CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE—RELIGIOUS GROUPS' USE OF PUBLIC SCHOOL BUILDINGS DURING NONSCHOOL HOURS NOT VIOLATIVE OF ESTABLISHMENT CLAUSE OF FIRST AMENDMENT—*Resnick v. East Brunswick Township Board of Education*, 77 N.J. 88, 389 A.2d 944 (1978).

Since 1962 the East Brunswick Township Board of Education (Board) has maintained a policy of allowing local groups to utilize the township's public school facilities during nonschool hours.[1] Organizations which have availed themselves of this program include religious as well as other nonprofit groups.[2] In return for their use of the buildings, such organizations must pay a rental fee which approximates the cost of any extra janitorial services required to maintain the

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[1] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 259, 343 A.2d 127, 128 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 93, 389 A.2d 944, 946 (1978). The rental policy was mandated by the Board of Education's Rules and Regulations Governing Use of East Brunswick School Facilities, which, as quoted by the New Jersey supreme court, states in pertinent part:

> 1. *Statement of Philosophy*
> It is the feeling of this Board of Education that each of the East Brunswick Public Schools, build [*sic*] and maintained through the expenditure of public funds, should be utilized to the fullest extent possible by East Brunswick community groups and agencies.

77 N.J. at 93, 389 A.2d at 946 (quoting Rules & Regulations § III (C)(1)).

Although the Board's "Rules and Regulations Governing Use of East Brunswick School Facilities" were amended in 1969 and 1976, there was no substantive change in the passage quoted by the court. *See* Rules & Regulations, *supra*, § III (C)(1).

This type of board policy was arguably authorized by N.J. STAT. ANN. § 18A:20–34 (West 1968), which provides in part:

> The board of education of any district may, pursuant to rules adopted by it, permit the use of any schoolhouse and rooms therein, and the grounds and other property of the district, when not in use for school purposes, for any of the following purposes:
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> a. The assembly of persons for the purpose of giving and receiving instruction in any branch of education, learning, or the arts, including the science of agriculture, horticulture, and floriculture;
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> . . . .
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> c. The holding of such social, civic, and recreational meetings and entertainments and such other purposes as may be approved by the board.

N.J. STAT. ANN. § 18A:20–34 (a), (c) (West 1968).

[2] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 259, 343 A.2d 127, 128 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 93, 389 A.2d 944, 946 (1978). The various groups which have used the school buildings include girl scout and boy scout troops, a language school, drama clubs and a square dancing association. *See* Brief and Appendix for Defendant-Appellant East Brunswick Twp. Bd. of Educ. at 3, Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978) [hereinafter cited as Brief for Defendant-Appellant East Brunswick Twp. Bd. of Educ.].

buildings.[3] Rental applications are made to the principal of the particular school involved.[4] Groups which use the school buildings on a "steady basis,"[5] such as the various religious groups, make annual reapplications.[6]

Plaintiff, Abraham Resnick, had been a resident of East Brunswick for more than eighteen years.[7] He had been aware of the board's rental policy for an extended period of time.[8] Resnick petitioned the board of education to cease renting the school facilities to the various religious groups.[9] In view of the Board's inaction concerning this petition, Resnick, in October, 1974, sought to enjoin the continuation of the rental practice.[10] The complaint was predicated

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[3] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 259, 343 A.2d 127, 128 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 94, 389 A.2d 944, 947 (1978). The rental fee assessed was $4.50 per hour while the actual out-of-pocket cost to the Board for janitorial services was $6.75 per hour. Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 94 & n.1, 389 A.2d 944, 947 (1978). The disparity of $2.25 per hour between the fee charged and the actual out-of-pocket costs is comprised of the Board's administrative, heat and utility expenses which were not billed to the various groups using the facilities. *Id.*; *see* Brief of Defendant-Appellant Reform Temple of East Brunswick at 5, Resnick v. East Brunswick Twp. Bd. of Educ., 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978). Groups using the school facilities to house fund raising events, excluding religious service collections, would be charged a substantially higher rental rate. 77 N.J. at 94 & n.2, 389 A.2d at 947.

[4] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 343 A.2d 127 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 94, 389 A.2d 944, 947 (1978).

[5] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 343 A.2d 127 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 94, 389 A.2d 944, 947 (1978). "Steady basis" groups are those organizations which use the school facilities for an "indeterminate period." 77 N.J. at 94, 389 A.2d at 947.

[6] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 343 A.2d 127 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 94, 389 A.2d 944, 947 (1978). While these groups must make annual reapplications, filing is merely a formality and the groups effectively have an open ended lease for an "indeterminate period." 77 N.J. at 94, 389 A.2d at 947; *see* notes 104–05 & 109–13 *infra* and accompanying text.

[7] *See* Brief and Appendix for Plaintiff-Appellant Resnick at 2, Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 389 A.2d 944 (1978) [hereinafter cited as Brief for Plaintiff-Appellant Resnick].

[8] *See* Brief for Plaintiff-Appellant Resnick, *supra* note 7, at 2.

[9] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 343 A.2d 127 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 96, 389 A.2d 944, 948 (1978).

[10] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 259, 343 A.2d 127, 128 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J.

upon the allegation that the use of the public schools by the religious organizations was statutorily unauthorized[11] and violative of both the state[12] and federal constitutions.[13]

The trial court held that the use of public schools for religious education and instruction was permissible under state statutory law, while the conducting of religious worship services within the same buildings was forbidden.[14] The court further ruled that the rental program, as implemented, was violative of the New Jersey Constitution.[15] Finally, the act of renting public school facilities to religious groups was found to violate the first and fourteenth amendments of

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88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 96, 389 A.2d 944, 948 (1978).

[11] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 259, 343 A.2d 127, 128 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 96, 389 A.2d 944, 948 (1978). The question concerning the legality of the use of public school facilities by religious organizations arose under N.J. STAT. ANN. § 18A:20–34 (West 1968). *See* note 1 *supra*.

[12] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 259, 343 A.2d 127, 128 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978). Resnick argued that the Board's rental policy violated article I of the New Jersey Constitution which states in pertinent part:

> Nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform.

135 N.J. Super. at 263, 343 A.2d at 128 (quoting N.J. CONST. art. I, para. 3).

Additionally, Resnick contended that the program should be declared invalid for violating the New Jersey Constitution, which mandates that "[t]here shall be no establishment of one religious sect in preference to another." N.J. CONST. art. I, para. 4; 135 N.J. Super. at 263, 343 A.2d at 128.

[13] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 259, 343 A.2d 127, 128 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978).

Resnick asserted that the rental program was violative of the first amendment of the United States Constitution which is applicable to the states through the fourteenth amendment. 135 N.J. Super. at 259, 343 A.2d at 128. The first amendment, in pertinent part, dictates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

[14] *See* Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 262, 343 A.2d 127, 129–30 (Ch. Div. 1975), *aff'd*, 144 N.J. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978).

[15] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. 257, 265, 343 A.2d 127, 131 (Ch. Div. 1975), *aff'd*, 144 N.J. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978). The court, in qualifying this aspect of its holding, stated that while the program in its present state violated article I, paragraph 3 of New Jersey's constitution, an increase in the rental fee to recover the extra costs incurred by the Board in providing facilities for religious education and instruction would remove the constitutional infirmity. 135 N.J. at 265, 343 A.2d at 131; *see* notes 3 *supra* & 89–90 *infra* and accompanying text.

the United States Constitution.[16] The appellate division, in a per curiam decision,[17] affirmed the chancery division judgment "substantially for the [same] reasons expressed in the opinion of the trial court."[18]

The defendants appealed as of right.[19] The Supreme Court of New Jersey, in *Resnick v. East Brunswick Township Board of Education*,[20] reversed the appellate court decision.[21] In so holding, New Jersey's highest court reasoned that title 18A, section 20-34 of the New Jersey Statutes Annotated authorized the use of public facilities for religious worship as well as religious instruction during nonschool hours.[22] In addition, so long as the religious groups reimbursed the

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[16] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. 257, 268, 343 A.2d 127, 133 (Ch. Div. 1975), *aff'd*, 144 N.J. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978).

[17] Resnick v. East Brunswick Twp. Bd. of Educ., 144 N.J. Super. 474, 475, 366 A.2d 345, 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978).

[18] Resnick v. East Brunswick Twp. Bd. of Educ., 144 N.J. Super. 474, 475, 366 A.2d 345, 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978).

[19] Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 343 A.2d 127 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978); Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 98, 389 A.2d 944, 949 (1978).

The original defendant named in the complaint was the Board of Education. The East Brunswick Baptist Church, the Nativity Evangelical Lutheran Church and the Reform Temple of East Brunswick were allowed to intervene as defendants. 77 N.J. 88, 96, 389 A.2d 944, 948 (1978).

In 1968, the Nativity Evangelical Lutheran Church began renting space in the Warnsdorfer Elementary School. East Brunswick Baptist Church had used the Robert Frost Elementary School since 1969. The Reform Temple of East Brunswick first rented the facilities at the Irwin Elementary School in 1973. *Id.* at 94–95, 389 A.2d at 947; *see* Brief for Defendant-Appellant East Brunswick Twp. Bd. of Educ., *supra* note 2, at 2–3.

Of the four original defendants, only the Reform Temple and the Board of Education elected to appeal the appellate division decision. 77 N.J. at 98, 389 A.2d at 947. In addition to these two defendants, the court permitted the New Jersey Council of Churches "to intervene as a party defendant." *Id.* at 98, 389 A.2d at 949.

[20] 77 N.J. 88, 389 A.2d 944 (1978).

[21] *Id.* at 121, 389 A.2d at 960.

[22] *Id.* at 98–99, 102, 389 A.2d at 949–50 (1978); *see* N.J. STAT. ANN. § 18A:20–34 (West 1968). In arguing that the Board's policy was invalid, plaintiff-appellant Resnick stated that the use of public facilities was not contemplated within the meaning of N.J. STAT. ANN. § 18A:20–34 (West 1968). 77 N.J. at 96, 389 A.2d at 948. This contention was based upon an interpretation of the statute arrived at through the use of the statutory construction doctrines *ejusdem generis* and *expressio unius est exclusio alterius*. *See id.* at 99–102, 389 A.2d at 949–50.

With respect to the *expressio unius* rule, Resnick stated that the statute had enumerated specific uses of school facilities which a board of education could permit, and since religious instruction and worship were not included therein, they are, by implication, excluded as valid uses of public school facilities. *See id.* at 99, 389 A.2d at 949.

Resnick also argued that the *ejusdem generis* doctrine should be applied by the court to interpret the statute. *Id.* at 100, 389 A.2d at 950. Under this construction doctrine, general words which follow a specific listing within a statute would only be applicable to the class of

out-of-pocket costs to the school board, the program would not violate the state constitution.[23] Lastly, the court found that the rental program was not violative of the first and fourteenth amendments of the United States Constitution, concluding that "[t]he East Brunswick scheme entails none of the dangers of the establishment of religion by government which the Constitution seeks to prevent."[24] Justice Clifford dissented, stating that the Board's policy of renting to religious groups for worship services was invalid under section 20-34[25] as well as violative of the first and fourteenth amendments.[26]

The establishment clause of the first amendment[27] was initially found to have been incorporated into the fourteenth amendment, and

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things delineated by the specific language. *Id.*; *see* J. SUTHERLAND, STATUTORY CONSTRUCTION § 47.17 (4th ed. 1973).

The court found the use of the buildings by township religious groups to be within the purview of N.J. STAT. ANN. § 18A:20–34 (West 1968). *See* 77 N.J. at 101–02, 389 A.2d at 950. In answering the statutory construction arguments proffered by Resnick, the court stated that any use of the construction doctrines was to aid in the interpretation of the statutes and not control it. *Id.* at 99, 389 A.2d at 949. *See also* Reilly v. Ozzard, 33 N.J. 529, 539, 166 A.2d 360, 365 (1960); J. SUTHERLAND, *supra* at § 47.17. Furthermore, the court declared that the intention of the legislature was to be the ultimate guideline when construing a statute. 77 N.J. at 99, 389 A.2d at 949. *See also* Reilly v. Ozzard, 33 N.J. at 539, 166 A.2d at 360, 365. Finally, the court warned that the construction aids must "be applied with great caution, and not arbitrarily or in a manner at variance with its true purpose." 77 N.J. at 99, 389 A.2d at 949.

In upholding the validity of the Board's policy, the court found the *expressio unius* doctrine to be inapplicable. The court focused upon the wording of title 18A, section 20–34(c), which allows the Board to permit "[t]he holding of such . . . meetings and . . . such other purposes as may be approved by the board." 77 N.J. at 99, 389 A.2d at 949. Because of this language, the court held that it was the intention of the legislature to give local school boards "wide discretion" in the usage of their school facilities. *Id.*

The court also found that use of school buildings by religious groups was valid under an application of the *ejusdem generis* doctrine. *Id.* at 100–01, 389 A.2d at 950. The nature of the religious group activities was held to be within the boundaries of the "common denominators" of the listed activities such as "group interaction, emotional release, regular participation of a portion of the community and character building." *Id.* at 101, 389 A.2d at 950.

Historical precedent was the final factor which helped the court to construe the statute in favor of permitting religious groups to use public school buildings. *Id.* Noting the frequency with which religious groups used public school facilities at the time section 18A:20–30 was enacted, the court postulated that "the absence of an express declaration to the contrary is strong evidence that the legislature did not intend to prohibit this long-standing practice." *Id.* *See also* W. CLAYTON, HISTORY OF UNION AND MIDDLESEX COUNTIES, NEW JERSEY 771–74 (1882).

[23] 77 N.J. at 103, 389 A.2d at 951. The court held that a rental program providing for full reimbursement of the Board's out-of-pocket costs would not violate article I, paragraph 3 of the New Jersey Constitution, which prohibits the use of tax revenues for the benefit of any church or religion. *Id.*

[24] 77 N.J. at 120, 389 A.2d at 960. The court's constitutional analysis was limited to the establishment clause of the first amendment. *Id.*

[25] *Id.* at 121, 389 A.2d at 960.

[26] *Id.*

[27] U.S. CONST. amend. I; *see* note 10 *supra*.

hence made applicable to the states, by the United States Supreme Court in *Everson v. Board of Education.*[28] In *Everson*, the Township of Ewing, New Jersey, instituted a program, authorized by a state statute, whereby the parents of children forced to take public transportation to school were partially reimbursed for the cost of that transportation.[29] Included in the group of parents eligible for reimbursement were parents of children who attended nonpublic religious schools.[30]

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[28] 330 U.S. 1, 15, *rehearing denied*, 330 U.S. 855 (1947). *Everson* was the first case in which the Court dealt exclusively with the establishment clause. Walz v. Tax Comm'n, 397 U.S. 664, 702 (1970) (Douglas, J., dissenting); School Dist. v. Schempp, 374 U.S. 203, 216 (1963); *see* Kauper, Everson v. Board of Education: *A Product of the Judicial Will*, 15 ARIZ. L. REV. 307, 307, 311 (1973). However, the constrictions of the religious clauses of the first amendment had previously been held to be applicable to the states through the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). *See also* Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). The Court in *Cantwell* stated that "[t]he First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." 310 U.S. at 303. The ultimate question in *Cantwell* in this respect arose under the free exercise and due process clauses, *id.* at 300–01, but this did not prevent the *Everson* Court from recognizing that the principles of both religion clauses had been extended to apply to the states. 330 U.S. at 8, 15.

Prior to *Everson*, a number of state courts had decided cases which involved relationships between various religious groups and local governments. For example, in State v. Dilley, 95 Neb. 527, 145 N.W. 999 (1914), the Nebraska supreme court held that the use of school buildings by religious groups on Sundays was permissible under the Nebraska Constitution. *Id.* at 529–30, 145 N.W. at 999–1000. In allowing the use, the court specifically found that there was no interference with any school business and that Sunday services by the religious groups had not converted the school buildings into places of worship. *Id.* at 529, 145 N.W. at 999. But in Spencer v. Joint School-Dist. No. 6, 15 Kan. 202 (1875), a taxpayer sought to enjoin the school district from leasing its school buildings for other than school purposes. *Id.* at 203. The court determined that the issuance of an injunction disallowing any use of public schools for any private purpose was appropriate. *Id.* at 204. *See also* School Directors v. Toll, 149 Ill. App. 541 (1909); Eckhardt v. Darby, 118 Mich. 199, 76 N.W. 761 (1898); Scofield v. Eighth School Dist., 27 Conn. 499 (1858). One commentator has pointed out that these state court decisions were based, for the most part, upon construction of local statutes and rarely involved constitutional interpretation of the permissibility of the uses involved. *See* C. ZOLLMAN, AMERICAN CIVIL CHURCH LAW 33–35 (1969). However, when the inquiry did rise to the constitutional level, the courts reviewed the statute under constraints placed on it by the constitution of that particular state and not the federal constitution. *Id.* For a general discussion of the pre-*Everson* church and state concept, see generally Note, *Nineteenth Century Judicial Thought Concerning Church-State Relations*, 40 MINN. L. REV. 672 (1956).

[29] 330 U.S. at 3 & n.1. The statute involved in *Everson* was N.J. REV. STAT. § 18:14–8 (Cum. Supp. 1941) which stated in pertinent part:

> Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.

N.J. REV. STAT. § 18:14–8 (Cum. Supp. 1941); 330 U.S. at 3 n.1.

[30] 330 U.S. at 3.

The Court, speaking through Justice Black, found the reimbursement plan to be a valid governmental exercise pursuant to the standards set by the establishment clause.[31] The Court observed that the first amendment requires a distinction to be made between constitutionally permissible legislation which authorizes a program for the welfare of the general public, of which religious institutions are members, and legislation designed solely to support or fund those

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[31] *Id.* at 18. In arriving at its decision, the Court felt it was necessary to review the historical significance and purpose of the religion clauses of the first amendment. *Id.* at 8–14; *id.* at 33–43 (Rutledge, J., dissenting). For the purpose of this Note, and because of the extensive documentation of the background and adoption of the first amendment, a brief historical account of the birth of the religion clauses will suffice.

The adoption of the first amendment was the end product of the religious persecution which was rampant in early colonial America. *See* 330 U.S. at 8–10. The colonial charters granted by the English Crown preconditioned the right to form a settlement upon the erection of a governmentally established religion. *Id.* at 9–10. Settlers in these areas were forced to pay taxes in support of the church, without regard to their belief or nonbelief. *Id.* at 9.

Even after the United States had won its freedom from England, state-supported religion flourished in the various states. *Id.* at 11. However, the sentiment of the people in many of these areas began to turn against the idea of governmental support of religion. *Id.* at 11. The fear of the dominance and persecution which accompanies a state religion grew in the minds of the colonials. *Id.* at 9–11. The public outcry for religious liberty was nowhere greater than in Virginia. *Id.* at 11; *id.* at 33–34 (Rutledge, J., dissenting). In 1785–1786 the Viriginia legislature voted to renew its taxing policy in support of the Anglican Church. *Id.* at 11; *id.* at 36 (Rutledge, J., dissenting). Thomas Jefferson and James Madison spearheaded the fight against the tax. *Id.* at 11–12; *id.* at 33–36 (Rutledge, J., dissenting). Prior to the legislative vote on the merits of the tax, Madison issued his famous Memorial and Remonstrance Against Religious Assessments. J. Madison, A Memorial and Remonstrance Against Religious Assessments (1785), *reprinted in* I J. MADISON, LETTERS AND OTHER WRITINGS OF JAMES MADISON 162 (1865) [hereinafter cited as *Memorial & Remonstrance*]. *See also* 330 U.S. at 63–72 app. (Rutledge, J., dissenting). Therein, Madison particularized the specific evils which accompany a state supported religion. *Memorial & Remonstrance*, *supra*, at 162–69. On the strength of the protest aroused by A Memorial and Remonstrance, the tax assessment bill died in December, 1785. 330 U.S. at 12; *id.* at 38 (Rutledge, J., dissenting). Shortly thereafter, Madison's influence was again felt when the Virginia legislature enacted Thomas Jefferson's Bill for Establishing Religious Freedom. *Id.* at 38 (Rutledge, J., dissenting).

Riding the wake of his religious liberty victory in Virginia, Madison was sent to the first Congress. *Id.* at 38 (Rutledge, J., dissenting). Convinced that the national government should have no right to support or involve itself with religion, Madison pledged to fight for a bill of rights guaranteeing, *inter alia*, religious liberty to all Americans. *Id.* at 38–39 (Rutledge, J., dissenting). Some three years later, Madison's convictions and efforts produced the religion clauses of the first amendment. *Id.* at 39 (Rutledge, J., dissenting). For a more comprehensive depiction of the adoption of the first amendment, see generally S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902).

While both the majority and dissenters felt it necessary to resolve the question in *Everson* with at least one eye upon the historical influences of the establishment clause, many commentators have stressed the necessity to revise the interpretation of the religion clauses and their values and not rely upon the eighteenth century values of Jefferson and Madison. *See* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development, The Religious Liberty Guarantee (Pt. I)*, 80 HARV. L. REV. 1381, 1381–84 (1967) & *The Nonestablishment Principle (Pt. II)*, 81 HARV. L. REV. 513, 513–15 (1968); Kauper, *supra* note 29, at 317–22.

institutions which teach or profess the tenets of a certain religion.[32] With respect to general welfare programs, the Court determined that a governing body could not exclude members of a religious group from receiving the benefits of public welfare legislation merely on the basis of their faith.[33]

The standard used by the Court in *Everson* was one of governmental neutrality towards religious institutions.[34] In what was to be the bedrock for later neutrality analyses, Justice Black articulated this standard as requiring that a government neither be hostile nor overly supportive of religion.[35] Justice Black further defined the

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[32] 330 U.S. at 14. The divisional line between the permissible inclusion of religious groups in a general welfare program and an impermissible aiding of religion was the keystone of the majority's decision in *Everson*. *See id.* at 16–18. This idea of permitting religious institutions to receive the benefits of social welfare legislation has played a preeminent role in Supreme Court decisions. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 689 (1971) (Court found federal legislation calling for construction aid grants to schools of higher education not to be per se violation of establishment clause merely because some of these schools had religious ties); Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (tax exemption granted to all charitable organizations held valid despite fact that religious groups were included in statutory definition of charitable organization); Board of Educ. v. Allen, 392 U.S. 236, 243 (1968) (Court upheld program of loaning textbooks to students in grades seven through twelve of any school, notwithstanding fact that parochial schools would receive incidental benefit of not having to purchase those books).

[33] 330 U.S. at 16–18. For Justice Black, the indirect benefits received by a parochial school as a by-product of New Jersey's bus fare reimbursement plan were no different than the police and fire protection benefits which it received by being a member of society. *Id.* at 17–18. In his dissent, Justice Rutledge distinguishes the majority's public welfare benefit argument by stating that neither the public nor the individual's welfare "is furthered when the state promotes religious education." *Id.* at 52 (Rutledge, J., dissenting). He argued further that police and fire protection were "matters of common right, part of the general need for safety," a category of "'public function[s]'" which does not encompass religious education. *Id.* at 60–61 (Rutledge, J., dissenting).

[34] 330 U.S. at 15. This neutrality principle was interpreted by the commentators at the time of *Everson* to mean that aid to religious groups which was indirect and incidental to public purpose legislation would not violate the demands of the establishment clause. *See, e.g.*, 60 HARV. L. REV. 793, 795–97 (1947). *But see* 22 N.Y.U.L.Q. REV. 331, 332–33 (1947). These interpretations seem correct, in retrospect, for Justice Black in his opinions following *Everson* draws the line between state benefits received by a religious institution which are indirect and incidental, deemed permissible, and those which are direct and primary and therefore deemed impermissible. In Board of Educ. v. Allen, 392 U.S. 236 (1968), Justice Black dissented from the majority's ruling that a New York statute which authorized a loan program of textbooks to students in grades seven through twelve was constitutionally valid. *Id.* at 250 (Black, J., dissenting). Distinguishing his *Everson* opinion, Justice Black argued that the textbook was the most essential educational tool and therefore the aid differed from the bus fare reimbursements involved in *Everson* with respect to its direct effect upon religion. *Id.* at 252–53 (Black, J., dissenting). *See also* Zorach v. Clauson, 343 U.S. 306, 319 (1952) (Black, J., dissenting) (Justice Black reprimanded majority for abandoning governmental neutrality requirement outlined in *Everson* and thereby validating program which "'encourages religious instruction'").

[35] 330 U.S. at 15. In arriving at this neutrality standard the *Everson* Court stated that

> [t]he "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass

principle by declaring that while the first amendment demanded governmental neutrality in dealings with both believers and nonbelievers, it in no way required the state to be hostile toward either.[36]

Therefore, in upholding the New Jersey School Transportation Statute, the Court viewed any benefit which might be received by a religious school as being an incidental benefit,[37] derived by the school as a result of its association with the recipients of the direct benefits of the legislation.[38]

> laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions.

Id.

In light of the ultimate holding by the Court, Justice Black's neutrality test has been criticized as being merely dictum. *See* Kauper, *The Supreme Court and the Establishment Clause: Back to* Everson?, 25 CASE W. RES. L. REV. 107, 114 & n.29 (1974). Professor Kauper stated that "since the Court in *Everson* upheld the state program under consideration . . . Justice [Black's] statement is technically dictum. Nonetheless it retains vitality as a clear articulation of the no-aid-to-religion view." *Id.* at 114 n.29. The authoritativeness of Justice Black's statement was also questioned by Justice Jackson in his dissent in *Everson* when he stated that "the undertones of the [majority] opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters." 330 U.S. at 19 (Jackson, J., dissenting).

[36] 330 U.S. at 18. This language, which begins the formulation of the neutrality test, was later interpreted to embrace the accommodation of religion standard used in subsequent cases. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 248 (1968); Zorach v. Clauson, 343 U.S. 306, 315 (1952).

[37] 330 U.S. at 17–18. The Court recognized that the schools received a benefit from the statute in that the parents of the school children were aided in affording the cost of transporting those children to the nonpublic schools. *Id.*

[38] *Id.* The parents were the direct recipients of the benefits issuing from the legislation. *Id.* The fact that the legislation called for no aid to be given to the religious school directly was the factor which ultimately allowed the Court to find that any benefit which the schools received was only incidental. *Id.* The dissenters did not find the majority's incidental benefit argument persuasive. Justice Jackson took cognizance of the purposes of the private schools in question—to promote and indoctrinate the Catholic religion. *Id.* at 22–23 (Jackson, J., dissenting). Taking this into consideration, he argued that the issue is not whether the church schools are the primary or incidental beneficiaries of the program. *Id.* at 24 (Jackson, J., dissenting). The state may not, in Justice Jackson's view, sustain a church at all, either directly or indirectly. *Id.* at 24–27 (Jackson, J., dissenting).

Likewise, Justice Rutledge saw no difference between direct aid and indirect aid to a church under the establishment clause standards. *Id.* at 57 (Rutledge, J., dissenting). Referring to the *Everson* bus fare plan, he stated that "distant as it may be in its present form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction." *Id.* Finally, Justice Rutledge observed that first amendment encroachments are matters of principle not of quantity or degree and that the standard which the Court should follow is "to keep separate the separate spheres as the First Amendment drew them" apart. *Id.* at 63 (Rutledge, J., dissenting). The shortcoming inherent within the policies advocated by Justices Jackson and Rutledge, as pointed out by various commentators, is that through complete separation, a government would be forced into a policy of hostility towards religion or the fostering of nonreligion over religion. *See, e.g.*, Giannella, *supra* note 31, 81 HARV. L. REV. at 513–28; Kauper, *supra* note 28, at 319–22.

The principle of neutrality remained as a vague guideline for case analysis under the establishment clause for the sixteen years following *Everson*.[39] The Court finally refined the establishment clause analysis in *School District v. Schempp*.[40] In *Schempp*, Pennsylvania

[39] In response to the *Everson* decision numerous commentators expressed their fear that the Supreme Court had not established sufficient guidelines for future courts to use in analyzing establishment of religion cases. *See, e.g.*, 60 HARV. L. REV., *supra* note 35, at 799–800; 22 N.Y.U.L.Q. REV., *supra* note 35, at 332–33.

[40] 374 U.S. 203 (1963). Prior to the *Schempp* decision the Court decided three cases which dealt with issues arising under the establishment clause. In McCollum v. Board of Educ., 333 U.S. 203 (1948), the Court was presented with a release-time program within the public schools which allowed children an opportunity to receive religious instruction. *Id.* at 205. The program involved the local school board granting permission for various religious groups to teach the tenets of their religions for thirty to forty-five minutes weekly. *Id.* at 207–08. Only those students whose parents requested that the student receive the instruction were allowed to do so. *Id.* at 207. Students not attending the religious classes had to move to another part of the school building and pursue their secular studies. *Id.* at 209.

The majority of the Court found the program to be an impermissible cooperation between church and state. *Id.* at 212. The Court declared that the "close cooperation between the school authorities and the religious council" resulted in the promotion of religion. *Id.* at 209. Also, the operation of the state's compulsory education system was found to "assist" as well as being "integrated with the program of religious instruction." *Id.* Lastly, in striking down the program as being violative of the establishment clause, the Court stated that it was not a manifestation of government hostility toward religion to hold that a public school system could not be used to spread religious faiths because religion and government can work best when "each is left free from the other within its respective sphere." *Id.* at 211–12.

As the lone dissenter, Justice Reed argued that the historical precedent of religious tolerance of the past weighed heavily for approval of the release-time program. *Id.* at 239–41 (Reed, J., dissenting). The practices of past cooperation between schools and religion were, in Justice Reed's view, against the majority's interpretation of the first amendment. *Id.* at 241, 255 (Reed, J., dissenting). In support of the program, he reasoned that "[t]his is an instance where . . . the history of past practices is determinative of the meaning of a constitutional clause, not a decorous introduction to the study of its text." *Id.* at 256 (Reed, J., dissenting).

In Zorach v. Clauson, 343 U.S. 306 (1952), the Court was again faced with a release-time statute. *Id.* at 308; *see* N.Y. EDUC. LAW § 3210(1)(b) (McKinney 1970). The New York City program in question differed from the program involved in *McCollum* in that the students who requested inclusion in the religious instruction program were allowed to leave the public school building to attend the religious session. *Compare* McCollum v. Board of Educ., 333 U.S. at 205 *with* Zorach v. Clauson, 343 U.S. at 308. Those not involved in the program remained in their classroom during this time. *Id.*

In finding the statute not violative of the first amendment, the Court distinguished *Zorach* and *McCollum*, holding that the pivotal difference between the cases was the use of the school buildings by the religious groups which was present in *McCollum* but absent in *Zorach*. *Id.* at 309. In the Court's opinion, the *Zorach* program was merely an accommodation of religion by the public school system. *Id.* at 315. In arriving at its conclusion, the *Zorach* Court placed some of its emphasis upon the religious nature of the country when, through Mr. Justice Douglas, it stated that "[w]e are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions." *Id.* at 313–14; *see* McCollum v. Board of Educ., 333 U.S. at 239–41 (Reed, J., dissenting). In light of *Zorach*, it has been argued that the Court's *McCollum* decision was misguided. *See, e.g.*, Giannella, *supra* note 31, 81 HARV. L. REV. at 571.

Engel v. Vitale, 370 U.S. 421 (1962), was *Schempp's* immediate predecessor. *Engel* involved the daily reading of an official "Regents' Prayer" in the public schools of New Hyde

had enacted a statute which required Bible readings in the public schools at the start of each school day.[41] This statute was challenged by the Schempp family as being violative of the first amendment prohibitions against the establishment of religion.[42]

In deciding that the statutory requirement of reading Bible verses in the public schools was an impermissible violation of the establishment clause,[43] the Court sharpened the focus of the neutrality principle originally expounded in *Everson*.[44] Writing for the majority, Justice Clark rearticulated the neutrality inquiry as a two-tiered test.[45] To be considered constitutionally valid, a governmental exercise must satisfy two prerequisites.[46] Initially, the legislation must have a secular purpose, and, secondly, the legislation must have a primary effect which neither advances nor inhibits religion.[47]

Park, New York. *Id.* at 422–23. The reading of this nondenominational prayer was made mandatory by a policy of the Board of Education of New Hyde Park. *Id.* The policy was adopted upon the recommendation of the State Board of Regents. *Id.* The state officials, in whom New York had entrusted its supervisory and legislative powers over the public school system, composed the prayer pursuant to their "Statement on Moral and Spiritual Training in the Schools." *Id.*

The Court concluded that the prayer recitation policy was "wholly inconsistent with the Establishment Clause." *Id.* at 424. The Court was emphatic to point out that the establishment clause means at least that a government may not compose an official prayer. *Id.* at 425. Also, a state cannot use its power or prestige "to control, support or influence the kinds of prayer the American people can say." *Id.* at 429. Finally, the Court stated that the nondenominational aspect of the prayer could not save it from its establishment clause infirmities. *Id.* at 430. The Court concluded that the intolerable evil involved is the act of establishment and not the particular religion or sect which is established. *Id.* at 436. *See also Memorial & Remonstrance*, *supra* note 31, at 163–64.

[41] 374 U.S. at 205. Also in question was a Maryland statute which allowed the Board of School Commissioners of Baltimore City to require Bible readings and/or the recital of the Lord's Prayer as part of the daily opening exercises within the school system. MD. EDUC. CODE ANN. 77:202 (1963); *see* 374 U.S. at 211. Both rules allowed those students not wishing to partake in the exercises to be excused from the readings. 374 U.S. at 205, 211–12.

[42] *Id.* at 205.

[43] *Id.* at 223.

[44] In administering the *Everson* neutrality test, the *Schempp* Court stated that the test is to focus on the purpose and effect of the legislation in question. *Id.* at 222. As a product of the implementation of this purpose-effect test, the Court's decision in *Schempp*, and *Engel* before it, vividly points out that for establishment clause violations a law need not reach the end result of actually establishing religion; it need only be a law respecting the establishment of religion. *See* Note, 6 SANTA CLARA LAW. 71, 72 (1965).

[45] 374 U.S. at 222. The Court gave the following definition to the two-tiered test:

> 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.

Id.

[46] *Id.*

[47] *Id.*

In administering the neutrality test, the *Schempp* Court found the purpose of the legislation to be sufficiently secular under establishment clause principles in that it aimed to improve the moral and educational values of the community.[48] However, the program failed the second aspect of the test[49] since the Court held that the legislation had a primary effect of advancing those religions whose faith and tenets were based upon the Bible.[50]

The Supreme Court further refined the establishment clause test in *Walz v. Tax Commission*.[51] The question before the Court in

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[48] *Id.* at 223–24. The Court seemed very reluctant to acknowledge that the laws in question had any secular purpose. However, knowing that resolving that particular question was not essential to the disposition of the issues at hand, the Court conceded the fact in light of the effect test. *Id.*

[49] *Id.* Each aspect of the Bible reading program was viewed as advancing religion. *Id.* The Court concluded that the Bible in and of itself served as "an instrument of religion." *Id.* The Court also refused to place credence in the argument that the Bible readings were only "relatively minor encroachments on the First Amendment." *Id.* at 225. The Court cautioned that any "breach of neutrality that is today a trickling stream may all too soon become a raging torrent." *Id.*

[50] *Id.* at 223–25. The Court found that Bible readings such as in *Schempp* "are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion." *Id.* at 225. For a general discussion on the purpose-effect neutrality test, see Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1177–85 (1974); Recent Developments, 31 OHIO ST. L.J. 396, 398–400 (1970).

The *Schempp* decision raises the question of when, if ever, a religious group might use public property for religious purposes without being in contravention of the first amendment. The *Schempp* case seems to have been decided by very narrow reasoning, and therefore may be construed so as not to preclude other types of church-state cooperation. *See, e.g.*, Giannella, *supra* note 31, 81 HARV. L. REV. at 570; Comment, *Bible Reading and the Lord's Prayer in Public School*, 9 N.Y.L.F. 540, 554–55 (1963); Recent Developments, *supra* at 401. Such a concern reached Justice Brennan, who, in his concurrence in *Schempp*, stated that "not every involvement of religion in public life violates the Establishment Clause. Our decision . . . does not clearly forecast anything about the constitutionality of other types of interdependence between religious and other public institutions." 374 U.S. at 294 (Brennan, J., concurring). With respect to the governmental neutrality principle, Justice Brennan, while steadfastly believing in a strict neutrality standard, recognized that there can be exceptions when he stated:

> In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize . . . the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood.

Id. at 299 (Brennan, J., concurring).

[51] 397 U.S. 664 (1970). Two years before the *Walz* case, the Court decided Board of Educ. v. Allen, 392 U.S. 236 (1968). Under review in *Allen* was a New York statute which allowed for a textbook loan program to students of any nonprofit school in grades seven through twelve. N.Y. EDUC. LAW § 701 (McKinney 1966) (amended 1973 & 1976). Included in the group of students eligible for the loans were students attending nonprofit religious schools. *Id.* at 239.

The Court, in applying the two-tiered *Schempp* test, found that the legislation had the secular purpose of furthering the educational activities of the young. *Id.* at 243. Furthermore, the Court saw no aspect of the legislation as effecting the advancement or inhibition of religion.

Walz was whether or not New York could constitutionally exclude religious institutions from paying property tax under a statute which afforded a property tax exemption to all nonprofit charitable institutions.[52] Chief Justice Burger articulated the particular evils which the establishment clause was aimed at preventing as being "sponsorship, financial support, and active involvement of the sovereign in religious activity."[53] The Chief Justice further advocated the use of the *Everson* Court's principle of "benevolent neutrality,"[54] which he found to be an "eminently sensible and realistic application of the language of the Establishment Clause."[55]

In applying the *Everson* principle of "benevolent neutrality," the Court again declared that its inquiry does not terminate with the review of the purpose of the legislation.[56] The end result of the legislation must also be reviewed to determine if the effect of the program is to foster an "excessive government[al] entanglement" between the

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Id. In the analysis of the Court, it was stated that the textbook loan program under review was analogous to the bus fare reimbursement program in *Everson* with respect to the purpose and effect of the program. *Id.* at 241–44.

It is interesting to note that Justice Black dissented on the grounds that the legislation was a "flat, flagrant, open violation of the First and Fourteenth Amendments," *Everson* notwithstanding. *Id.* at 250 (Black, J., dissenting). In distinguishing the two cases, he stated that bus fares are incidental to educational programs whereas textbooks, even secular textbooks, are at the heart of the educational process. *Id.* at 252 (Black, J., dissenting). Therefore, any program which helps supply textbooks to a sectarian school "will . . . inevitably tend to propagate the religious views of the favored sect." *Id.* (Black, J., dissenting).

[52] 397 U.S. at 667. Although the New York Constitution expressly allowed for the exemption of religious organizations from the payment of property taxes, N.Y. CONST. art. 16, § 1; *id.* at 666–67, the appellants argued that such an exemption indirectly required them to make support contributions to the religious groups, thereby constituting an impermissible establishment of religion. 397 U.S. at 667.

[53] 397 U.S. at 668. These evils were cited as the specific meaning of the establishment clause as the framers of the Constitution knew it. *Id.*

[54] *Id.* at 669. The Court's use of the term "benevolent neutrality" is a testimony to the position taken by the Court that while neutrality is the preferred position, there exists a myriad of situations which allow the state and religion to commingle with each other without violating first amendment prohibitions. *Id.* at 668–72.

[55] *Id.* at 671. The Chief Justice admitted that when the *Everson* Court's holding was scrutinized in relation to the language and underpinnings of the opinion, the result seemed illogical. *Id. See also* Everson v. Board of Educ., 330 U.S. at 19 (Jackson, J., dissenting). However, the *Walz* Court was quick to point out that if the majority in *Everson* had construed the establishment clause as the dissenters there advocated, the result "would [have] undermine[d] the ultimate constitutional objective as illuminated by history." 397 U.S. at 671. *See also* McCollum v. Board of Educ., 333 U.S. 203, 241–56 (1948) (Reed, J., dissenting); Zorach v. Clauson, 343 U.S. 306, 313–15 (1952). That ultimate goal is to be interpreted as allowing religious institutions to receive the benefactions to which they are entitled as members of society. *See* Giannella, *supra* note 31, 81 HARV. L. REV. at 514–15. Exclusion of religious groups from social welfare programs, such as was involved in *Walz*, would tend to promote nonreligion over religion and would destroy the principal basis for the program. *Id.* at 518–20.

[56] 397 U.S. at 674.

state and religion.[57] Under this analysis, the Court found that the tax exemption, when posed against the alternatives, did not foster an excessive entanglement between the state and the religious groups exempted.[58] The statute was therefore upheld as being valid under the strictures of the establishment clause.[59]

The test of constitutional validity under the establishment clause entered its present stage of development in *Lemon v. Kurtzman*.[60] The *Lemon* Court stated that the establishment standard consisted of three aspects: The legislation must have a secular purpose;[61] the legislation must have a primary effect which neither advances nor inhibits religion;[62] and, the legislation must not foster an excessive en-

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[57] *Id.* The excessive entanglement "test is . . . one of degree." *Id.* This new degree-oriented analysis in *Walz* was an attempt by the Court to broaden the scope of the effect test stated in *Schempp*. *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 167, 168 (1971). Although the tax exemption was not invalidated under the excessive entanglement test, the Court did attempt to establish some guidelines for future establishment cases. 397 U.S. at 675. In analyzing whether a particular church-state relationship involves an excessive entanglement between the government and religion, "the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.*

[58] 397 U.S. at 675–76. The Court found none of the specific evils present at which the establishment clause was directed. *Id.* The exemption did not constitute sponsorship since there was no transfer of funds from the State to the religious groups. *Id.* at 675. Although not expressly stated, the exemption was not viewed by the Court as a sufficient means of financial support to the religious groups so as to create an excessive entanglement between the government and religion. *Id.* Generally, the Court found "no genuine nexus between tax exemption and establishment of religion." *Id.* Finally, the exemption was viewed as causing "only a minimal and remote involvement between church and state and far less than taxation of churches." *Id.* at 676.

The viability of the entanglement test has been questioned by some writers. *See, e.g.*, Note, *supra* note 50, at 1186–87. Such thinking is based upon the idea that the entanglement test will never review anything other than the extent of government supervision or surveillance over religion. *Id.* at 1186. Other commentators feel that the entanglement test was merely an extension and clarification of the scope of the inquiry under the effect portion of the *Schempp* test. *The Supreme Court, 1970 Term, supra* note 57, at 168. The entanglement test, however, became a clear and distinct level in the establishment clause analysis. Lemon v. Kurtzman, 403 U.S. 602 (1971); *see* notes 63 & 68–74 *infra* and accompanying text. The scope of the inquiry under the excessive entanglement question was enlarged to include, as being sufficient to invalidate the legislation, the potential political divisive nature of the legislation. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); *see* notes 72–74 *infra* and accompanying text. *See also* Note, *Voucher Systems of Public Education After Nyquist and Sloan: Can a Constitutional System Be Devised?*, 72 MICH. L. REV. 895, 900 (1974).

[59] 397 U.S. at 680. The Court relied to a large extent upon the historical precedent of religious tax exemptions in this country in reaching its conclusion. *Id.* at 676–80. To emphasize the point, the Court quoted Justice Holmes' statement that " '[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" 397 U.S. at 678 (quoting Jackson v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).

[60] 403 U.S. 602 (1971).

[61] *Id.* at 612.

[62] *Id.*

tanglement between government and religion.[63] Therefore, the *Lemon* Court made the *Walz* excessive entanglement analysis a separate inquiry and combined it with the *Schempp* purpose-effect test to arrive at this new tripartite standard.[64]

The *Lemon* Court was asked to review legislative enactments from Pennsylvania[65] and Rhode Island[66] which provided for reimbursement plans that permitted supplementary expense and salary payments to be given to nonpublic schools and school teachers. The Court stated that in analyzing the programs under the establishment clause test, it must examine the cumulative effect of all the aspects of the supplementary salary plans to be able to adjudge their constitutionality.[67]

Using this criteria, the Court acknowledged that the states involved had sufficiently proper purposes in enacting the statutes.[68]

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[63] *Id.* at 613.

[64] *Id.* at 612–13. The Court cited Board of Educ. v. Allen, 392 U.S. 236 (1968), as implementing for the purpose-effect tests. *Id.* at 612. While the *Allen* Court instilled the tests in arriving at the constitutionality of the New York textbook loan program, it was merely applying the tests as had been formulated in *Schempp*. *See* notes 40–50 *supra* and accompanying text.

The *Lemon* Court first stated the excessive entanglement standard as a separate test. 403 U.S. at 613. While this new test was initially articulated as part of the effect test by the *Walz* Court, it now has the capacity of limiting the effect test by being made a third and separate test. *The Supreme Court, 1970 Term, supra* note 57, at 167–68, 172.

[65] PA. STAT. ANN. tit. 24, §§ 5601–5608 (Purdon Cum. Supp. 1971) (repealed 1977). The Pennsylvania statute authorized reimbursements to be made directly to nonpublic schools for their expenditures on teacher salaries, textbooks and instructional materials used in teaching purely secular subjects. 403 U.S. at 609, 610; *see* PA. STAT. ANN. tit. 24, § 5601 (Purdon Cum. Supp. 1971) (repealed 1977). The nonpublic schools had to maintain prescribed accounting procedures to identify the separate secular expenditures. 403 U.S. at 609–10; *see* PA. STAT. ANN. tit. 24, § 5605 (Purdon Cum. Supp. 1971) (repealed 1977). These records were subject to review and audit by state officials. 403 U.S. at 609–10; *see* PA. STAT. ANN. tit. 24, § 5605 (Purdon Cum. Supp. 1971) (repealed 1977). These records were subject to review and audit by state officials. 403 U.S. at 609–10; *see* PA. STAT. ANN. tit. 24, § 5605 (Purdon Cum. Supp. 1971) (repealed 1977).

[66] The Rhode Island Salary Supplement Act, R. I. GEN. LAWS §§ 16-51-1 to -51-9 (1970). The Act provided for the supplementing of nonpublic school teachers' salaries. 403 U.S. at 607. The payments which were made directly to the teachers could not exceed 15% of the teacher's current annual salary. *Id.* To be eligible for the supplementary salary, the teacher had to conduct classes in subjects which were offered at public schools. *Id.* at 608. The nonpublic school teachers filed applications with the state for approval of the reimbursement program. *Id.* The schools also filed financial and scholastic data with the state for review to see if the school and teacher met the criteria of the statute. *Id.* at 607–08.

[67] *Id.* at 613–15. In reviewing the cumulative impact of the relationship between government and religion, the Court stated that the *Walz* standard mandated "close scrutiny of the degree of entanglement involved in the relationship." *Id.* at 614. While the Court recognized that total separation of church and state was impossible, the objective of the tripartite test under the establishment clause prohibitions was "to prevent, as far as possible, the intrusion of either into the precincts of the other." *Id.*

[68] *Id.* at 613. The intent of the legislature was to enhance the quality of secular education in schools that were covered by the respective states' compulsory attendance laws. *Id.* In this

However, the programs of supplementing nonpublic school teachers salaries were found to violate the establishment clause due to their tendency to cause an excessive entanglement between government and religion.[69] This entanglement arose through the comprehensive surveillance and monitoring system[70] which the states were forced to administer to ensure that the aid to the teachers would not be used for any sectarian purposes.[71] The Court also reasoned that the programs had the capacity to cause great political divisiveness among the various religious groups.[72] Freedom from such political fragmentation in response to government aid to religion was one of the princi-

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regard the Court found that there was no basis to conclude that any aspect of the program was designed to advance religion. *Id.*

[69] *Id.* at 616–22.

[70] *Id.* The substantial religious nature of the church-oriented schools forced the necessity of these monitoring controls. *Id.* at 616, 620–21. The legislatures, in giving the aid to secular aspects of the school only, were forced to set up surveillance procedures to be assured the aid would not fall to sectarian use. *Id.* If the aid were used for sectarian purposes, it would be an impermissible fostering of religion by the state. *Id.* at 618–19.

[71] *Id.* at 616–22. Because of the teacher-school relationship and the potential for abuse of the aid, "[a] comprehensive, discriminating, and continuing state surveillance [would] inevitably be required to ensure that [the] restrictions are obeyed and the First Amendment otherwise respected." *Id.* at 619. Such precautionary measures would cause an "excessive and enduring entanglement between state and church," which would violate the minimal contacts aspect of the excessive entanglement test of *Walz*. *Id.*; Current Decisions, 12 WM. & MARY L. REV. 679, 680 (1971).

A second aspect of the Pennsylvania statute, that of direct payment of the aid to the sectarian school before it was put to its secular use, was also declared violative of the establishment clause. 403 U.S. at 621. Virtually always, direct subsidies to religious groups are violative of the first amendment. *Id.* Direct subsidies are what the Court is guarding against when it speaks of having no sponsorship or financial support of religion by government, Walz v. Tax Comm'n, 397 U.S. at 675, and no concert between religion and government. *See* Zorach v. Clauson, 343 U.S. 306, 312 (1952). Again, the Court pointed out that for Pennsylvania to ensure the secular use of these subsidies, it would have to maintain a system of control and surveillance which would violate the establishment clause by excessively entangling the state and the nonpublic schools. 403 U.S. at 621–22.

[72] *Id.* at 622–24. This is the first instance where the majority of the Court stated that political divisiveness must be reviewed as an excessive entanglement criteria. It had, however, been advocated in prior cases by various Justices as grounds for invalidation of a program. *See* Walz v. Tax Comm'n, 397 U.S. at 695 (Harlan, J., concurring); Board of Educ. v. Allen, 392 U.S. at 249 (Harlan, J., concurring); School Dist. v. Schempp, 374 U.S. at 307 (Goldberg, J., concurring).

Contributing to the Court's conclusion that the potential for political divisiveness was great enough to be considered under the excessive entanglement test was the absence of any historical precedent for the supplementary salary program. 403 U.S. at 624. In comparison to the tax exemption in *Walz*, which had a two hundred year historical existence, the *Lemon* programs were innovations in the realm of church-state relations. *Id.* at 624. In making its determination that the program contributed to potential political divisiveness, the Court pointed to the fact that only a limited number of religions would be aided by the salary programs. *Id.* at 623. This, again, is unlike the statute in *Walz* which afforded the tax exemption to all religions, thereby minimizing the threat of political divisiveness. *Id.* at 623–24.

pal objectives of the religion clauses.[73] Therefore, the Court held that any legislation falling under establishment clause scrutiny must be free from promulgating this political divisiveness.[74]

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[73] 403 U.S. at 622. The Court's decision was effected by the possibility that the legislature's attention would be diverted from issues and problems of concern by questions under the religion clauses. *Id.* at 623. The fear of this fragmentation prompted the Court to point out that "[t]he history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief." *Id.; see* note 32 *supra* and accompanying text.

[74] 403 U.S. at 622–24.

Decided on the same day as *Lemon* was Tilton v. Richardson, 403 U.S. 672 (1971). In *Tilton*, the federal government had enacted a statute which provided for grants to be made to colleges and universities to aid in the expansion of their facilities. *Id.* at 675. *See* 20 U.S.C. §§ 711–21 (1964 & Supp. V 1964) (repealed Supp. II 1972). Private, religious-oriented colleges would be eligible for such a grant. 403 U.S. at 675–76; 20 U.S.C. §§ 711–21 (1964 & Supp. V 1964) (repealed Supp. II 1972). The statute prohibited the use of the buildings for other than secular purposes for twenty years. 403 U.S. at 675; 20 U.S.C. §§ 711–21 (1964 & Supp. V 1964) (repealed Supp. II 1972).

In deciding the case, the Supreme Court applied the tripartite test which it had just reformed in *Lemon*. 403 U.S. at 678. The Court found the government's aim to maintain and advance higher education to be a sufficiently secular purpose to meet the establishment clause standards. *Id.* at 678–79. In analyzing the primary effect of the grant program, the Court stated that the crucial test is not whether the religious institution gains some benefit which is incidental to the legislation, but whether the primary or principal effect on the legislation advances religion. *Id.* at 679–80. The Court found no evidence within the facts of the case to show that the educational institutions were so pervasively religious that their secular and religious functions could not be separated. *Id.* at 680–81. There was simply no showing that religion would find its way into these facilities. *Id.*

The Court then examined the grant legislation under the excessive entanglement standard. *Id.* at 684–89. In holding that the legislation did not involve excessive entanglements between the government and religion, the Court distinguished the *Tilton* grant program from the subsidies involved in *Lemon*. *Compare* Tilton v. Richardson, 403 U.S. at 685–89 *with* Lemon v. Kurtzman, 403 U.S. at 620–24. The risk that this governmental aid would serve to support religion was lower than that in *Lemon*. 403 U.S. at 687. The Court also reasoned that because in the college situation there is more academic freedom than in secondary schools, little affirmative religious preaching, and people of older years who are less impressionable than high school students, the risk of unsuspecting religious indoctrination was decreased. *Id.* at 685–86. This reduces the need for intensive surveillance techniques by the government, thereby decreasing the entanglements involved between the government and the schools. *Id.* at 687.

The majority in *Tilton* also concluded that the nonideological character of the aid was important in reducing the constitutional infirmities of the program. Citing *Everson* and *Allen*, the Court stated:

> Our cases . . . have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school that they attend.

Id.; see Board of Educ. v. Allen, 392 U.S. 236, 248–49 (1968); Everson v. Board of Educ., 330 U.S. 1, 17–18 (1947).

Lastly, the potentiality of political divisiveness was determined not to be of the same magnitude when dealing with colleges and universities as opposed to secondary schools. 403 U.S. at 688–89. The Court believed that the local religious constituency of the parochial school posed far greater problems of potential political fragmentation than did the diverse population on a college campus. *Id.* at 689.

While the Supreme Court has never been required to rule directly upon the question of the constitutionality of religious groups using public buildings for worship purposes, numerous lower courts have decided cases involving this situation.[75] At first glance, the cases appear to lack any consistency in separating the functions of church and state.[76] However, when reviewed more closely, there emerges a clear interpretation that under first amendment guidelines, religion and government may become intermingled so long as their relationship is not an excessively dependent or controlling force upon one another.[77]

One prime example of such a state court's application of the establishment clause neutrality principle occurred in *Southside Estates Baptist Church v. Board of Trustees*.[78] In *Southside Estates*, the Supreme Court of Florida had occasion to rule upon the constitutionality of a local school board's rental policy which allowed religious groups to use the public school buildings when they were not being used for school purposes.[79]

The Court did, however, qualify its decision by requiring that the twenty-year limitation against religious use be replaced by an ad infinitum restriction. *Id.* at 683–84, 689. The use of such a facility for religious purposes after the twenty-year period had elapsed would still violate the establishment clause. *Id.* at 683. For a discussion of the *Lemon* and *Tilton* decisions and their effect upon the establishment clause standard, see *The Supreme Court, 1970 Term, supra* note 57, at 170–79.

[75] For a general overview of the early state decisions, see note 28 *supra*.

[76] *See, e.g.*, Reed v. Van Hoven, 237 F. Supp. 48, 53–57 (W.D. Mich. 1965) (students permitted to conduct prayer sessions in public school prior to commencement of school day); Lewis v. Mandeville, 201 Misc. 120, 123, 107 N.Y.S.2d 865, 868 (Sup. Ct. 1951) (use of auditorium in firehouse by religious groups held constitutional).

But the general trend of state court cases decided prior to *Everson* generally ruled that the state had no power to allow the religious groups to use public buildings. *See* note 28 *supra*.

[77] *See* Reed v. Van Hoven, 237 F. Supp. 48 (W.D. Mich. 1965); Lewis v. Mandeville, 201 Misc. 120, 123, 107 N.Y.S.2d 865, 868 (Sup. Ct. 1951); Schaad v. Ocean Grove Camp Meeting Ass'n, 72 N.J. 237, 290–91, 370 A.2d 449, 477–78 (1977). The state courts seemingly felt that to deny the religious organizations the benefits they otherwise deserved would be instilling hostility in the state's dealing with the religious groups as members of society. *See, e.g.*, Lewis v. Mandeville, 201 Misc. at 123, 107 N.Y.S.2d at 868. *See also* Giannella, *supra* note 32, 81 HARV. L. REV. at 515, 518; Note, *supra* note 34, 60 HARV. L. REV. at 795–97; Note, *supra* note 34, 22 N.Y.U.L.Q. REV. at 331, 332–33.

[78] 115 So. 2d 697 (Fla. 1959).

[79] *Id.* at 698. The board of trustees permitted several religious groups to use the public school buildings on Sundays. *Id.* The use was temporary, pending the completion of the groups' church buildings. *Id.* No record of rent paid by the religious groups nor direct expense to the school board was shown. *Id.*

The board policy was challenged on two grounds. First, it was argued that the rental program violated the Florida Constitution, which provides:

> No preference shall be given by law to any church, sect or mode of worship and no money shall ever be taken from the public treasury directly or indirectly in

The court in *Southside Estates* concluded that any benefit which the religious groups received from the use of the school buildings was only an incidental benefit which was attributed to the groups solely because they were members of the class of organizations which was allowed to make use of the facilities under the statute.[80] The court further declared that the first amendment had not been violated by the rental program since no public funds had been used in an establishment of religion or in the perference of one religion over another.[81]

The *Resnick* court was presented with two constitutional issues.[82] The East Brunswick Board of Education's program was initially alleged as being violative of the New Jersey Constitution.[83] The court was also asked to declare that the program constituted an establishment of religion in violation of the religion clauses of the first amendment.[84]

The New Jersey constitutional provisions concerning permissible state involvement with religion are far less pervasive than the prohi-

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aid of any church, sect or religious denomination or in aid of any sectarian institution.

FLA. CONST. art. 1, § 6, *quoted in* 115 So. 2d at 698–99.

Second, the plaintiffs argued that such a use of public facilities by the religious groups violated the prohibitions within the establishment clause of the first amendment made applicable to the states through the fourteenth amendment. *Id.* at 698.

[80] 115 So. 2d at 700–01. The religious groups were properly included under the statutory language " 'any legal assembly' " by the school board. *Id.* at 700 (quoting FLA. STAT. ANN. § 235.02 (West 1940)). With respect to the benefit that the religious groups would receive by using the school buildings, the court stated that it could "properly apply the maxim *de minimus non curat lex.*" 115 So. 2d at 699.

[81] *Id.* at 701. The court found "nothing in the conduct of the appellee trustees to suggest the involvement of public funds or property in the establishment of religion or in preferring one religious faith over another." *Id.*

The court also held that the Florida constitutional prohibition against the use of public funds to aid any religious denomination had not been violated by the religious groups using the school buildings. *Id.* at 699; *see* FLA. CONST. § 6; notes 83–85 *infra* and accompanying text.

The court placed a caveat on the use of the school buildings by religious groups when it stated "by way of dictum" that the use of the buildings "for prolonged periods of time, absent evidence of an immediate intention on the part of the Church to construct its own building" would be sufficient to take such a use out of the permissible area of church-state relationships under the establishment clause. 115 So. 2d at 700.

[82] Resnick v. East Brunswick Twp. Bd. of Educ., 77 N.J. 88, 96, 389 A.2d 944, 948 (1978). The court also heard arguments contending that N.J. STAT. ANN. § 18A:20–34 (West 1968), did not contemplate the use of school buildings for religious worship but merely permitted religious education sessions to be conducted within the schools. 77 N.J. at 96, 389 A.2d at 948. However, the majority did not accept this statutory construction argument and held that religious worshipping in public schools after school hours did not violate title 18A, section 20–34. *Id.* at 98–102, 389 A.2d at 949–50. For a more detailed discussion of this issue, see note 22 *supra* and accompanying text.

[83] 77 N.J. at 96, 389 A.2d at 948.

[84] *Id.*

bitions under the establishment and free exercise clauses of the federal constitution.[85] Therefore, the court in *Resnick* was faced with a very narrow issue with respect to the New Jersey Constitution.[86] Justice Pashman, writing for the majority, found that there had been no preference of one religion over another resulting from the Board's rental policy.[87] Additionally, he cited the state constitution as prohibiting the use of local taxes to support any religion.[88] This provision had been violated by the Board's failure to require the religious groups using the schools to fully reimburse the Board for its out-of-pocket costs.[89] However, the majority allowed for an upward amendment of the rental fee to alleviate this infirmity without destroying the rental program.[90]

The major issue, as perceived by the court, was whether or not the policy of renting the school facilities to religious groups was violative of the first amendment of the federal constitution.[91] The court, finding no coercion respecting religion in the East Brunswick rental policy, dispensed with the necessity of analyzing the rentals under

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[85] *Id.* at 104, 389 A.2d at 952. In so holding, the court adopted the late Chief Justice Weintraub's limiting definition of the scope of the state's constitutional prohibition on the government's ability to intertwine itself with religion as stated in Clayton v. Kervick, 56 N.J. 523, 528, 267 A.2d 503, 505–06 (1970), *vacated*, 403 U.S. 945 (1971), *aff'd on remand*, 59 N.J. 583, 285 A.2d 11 (1971); 77 N.J. at 104, 389 A.2d at 952. *See also* Schaad v. Ocean Grove Camp Meeting Ass'n, 72 N.J. 237, 370 A.2d 449 (1977). In *Schaad*, the New Jersey supreme court perceived that the New Jersey constitutional provisions did not pertain to the establishment issue at hand and analyzed those issues under the Supreme Court's tripartite first amendment test. 72 N.J. at 251–62, 370 A.2d at 456–62; State Bd. of Educ. v. Board of Educ., 108 N.J. Super. 564, 577–78, 262 A.2d 21, 28 (Ch. Div. 1970), *aff'd*, 57 N.J. 172, 270 A.2d 412 (1970) (chancery division mandated that in order to invalidate prayer readings in public schools lower courts must follow stare decisis and defer to Supreme Court precedents when rule of decision is clear).

[86] 77 N.J. at 103–04, 389 A.2d at 951–52. The New Jersey Constitution limits the acts of the state with reference to religion in that it prohibits the use of any tax monies in support of any church or religion. N.J. CONST. art. I, para. 3. It additionally mandates that no one religion may be given preference over any other religion. N.J. CONST. art. I, para. 4.

[87] 77 N.J. at 104, 389 A.2d at 952.

[88] *Id.* at 103, 389 A.2d at 951, *citing* N.J. CONST. art. I, para. 3.

[89] *Id.* Since any expense which was directly attributable to the religious groups' use of the school which was not reimbursed would constitute state support of those religious groups, the program was held invalid, at least to the extent of the unpaid expenses. *Id.*

[90] *Id.* at 103, 389 A.2d at 951. The majority affirmed the lower court's opinion insofar as it held that the rate structure was not integral to the rental program and could therefore be increased to cover the total out-of-pocket costs of the Board without changing the significant aspects of the program. *Id.*; *see* Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 265, 343 A.2d 127, 131 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 343 A.2d 127 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978).

[91] 77 N.J. at 104, 389 A.2d at 952.

the free exercise clause standards.[92] In turn, the court confined its constitutional discussion to the establishment clause issue.[93]

Justice Pashman reasoned that the court must review the program in light of the tripartite test mandated in the establishment of religion analysis articulated by the United States Supreme Court in *Walz* and *Lemon*.[94] The requirement of a secular purpose for the legislation is not a very rigid test, requiring merely an articulation of little more than a "colorable secular design."[95] The majority found the East Brunswick School rental policy to have the secular purpose of maximizing the usefulness of public buildings and aiding the community charities.[96]

The primary purpose of the statutory authority was to grant wide discretion to local school boards in deciding how to use dormant school facilities.[97] The majority declared the primary effect of the statute was to extend the benefits of using these buildings to charitable community groups.[98] The Board's policy was, therefore, viewed as aiding all nonprofit organizations in East Brunswick.[99] Justice Pashman concluded that the benefit which enured to the religious

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[92] *Id.* at 105, 389 A.2d at 952. The court looked to School Dist. v. Schempp, 374 U.S. 203 (1968), for its definition of a free exercise case. The *Schempp* Court stated that "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Id.* at 223.

[93] 77 N.J. at 105, 389 A.2d at 952.

[94] *Id.* at 107–08, 389 A.2d at 953–54. For a more in-depth discussion concerning the tripartite test, see notes 47–76 *supra* and accompanying text. The majority also echoed the sentiments of the Supreme Court by enumerating that "[t]he objective of these tests has been . . . [the] protection against 'sponsorship, financial support, and active involvement of the sovereign in religious activity.' " 77 N.J. at 108, 389 A.2d at 954 (quoting Walz v. Tax Comm'n, 377 U.S. 664, 668 (1970)).

[95] 77 N.J. at 108, 389 A.2d at 954. In the process of upholding the secular purpose of the statute, the court stated that the establishment clause test required that a court defer to any reasonable articulation of a proper legislative intent in enacting the statute. *Id.* at 108–09, 389 A.2d at 954; *see, e.g.*, Wolman v. Walter, 433 U.S. 229, 236 (1977) (nonpublic school pupils included in general program of educational aid distribution); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (although Court invalidated New York program which gave repair and maintenance grants to nonpublic schools, it found purpose of program as articulated by legislature to be sufficient under tripartite test); Lemon v. Kurtzman, 403 U.S. 602 (1971) (state statute providing financial support to nonpublic schools for specified secular subjects found unconstitutional). *See also* Note, *supra* note 50, at 1178 & n.26.

[96] 77 N.J. at 109–10, 389 A.2d at 954. The court also stated that there had been no allegations proffered of bad faith on the part of the Board, thereby giving the court "no reason to doubt [the policy's] stated purposes." *Id.*

[97] *Id.* at 111, 389 A.2d at 955.

[98] *Id.*

[99] *Id.* Not only were the community charities viewed as the beneficiaries of the Board's rental policy, but the court stated that "[t]he community as a whole is benefitted when nonprofit organizations of interest to its members prosper." *Id.*

groups was an incidental derivative of the general program.[100] By allowing the religious institutions to use the school buildings under such circumstances, the Board's policy did not amount to an impermissible advancement of religion.[101] The majority reasoned that since there was no substantial outlay of public funds, the " 'significantly religious' character" of the groups should not preclude them from gaining benefits which other groups in the same class were entitled to receive.[102]

Additionally, the majority examined the rental policy under the third level of the establishment clause test; namely, did the use of the school buildings by the religious groups foster an excessive entanglement between religion and government?[103] Justice Pashman found no administrative entanglement due to the nonexistence of any important administrative function in approving the rental applications.[104] Furthermore, there was no need for the Board to conduct a

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[100] *Id.*

[101] *Id.* It was viewed that the religious institutions were simply members of the larger group of organizations eligible to rent the school buildings such as girl scouts, boy scouts, garden clubs, basketball teams, drama clubs, drum and bugle corps and language schools. *Id.*

[102] *Id.* at 114, 389 A.2d at 957. The aid to the religious groups was viewed as a benefit which any charity would receive when using the schools. *Id.* at 112–14, 389 A.2d at 956–57. Therefore, the religious institutions, being members of that class of organizations for whom the aid has been made available, should not be denied the use of the buildings merely because of their religious substructure. *Id.*; *see* Walz v. Tax Comm'n, 397 U.S. at 672–74; Everson v. Board of Educ., 330 U.S. at 6–7, 14; Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d 697 (Fla. 1959). In fact, this area of friendly and detached cooperation with the efforts of parents and religious groups has been viewed as entirely consistent with the first amendment. Fahy, *Religion, Education, and the Supreme Court*, 14 LAW & CONTEMP. PROB. 73, 91 (1949); Giannella, *supra* note 31, 81 HARV. L. REV. at 514–20.

Extending such a rationale, the withholding of such benefits from religious groups which would otherwise be offered to them but for their religious nature can be viewed as governmental hostility towards religion not demanded by the prohibitions of the establishment clause. *See* Giannella, *supra* note 31, 81 HARV. L. REV. at 515, 518–22.

[103] 77 N.J. at 114, 389 A.2d at 957. This excessive entanglement analysis was the primary focus of the trial court's objection to the East Brunswick rental policy. *Id.* The trial judge found three levels of entanglement between church and state when the religious groups are allowed to rent for such long periods of time. Resnick v. East Brunswick Twp. Bd. of Educ., 135 N.J. Super. 257, 258, 343 A.2d 127, 133 (Ch. Div. 1975), *aff'd*, 144 N.J. Super. 474, 366 A.2d 345 (App. Div. 1976), *rev'd*, 77 N.J. 88, 389 A.2d 944 (1978). Firstly, the program involved excessive bookkeeping and scheduling concerning the religious organizations, thereby resulting in an administrative entanglement. *Id.* Secondly, a political entanglement would ensue as the school principal and board members would be subject to the "demands and pressures" of both the religious institutions and those opposing the religious group's use of any public school facilities. *Id.* Finally, the court found the mere ongoing presence of the groups and the storing of religious artifacts in school storerooms to be a relationship which excessively entangled church and the state. *Id.*

[104] 77 N.J. at 116, 389 A.2d at 958. If a religious group applied for a time slot which was not already occupied by another group, the granting of the application was to a large extent a pro forma procedure. *Id.* Thus, the granting of an application to rent a school building is more

comprehensive surveillance program for the groups used the buildings during nonschool hours, thereby alleviating the fear of religious indoctrination of the unbelieving or unwilling.[105] Justice Pashman did not find a significant potential for any political divisiveness occurring as a result of this rental program.[106] Consequently, he disagreed with the trial court's decision that the storing of religious artifacts was an entanglement sufficient to warrant the invalidation of the Board's rental program.[107] In fact, without a showing that the storage space used was needed by the schools, the housing of such religious articles was viewed as merely accommodating religion rather than advancing it.[108]

However, the majority did place a limitation upon the length of time one religious group could use the school buildings.[109] Following the reasoning of *Southside Estates*, Justice Pashman declared that the use must be temporary and that the religious groups must show an immediate intent in procuring their own buildings.[110] It was viewed that should the rental extend beyond a temporary use, the religious groups would effectively be receiving the school Board's stamp of approval.[111] While not wanting to define a fixed, mechanical stan-

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ministerial than it is discretionary. *Id.* The court reasoned, therefore, that there is no significant administrative function in having a clerk process such an application. *Id.*

[105] *Id.* In distinguishing *Schempp, Lemon, Engel* and the other United States Supreme Court decisions concerning state aid to religious schools, Justice Pashman noted that the religious instruction occurred during nonschool hours, ensuring that its religious nature was not likely to engraft itself into secular education. *Id.*

[106] *Id.* The political divisiveness aspect of the excessive entanglement test was initially used by Chief Justice Burger in Lemon v. Kurtzman, 403 U.S. 602, 622–25 (1971). The *Resnick* majority cites that the reason for the *Lemon* Court's "fear of political fragmentation . . . was . . . 'the need for annual appropriations.'" 77 N.J. at 116, 389 A.2d at 958 (quoting Lemon v. Kurtzman, 403 U.S. at 623). Justice Pashman, finding no appropriations necessary within the East Brunswick scheme, held that the rental program did not foster any political fragmentation. *Id.* at 116, 389 A.2d at 958. He also noted that the absence of any discretionary function by the school principals in granting the application lessened the possibilities of political disfavor. *Id.* Finally, there was no showing in the record that historically there had been any divisiveness in the township over the use of public buildings by religious groups. *Id.* at 116–17, 389 A.2d at 958.

[107] *Id.* at 117, 389 A.2d at 958.

[108] *Id.* Justice Pashman termed the cooperation between the schools and the religious bodies in the storing of the artifacts as "a minimal accommodation" of religion. *Id.* Since these religious articles would not be on general display during the school day, the temporary holding of them by the schools did not amount to a constitutional infirmity. *Id.*

[109] *Id.*

[110] *Id.* The majority found that the religious groups under review had all made diligent efforts and good faith preparations in their attempt to find their own houses of worship. *Id.* In fact, the fear of a religious group using a school on a permanent basis was seen to be very "hollow." *Id.* at 118, 389 A.2d at 959.

[111] *Id.* at 117, 389 A.2d at 958–59. Justice Pashman expressed the fear that a continuous use of the property would be tantamount to the school system promoting religion. *Id.* However, the

dard which must be followed in every situation,[112] the court inferred that a rental arrangement lasting five years was reaching the limit of a permissible use of the schools.[113]

In his dissent, Justice Clifford argued that the decision of the majority was another step toward the destruction of the necessary separation between church and state.[114] He contended that there was no statutory authority for permitting religious worship in public school buildings[115] and that the majority's decision circumvented the intent of the legislature in enacting section 18A:20-34.[116]

Respecting the first amendment tripartite test, Justice Clifford found, as did the majority, a proper secular legislative purpose in the enacting of the statute and the adoption of the East Brunswick rules policy.[117] However, he argued that the renting of the school

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majority also discounted Justice Clifford's dissenting argument that the rental policy of granting indefinite rental arrangements equaled granting a lease for all time. *Id.* at 117–18 & n.8, 389 A.2d at 458–59; *id.* at 121–22, 389 A.2d at 961 (Clifford, J., dissenting). It was felt that with the inordinate amount of possible mishaps which might attend land purchases and building construction plans, the indefinite lease as used by East Brunswick was a sensible accommodation of religion under the circumstances. *Id.*

[112] *Id.* at 117–18, 389 A.2d at 958–59. The court placed the burden of deciding what the specific time guidelines should be upon the trial court within each individual fact pattern. *Id.*

[113] *Id.* at 118, 389 A.2d at 959. The Board's leasing arrangement with the Reform Temple commencing in 1973 was viewed as "approaching the outer bounds of reasonable time and nearing the point of prohibited entanglement." *Id.*

[114] *Id.* at 121, 389 A.2d at 960. This policy-based argument is similar in nature to those advanced by several Justices when state-religion accommodation programs have been upheld in the past. *See* Walz v. Tax Comm'n, 397 U.S. 664, 708–09 (1970) (Douglas, J., dissenting). In *Walz*, Justice Douglas argued that with respect to general social legislation and its benefits, there is a difference between nonprofit organizations as a whole and religious groups. *Id.* (Douglas, J., dissenting). *See also* Zorach v. Clauson, 343 U.S. 306, 319 (1952) (Black, J., dissenting); Everson v. Board of Educ., 330 U.S. 1, 51–52 (1947) (Rutledge, J., dissenting).

[115] 77 N.J. at 126, 389 A.2d at 963. Justice Clifford agreed with the majority that the provisions of N.J. STAT. ANN. § 18A:20–34(a) (West 1968), could be interpreted to include the use of public schools for religious education and instruction. 77 N.J. at 26, 389 A.2d at 963 (Clifford, J., dissenting); *see* notes 20 & 98 *supra* and accompanying text. However, he disagreed that the statutory provisions authorized the leasing of a school facility for housing religious worship. 77 N.J. at 126, 389 A.2d at 963 (Clifford, J., dissenting).

[116] 77 N.J. at 127, 389 A.2d at 963 (Clifford, J., dissenting). To Justice Clifford, the majority, by discarding the use of the settled statutory construction aid, *ejusdem generis*, overexpansively interpreted subsections (a) and (c) of section 20-34. *Id.* (Clifford, J., dissenting). He found the statutory language unclear, thereby calling for the application of such a definitional aid. *Id.* (Clifford, J., dissenting). Under the *ejusdem generis* doctrine, Justice Clifford contended that religious services were not of the general type of activities which subsections (a) and (c) of section 20-34 were intended to include as permissible in the school buildings. *Id.* (Clifford, J., dissenting).

[117] *Id.* at 129, 389 A.2d at 969 (Clifford, J., dissenting). It was undisputed that the underlying purpose of the legislation was to use the public school facilities to their optimum level by allowing diverse groups from the community to rent the buildings during nonschool hours. *Id.* (Clifford, J., dissenting); *see* notes 109–10 *supra* and accompanying text.

facilities to the religious groups was violative of the establishment clause because it impermissibly advanced religion.[118] For Justice Clifford, the analysis was not to seek the ultimate effect of the legislation but to review whether or not a primary effect of the legislation effectively advances religion.[119] Consequently, he cited the rental program as conferring direct and immediate benefits upon the religious groups in the form of economic savings through lessened rentals,[120] the opportunity to communicate to an otherwise unreachable larger audience,[121] and indirect endorsements of religion by the school board.[122]

Justice Clifford also disagreed with the majority's reasoning that the rental program was not invalid under the excessive entanglement test.[123] Due to the extensive record keeping and communication be-

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[118] 77 N.J. at 130–35, 389 A.2d at 965–67 (Clifford, J., dissenting).

[119] *Id.* at 131–33, 389 A.2d at 965–66 (Clifford, J., dissenting). Justice Clifford reasoned that the East Brunswick program conferred a great aid to religion and therefore had a primary effect of advancing religion. *Id.* at 131, 389 A.2d at 965. Disagreeing with the majority, he stated that the focus of the primary effect test should not be a finding of "*the* primary effect," but a reviewing of all the aspects of the program to see whether or not it causes a "direct and immediate" advancement of religion. *Id.* at 131–32, 389 A.2d at 965–66 (Clifford, J., dissenting) (emphasis in original); *see* notes 112–16 *supra* and accompanying text.

In support of the aforementioned principle, Justice Clifford relied upon the Supreme Court's decision in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). 77 N.J. at 131–34, 389 A.2d at 965–67. In *Nyquist*, the Court declared that the primary effect test did not mandate an ultimate judgment with respect to the primary effect of the statute in question. 413 U.S. at 783–85 n.39. In holding that any statute having the effect of directly and immediately advancing religion was unconstitutional, the Court found a New York statute calling for direct grants to nonpublic sectarian schools to be violative of the first amendment. *Id.*; *see* N.Y. EDUC. LAW. ANN. §§ 12:549–53, 559–63 (McKinney Cum. Supp. 1972–1973).

Therefore, Justice Clifford pointed out that the error in the majority's analysis was that it directed its inquiry from the perspective of the taxpayers who financed the building and maintenance of the schools. 77 N.J. at 130 n.5, 389 A.2d at 965 (Clifford, J., dissenting). Rather, he argued, the primary effect test must be reviewed "from the perspective of the *beneficiaries* of the program." *Id.* (Clifford, J., dissenting) (emphasis in original). If their position was advanced, the program violated the prohibitions of the establishment clause. *Id.* (Clifford, J., dissenting).

[120] 77 N.J. at 130, 132–33, 389 A.2d at 965, 966 (Clifford, J., dissenting). By the Board not assessing a fair rental rate upon the religious groups, Justice Clifford contended that the majority mistakenly permitted a significant economic benefit to be conferred upon the groups. *Id.* at 130, 389 A.2d at 965 (Clifford, J., dissenting); *see* notes 112–16 *supra* and accompanying text.

[121] 77 N.J. at 130–31, 389 A.2d at 965 (Clifford, J., dissenting). Justice Clifford reasoned that the program invalidly "afford[ed] the religious bodies an otherwise unavailable public forum for expounding their tenets." *Id.* at 131, 389 A.2d at 965 (Clifford, J., dissenting).

[122] *Id.* (Clifford, J., dissenting). By allowing such elongated rentals by the various religious groups, the program undeniably has the effect of "placing the imprimatur of government upon religion in general." *Id.* (Clifford, J., dissenting). For Justice Clifford, the rental agreements involved in the present case had trespassed into the area that "'implicate[d] the Board in the promotion of religion.'" *Id.* (Clifford, J., dissenting).

[123] *Id.* at 133, 389 A.2d at 966 (Clifford, J., dissenting).

tween the religious groups and the schools, Justice Clifford determined that an impermissible administrative entanglement was present.[124] He also stated that the discretionary power of the principal in authorizing the rental applications and the outside pressure which was likely to be directed towards that position created a great potential for political fragmentation within the community.[125] Finally, Justice Clifford contended that *Southside Estates* was not applicable to the facts at hand.[126] *Southside Estates,* as he interpreted the decision, had mandated only that the use of the schools by the religious groups be temporary in order to be constitutionally permissible.[127] According to Justice Clifford, the length of the various uses of the East Brunswick school buildings could be categorized as anything but temporary.[128]

It is questionable whether the *Resnick* court has treaded upon forbidden first amendment ground, as the dissent apparently be-

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[124] *Id.* (Clifford, J., dissenting). Adding strength to the argument that the relationship between the schools and religious institutions involved an entanglement was the need to store religious artifacts on the school premises. *Id.* (Clifford, J., dissenting). Justice Clifford reasoned that such storage mandated the Board's supervision over the safety and display of the artifacts. *Id.* (Clifford, J., dissenting).

[125] *Id.* at 133–34, 389 A.2d at 966–67 (Clifford, J., dissenting). The variables which amount to an entanglement due to political divisiveness were: the pressures attendant upon a principal in the application granting process when two groups request the same times, *id.* at 133–34, 389 A.2d at 966 (Clifford, J., dissenting); the possible pressure exerted by religious groups who annually apply for a lease to the same principal, *id.* at 133–34, 389 A.2d at 966–67 (Clifford, J., dissenting); and the potential divisive reaction by the taxpayers to any use of the school facilities by the religious bodies. *Id.* at 134, 389 A.2d at 967 (Clifford, J., dissenting).

[126] *Id.* at 135, 389 A.2d at 967 (Clifford, J., dissenting). The majority had relied very heavily upon *Southside Estates* in concluding that the Board's rental program was constitutional. *Id.* at 117–18, 389 A.2d at 958–59; Southside Estates Baptist Church v. Board of Trustees, 115 So.2d at 699–701; *see* notes 123–24 *supra* and accompanying text.

[127] 77 N.J. at 135, 389 A.2d at 967 (Clifford, J., dissenting). In *Southside Estates,* the Florida supreme court stated that any use of the school buildings by religious groups had to be temporary and coexistent with an immediate intent on the part of the religious bodies to secure their own worship buildings. *Id.* (Clifford, J., dissenting); Southside Estates Baptist Church v. Board of Trustees, 115 So.2d at 700.

[128] 77 N.J. at 135, 389 A.2d at 967 (Clifford, J., dissenting). The pace taken by the religious organizations was found by Justice Clifford to be "a leisurely pace, at best." *Id.* (Clifford, J., dissenting). Finally, he stated the precedential value of *Southside Estates* was nil because the case was decided well before the formulation of the "currently applicable three-part establishment clause test." *Id.* (Clifford, J., dissenting).

Judge Conford of the appellate division, who was temporarily assigned to the supreme court, joined in the opinion of Justice Clifford, but stated that in his interpretation of the establishment clause prohibitions, any sectarian use of public buildings violated the concept of separation of church and state found in both the federal and state constitutions. *Id.* at 136–37, 389 A.2d at 968 (Conford, J., dissenting).

lieves,[129] or has logically extended the concept of benevolent neutrality. In upholding the validity of the Board's program, the majority reasoned that any aid which the religious groups derived from using the school facilities was an incidental benefit from the program.[130] Because the religious bodies were within the general class of organizations eligible to rent the buildings, the benefits to these religious groups were viewed as secondary to the primary effect of benefiting the community.[131]

However, as pointed out by Justice Clifford, the majority seemed to improperly limit its focus to "*the* primary effect" of the rental program.[132] As set out by the United States Supreme Court, any primary effect of the program which advances religion is violative of the establishment clause.[133] Therefore, the proper question is what constitutes *a* primary effect.[134] For Justice Clifford, an effect is a primary effect if it directly and immediately advances religion.[135]

While Justice Clifford was more literal in his definition of the primary effect test, the majority's analysis, in application, appears to be more in line with the Supreme Court decisions.[136] Benefits con-

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[129] *Id.* at 121, 389 A.2d at 960 (Clifford, J., dissenting). Justice Clifford renounced the result reached by the majority as being "another fissure in the wall of separation between church and state." *Id.* (Clifford, J., dissenting).

[130] *Id.* at 111, 389 A.2d at 955; *see* notes 100–01 *supra* and accompanying text.

[131] 77 N.J. at 111, 114, 389 A.2d at 955, 957; *see* notes 100–02 *supra* and accompanying text.

[132] 77 N.J. at 131, 389 A.2d at 965 (Clifford, J., dissenting) (emphasis in original). It was pointed out that such an ultimate finding was unnecessary because if any aspect of the rental program had a direct and immediate effect of advancing religion, the program would be violative of the establishment clause. *Id.* at 131–32, 389 A.2d at 965–66 (Clifford, J., dissenting).

[133] *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783–85 n.39 (1973).

[134] The crux of the primary effect test lies in the differentiation between those aspects of the program which primarily advance religion and those aspects which incidentally afford religion various benefits. Government aid falling within the former classification is invalid under the establishment clause test while aid of the latter type has traditionally been upheld. *Compare* Tilton v. Richardson, 403 U.S. 672, 677–89 (1971) and Walz v. Tax Comm'n, 397 U.S. 664, 674–80 (1970) and Board of Educ. v. Allen, 392 U.S. 236, 244–49 (1968) and Zorach v. Clauson, 343 U.S. 306, 313–15 (1952) and Everson v. Board of Educ., 330 U.S. 1, 15–18 (1947) *with* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789–99 (1973) and Lemon v. Kurtzman, 403 U.S. 602, 615–25 (1971) and School Dist. v. Schempp, 374 U.S. 203, 216–27 (1963) and Engel v. Vitale, 370 U.S. 421, 429–36 (1962).

[135] 77 N.J. at 132, 389 A.2d at 966. Following the *Nyquist* approach, Justice Clifford found the program ran afoul of the first amendment notwithstanding the fact that its primary purpose was legitimate. *Id.* (Clifford, J., dissenting); *see* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783–85 n.39.

[136] The Supreme Court, while operating under the standard advocated by Justice Clifford, has held general welfare program benefits to be sustainable on the basis that the advantages received by the religious organizations were not direct enough to find the program primarily advanced religion. *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 688–89 (1971) (higher education construction grant program held constitutional as it applied to religiously oriented colleges

ferred upon religious bodies through the application of general welfare legislation have been held by the Court to be incidental and indirect.[137] The amount of aid to the religious institutions apparently has not been determinative of a first amendment violation as long as that aid has been indirectly conferred upon the religious bodies.[138] Therefore, the advantage gained by the religious groups in *Everson*,[139] *Zorach*,[140] *Allen*,[141] and *Tilton*,[142] while being substantial, was upheld because in each case it was viewed as an indirect and incidental derivative of the general welfare legislation involved.[143] Conversely, the statutory programs in *McCollum*,[144] *Schempp*,[145] and *Lemon*[146] were struck down because the government had proposed to aid religion in too direct a manner to be valid under the establishment clause.[147]

The benefit gained by the religious groups in *Resnick* seems to be sustainable under this primary effect test. The East Brunswick rental program was designed to make available to all charitable groups in the community the use of public school property in order to make use of dormant facilities.[148] Being of this general class, the religious groups could rightfully rent the school facilities.[149] Any ben-

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and universities); Walz v. Tax Comm'n, 397 U.S. 664, 672–74 (1970) (tax exemption for charitable organizations valid as extended to religious institutions). Therefore, the *Resnick* majority's differentiation of what is *the* primary effect versus *any* primary effect was probably unnecessary.

[137] *See, e.g.*, Tilton v. Richardson, 403 U.S. 672, 688–89 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 672–74 (1970); Board of Educ. v. Allen, 392 U.S. 236, 248–49 (1968); Everson v. Board of Educ., 330 U.S. 1, 15–18 (1947).

[138] *See* Tilton v. Richardson, 403 U.S. 672, 688–89 (1971) (where Court's validation of construction loan program potentially allowed millions of dollars to be granted to religiously based schools for building of new facilities); Walz v. Tax Comm'n, 397 U.S. 664, 672–74 (1970) (disregarding that potential financial gain by religious groups via tax exemption could be quite substantial, Court ruled that such exemptions were valid under first amendment).

[139] 330 U.S. 1 (1948).

[140] 343 U.S. 306 (1952).

[141] 392 U.S. 236 (1968).

[142] 403 U.S. 672 (1971).

[143] *See* notes 30–76 *supra* and accompanying text.

[144] 333 U.S. 203 (1948).

[145] 374 U.S. 203 (1963).

[146] 403 U.S. 602 (1971).

[147] *See* notes 42–76 *supra* and accompanying text.

[148] 77 N.J. at 93, 389 A.2d at 946 (quoting East Brunswick Board of Education, Rules and Regulations § III(C)(1)); *see* note 1 *supra* and accompanying text.

[149] 77 N.J. at 120–21, 389 A.2d at 960. It has been argued that to deny religious organizations the receipt of the benefits they are rightfully entitled to as members of society would be government hostility towards religion and the fostering of irreligion above religion. *See* Giannella, *supra* note 31, 81 HARV. L. REV. at 516–28; Current Decisions, *supra* note 71, at 680–81.

efits derived therefrom by the religious bodies are clearly indirect and incidental to the rental program.[150]

The majority also decided that, contrary to the dissenting view, there was no substantial possibility of an administrative entanglement occurring.[151] The "ministerial" act of granting the applications and the limited contact between the schools and the religious institutions were viewed as being insufficient to warrant a ruling of constitutional invalidity.[152] Again, the *Resnick* court's analysis is seemingly in line with the establishment clause test. The Supreme Court has never required total separation of church and state.[153] In fact, with respect to public welfare programs, absolute separation between the two is virtually impossible.[154] Accordingly, the storage of religious artifacts, *sans* any encroachment upon needed school space,[155] seems to be the mere accommodation of the religious groups that the majority found it to be.[156]

However, the dissenters felt that there was a grave potential for political divisiveness in East Brunswick as a result of the rental program.[157] Initially, there would be political pressures applied to the principals by the various religious bodies in order to gain a prefer-

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[150] 77 N.J. at 111, 389 A.2d at 955; *see* notes 97-101 *supra* and accompanying text.

[151] 77 N.J. at 118, 389 A.2d at 959. The majority saw "[n]o significant administrative function . . . involved" in the program which would support an argument of administrative entanglement. *Id.* at 116, 389 A.2d at 958.

[152] *Id.* at 116, 118-19, 389 A.2d at 958.

[153] *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973); Lemon v. Kurtzman, 403 U.S. 602, 614 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 670, 676 (1970).

[154] Given the scope of governmental regulation and programming, it seems highly improbable that the church and state can escape any contact between each other. Walz v. Tax Comm'n, 397 U.S. at 676. General welfare legislation by definition must involve some minimal contact between the two, for the state administers the program. To deny any relationship between the two would refuse all religious organizations the receipt of any benefits from social welfare programs. This would amount to nothing less than discrimination against religion and the fostering of secularism over sectarianism. For a discussion concerning the concept of inclusion of religious bodies in the receipt of general government benefits, see Giannella, *supra* note 31, 81 HARV. L. REV. at 515-28.

[155] 77 N.J. at 117, 389 A.2d at 958. The majority remarked that such a showing would be an impermissible interference with public school education. *Id.* Using needed storage space might be seen as the school board actively choosing to advance religion over public education, which may be in violation of the first amendment.

[156] *Id.* at 117, 389 A.2d at 958. The majority, in so categorizing the storage arrangement, found "[i]t certainly [was] not the type of extensive entanglement which was condemned by the Supreme Court . . . ." *Id.*

[157] *Id.* at 133, 389 A.2d at 966-67 (Clifford, J., dissenting); *see* note 125 *supra* and accompanying text.

ence in the granting process.[158] Additionally, the dissenting members of the court felt that this program would cause widespread community fragmentation concerning the use of the public school facilities by the various groups.[159] Both possibilities seem highly unlikely. Due to the first-come, first-serve pro forma nature of the application procedure,[160] it hardly seems profitable for religious institutions to exert their energies toward a school official who has little control over the time available to rent a building. Also, the probability that the community will politically fragmentize is very slight. In fact, considering the historical precedent of allowing religious groups to use public buildings when without their own religious houses,[161] there appears to be a far greater threat of divisiveness within the community should such a program be eliminated.

The majority cautioned, however, that an extended use of the school buildings by religious groups would be a violation of the establishment clause.[162] However, it refused to articulate any standard which would define a temporary use of the facilities.[163] Instead, the court left that question open-ended to give the trial courts a free hand in evaluating the standard of a temporary use within the context of a given factual situation.[164] The court did infer that a rental arrangement which was entering into its sixth year was "approaching the outer bounds" of the meaning of temporary.[165]

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[158] 77 N.J. at 133–34, 389 A.2d at 966–67 (Clifford, J., dissenting). The strength of this argument was diluted as Justice Clifford himself questioned whether this situation could be divisiveness at a level which would result in the invalidation of the program. *Id.* at 134, 389 A.2d at 967 (Clifford, J., dissenting).

[159] *Id.* (Clifford, J., dissenting). Again, Justice Clifford recognized that community dissent alone would not make the rental policy violative of the establishment clause. *Id.* (Clifford, J., dissenting). However, he urged that the court cannot ignore any aspect of political divisiveness when reviewing the program. *Id.* (Clifford, J., dissenting).

[160] *Id.* at 116–17, 389 A.2d at 958.

[161] *Id.* at 101, 389 A.2d at 950. *See also* W. CLAYTON, *supra* note 22, at 771–74. That such historical precedent should be seriously considered was evidenced by the *Walz* Court's quotation of Justice Holmes in Jackson v. Rosenbaum Co., 260 U.S. 22 (1922), " '[i]f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it.'" Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970) (quoting Jackson v. Rosenbaum Co., 260 U.S. 22, 31 (1922)).

[162] 77 N.J. at 117, 389 A.2d at 958. The court reasoned that at some point the imprimatur of the school board would be placed upon those religions of excessively long rental periods. *Id.*

[163] *Id.* at 117–18, 389 A.2d at 958–59. Perhaps the court's reluctance to set a standard stemmed from an awareness that the equities of each rental situation would be different and therefore any attempt to manufacture a working guideline would be an exercise in futility.

[164] *Id.* In defining the test, the majority was in general agreement with the Florida supreme court in *Southside Estates* that the standard should be two-fold: first, the use must be temporary; and second, there must be a demonstrated intent by the religious group to acquire its own building. *Id.*; *see* Southside Estates Baptist Church v. Board of Trustees, 115 So. 2d at 700–01.

[165] 77 N.J. at 118, 389 A.2d at 959.

The court has attempted to set up a flexible standard which will vary with the facts of each case.[166] However, its inferential time standard may cause some problems when a good-faith religious group, for one reason or another, cannot erect or purchase a building in that time. Should a religious body be disallowed from using the building because it has rented school facilities for a period greater than five or six years? Perhaps this length of time standard should be used, but only in conjunction with an intent standard. If a religious group has taken good-faith steps which evidence an actual intent to acquire a house of worship, then the time element in a permissible rental stay should be greater than the time allowed to a group showing no such intent. As a general guide, the time standard could be set at the reasonable length of time it would take a religious congregation to build a suitable place of worship. Again, this requirement would have to be flexible, bending perhaps to any key facts in a particular rental situation. While it is somewhat questionable whether or not the majority in *Resnick* intended such flexibility,[167] the standard adopted by the court is broad enough to allow a trial judge to engage in such an analysis.

The majority in *Resnick* has taken prior establishment clause case law analysis and extended slightly the scope of permissible church-state relationships. The court's opinion re-emphasizes the idea that religious organizations, as members of society, may partake of the various benefits afforded by general welfare legislation notwithstanding their religious nature.[168] Due to the pervasive nature of state regulations and programs, it would be virtually impossible to exclude religious organizations from those groups eligible to receive state benefits.[169] If a state were to deny these religious groups such inci-

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[166] *Id.* at 117–18, 389 A.2d at 958–59.

[167] This uncertainty is caused by the majority's outer bounds standard of somewhere in the five year range, and its discounting of Justice Clifford's argument that the indefiniteness of the rental program leases was constitutionally invalid. *Id.* at 117–18 & n.8, 389 A.2d at 958–59. Possibly the court meant that while requiring the leases to be for a fixed term is highly impractical since the religious groups were without buildings, at the same time it would be impermissible to allow the religious groups to lease the school facilities for an unreasonable period of time. *Id.*

[168] For other opinions concerning the allowance of religious groups the benefactions of such legislation, see Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970). *See also* Giannella, *supra* note 31, 81 HARV. L. REV. at 515–28; Current Decisions, *supra* note 71, at 679–81.

[169] Total separation has never been interpreted as being the goal of the establishment clause. *E.g.*, Zorach v. Clauson, 343 U.S. 306, 312 (1952). So long as the legislation does not provide sponsorship or financial support or require active involvement of the sovereign in any religious activity, the governmental program may be sustainable under the establishment clause. Tilton v. Richardson, 403 U.S. 672, 677 (1971).

dental benefits, it would be acting in a hostile manner toward religion,[170] which is as prohibited under the first amendment as is a state effectuating the advancement of religion.[171]

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[170] For a general discussion on the right of religious institutions to receive general welfare benefits, see Giannella, *supra* note 31, 81 HARV. L. REV. at 515–28; Note, *Establishment of Religion by State Aid*, 3 RUTGERS L. REV. 115, 117–21 (1949).

[171] Numerous cases have held that government may not hinder nor advance religious groups. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760–61, 794 (1973); School Dist. v. Schempp, 374 U.S. 203, 218 (1963); Zorach v. Clauson, 343 U.S. 306, 312, 315 (1952); Everson v. Board of Educ., 330 U.S. 1, 15 (1948).