax in failing to monitor the Whitewater and Ironwood transactions and in allowing the messes to happen. . . . [S]ection 103(b) [the applicable tax law provision] should not be read to encourage issuers both to be ignorant of the facts prospectively and to remain ignorant and do nothing after the fact.[103]

While it is often said that "bad facts make bad law," the decision in *Harbor Bancorp* suggests that under appropriate circumstances, conduit issuers may be required to engage in continuing diligence and responsibility, which on the one hand could lead to an endorsement of religion and on the other to an entanglement with the borrower.

Against this backdrop, there is the argument put forth in footnote 7 of the *Hunt* opinion and in *Steele* that the economic reality of the financing is that the investors loaned money to the borrower, the conduit issuer was not responsible for repaying the bonds, neither the amounts so invested nor the amounts repaid are the government's money, and, as such, there is neither establishment nor entanglement. However one views this conundrum, there appears to be a distinction between the active role of a bond issuer and the more passive administrator of a shredded tire program or the distributor of textbooks and school lunches.

There is also another way in which the issuance of tax-exempt bonds differs from other forms of aid. Conduit bonds issued for the benefit of pervasively sectarian borrowers in almost all instances need to qualify under Section 145 of the Internal Revenue Code as "qualified 501(c)(3) bonds" where the borrower is exempt from tax under Section 501(c)(3) of the Internal Revenue Code. One of the requirements that must be met is the public hearing and approval requirement.[104] In circumstances where the bond-financed property is not located within the jurisdiction of the issuer, such hearing and approval requirement must be met by both the issuer and the host (the governmental unit in which the property is to be located). The purpose of this requirement is to give persons affected by the facilities to be financed the opportunity to be heard.[105] The approval may be given by

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[103] *Id*. at 288–297.

[104] I.R.C. § 147(f) (2012).

[105] See H.R. Rep. No. 97-760 (1982), reprinted in 1982 U.S.C.C.A.N. 1190.

the applicable elected representative (e.g., the highest elected official or the elected legislative body) or by public referendum.

Although this approval requirement raises a question whether a program intended to be neutral can pass constitutional muster when there is an approval requirement that is vested in the discretion of a single official, a legislative body, or a local referendum, that is not exclusive to financings involving sectarian institutions. For example, an official or legislative body may be subject to pressures with respect to any potential conduit borrower not favored in its community (e.g., halfway houses, mental health facilities, etc.) Similar pressures could result in a referendum denying the required approval. While the approval issue is not limited to sectarian institutions, the necessity of obtaining this approval would appear to be a distinction between bond financing and other forms of public benefit programs.

VII. STATE LAW LIMITATIONS: BLAINE AMENDMENTS

The importance of state law in evaluating the overall validity of municipal bonds issued for the benefit of religious organizations should not be underestimated. Assuming a particular issuance complies with both the Establishment Clause and the Free Exercise Clause, such issuances must overcome further restrictions found in many state constitutions prohibiting government aid to religiously affiliated institutions. This section provides a general overview of state constitutional provisions restricting state aid to religious organizations and examines the application of these provisions in certain states.

While constitutional provisions restricting the use of government funds to aid sectarian organizations vary from state to state, such provisions are generally known as "Blaine Amendments," named after Representative James Blaine of Maine, who introduced an amendment to the United States Constitution on December 17, 1875. The amendment provided:

> No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.[106]

Had it been adopted, the effect of this amendment would have been to directly apply the religion clauses of the First Amendment to the states

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[106] H.R.J. Res. 1, 44th Cong., 1st Sess., 4 Cong. Rec. 205 (1875).

(which, at the time, was not the case) as well as prevent states from providing financial support to private religious schools. While support for the federal Blaine Amendment may have been couched in terms of favoring secular education, it was well known the amendment was rooted in anti-Catholic sentiment. As Justice Thomas noted in *Mitchell*, "[c]onsideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that sectarian was code for Catholic."[107] While the federal Blaine Amendment easily passed the House, the amendment was ultimately defeated in the Senate.

Although the Blaine Amendment movement could have ended on the Senate floor, within a year of its defeat, 14 states had adopted legislation modeled after the federal Blaine Amendment. Within 20 years, nearly 30 states adopted Blaine-type amendments to their constitutions. Although a majority of states adopted Blaine Amendments voluntarily, many states were forced to incorporate Blaine Amendments into their constitutions as a condition to being admitted to the Union as a new state. Many of the provisions adopted, either voluntarily or not, focused on financial support for schools, but many expanded on the federal amendment to prohibit financial support for a wide variety of sectarian institutions.[108]

Today, there are more than 37 Blaine Amendments throughout the country,[109] and the language and scope of these amendments vary tremendously. Though it is beyond the scope of this article to detail each Blaine Amendment's effects on municipal bond financings, below is a general overview of how such amendments have been interpreted by courts throughout the country. While some Blaine Amendments prohibit the financing of sectarian institutions, other Blaine Amendments are narrowly construed to permit such financings. Some courts seem to have chosen to side-step the plain language of their state's Blaine Amendments, while

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[107] *Mitchell v. Helms*, 530 U.S. 793, 828 (2000).

[108] *See* Mark Edward DeForrest, An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns, 26 HARVARD J. L. & PUB. POL'Y. 551, 588-590 (Spring 2003).

[109] *See* Ala. Const. art. XIV, § 263; Alaska Const. art. VII, § 1; Ariz. Const. art. IX, § 10; Ark. Const. art. XIV, § 2; Colo. Const. art V, § 34; Del. Const. art. X, § 3; Fla. Const. art. I, § 3, art. IX, § 6; Ga. Const. art. I, § 2, para. 7; Haw. Const. art. X, § 1; Idaho Const. art. IX, § 5; Ind. Const. art. I, § 6; Ky. Const. §§ 186, 189; Mass. Const. amend. XVIII, § 2; Mich. Const. art. I, § 4, art. VIII, § 2; Minn. Const. art. I, § 16, art. XIII, § 2; Miss. Const. art. VIII, § 208; Mo. Const. art. I, § 7, art. IX, §§ 5, 8; Neb. Const. art. VII, § 11; Nev. Const. art. XI, § 2; N.J. Const. art. VIII, § 4, para. 2; N.M. Const. art. XII, § 3; N.Y. Const. art. XI, § 3; N.C. Const. art V, § 12, art. IX, § 6; N.D. Const. art. VIII, § 1; Okla. Const. art. II, § 5, art. XI, § 5; S.D. Const. art VIII, § 16; Tex. Const. art. VII, § 5; Va. Const. art VIII, § 10; Wash. Const. art. I, § 11, art. IX, § 4; Wis. Const. art. X, § 6; Wyo. Const. art. VII, § 12.

other courts have directly relied on current First Amendment jurisprudence to determine whether particular financings are permissible.[110]

In some states, the use of municipal bond financing has been found to be a direct violation of their version of the Blaine Amendment. In *University of Cumberlands v. Pennybacker*,[111] the Kentucky General Assembly authorized $10 million in public bond financing for the construction of a pharmacy school on the campus of a private Baptist college. Taxpayers challenged the financing as a violation of Section 189 of Kentucky's Constitution, which provides that "[n]o portion of any fund or as now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school." The Supreme Court of Kentucky found this financing to be a clear violation of Section 189. In so holding, the court noted that Section 189 was created in direct response to the common school movement, the movement that fueled the Blaine Amendment, and that the Kentucky framers specifically contemplated that no state monies were to be appropriated to religious schools.[112]

In certain other states, the use of municipal bond financing has been found permissible as a result of a narrow interpretation of the existing Blaine Amendment. In *Higher Educational Facilities Authority v. Booth Gardner*,[113] the Washington Higher Education Facilities Authority (the "Authority") issued bonds on behalf of Seattle University and Pacific Lutheran University, both religiously affiliated institutions. The Washington Constitution contains two provisions calling such financing into question. Article 1, Section 11 of the Washington Constitution provides that "[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment. . . ." In addition, Article 9, Section 4 mandates that "[a] ll schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." The Washington Supreme Court narrowly construed the two provisions by concluding that the use of the Authority's power to issue conduit bonds neither conferred "money" nor "property."[114] The benefit realized by the universities through the financing that was federally tax exempt was conferred by operation of the Internal Revenue Code rather than by the state. As such, the conduit financings were permissible under the Washington Constitution.

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[110] DeForrest, *supra* note 108.

[111] *Univ. of Cumberlands v. Pennybacker*, 308 S.W.3d 668 (Ky. 2010).

[112] *Id.* at 681–683.

[113] *Higher Educ. Facilities Auth. v. Gardner*, 103 Wash. 2d 838, 699 P.2d 1240 (Wash. 1985).

[114] *Id.* at 844.

Similarly, the Illinois Constitution has been interpreted to permit tax-exempt financing in spite of a constitutional provision prohibiting aid to sectarian institutions. Section 3 of Article X of the Illinois Constitution provides that neither the state nor any political subdivision "shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatever." In *Cecrle v. IEFA*,[115] this provision was applied to bonds issued by the Illinois Educational Facilities Authority on behalf of Lewis College, a private Catholic college. In holding that the financing did not violate the Illinois Constitution, the Illinois Supreme Court noted that the type of financing at issue was unknown when Section 3 of Article X was adopted.[116] The court pointed out, however, that the state constitution expressly authorizes the General Assembly to exempt from taxation property used for educational and religious purposes.[117] The court concluded that the state constitution was not intended to "prohibit the General Assembly from directly establishing a tax-exempt status for religiously affiliated schools."[118]

The Arizona state constitution contains two provisions that touch upon government aid to religious institutions. Article II, Section 12 (the religion clause), states in part: "No public money or property shall be appropriated for or applied to any religious worship, exercise, or institution, or to the support of any religious establishment." Article IX, Section 10 (the aid clause), says: "No tax shall be laid or appropriation of public money made in aid of any church, or private or sectarian school, or any public service corporation." In *Kotterman v. Killian*,[119] the Arizona Supreme Court was faced with the task of interpreting both clauses. Its decision to allow a government tax-exemption program based on application of the *Lemon* test and reference to the *Mueller* case underscores that indirect government aid or aid provided as a result of decisions made by individuals is not prohibited in Arizona based on (1) the actual language of the clauses and (2) the character of the aid.

In other instances, municipal bond financing schemes have been found to be permissible on the basis that the Blaine Amendment is a parallel provision to the Establishment Clause.[120] In *Virginia College*, the Virginia

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[115] *Cecrle v. Ill. Educ. Facilities Auth.*, 288 N.E.2d 399 (Ill. 1972).

[116] *Id.* at 402.

[117] *Id.*

[118] *Id.*

[119] *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999).

[120] See, e.g., *Va. Coll. Bldg. Auth. v. Lynn*, 538 S.E.2d 682 (Va. 2000).

College Building Authority issued bonds on behalf of Regent University, an institution affiliated with the Christian Broadcasting Network. The issuance was challenged as, among other things, a violation of Article I, Section 16 of the Virginia Constitution, which provides that the General Assembly "shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society."[121] In determining whether the financing violated the state constitution, the Supreme Court of Virginia noted that Establishment Clause jurisprudence had always directly informed its interpretation of the state constitution, as Article I, Section 16 was a parallel provision to the Establishment Clause.[122] As such, the court analyzed the financing through the lens of the Establishment Clause as the case law existed at that point in time. Citing *Agostini* and *Mitchell*, the court ultimately concluded that the role of the state was merely that of a conduit and therefore the bond proceeds were not government aid received by Regent University.[123]

As with *Virginia College*, in some instances Establishment Clause jurisprudence has been applied even where the state constitutional provision is deemed more restrictive than the First Amendment, and courts have nevertheless concluded financing of sectarian institutions is permissible. In *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, a hospital affiliated with the Roman Catholic Church sought funding to expand its facilities.[124] The parties agreed the statute authorizing the bond issuance had a "wholesome secular purpose" to improve health care delivery by lowering health care costs.[125] The court relied on *Hunt* in holding that "because the hospital is not a pervasively religious institution and because the Act insures against benefiting any significant religious activities within the hospital, . . . the Act does not have the primary effect of advancing religion."[126] As a result, under then-current First Amendment jurisprudence, the tax-exempt financing was determined to be valid under state law.[127]

In California, the state constitution generally prohibits government appropriation or payment from public funds or grants to organizations "controlled by any religious creed, church, or sectarian denomination

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[121] *Id*. at 689.

[122] *Id.* at 691.

[123] *Id*. at 699-700.

[124] *State ex rel. Wis. Health Facilities Auth. v. Lindner*, 91 Wis.2d 145 (1979).

[125] *Id.* at 152.

[126] *Id*. at 161.

[127] *Id.* at 163.

whatever."[128] This strict limitation was tested in a bond validation proceeding that reached the California Supreme Court in 2007 in *California Statewide Communities Development Authority v. All Persons Interested*.[129] In the circumstances underlying the case, the conduit issuer petitioned for validation of tax-exempt bonds to be issued for the benefit of three educational institutions that were deemed to be pervasively sectarian.[130] The trial court concluded that "low cost financing for the [institutions] . . . involves financing religious indoctrination" using the issuer's bond program and thus violates the state's constitutional restriction.[131] In reversing and remanding the case, the California Supreme Court established a four-part test to determine whether a bond program violates the constitution: (1) the bond program must serve the public interest and provide no more than an incidental benefit to religion; (2) the program must be available to both secular and sectarian institutions on an equal basis; (3) the program must prohibit use of bond proceeds for "religious projects"; and (4) the program must not impose any financial burden on the government.[132] To interpret part one of the test, the court relied in part on suggestions in *Hunt* and *Mitchell*, with reference to *Virginia College* and *Steele*, that any benefit to religion from the bond program would be merely incidental when there is no expenditure of public money.[133]

Even before *Hunt*, certain tax-exempt financing programs were found to be broadly acceptable through the application of general First Amendment principles that have been applied without rigorous application or analysis of existing First Amendment jurisprudence. In 1969, the State of Florida enacted the Education Facilities Law, which provided for the financing of higher educational facilities through the issuance of tax-exempt bonds by various political subdivisions. The program was eventually challenged, in part, because Article I, Section 3 of the Florida Constitution provides that "[n]o revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution." The Florida Supreme Court held the Educational Facilities Law did not violate Article I, Section 3 of the state constitution because the Educational Facilities Law had the effect

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[128] Ca. Const. art. XVI, sec. 5.

[129] *Cal. Statewide Cmtys. Dev. Auth. v. All Persons Interested*, 152 P.2d 1070 (Cal. 2007)

[130] *Id.* at 1072.

[131] *Id.* at 1087.

[132] *Id.* at 1077.

[133] *Id.* at 1080.

of promoting the general welfare of society, apart from any religious consideration, and its primary purpose was not to promote religion.[134]

VIII. CONCLUSION

A fundamental role of a bond attorney is to provide an "unqualified" legal opinion to bond purchasers concerning the legality and validity of municipal bonds.[135] An opinion may be unqualified if the bond attorney is firmly convinced[136] that, under the law in effect on the date of the opinion, the highest court of the relevant jurisdiction, acting reasonably and properly briefed on the issues, would reach the legal conclusions stated in the opinion.[137] Financings benefiting pervasively sectarian institutions pose particular challenges under this opinion standard given the current status of federal and state constitutions, statutes, and case law.

The federal framework each bond attorney must consider includes not only the Establishment and Free Exercise Clauses but also a myriad of interpretive case law, most importantly the Court's *Lemon*, *Agostini*, and *Hunt* cases, all discussed in this article. The legality and validity of bonds further depends on the particular state's constitutional and legislative limitations as well as the administrative positions of applicable state issuing agencies.

While these laws and court opinions are a helpful guide to bond attorneys, jurisprudence has developed in an uncertain direction since *Hunt*, and the application of this new jurisprudence to the context of municipal bonds remains murky. For example, the Sixth Circuit decision in *Steele* and case law developing in response to footnote 7 in *Hunt* suggest that the constitutionality of government interaction with pervasively sectarian institutions may depend less on the character of the institution and more on the type of government aid provided. The Court's agreement to hear the *Trinity Lutheran* case in 2017 gave hope for clarity on this issue. In the opinion released in April 2017, however, the justices addressed only the Free Exercise Clause and appeared to limit the decision largely to its particular facts, which is likely to provide little substantive value to bond attorneys evaluating municipal bond financings for pervasively sectarian institutions. In the absence of further case law, the bond community is left with the *Lemon-Agostini* Test as applied in *Hunt*, in conjunction with individual bond attorney interpretations regarding the importance and relevance of *Steele*.

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[134] *Nohrr v. Brevard Cty. Educ. Facilities Auth.*, 247 So. 2d 304, 307 (Fl. 1971).

[135] Nat'l Assoc. of Bond Lawyers, The Function and Professional Responsibilities of Bond Counsel 6 (3rd ed. 2011).

[136] Also characterized as having "a high degree of confidence."

[137] Nat'l Assoc. of Bond Lawyers, Model Bond Opinion Report i (2003).