

# SEPARATISM IN THE AGE OF PUBLIC SCHOOL CHOICE: A CONSTITUTIONAL ANALYSIS

## INTRODUCTION

When the doors of the Khalil Gibran International Academy (KGIA) in Brooklyn, New York, and the Ben Gamla Charter School (Ben Gamla) in Hollywood, Florida, opened for the first time in the fall of 2007, the new school year was enveloped in a shadow of controversy.<sup>1</sup> KGIA had already gone through one principal after a political firestorm erupted weeks before any student would ever set foot inside its walls,<sup>2</sup> and the public had long been demanding that plans for both of the schools' openings be discarded, or, at the very least, postponed.<sup>3</sup>

KGIA and Ben Gamla are publicly funded schools that focus on teaching Arabic and Hebrew, respectively, and their corresponding cultures.<sup>4</sup> These schools are part of a growing movement across America to open primary and

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<sup>1</sup> See, e.g., Noah Feldman, *Universal Faith*, N.Y. TIMES, Aug. 26, 2007 (Magazine), at 13 (describing the controversial openings of KGIA and Ben Gamla and education officials' "effort to accommodate a religious community"); Sarah Garland, *New Brooklyn School to Offer Middle East Studies*, N.Y. SUN, Mar. 7, 2007, <http://www.nysun.com/new-york/new-brooklyn-school-to-offer-middle-east-studies/49971/>.

<sup>2</sup> Former KGIA principal, Dhabah "Debbie" Almontaser, faced insurmountable trouble in early August 2007. When asked to comment on an emerging controversy regarding the T-shirt slogan, "Intifada NYC"—a slogan that has been interpreted to call for an uprising like that in Palestine—Almontaser "downplayed the significance of the T-shirts," stating that the word "basically means 'shaking off.'" Chuck Bennett & Jana Winter, *City Principal Is 'Revolting,'* N.Y. POST, Aug. 6, 2007, at 7. She further stated, "I think it's pretty much an opportunity for girls to express that they are part of New York City society . . . and shaking off oppression." *Id.*; see Daniel Pipes, *On New York's "Khalil Gibran International Academy"* (Mar. 7, 2007), <http://www.danielpipes.org/blog/731>.

<sup>3</sup> See Feldman, *supra* note 1, at 13 ("The uproar over Khalil Gibran has reached a fever pitch, and the founding principal has already resigned."). Among many others, Frank Gaffney, the Founder and President of the Center for Security Policy and former Assistant Secretary of Defense for International Security Policy under President Reagan, implored the Chancellor of New York City schools to postpone the opening of the school. Letter from Frank Gaffney, Founder & President, Ctr. for Sec. Policy, to Joel Klein, Chancellor, N.Y. City Sch. (Aug. 6, 2007) (on file with author). Gaffney noted his own work to put Middle Eastern languages in the public school curriculum, and suggested that "deferring the opening of the KGIA would afford time for such an alternative to be considered, or other steps taken to minimize the risks associated with the present approach." *Id.*

<sup>4</sup> See Abby Goodnough, *Hebrew Charter School Spurs Florida Church-State Dispute*, N.Y. TIMES, Aug. 24, 2007, at A1 ("[T]he Ben Gamla Charter School . . . is run by an Orthodox Rabbi, serves Kosher lunches and concentrates on teaching Hebrew.").

secondary public schools that center on a particular language and culture through initiatives of the state or state-granted and state-funded charters.<sup>5</sup> These mechanisms, however, enable each of those schools to stay at arm's length from the state by granting private individuals and groups greater responsibility over what happens within its doors, and offering very little government oversight.<sup>6</sup>

Although many dual-language and ethnocentric schools are opened every year, the teaching of Arabic and Hebrew spark considerably more controversy than other similar schools because of the specific languages and cultures being emphasized.<sup>7</sup> Opponents of these two schools argue that it is impossible to teach Arabic or Hebrew without also teaching the doctrines of Islam or Judaism—something that is strictly forbidden in a state-funded school.<sup>8</sup> They fear that the schools will be “organized around the distinctive cultures (and thus religions) associated with those languages.”<sup>9</sup> Thus, the lack of state oversight and the ability for private individuals and organizations to control the curriculum, faculty, budgeting, texts, and other decisions make schools like Ben Gamla and KGIA even more vulnerable to criticism.<sup>10</sup>

While both KGIA's and Ben Gamla's curricula purposely leave out any mention of teaching Islam or Judaism, many fear that the schools are actually accommodating and supporting a specific religious community, thus crossing the line between church and state drawn by the Establishment Clause of the First Amendment to the U.S. Constitution.<sup>11</sup> This argument stems from the

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<sup>5</sup> See Wendy Parker, *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563, 602 (2001) (describing several other linguistically and culturally centered charter schools, such as Lansing, Michigan's African-American charter school; Southfield, Michigan's Armenian charter school; Saginaw, Michigan's Hispanic charter school; and Morton, Minnesota's American Indian charter school).

<sup>6</sup> See *infra* Part I.

<sup>7</sup> See Feldman, *supra* note 1, at 13 (describing the difficulty that educators would face in teaching Arab civilization without Islam and Jewish culture without the underpinnings of Jewish religious faith).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; see also Akilah Johnson, *Critics Say School Is Religious*, S. FLA. SUN-SENTINEL, June 17, 2007, at B1 (quoting a taxpaying parent's concern that he will have to “finance someone else's child attending a parochial school”). This Comment generally uses the word “Jewish” as a parallel to “Arabic” to describe an ethnicity and a culture, rather than just a religion. This application is used only to the extent that officials and supporters of Ben Gamla themselves use the term to describe their school and its curriculum. See, e.g., Alexa Bryn, *Fla. Charter School Fuels Church-State Debate*, FORWARD, Aug. 10, 2007, at A7 (describing which Jewish practices will and will not be observed).

<sup>10</sup> See Goodnough, *supra* note 4 (stating that a charter school like Ben Gamla is “more problematic” because it “receives public money but is exempt from certain rules”).

<sup>11</sup> See *id.* (stating that opponents of Ben Gamla believe that this kind of school offends “paramount legal and political boundaries”).

proposition that it is impossible to separate the cultures from their religious counterparts. As one concerned individual remarked: “What, after all, is the point of a Jewish cultural school if not to bring the students to appreciation and acceptance of Jewish values? And what are those values if not the outgrowth of Judaism’s millenniums of religious faith and practice?”<sup>12</sup>

A closer look reveals why the controversy has risen to the point of real public and legal concern.<sup>13</sup> The former and current KGIA principals handpicked the school’s advisory board and worked to create the curriculum, choose teachers, and select community sponsors and affiliates to work with the students.<sup>14</sup> This has proven incredibly troubling.<sup>15</sup> The advisory board consists only of clergy members, none of whom have any secular expertise or training in education,<sup>16</sup> and all three Muslim Imams on the board support radical Islamist views.<sup>17</sup> Further, the Arabic curriculum and textbooks that are used have largely remained a mystery to the public, but are said to be supplied by the Council on Islamic Education—which some claim has strong ties to the Saudi government<sup>18</sup>—and at the recommendation of the advisory board.<sup>19</sup>

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<sup>12</sup> Feldman, *supra* note 1, at 14–15.

<sup>13</sup> For example, the outrage over KGIA’s opening has recently spawned the formation of groups like the Stop the Madrassa Coalition and has led to threats of litigation by The Law Offices of David Yerushalmi against the New York Department of Education. See Letter from David Yerushalmi, Att’y, to Eliot Spitzer, Governor, et al. (July 23, 2007), [http://stopthemadrassa.files.wordpress.com/2007/07/letter\\_foil-req-to-gov-spitzer-mayor-bloomberg-et-al-re-kgia-fin.pdf](http://stopthemadrassa.files.wordpress.com/2007/07/letter_foil-req-to-gov-spitzer-mayor-bloomberg-et-al-re-kgia-fin.pdf) [hereinafter Letter from Yerushalmi] (referring to the “intense opposition by concerned parents,” and charging that “city and state officials . . . are purposefully evading their legal obligations”).

<sup>14</sup> See Letter from Frank Gaffney, Founder & President, Ctr. for Sec. Policy, to Joel Klein, Chancellor, N.Y. City Sch. (Aug. 10, 2007) [hereinafter Second Letter from Gaffney] (on file with author) (urging Chancellor Klein, for a second time, to postpone the opening of KGIA). These decisions came before Almontaser was forced to step down after her true Islamic extremist ties and views were uncovered. Pipes, *supra* note 2.

<sup>15</sup> See Second Letter from Gaffney, *supra* note 14 (urging the Chancellor to cancel plans to open the school because “everything [the ex-Principal] touched . . . must be viewed . . . with suspicion”).

<sup>16</sup> See Stop the Madrassa: A Community Coalition, Shut Down the Advisory Board. Shut Down the KGIA. Give These Kids a Quality Education (Aug. 30, 2007), <http://stopthemadrassa.wordpress.com/2007/08/30/shut-down-the-advisory-board-shut-down-the-kgia-give-these-kids-a-quality-education/> (stating, for instance, that Imam Shamsi Ali’s job is Director of the Jamaica Muslim Center of Queens); see also Letter from Yerushalmi, *supra* note 13 (demanding answers about KGIA, and specifically questioning an all-religious advisory board lacking educational experience).

<sup>17</sup> See Stop the Madrassa: A Community Coalition, *supra* note 16 (detailing the affiliation of each Imam to the Mosque of the Islamic Brotherhood, Koranic Madrassas, and other extremist organizations that encourage separatist views).

<sup>18</sup> See Editorial, *Stop the Brooklyn Madrassa*, INVESTOR’S BUS. DAILY, Aug. 24, 2007, <http://www.ibdeditorials.com/IBDArticles.aspx?id=272847462482117> (noting that the chief consultant to the council is on the Saudi payroll).

Finally, and perhaps most troubling, the Arabic language courses are being taught by noncertified individuals from the Arab-American Family Support Center (AAFSC), a social service agency based in Brooklyn.<sup>20</sup>

Ben Gamla also had a difficult time establishing a curriculum, and was unable to teach Hebrew for the first month of school because of religious conflicts over the textbooks and lessons.<sup>21</sup> Like KGIA, Ben Gamla had to replace its first principal, a rabbi, to appease critics who thought that a rabbi overseeing a public school was inappropriate.<sup>22</sup> Although it is impossible to find out how many of its students are Jewish, the fact that the school will only serve kosher meals, with no accommodations for other religions' dietary practices,<sup>23</sup> is a good sign that Jews make up a vast majority of the student population.

Thus, the new school year brought with it a new twist on an old problem: the place of religion in the American public school system. In the past six decades, the Supreme Court has tackled concrete questions<sup>24</sup> such as the constitutionality of the Ten Commandments posted in public school

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<sup>19</sup> See Letter from Garth Harries, Chief Executive, Office of New Sch., to Irene Alter, at 2 (May 7, 2007), available at <http://www.danielpipes.org/blog/2007/03/on-new-yorks-khalil-gibran-international.html> (“The Arabic curriculum will be developed by the school’s multi-cultural staff and will be taught by staff from the Arab-American Family Support Center (AAFSC), with a New York State certified teacher in the classroom.”). Concerned citizens, myself, and a law firm determined to begin litigation have made multiple Freedom of Information Law (FOIL) requests to the Department of Education, Chancellor Klein, and Mayor Bloomberg asking for substantive information about the curriculum and textbooks used at KGIA. These requests have fallen on deaf ears. See, e.g., Letter from Yerushalmi, *supra* note 13 (stating that “written letters to various officials . . . have received no substantive response”).

<sup>20</sup> N.Y. CITY DEP’T OF EDUC., NEW SCHOOL EXECUTIVE SUMMARY 2007, NEW CENTURY HIGH SCHOOL GRANT APPLICANT, KHALIL GIBRAN INTERNATIONAL ACADEMY 5 n.1 (2007), available at <http://www.pipelinenews.org/images/KGIAexecsummary.pdf> [hereinafter KGIA EXECUTIVE SUMMARY]. To try to quell the fear that noncertified social service workers, without a specified curriculum to follow and with their own agendas, will deviate from the school’s promise to leave religion and any other social indoctrination out of its teaching, the Mayor has promised that they will be supervised by certified teachers. But, as one critic has correctly pointed out, “it is unclear how that can be done if the latter do not speak Arabic.” Letter from Yerushalmi, *supra* note 13.

<sup>21</sup> See Goodnough, *supra* note 4, at A1 (stating that during the first week of school, “the Broward County School Board ordered Ben Gamla to suspend Hebrew lessons because its curriculum—the third proposed by the school—referred to a Web site that mentioned religion”).

<sup>22</sup> *Id.* at A17 (stating that the initial principal “hired someone else after people said it was inappropriate for a rabbi to oversee instruction”).

<sup>23</sup> See Bryn, *supra* note 9 (describing which Jewish practices will and will not be observed).

<sup>24</sup> This is not to suggest that the decisions were easily or unanimously reached, or even that the decisions are consistent. Rather, what this Comment means by “concrete” is that the parameters of the subject matter in question could be easily articulated and identified, as opposed to being abstract and unquantifiable.

classrooms,<sup>25</sup> and the teaching of Creationism,<sup>26</sup> but never before has it addressed the possibility that a sectarian school could be dressed in secular clothing, with proponents using charter schools and other independent initiatives as a backdoor approach to obtain public funding for sectarian purposes.

Opponents of such schools ground their argument in the Establishment Clause of the First Amendment: “Congress shall make no law respecting an establishment of religion.”<sup>27</sup> This clause deals largely with society’s conception of religion and governmental action.<sup>28</sup> After decades of uncertainty in Establishment Clause litigation, the Supreme Court in 1971 announced a three-pronged test designed to guard Americans from the imposition of government-established religion, in *Lemon v. Kurtzman*.<sup>29</sup> The test requires that a statute have a secular purpose, that its primary effect neither advances nor inhibits religion, and that it does not foster an excessive entanglement between government and religion.<sup>30</sup> A review of the last four decades reveals that the *Lemon* test has been unable to produce clear, systematic, and predictable decisions.<sup>31</sup> The results have varied so much, in fact, that the very fate of the *Lemon* test remains in question, with each Justice formulating his or her own test to replace it.<sup>32</sup> Despite this, the Court has never garnered a consensus behind a new test, thereby leaving *Lemon* the default test for Establishment Clause cases, and the one used by a majority of the Court as

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<sup>25</sup> See, e.g., *Stone v. Graham*, 449 U.S. 39 (1980) (striking down a Kentucky state law that required the Ten Commandments to be posted in every public school classroom because it had no secular legislative purpose and was plainly religious in nature).

<sup>26</sup> See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down Louisiana’s Creationism Act, which mandated the teaching of Creation-Science with Evolution-Science in public schools, arguing that its purpose was to advance religion).

<sup>27</sup> U.S. CONST. amend. I.

<sup>28</sup> The Establishment Clause was incorporated to apply to the states under the Fourteenth Amendment in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). See Denise Cote, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175 (1974) (stating that the Establishment Clause was “adopted to avoid the European and colonial experience of social discord generated by governmental involvement with religion”).

<sup>29</sup> 403 U.S. 602, 612–13 (1971).

<sup>30</sup> *Id.*

<sup>31</sup> See Edward L. Heinrich, *Wallace v. Jaffree: The Lemon Test Sweetened*, 22 HOUS. L. REV. 1273, 1274 (1985) (“[T]he Supreme Court has struggled to develop workable standards for deciding cases arising under the Establishment Clause.”); see also JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 196 (2d ed. 2005) [hereinafter WITTE, EXPERIMENT] (noting “[t]he increasingly wide disparities of logic and results in the Court’s cases in the later 1970s and 1980s”).

<sup>32</sup> See WITTE, EXPERIMENT, *supra* note 31, at 185 (“[I]ndividual justices have slowly imported into their own analysis new principles of religious equality and liberty of conscience, which the Court is now struggling mightily to integrate.”).

recently as *McCreary County v. American Civil Liberties Union of Kentucky*.<sup>33</sup> Thus, any challenge to the constitutionality of schools like KGIA and Ben Gamla today must satisfy each prong of the *Lemon* test.<sup>34</sup>

The process of applying *Lemon* can be daunting when the government attempts to avoid liability by masking an unconstitutional purpose with a secular, constitutional one. Ethnocentric schools like KGIA and Ben Gamla do just that; by pitching their schools as linguistic and cultural centers, these publicly funded schools attempt to mask their unconstitutional purposes and effects. This Comment uses KGIA and Ben Gamla as guiding examples to explore why the *Lemon* test is equipped to handle such modern, sophisticated trends in public education and Establishment Clause litigation. It argues that when analyzed against each prong of the *Lemon* test as it stands today, schools like KGIA and Ben Gamla should be found unconstitutional.

However, this Comment also argues that such a conclusion is not guaranteed. Since the inception of the *Lemon* test, the Court has been widely inconsistent in applying the test, making results unpredictable.<sup>35</sup> Over the last twenty years, the Court's shifting construction of the excessive entanglement prong has caused uncertainty in its application.<sup>36</sup> Thus, to maintain legitimacy in the Establishment Clause doctrine, the Supreme Court should continue along its current path away from the *Lemon* test and toward Justice O'Connor's endorsement test.<sup>37</sup> Such a test would foster reconciliation with the existing case law, yet be flexible enough to adapt to the modern, changing needs of Establishment Clause cases.<sup>38</sup>

Part I briefly explores the nature of charter schools and new school initiatives, to understand the risks involved with publicly funded schools that lack significant government oversight. Part II discusses the purpose of the Establishment Clause and the inconsistent case law up to and including the formulation of the *Lemon* test. It further details some of the significant cases following *Lemon* which posited new interpretations of the three-pronged analysis.

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<sup>33</sup> 545 U.S. 844, 845 (2005) (striking down Kentucky's display of the Ten Commandments in public courthouses, and refusing to abandon the *Lemon* test's purpose prong).

<sup>34</sup> *Id.* at 864.

<sup>35</sup> See generally *infra* Part II.

<sup>36</sup> See *infra* Part II.C.

<sup>37</sup> See *infra* Part IV.

<sup>38</sup> See *infra* Part IV.

Keeping those interpretations in mind, Part III uses KGIA and Ben Gamla as examples to test the viability of those and similar schools under the *Lemon* test, and concludes that such schools would fail each prong, regardless of which formulation is applied. Finally, Part IV suggests that the unpredictability of current Establishment Clause litigation requires that Justice O'Connor's endorsement test be adopted as the best way to reconcile the Court's interpretations of *Lemon*, and to ensure that the test is able to adapt to modern trends, such as these culturally and linguistically centered schools.

Finally, the topic of culturally and linguistically centered schools paid for with public funds is very broad. Ethnocentric schools, in particular, open the door to a number of constitutional issues. While this Comment only addresses the issue of separation of church and state, many issues arise in the fields of equal protection and education. Specifically, in the wake of *Brown v. Board of Education*,<sup>39</sup> states have been called on to provide integrated educations, recognizing the benefits of a school with a diverse group of students.<sup>40</sup> With this push could come challenges that a school district's attempt to attract predominantly one race is unlawful racial discrimination.<sup>41</sup> Additionally, KGIA brings to the forefront national security issues, as many commentators have warned that Arabic schools may become breeding grounds for radical anti-Western beliefs.<sup>42</sup> Thus, there are multiple ways for these kinds of schools to be challenged. However, the remainder of this Comment addresses the issue in the context of an Establishment Clause violation, as it currently appears to be the most viable challenge and the one most likely to make its way to court in the coming years.<sup>43</sup>

## I. PUBLICLY FUNDED: CHARTER SCHOOLS AND NEW SCHOOL INITIATIVES

The last twenty years have seen a dramatic effort to reform our primary and secondary public school systems by providing parents and students more

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<sup>39</sup> 347 U.S. 483 (1954).

<sup>40</sup> See Parker, *supra* note 5, at 586–87 (“[T]he Court [has] noted that desegregative busing ‘at bottom inures primarily to the benefit of the minority, and is designed for that purpose.’” (citation omitted)).

<sup>41</sup> See *id.* at 611 (stating that race-specific charter schools “would probably be deemed unconstitutional race discrimination, most likely as an unlawful racial classification”).

<sup>42</sup> See, e.g., Daniel Pipes, *A Madrasa Grows in Brooklyn*, N.Y. SUN, Apr. 24, 2007, <http://www.nysun.com/foreign/madrassa-grows-in-brooklyn/53060>; William Mayer & Beila Rabinowitz, *Brooklyn's Khalil Gibran Madrassah Will Function as Jihad Recruitment Center*, PIPELINE NEWS, Aug. 7, 2007, <http://www.pipelinenews.org/index.cfm?page=kgiagroup1.htm>.

<sup>43</sup> See *supra* note 13 and accompanying text (describing some individuals' and groups' efforts to close the schools by threatening litigation).

choices.<sup>44</sup> States have been experimenting with the concept of outsourcing control over public schools to private individuals or organizations that create specialized schools targeting particular students—whether by race, ethnicity, or certain interests like music or fine arts—all publicly funded by the taxpayer’s dollars.<sup>45</sup> Charters and new school initiatives pose a particular risk of misusing public funds in violation of the Establishment Clause because they lack oversight sufficient to ensure that religion stays out of the classroom.<sup>46</sup> This Part discusses how both types of schools are developed and funded.

KGIA was opened in partnership with New Visions for Public Schools, a nonprofit group committed to opening small public schools in New York City to “develop innovative programs that help students achieve their fullest potential,”<sup>47</sup> and the AAFSC.<sup>48</sup> These partnerships are part of New York City Mayor Michael Bloomberg’s Children First Campaign, an initiative that empowers public schools, and specifically their principals, to tailor the education they provide to their particular students.<sup>49</sup> The principal is given the power to choose to partner with an external organization that will then join in making administrative and curriculum decisions.<sup>50</sup> By doing so, support and decisions that once came from the state are now coming from private groups.<sup>51</sup> Consequently, while these schools will have public funding like any other public school in the district, the oversight once provided by the state will now be provided by the principal and the external organizations that he or she chooses.<sup>52</sup>

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<sup>44</sup> See Parker, *supra* note 5, at 564 (discussing the theory that giving parents more choice in where they send their child to school will improve the child’s education).

<sup>45</sup> *Id.*

<sup>46</sup> See Goodnough, *supra* note 4, at A1 (stating that there is “caustic debate over whether a public school can teach Hebrew without touching Judaism and the unconstitutional side of the church-state divide”).

<sup>47</sup> New Visions for Public Schools Info, <http://www.schooljobsnow.com/browse.phtml?sid=ny&eid=6672&a=eip> (last visited Jan. 4, 2009).

<sup>48</sup> See KGIA EXECUTIVE SUMMARY, *supra* note 20; at 2; see also KGIA, Overview, <http://schools.nyc.gov/SchoolPortals/13/K592/AboutUs/Overview/default.htm> (last visited Jan. 4, 2009). While the AAFSC claims it is secular in nature, its critics vehemently disagree. See, e.g., KGIA Information Central, KGIA Facts (July 17, 2007), <http://www.pipelinenews.org/index.cfm?page=kgiagroup1.htm> (detailing how the AAFSC supports radical Islam through teaching children the practice of jihad and what forms of violence and rebellion are and are not justified).

<sup>49</sup> See N.Y. City Dep’t of Educ., Children First Today, <http://schools.nyc.gov/AboutUs/ChildrenFirstToday/default.htm> (last visited Sept. 8, 2008) (“[A]ll public schools are empowered, as their principals and their teams gain broader discretion over allocating resources, choosing their staffs, and creating programming for their students.”).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

As a charter school, Ben Gamla also receives public funding, although its relationship with the state is even more tenuous.<sup>53</sup> Charter schools are the most rapidly growing option today in the effort to reform the American public school system by giving students more choices and increasing competition among schools.<sup>54</sup> Charters essentially allow parents to choose either their children's assigned public school, or one of the increasing number of charter schools that offer particularized educations.<sup>55</sup> While charter schools still must follow basic civil rights provisions, they receive public funding and full discretion over budgeting and spending while they remain largely exempt from the rules and policies of the school district.<sup>56</sup>

Charter schools can be formed and developed by any individual or organization,<sup>57</sup> supporting one of the main purposes of the charter to foster "new ideas and competition to improve education for everyone."<sup>58</sup> The most unique aspect of charter schools is that once granted, the school is free to tailor its curriculum and instruction in any way it sees fit, without following the state or district's typical public school requirements, as long as the teaching is secular in nature.<sup>59</sup> Finally, similar to Mayor Bloomberg's Children First Campaign, most states require that admission be granted to charter schools on a first-come, first-served basis, with a strict lottery system for any surplus in applications.<sup>60</sup>

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<sup>53</sup> See Goodnough, *supra* note 4, at A1 (explaining that some critics believe that Ben Gamla is more problematic than KGIA because "[a]s a charter school that receives public money but is exempt from certain rules . . . it is subject to less oversight").

<sup>54</sup> See Parker, *supra* note 5, at 566 (stating that "the charter school movement has flourished"). "The first opened in 1992, and . . . the number of charter schools grew to more than 1600, educating 430,000 students in thirty-one states and the District of Columbia." *Id.* at 566–67.

<sup>55</sup> For a useful overview of each state's charter system, see US Charter Schools, <http://www.uscharterschools.org> (last visited Oct. 9, 2008).

<sup>56</sup> See, e.g., The Center for Education Reform, FAQs, <http://www.edreform.com/index.cfm?fuseAction=document&documentID=60> (last visited Oct. 9, 2008) (stating that charter schools "are freed from the red tape that often diverts a school's energy and resources away from educational excellence"); see also Johnson, *supra* note 9 (noting that Ben Gamla costs the taxpayers in Broward County about \$360,000).

<sup>57</sup> See Parker, *supra* note 5, at 575–76 ("In most states, *anyone* or *any* organization can request a charter." (emphasis added)). If the charter is granted, the grant is contingent on the school fulfilling its obligations in the charter, and failure to do so can lead to revocation. See *id.*; see also FLA. STAT. ANN. § 1002.33 (3)(a) (2007) ("An application for a new charter school may be made by an individual, teachers, parents, a group of individuals, a municipality, or a legal entity organized under the laws of this state.").

<sup>58</sup> Parker, *supra* note 5, at 575; see also FLA. STAT. ANN. §§ 1002.33 (2)(b)(3), (2)(c)(2) (providing guidelines that charter schools shall "[e]ncourage the use of innovative learning methods," and may "[p]rovide rigorous competition within the public school district").

<sup>59</sup> Parker, *supra* note 5, at 576.

<sup>60</sup> *Id.* at 577.

Thus, opponents of KGIA and Ben Gamla worry that the lack of government oversight and the ability of individuals to control the administration and curriculum will create an environment where it is easier to get away with constitutional violations.<sup>61</sup> As the next Part discusses, this fear is worsened by the lack of predictability in the application of the Establishment Clause doctrine.

## II. LEGAL DEVELOPMENT

As with all constitutional provisions, interpretation of the Establishment Clause is almost entirely a product of case law.<sup>62</sup> Like many other areas of law, Establishment Clause doctrine can be viewed as frequently inconsistent.<sup>63</sup> Section A discusses the different interpretations of the Establishment Clause that the Supreme Court would have to piece together if confronted with a challenge to the constitutionality of ethnocentric schools. Section B presents the *Lemon* test and the Court's decision in *Lemon v. Kurtzman* to provide a starting point for analyzing such schools under current law. Section C concludes with an analysis of subsequent case law that casts doubt on the merits of the three-pronged *Lemon* test.

### A. *The Separation of Church and State: A Wall of Separation, or a Doctrine that Requires Neutrality?*

Much of the current debate concerning the application of the *Lemon* test lies in coming to a consensus about the purpose of the separation of church and state and, additionally, the Establishment Clause.<sup>64</sup> Thus, this section gives a brief discussion of the purpose and meaning of the Establishment Clause, explaining why the Court has been inconsistent in its cases, and where the Court's interpretations are heading.

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<sup>61</sup> See Goodnough, *supra* note 4, at A1 (noting that opponents of the school ask how it would not go over to the "unconstitutional side of the church-state divide").

<sup>62</sup> See WITTE, EXPERIMENT, *supra* note 32, at 80 (detailing how Congress went through many different provisions before finally settling on its final draft).

<sup>63</sup> See *infra* note 82 and accompanying text.

<sup>64</sup> See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (detailing how the Supreme Court has repeatedly been unable to form a well-defined majority on Establishment Clause issues); WITTE, EXPERIMENT, *supra* note 32, at 89–102 (detailing how "determining the original understanding of the First Amendment has been the perennial challenge of the American experiment").

As early as 1879, the Court stated that the Establishment Clause was intended to erect “a wall of separation between church and state.”<sup>65</sup> More recently, and more specifically, the Court has agreed that the Establishment Clause was designed to prevent the government from giving a preference to one religion over another.<sup>66</sup> Justice Black’s majority opinion in *Everson v. Board of Education* attempted to better define the Establishment Clause:

Neither [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount . . . can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.<sup>67</sup>

Despite the use of the wall theory for many decades, the Court found it very difficult to apply with any consensus.<sup>68</sup>

Beginning in the 1960s, the Court began to refine a new formulation to guide courts’ application of the Establishment Clause.<sup>69</sup> Justice Clark in *Abington Township School District v. Schempp*<sup>70</sup> established the concept of “wholesome ‘neutrality’” based on the belief that every person had the right to his or her own religious practices, but that the legislature had no power with respect to religious beliefs.<sup>71</sup> Continuing the trend of “neutrality,”<sup>72</sup> the Court

<sup>65</sup> *Reynolds v. United States*, 98 U.S. 145, 164 (1878). The Court in *Reynolds* was referring to Thomas Jefferson’s famous response to the Danbury Baptist Association in which he boldly stated that “religion is a matter which lies solely between man and his God . . . [and the legislature should] make no law respecting an establishment of religion.” THE WRITINGS OF THOMAS JEFFERSON 281–82 (A. Bergh ed., 1905).

<sup>66</sup> See, e.g., *Wallace*, 472 U.S. at 113 (noting that the Clause was intended to prohibit “the Federal Government from asserting a preference for one religious denomination or sect over others”).

<sup>67</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

<sup>68</sup> See *Wallace*, 472 U.S. at 107 (“Whether due to its lack of historical support or its practical unworkability, the *Everson* ‘wall’ has proved all but useless as a guide to sound constitutional adjudication.”). Justice Rehnquist continued to call the wall of separation a mere “metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.” *Id.*

<sup>69</sup> See WITTE, EXPERIMENT, *supra* note 32, at 193 (describing the evolution of the neutrality test); see also Heinrich, *supra* note 31, at 1283 (same).

<sup>70</sup> 374 U.S. 203 (1963) (striking down statutes that required Bible reading or prayer in public schools).

<sup>71</sup> *Id.* at 222. Further, working largely from Justice Black’s opinion in *Everson*, the Court enunciated guiding principles that would later be known as the “purpose” and “effect” prongs of the *Lemon* test, designed to prohibit actions that advance or inhibit religion. See *Everson*, 330 U.S. at 15; *Schempp*, 374 U.S. at 222.

<sup>72</sup> The *Schempp* neutrality test was used in every subsequent decision with just one exception until the test was reformulated in *Lemon v. Kurtzman*. Cote, *supra* note 28, at 1177. The only time the Court did not

in *Walz v. Tax Commission* shed further light on the Establishment Clause, arguing that it was intended to address three main evils: “sponsorship, financial support, and active involvement of the sovereign in religious activity.”<sup>73</sup> However, the Court found the principle of neutrality no easier to apply than that of strict separation.<sup>74</sup>

### B. *The Lemon Test*

Consequently, one year later in *Lemon v. Kurtzman*, the Court attempted to create a more predictable and reliable test by assembling the criteria that had developed through the case law.<sup>75</sup> Writing for the Court, Chief Justice Burger announced the *Lemon* test, which all statutes challenged under the Establishment Clause must pass: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”<sup>76</sup> If a statute violates any one of these three prongs, it must be found unconstitutional under the Establishment Clause.<sup>77</sup>

The Court found that Pennsylvania and Rhode Island laws providing church-related schools with financial support for teachers, textbooks, and other instructional materials were unconstitutional because they failed the excessive entanglement prong, negating the need to address the other two prongs.<sup>78</sup> Recognizing the inherent struggle to produce clear guidelines within the *Lemon* test, the Court noted that “the line of separation, far from being a ‘wall,’ is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”<sup>79</sup>

Finally, the Court expressed several reasons for its finding of excessive entanglement: thirty minutes per day were set aside for religious instruction;

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use the test was in *Epperson v. Arkansas*, 393 U.S. 97 (1968), where the Court struck down a state statute forbidding the teaching of evolution in public schools. *Id.*

<sup>73</sup> *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970). Thus, the Court added another element to the neutrality test that prohibits an excessive entanglement between government and religion. *Id.* at 674.

<sup>74</sup> See Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 811–12 (1984) (highlighting the difficulties in the application of the “neutrality” test); Heinrich, *supra* note 31, at 1283 (noting that “[t]he neutrality concept, like the ‘wall’ theory, has been difficult to apply”).

<sup>75</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612–14 (1971).

<sup>76</sup> *Id.* at 612–13 (citation omitted).

<sup>77</sup> *Stone v. Graham*, 449 U.S. 39, 42–43 (1980).

<sup>78</sup> *Lemon*, 403 U.S. at 613–14.

<sup>79</sup> *Id.* at 614.

there were religious extracurricular activities; two-thirds of the teachers were nuns; the students were of an impressionable age; having the government patrol the content of the textbooks would be dangerous; and there were religious symbols in the classrooms.<sup>80</sup> Perhaps most telling for our purposes in analyzing the KGIA and Ben Gamla schools, the Court noted that regardless of whether there was proof that religious instruction was seeping into secular subjects, the factors suggested the potential hazards of this kind of public aid:

The teacher is . . . subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.<sup>81</sup>

Despite the Court's later attempts to tighten it, the *Lemon* test has left vast room for interpretation.<sup>82</sup> The Justices have not all agreed on the test's interpretation, nor have they had consistent success in its application.<sup>83</sup> Unsurprisingly, because of the split in case law leading to the formation of the *Lemon* test—between the wall theory and the neutrality theory—discrepancies appear to lie in how a particular Justice interprets each case: with an eye for neutrality or an eye for strict separation.

### C. *Subsequent Formulations in Establishment Clause Doctrine*

Twenty-three years after the Court formulated the *Lemon* test, in *Board of Education of Kiryas Joel Village School District v. Grumet* the Court pronounced perhaps its strictest interpretation of the Establishment Clause, while seemingly ignoring the *Lemon* test.<sup>84</sup> The case involved the Kiryas Joel Village, an Orthodox Jewish enclave in New York State.<sup>85</sup> The village fell

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<sup>80</sup> *Id.* at 615–19.

<sup>81</sup> *Id.* at 618.

<sup>82</sup> See, e.g., WITTE, EXPERIMENT, *supra* note 32, at 193–95 (discussing how each prong of the test has several separate interpretations).

<sup>83</sup> See Kenneth Mitchell Cox, Comment, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1179 (1984) (noting that there has been “criticism that the Court's definitional efforts and line drawing lack a lasting fundamental character”). Furthermore, its application has sparked criticism from many legal scholars and legislative officers, causing the introduction of more than “150 constitutional amendments . . . in Congress to overturn the Supreme Court's school prayer rulings.” Heinrich, *supra* note 31, at 1274.

<sup>84</sup> Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

<sup>85</sup> *Id.* at 690–91 (depicting the religious sect as a group that “make[s] few concessions to the modern world and go[es] to great lengths to avoid assimilation into it”).

within a school district that included several other surrounding towns, but by 1989 only one child from the Kiryas Joel Village was attending public school in that district.<sup>86</sup> The other villagers avoided sending their children to public schools, arguing that they would face “emotional trauma” if they were to attend school with students who did not share their faith and customs.<sup>87</sup> Finally, in 1989 the New York legislature passed a statute allowing the village of Kiryas Joel to make up its own school district, knowing fully that it was drawing the lines for this district strictly around “members of the same religious sect.”<sup>88</sup> Consequently, a locally elected board of education would make decisions regarding the schools in the district, such as opening and closing, the hiring of teachers, and which textbooks would be used.<sup>89</sup>

A majority of the Court found this arrangement to be unconstitutional. Writing for the majority, Justice Souter argued for strict neutrality toward religion, claiming that the state violated this mandate by giving a religious group authority over its public schools and by making “no assurance that governmental power has been or will be exercised neutrally.”<sup>90</sup> Although Justice Souter was able to garner majority support for the outcome of *Kiryas Joel*, the Court was deeply divided over the reasoning, producing four separate and distinct concurring opinions.<sup>91</sup>

Justice Souter’s opinion was based on a previous Supreme Court decision in *Larkin v. Grendel’s Den*.<sup>92</sup> There, the Court found that a Massachusetts statute granting religious bodies the power to veto liquor license applications was unconstitutional because it violated both the excessive entanglement and primary effect prongs of *Lemon*.<sup>93</sup> While many commentators make much of the fact that Justice Souter did not mention the *Lemon* test in his *Kiryas Joel* opinion, the criticism is somewhat misguided.<sup>94</sup> For the purposes of analyzing a challenge under the Establishment Clause, Justice Souter found the facts of *Kiryas Joel* identical to those of *Larkin*.<sup>95</sup> For this reason, it seems as though it

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<sup>86</sup> *Id.* at 693.

<sup>87</sup> *Id.* at 692–93.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 693.

<sup>90</sup> *Id.* at 696.

<sup>91</sup> *See generally id.*

<sup>92</sup> 459 U.S. 116 (1982).

<sup>93</sup> *Id.* at 126.

<sup>94</sup> *See* R. Craig Wood & Luke M. Cornelius, *Kiryas Joel II: The Continuing Controversy of Church and State Separation*, 115 WEST’S EDUC. L. REP. 227, 231 (1997) (noting that the Court implicitly relied on *Lemon*, since it used the more recent precedent of *Larkin*).

<sup>95</sup> *Kiryas Joel*, 512 U.S. at 696.

was unnecessary for him to do his own three-pronged analysis; rather, he needed only to show that the same entanglement between government and religion that was found in *Larkin* occurred when New York State delegated authority over its public schools to a religious group, expressly or otherwise.<sup>96</sup>

However, Justice Souter passed up an opportunity to uphold the *Lemon* test explicitly, thereby opening the door for those who wish to seek a new approach in deciding Establishment Clause cases.<sup>97</sup> Of all the Justices, Justice Blackmun (who no longer serves on the Court), was the only one to support the *Lemon* test explicitly.<sup>98</sup> Providing the starkest contrast to Justice Blackmun, Justice O'Connor characterized the *Lemon* test as "rigid" and "unitary."<sup>99</sup> She argued instead for a more pliable test which would allow the Court to adapt the Establishment Clause to different situations<sup>100</sup> and "new problems."<sup>101</sup>

In 1985, the Court in *Aguilar v. Felton* was confronted with a challenge to New York City's use of portions of federal funds allocated to assist educationally struggling children from low-income families.<sup>102</sup> The city, in an effort to equalize the assistance among all children who qualified based on need and academic performance, regardless of the school that they attended, sent public school teachers into parochial schools as well as public schools.<sup>103</sup> The majority struck down this assistance, holding that the program required government oversight that would inevitably lead to an excessive entanglement of church and state in violation of the third prong of the *Lemon* test.<sup>104</sup>

The Court found this violation on three grounds. First, the public school teachers were bringing their services to predominantly sectarian schools. Second, because of this fact and the possibility for impermissible sectarian effects, the state would have to provide "pervasive monitoring" to ensure that

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<sup>96</sup> *Id.* at 696–97.

<sup>97</sup> *Id.* at 721 (O'Connor, J., concurring) ("As the Court's opinion today shows, the slide away from *Lemon*'s unitary approach is well under way.")

<sup>98</sup> *Id.* at 710–11 (Blackmun, J., concurring) (stating that he "remain[s] convinced of the general validity of the basic principles stated in *Lemon*, which have guided this Court's Establishment Clause decisions in over 30 cases").

<sup>99</sup> *Id.* at 721 (O'Connor, J., concurring).

<sup>100</sup> *Id.* at 718.

<sup>101</sup> *Id.* at 719; *see infra* Part IV (arguing for this approach as a more foolproof means toward handling modern trends in Establishment Clause case law).

<sup>102</sup> 473 U.S. 402, 404 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203, 208 (1997).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 414.

religion was not seeping into the education.<sup>105</sup> And third, the circumstances would require administrative personnel and teachers of both the parochial and public schools to work together to resolve issues with the students and the program in general.<sup>106</sup> Writing for the Court, Justice Brennan stated, “When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular.”<sup>107</sup>

After decades of using the *Lemon* test as a means to achieve a strict separation between religion and state, the Court in *Agostini v. Felton* reformulated the test, intending to make it less determinative.<sup>108</sup> In a landmark case that overruled the Court’s prior decision in *Aguilar* and several of its progeny, the Court rejected the presumption “that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion.”<sup>109</sup>

Going even further toward a more flexible, lenient test, the Court essentially folded the third prong of the *Lemon* test—the excessive entanglement prong—into the test’s second prong—the effect prong.<sup>110</sup> Now, the *Lemon* test requires only two inquiries: (1) “whether the government acted with the purpose of advancing or prohibiting religion”; and (2) “whether the aid has the effect of advancing or inhibiting religion.”<sup>111</sup> The Court found that the excessive entanglement prong is not separate from the effect prong because similar factors are used to apply both.<sup>112</sup> Indeed, when a Court finds excessive entanglement, it is warning that there is a danger for impermissible religious effects.<sup>113</sup>

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<sup>105</sup> *Aguilar*, 473 U.S. at 412–13.

<sup>106</sup> *Id.* at 413.

<sup>107</sup> *Id.* at 409–10.

<sup>108</sup> *Agostini*, 521 U.S. at 203.

<sup>109</sup> *Id.* at 223.

<sup>110</sup> *Id.* at 203.

<sup>111</sup> *Id.* at 222–23; see also WITTE, EXPERIMENT, *supra* note 32, at 195 (describing the change in the *Lemon* test’s prongs resulting from the *Agostini* decision).

<sup>112</sup> *Agostini*, 521 U.S. at 232.

<sup>113</sup> See, e.g., *id.* at 233 (recognizing that entanglement is best thought of “as an aspect of the inquiry into a statute’s effect”). In *Lemon*, the entanglement that was found to invalidate the statute “also was found to have the effect of inhibiting religion. Thus, it is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute’s effect.” *Id.*

Thus, under this new formulation of the *Lemon* test, when the Court analyzes the effect prong it must evaluate whether “government indoctrination” of religion occurs; whether the program “define[s] its recipients by reference to religion”; or whether the program “create[s] an excessive entanglement” as a result.<sup>114</sup> However, the constitutionality of a program or policy does not turn merely on whether there is an excessive entanglement between church and state; rather, the Court must find that this entanglement has the primary effect of advancing religion.<sup>115</sup> In finding that the government’s aid did not have this effect, the *Agostini* Court upheld the program in which public school teachers gave remedial aid to low-income children on parochial school grounds, as long as it had constitutional safeguards to ensure the proper application of the instruction.<sup>116</sup>

Even while working to make the *Lemon* test less strict, the Court in *Agostini* recognized a few distinctions about this kind of aid to parochial schools that are very important to this discussion of the KGIA and Ben Gamla schools. Three factors mitigated the *Aguilar* Court’s fear of public school teachers expounding religious views. First, most of the public school teachers were sent into parochial schools that had “religious affiliations different from their own.”<sup>117</sup> Second, the majority of the public school teachers were moved among the parochial schools, “spending fewer than five days a week at the same school.”<sup>118</sup> Finally, the Court noted the importance of a field supervisor visiting every month to ensure compliance.<sup>119</sup>

While *Agostini* ushered in a new formulation of the *Lemon* test, it did so, surprisingly, without overruling the old three-pronged analysis.<sup>120</sup> The remainder of this Comment will evaluate the constitutionality of schools like KGIA and Ben Gamla by analyzing them under the *Lemon* test as it stands today—where the Court could seemingly decide to use the old *Lemon* test or *Agostini*’s two-pronged formulation. Further, it suggests a way the Court can go forward with a more predictable and reliable jurisprudence in the future.

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<sup>114</sup> *Id.* at 234.

<sup>115</sup> *Id.* at 233.

<sup>116</sup> *Id.* at 234–35 (noting that monitoring through monthly unannounced visits could be sufficient to ensure that religion was not being taught).

<sup>117</sup> *Id.* at 211.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 203.

### III. AN ANALYSIS OF KGIA AND BEN GAMLA SCHOOLS

While *Lemon* has never been overruled, individual Justices of the Supreme Court have spent the last twenty-five years critiquing the three-pronged test.<sup>121</sup> This Part takes the lessons gleaned from the prior analysis of Establishment Clause case law and applies them to culturally and linguistically centered public schools that inevitably consist of predominantly one ethnic and religious group. In doing so, this Comment uses the KGIA and Ben Gamla schools as examples of publicly funded and religiously oriented schools.<sup>122</sup> Ultimately, this Part concludes that when a Court is confronted with the constitutionality of such schools, whether it chooses to apply the old *Lemon* test or the new two-pronged *Agostini* test,<sup>123</sup> it will find that such schools fail each prong of the analysis.

#### A. *The Purpose Prong*

##### 1. *Development Through Case Law*

The *Lemon* test's first prong, that a "statute must have a secular legislative purpose,"<sup>124</sup> has undergone a heavy makeover since its inception.<sup>125</sup> The purpose prong was once used as merely a formality; legislators need only produce a secular purpose for enacting the legislation, and such explanations would be accepted on their face, with no regard to whether there was also a

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<sup>121</sup> See, e.g., *McCreary County v. Am. Civil Liberties Union (ACLU) of Ky.*, 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) ("As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve."); *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in judgment) ("Despite its initial promise, the *Lemon* test has proved problematic.")

<sup>122</sup> It is important to note that while these schools are meant to be examples of publicly funded and religiously oriented schools, they by no means are fully representative. Further, the facts used in this analysis are not exhaustive. See Letter from Yerushalmi, *supra* note 13, at 2 (explaining the New York Department of Education's reluctance to turn over public documents). As some commentators have noted, it is also difficult to determine exactly what will occur inside the schools at such an early stage in their existences. See, e.g., Goodnough, *supra* note 4, at A17 (quoting Howard Simon, the Executive Director of the ACLU of Florida, as saying that "[w]hether this is going to cross the line or not will depend on what goes on in the classroom"). Thus, this analysis is meant to be used as an instructional tool for future litigation.

<sup>123</sup> The outcome would likely be the same even if the Court chooses to use the endorsement test championed by Justice O'Connor. See *infra* Part IV.

<sup>124</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

<sup>125</sup> See Cote, *supra* note 28, at 1178–79 (explaining the evolution of the purpose test until its substantive use in the 1960s and subsequent decline).

sectarian purpose.<sup>126</sup> It was not until the 1960s when courts began to challenge the government's stated purposes and seek out any underlying sectarian motivations.<sup>127</sup>

With statutes that required students to read the Bible in public schools, or the posting of the Ten Commandments in courthouses, looking beyond the stated purpose of the legislators was not such a difficult task.<sup>128</sup> Today, however, unconstitutional, sectarian purposes are not as overt. This is particularly true with respect to the emergence of public schools that use linguistic and cultural education as a way to mask religious ties and submersion. For example, the Executive Summary for KGIA states its purpose as the following:

There is a need for education about and creating cultural understanding of the complexity of Arabic history and the diversity of Arab culture. The very existence of this school will provide the needed mechanism for a diverse population of students to learn about Arab culture and its contributions. Students will graduate with a deep understanding of different cultural perspectives . . . preparing them for leadership in today's constantly changing global world.<sup>129</sup>

Of course, no school board today would include religious instruction in its Executive Summary or even in its curriculum.<sup>130</sup> In this way, Justice Souter's opinion in *McCreary County* was ahead of its time.<sup>131</sup> Though forecasting the possibility that savvy lawyers could try to dodge culpability under the Establishment Clause by purporting to meet the *Lemon* requirements, he

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<sup>126</sup> See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) (upholding a statute that reimbursed parents who send their children to private parochial schools for bus transportation). In *Everson*, the Court accepted the state's argument at face value that the legislation "does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.*

<sup>127</sup> See *Cote*, *supra* note 28, at 1178–79 (explaining the change in deference to the government's stated purpose in *Schempp*). In *Schempp*, the Court declined to accept the state's purported secular purpose of using selected verse and recitation of the Bible at the start of each day to promote moral values and teach literature. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 (1963). Rather, the Court held that such practices were overtly religious ceremonies and intended to be so. *Id.* at 223.

<sup>128</sup> See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 845 (2005) (describing that, "the narrow scope of the display," was an indication that the purpose could not be purely educational in nature); *Schempp*, 374 U.S. at 224 (highlighting the obvious religious nature of the statute and observing that "[s]urely the place of the Bible as an instrument of religion cannot be gainsaid").

<sup>129</sup> KGIA EXECUTIVE SUMMARY, *supra* note 20, at 2.

<sup>130</sup> In fact, where administrators have been less careful in their curriculum selection, such blunders quickly result in the suspension of the lessons. See, e.g., *Goodnough*, *supra* note 4 (explaining that a discovery of a religious website in Ben Gamla's curriculum resulted in the third suspension of its language classes).

<sup>131</sup> *McCreary County*, 545 U.S. at 850.

rejected the idea that the test could not look beyond these “sham[s].”<sup>132</sup> Indeed, the *Lemon* test is capable of uncovering sectarian purposes not stated by the government, and courts are required to make such inquiries.<sup>133</sup>

The Court in *McCreary County* rejected the government’s contention that courts should abandon the purpose test.<sup>134</sup> Rather, the majority held that such inquiries are abundant in jurisprudence and are particularly crucial in Establishment Clause analysis.<sup>135</sup> The Court gave a fairly detailed account of how to distinguish the government’s sincere purpose from a sham purpose.<sup>136</sup> The Court must play the role of an “objective observer,” gleaning purpose from external signs such as the “text, legislative history, and implementation of the statute.”<sup>137</sup>

The concept of looking at purpose from the perspective of an objective observer reflects the Court’s view that the government’s purpose can have effects beyond those that it expressly states.<sup>138</sup> Thus, an impermissible purpose would be one in which the government “sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members.”<sup>139</sup> By the same token, a motive that is so secret that an objective observer cannot see its religious ties is not, by itself, enough to fail the purpose test.<sup>140</sup>

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<sup>132</sup> *Id.* at 864 (“The secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective.”). Note also that the Court had used this language in early *Lemon* test cases. See *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O’Connor, J., concurring in judgment) (noting that courts are “capable of distinguishing a sham secular purpose from a sincere one”).

<sup>133</sup> See, e.g., *McCreary County*, 545 U.S. at 864 (“[I]t is nonetheless the duty of the courts to ‘distinguish[h] a sham secular purpose from a sincere one.’” (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000))).

<sup>134</sup> *Id.* at 861 (rejecting the argument that “the very consideration of purpose is deceptive” and that any attempt to discover the true purpose is futile).

<sup>135</sup> *Id.* at 862.

<sup>136</sup> *Id.* at 861–62.

<sup>137</sup> *Id.* at 862 (citing *Santa Fe*, 530 U.S. at 308).

<sup>138</sup> *Id.* at 860.

<sup>139</sup> *Id.* (citing *Santa Fe*, 530 U.S. at 309–10). It is also important to note that Justice O’Connor uses this language to argue for her endorsement test. See *infra* Part IV (explaining that Justice O’Connor’s endorsement test focuses on the message the government’s actions send to the community with regard to whom is within a favored group).

<sup>140</sup> *McCreary County*, 545 U.S. at 863 (noting that since a secret motive “stirs up no strife” and has no effect on nonadherents, it is preferable to “wait and see” if the government action in fact has the effect of advancing religion).

## 2. *Application of the Purpose Prong*

Applying these principles to schools like KGIA and Ben Gamla results in the undeniable conclusion that the objective observer, one who is not Muslim or Jewish, looks at these schools as though he or she is an outsider and a less-favored member of the political community.<sup>141</sup> Since there is little, if any, text or legislative history regarding the creation of public schools and the granting of charters, the analysis in this section largely comes from the third factor posited in *McCreary County*, the implementation of the statute.<sup>142</sup> First, while exact statistics are unavailable because public schools are not permitted to ask the religious affiliations of their students, it is clear from looking at the students each school targeted and the individuals that make up the administration that these schools will consist predominantly of Muslims and Jews.<sup>143</sup> For example, until facing political firestorms for their decisions, both KGIA and Ben Gamla chose principals sharing the religious views of their respective schools.<sup>144</sup> Debbie Almontaser, the mastermind behind KGIA, who was its former principal and responsible for all of its early administrative, hiring, and curriculum decisions, was forced to relinquish the position after her radical Islamist views became widely known.<sup>145</sup> Similarly, Rabbi Siegel was the principal of Ben Gamla until he was forced to hire a replacement amid criticism that it is inappropriate for a rabbi to oversee secular instruction.<sup>146</sup>

When the individuals who run the schools adhere to the same or similar religious values and support the same impermissible sectarian purpose, these individuals are bound to make mistakes in not concealing their intentions as well as they may wish. It is during these times that the sectarian purpose behind KGIA and Ben Gamla is more readily apparent.<sup>147</sup> For example, Ben Gamla's curriculum has been rejected due to religious content by the Broward County School Board three times since its proposal.<sup>148</sup> Similarly, KGIA under

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<sup>141</sup> See, e.g., Feldman, *supra* note 1.

<sup>142</sup> *McCreary County*, 545 U.S. at 862.

<sup>143</sup> See, e.g., Feldman, *supra* note 1.

<sup>144</sup> *Id.*

<sup>145</sup> See Second Letter from Gaffney, *supra* note 14. Unfortunately, Debbie Almontaser was replaced by another religious figure, although this time the school knew better than to use an individual with the same radical Islamist ties. *Id.*

<sup>146</sup> See Goodnough, *supra* note 4.

<sup>147</sup> Such a discovery regarding KGIA is substantially unlikely at this point due to the New York State Department of Education's refusal to produce public documents regarding the specific curriculum and the textbooks being used at the school. See Letter from Yerushalmi, *supra* note 13.

<sup>148</sup> See Goodnough, *supra* note 4 (chronicling the lengths that Ben Gamla has had to go in order to get its curriculum approved without including religious references). This problem has been a reoccurring one for Ben

Almontaser had once supported serving *only* Halal meals, an attempt to pander to—rather than accommodate—a particular religious view.<sup>149</sup> As the Supreme Court has held on similar grounds, the fact that the curriculum may one day be free of religious references, or that some religious practices are removed after public pressure to sue the school, does not erase the original choices of the administration, which reflect a religious purpose for opening the school.<sup>150</sup> Thus, those objective observers who do not adhere to the particular religious beliefs fostered in KGIA and Ben Gamla schools would surely see themselves as disfavored outsiders and see the schools as catering to chosen religious communities.

Further, the secular purpose must not be inadequate or secondary to the religious purpose.<sup>151</sup> In *Wallace v. Jaffree*, the Court struck down a statute allowing silence in schools for voluntary prayer.<sup>152</sup> The state argued that the statute's motivation was a secular one, namely to accommodate school prayer.<sup>153</sup> The Court rejected that purpose "given the implausibility of that explanation in light of another statute already accommodating children wishing to pray."<sup>154</sup> Analyzed under this light, the government's purported motivation for creating schools like KGIA and Ben Gamla is also implausible. If the purpose is merely to immerse students in the history and language of another culture, this is easily done, as public schools already do, through language

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Gamla, and it is expected to be so in the future because of the inherent difficulty of finding Hebrew instructional books that do not refer to the Jewish religion or the Torah. Such a difficulty only serves to bolster the theory of this Comment—that it is virtually impossible to separate the teaching of Arabic and Hebrew from their religious counterparts. *See id.*

<sup>149</sup> *See* Second Letter from Gaffney, *supra* note 14 (noting that the department must have become suspicious over Almontaser's attempts to create a Halal kitchen); *see also* Bryn, *supra* note 9 (stating Ben Gamla's decision to serve only Kosher meals).

<sup>150</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 866 (2005) (rejecting the argument that the Court should not consider past government actions that could reflect on the purpose of a statute). An argument to the contrary would require the Court to "ignore perfectly probative evidence" using an "absentminded objective observer, not one presumed to be familiar with the history of the government's actions and competent to learn what history has to show." *Id.*

<sup>151</sup> *See, e.g., Lynch v. Donnelley*, 465 U.S. 668, 691 (1983) (O'Connor, J., concurring) (stating that the purpose inquiry "is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes"); *Stone v. Graham*, 449 U.S. 39, 41 (1981) (holding that the secular purpose for displaying the Ten Commandments proposed by the state was insufficient); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 223–24 (1963) (finding that requiring students at a public school to select and read Bible verses at the start of every day violates the Establishment Clause).

<sup>152</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>153</sup> *See id.* at 57 n.45 (explaining that the Governor argued for the acceptance of the statute as a permissible accommodation of religion).

<sup>154</sup> *McCreary County*, 545 U.S. at 864.

courses in existing schools.<sup>155</sup> However, it is clear from Ben Gamla and KGIA's unwillingness to conform to such existing programs that the states' true desire was to segregate a religious and cultural group, thereby validating and encouraging their sectarian beliefs.<sup>156</sup>

This point is even clearer when one considers that the Arabic language classes, claimed to be the highlight of receiving an education from KGIA, are taught by individuals from a social service agency, not by certified teachers.<sup>157</sup> If the true goal is to teach children the Arabic language, this purpose is better, and more secularly, served by existing programs with board certified teachers.<sup>158</sup> While many will argue that promoting cultural and linguistic awareness through public education is a valid secular purpose, the purpose becomes less credible when it could be accomplished by other means.<sup>159</sup> Specifically, the Court in *Kiryas Joel* found that the New York legislature could have used several alternatives to provide bilingual and bicultural education to the Satmar children that would not have implicated the Establishment Clause.<sup>160</sup> Justice Souter noted that, "Since the Satmars do not claim that separatism is religiously mandated, their children may receive bilingual and bicultural instruction at a public school already run by the . . . district."<sup>161</sup>

### B. *The Effect Prong*

As observed in *Board of Education v. Allen*,<sup>162</sup> and officially adopted in *Lemon*, the second prong of the Establishment Clause analysis asks whether culturally and linguistically centered public schools have a primary or principal effect that enhances or inhibits religion.<sup>163</sup> This prong largely turns on a court's assessment of individuals in their official capacities and whether they pose a risk of abusing their powers in a way that would enhance or inhibit

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<sup>155</sup> See Second Letter from Gaffney, *supra* note 14 (requesting that the opening of KGIA be delayed so that a language curriculum in existing schools could be developed).

<sup>156</sup> *Id.*

<sup>157</sup> See KGIA EXECUTIVE SUMMARY, *supra* note 20.

<sup>158</sup> See Second Letter from Gaffney, *supra* note 14 (arguing that alternatives, such as teaching the Arabic language in existing schools, could serve the same purpose while avoiding a constitutional showdown).

<sup>159</sup> *Id.*

<sup>160</sup> Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 707 (1994).

<sup>161</sup> *Id.* Similarly, in *Larkin*, the Court found that the objective of zoning liquor vendors near churches and schools could "be readily accomplished by other means." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 124 (1982).

<sup>162</sup> Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968).

<sup>163</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

religion.<sup>164</sup> This section uses the Court's analysis in *Larkin*, *Kiryas Joel*, and *Agostini* to assess the individual teachers, board members, and administrators in KGIA and Ben Gamla, who are given the power to run publicly funded schools, as well as the student body that they actively attract and teach. Upon reviewing the case law, this Comment shows that this delegation of authority parallels—and arguably surpasses—the risk of abuse of power found in similar constitutionally impermissible schemes.

### 1. *Larkin v. Grendel's Den: Neutrality Toward Religion*

In *Larkin*, the Court suggested that government proof of its neutrality toward religion is necessary to satisfy the effect prong.<sup>165</sup> While finding that the legislature had a secular purpose in enacting a law that essentially gave religious authorities the power to reject liquor licenses zoned in areas near churches and schools, the Court struck down the law, in part, because it found a risk that the churches could abuse this power by using it for purposes other than those that are “secular, neutral, and nonideological.”<sup>166</sup> There, the church's ability to reject a license was standardless; the church did not have to give any reasons for why it did not want a particular applicant to be granted a liquor license.<sup>167</sup> It could be used to weed out neighbors it considered undesirable, to favor applicants who were members of its congregation, or for other similarly non-neutral purposes.<sup>168</sup> Further, the Court in *Larkin* found that the “mere appearance” of the state giving a governmental power to the church “provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred.”<sup>169</sup>

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<sup>164</sup> See, e.g., *Agostini v. Felton*, 521 U.S. 203, 211 (1997) (analyzing the religious affiliations of individual public school teachers to determine if they would abuse their power to teach in private, religious schools); *Kiryas Joel*, 512 U.S. at 698 (analyzing a state action that gave a religious sect political power over a school district); *Larkin*, 459 U.S. at 125 (recognizing that the power of rejecting liquor licenses could have been used by the individuals to promote religious goals).

<sup>165</sup> See *Larkin*, 459 U.S. at 125 (noting the need for legislation to serve neutral purposes).

<sup>166</sup> *Id.* (citation omitted) (internal quotation marks omitted).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* It is important to note that while the delegation of powers could be monitored to ensure the presence of only nonideological purposes, curing the failed effects test, the Court has overwhelmingly been reluctant to allow this strategy because the public involvement implicates the excessive entanglement prong. See *Aguilar v. Felton*, 473 U.S. 402 (1985). While *Aguilar* was effectively overruled in *Agostini*, the argument was not debunked. The Court disagreed with *Aguilar* and instead found that the act did not fail the effects test. Thus, the entanglement prong could not have been implicated. See *Agostini*, 521 U.S. at 233.

<sup>169</sup> *Larkin*, 459 U.S. at 125–26.

## 2. Kiryas Joel: *Conducting Background Tests on Those Given Governmental Power*

Taken together, *Larkin* and *Kiryas Joel* establish a threshold which must be met before a court will find that KGIA or Ben Gamla are neutral, nonideological schools. As previously discussed, the views set forth in *Larkin* were wholly adopted by the Court in *Kiryas Joel*.<sup>170</sup> Furthermore, Justice Souter directly addressed the discrepancy between giving governmental authority to a church and its ordained clergy, as in *Larkin*, and giving governmental authority to a community of voters based on their shared religion, as in *Kiryas Joel*.<sup>171</sup> Upon an analysis of the individuals receiving control of the school district, Justice Souter concluded that this difference was “subtle” and “turns out to lack constitutional significance.”<sup>172</sup>

There is, of course, a fine line between determining that a law has the effect of advancing religion on the one hand, and denying religious individuals the right to participate in the functions of government, on the other.<sup>173</sup> The problem, however, is that the individuals’ religious affiliations were not “incidental” to the power that they yielded in controlling the school district in *Kiryas Joel*.<sup>174</sup> There, the legislation giving the voters of Kiryas Joel their own school district effectively identified the sect by their religious affiliations, even though the language of the statute did not make such a suggestion.<sup>175</sup> In making this distinction, the Court emphasized that the state legislature’s precise drawing of new district lines to include only the members of the Satmar sect had the effect of promoting religion.<sup>176</sup>

Similarly, the religious affiliations of the individuals who operate, supervise, and teach at KGIA and Ben Gamla are not incidental to the governmental powers conferred upon them. A closer look at these schools shows that they were created to attract only students of Arabic and Jewish

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<sup>170</sup> See *supra* Part II.C.

<sup>171</sup> See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 689 (1994) (noting that the problem presented is subtler than in *Larkin* because of the legislature’s delegation of power to the “qualified voters of the village of Kiryas Joel” (emphasis added)).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 698–99.

<sup>174</sup> *Id.* at 699.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 700–01. The Court also noted that the district was approved by a special act to serve an extremely small amount of people, increasing the likelihood that outsiders would perceive this to be an unconstitutional promotion of the Satmar sect. *Id.* at 701. Such a perception could also be evoked from the fact that KGIA began with only sixty students. See KGIA EXECUTIVE SUMMARY, *supra* note 20.

ethnicity. The KGIA curriculum requires 360 minutes of Arabic study each week, an annual course on Arabic culture and the arts, and externships and community service hours with Arabic community groups.<sup>177</sup>

The Ben Gamla curriculum requires one period per day of Hebrew instruction and a second substantive course taught in a mix of Hebrew and English.<sup>178</sup> While there are no specific classes on Jewish culture, Rabbi Siegel commented that the subject would come up during special units in Hebrew instruction.<sup>179</sup> It is hard to imagine parents voluntarily sending their children to receive Hebrew or Arabic language and culture instruction if they were not, themselves, of Jewish or Arabic descent. Moreover, it is clear by Ben Gamla's choice to serve strictly kosher meals and KGIA's attempt to serve strictly Halal meals that each schools' students are not just of the same ethnicity, but the majority are practicing followers of Judaism or Islam.<sup>180</sup>

Further, parents were made aware of the individuals who were running the schools and their religious affiliations through advertising and reporting.<sup>181</sup> Thus, it is fairly intuitive from these facts that the majority of these students will share the same religious faiths (Islam and Judaism), and, as in *Kiryas Joel*, it is likely that this was a desired consequence of those who created the schools.<sup>182</sup>

The separation encouraged by KGIA and Ben Gamla, by attracting students predominantly of one faith, is what was feared in *Kiryas Joel*.<sup>183</sup> Justice Souter described the effects problem as one that went beyond merely accommodating a certain faith.<sup>184</sup> Rather than using constitutional methods to respect the culture and beliefs of the Satmars, the state used a method that "affirmatively supports a religious sect's interest in segregating itself" and unconstitutionally

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<sup>177</sup> See KGIA EXECUTIVE SUMMARY, *supra* note 20, at 28. For frightening, although slanted, descriptions of some of the radical Islamist affiliations of individuals and groups who are partnering to teach Arabic and host externships, see Stop the Madrassa: A Community Coalition, *supra* note 16; KGIA Information Central, *supra* note 48.

<sup>178</sup> Goodnough, *supra* note 4, at A17.

<sup>179</sup> *Id.* (explaining that Jewish culture may come up in the context of Hebrew language instruction or during special units on specific elements of Jewish culture, such as folk dancing).

<sup>180</sup> See *supra* notes 23 and 149 and accompanying text.

<sup>181</sup> Because enrollment in these schools is voluntary, both schools have recruited students based on the curricula and religious accommodations. See Bryn, *supra* note 9, at A7 (reporting that Ben Gamla's director is an ordained Orthodox Rabbi, the school serves Kosher meals, and Hebrew is taught).

<sup>182</sup> *Id.*

<sup>183</sup> See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

<sup>184</sup> *Id.* at 706.

“provided official support to cement the attachment of young adherents to a particular faith.”<sup>185</sup> Such results unequivocally implicate the perception feared in *Larkin*—that the very appearance of the state sanctioning a religion provides a significant benefit to that religion—thereby violating the effect prong.<sup>186</sup> Thus, these schools suffer from the same afflictions found in *Kiryas Joel* and *Larkin*; namely, there is no effective way to guarantee that the power used by these individuals will be neutral and nonideological. In fact, there is every reason to believe the opposite.

### 3. *Distinguishing Agostini v. Felton*

While *Kiryas Joel* and *Larkin* offer factual similarities, the circumstances of *Agostini* are in stark contrast to schools like KGIA and Ben Gamla. Contrary to the Court’s decision in *Aguilar*, the *Agostini* Court held that the state practice of sending public school teachers to religious private schools, to provide remedial education to disadvantaged children, did satisfy the effect prong.<sup>187</sup> In doing so, the Court also emphasized the need for a fact-specific inquiry to determine whether individuals receiving power from the government posed a risk of abusing that power.<sup>188</sup> After a second look at the facts,<sup>189</sup> the Court determined that there were several safeguards ensuring that the teachers would be conducting themselves and their lessons in a nonideological, neutral manner.<sup>190</sup> First, the public school teachers were selected by government agents who were disinterested in the private schools, and most of the public school teachers did not share the same religious affiliation as the school in which they were placed.<sup>191</sup> Second, the Court noted the important fact that these teachers did not stay in the same religious school, but instead moved from school to school during the year.<sup>192</sup> Finally, the government provided

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<sup>185</sup> *Id.* at 711 (Stevens, J., concurring).

<sup>186</sup> *See Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116, 125–26 (1982) (noting that even the appearance of conferring power on a religion will provide a benefit).

<sup>187</sup> *Agostini v. Felton*, 512 U.S. 203 (1997).

<sup>188</sup> *See id.* at 223 (acknowledging that previous Court decisions assumed indoctrination, but now applying a case-specific inquiry).

<sup>189</sup> The case arose out of the same facts from *Aguilar*. The petitioners, once bound by the injunction ordered in *Aguilar*, challenged the ruling twelve years later, claiming that the case law had drastically changed. *Id.* at 208.

<sup>190</sup> *Id.* at 233 (holding that due to changes in Establishment Clause jurisprudence, the Title I program at issue in *Aguilar* does not cause “‘excessive’ entanglement that advances or inhibits religion”).

<sup>191</sup> *Id.* at 211.

<sup>192</sup> *Id.*

public supervisors to ensure that religion was not being taught or encouraged by the public school teachers.<sup>193</sup>

KGIA and Ben Gamla cannot put forward convincing evidence that any of these safeguards are present. As previously established, the evidence is clear that the religious affiliations of the administrators, founders, and board members are the same as the schools they created and, likely, the students who attend them.<sup>194</sup> In the case of KGIA and Ben Gamla—along with any other school created by a new school initiative or charter—the administrators and board members are the individuals who handpick the teachers.<sup>195</sup> Thus, unlike in *Agostini* where the teachers were chosen by government agents with no connection to the private schools, the teachers at KGIA and Ben Gamla will inevitably be chosen to reflect the views, culture, and goals of the schools and administrators themselves.<sup>196</sup> Further, it seems intuitive that those individuals who will be recruited to teach Arabic or Hebrew will also be affiliated with the corresponding religion. This is particularly true at KGIA where the Arabic classes are taught by noncertified AAFSC members with very specific agendas.<sup>197</sup>

Rather than serving temporary stays at the schools, Ben Gamla and KGIA teachers are full time and do not move from school to school.<sup>198</sup> Finally, while KGIA provides certified teachers who will supervise a few of its classes to discourage teachers from bringing in non-neutral discussions,<sup>199</sup> this is of very little importance. The classes posing the most significant risk of encouraging religion are the Arabic language classes, and thus an English-speaking supervisor, knowing nothing about the Arabic language, will be entirely useless as a safeguard.<sup>200</sup> Because KGIA and Ben Gamla cannot produce

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<sup>193</sup> *Id.* at 211–12.

<sup>194</sup> *See supra* Part III.A.2.

<sup>195</sup> *See supra* Part I.

<sup>196</sup> By allowing such decisions to be made by the administrators and board members, the schools ensure that they create a segregated group of people representing the same views, backgrounds, and cultures. Such an environment clearly gives way to Equal Protection and *Brown v. Board of Education* arguments. For this discussion, see generally Parker, *supra* note 5.

<sup>197</sup> *See* Mayer & Rabinowitz, *supra* note 42 (expressing concerns over the Islamic organizations that would be incorporated into and assisting with the curriculum and with KGIA's advisory board, which is made up of primarily religious figures); Stop the Madrassa: A Community Coalition, *supra* note 16 (profiling three members of the advisory board to show their ties to Islamic organizations).

<sup>198</sup> *See* KGIA EXECUTIVE SUMMARY, *supra* note 20, at 5–6 (describing the responsibilities and duties of KGIA dual-language teachers).

<sup>199</sup> *Id.*

<sup>200</sup> *See* Letter from Yerushalmi, *supra* note 13 (questioning how non-Arabic-speaking supervisors could properly oversee the curriculum).

adequate safeguards, those schools pose a real risk of abuse and ideological indoctrination, having the impermissible effect of advancing religion.

### C. *The Excessive Entanglement Prong*

#### 1. *From Lemon to Agostini*

Unlike the purpose and effect prongs, the excessive entanglement prong has undergone several makeovers since its late introduction in *Walz* in 1970.<sup>201</sup> These formulations range from an independent third prong in *Lemon* in 1971, to its high-water mark in *Larkin* and *Kiryas Joel* in the 1980s and 1990s, to what some consider its demise in *Agostini* in 1997. This subsection analyzes each of those formulations and ultimately concludes that—regardless of which formulation the Court chooses to apply—government support for culturally and linguistically centered schools should fail the excessive entanglement prong.

One year before endorsing the *Lemon* test as the test of choice for Establishment Clause cases, the Court in *Walz* announced that before it could be sure that a tax exemption for churches was constitutional, it “must also be sure that the end result—the effect—is not an excessive government entanglement with religion.”<sup>202</sup> The Court’s description of this requirement was a signal that it considered the effect of the legislative aid to be inextricably tied to whether the aid constituted an excessive entanglement.<sup>203</sup>

Thus began what has been a tumultuous history of the excessive entanglement prong. Just one year after *Walz*, the Court formally adopted the current *Lemon* test from existing case law, but clearly chose to make the excessive entanglement prong wholly distinct from an analysis of a statute’s effects.<sup>204</sup> Regardless of the formulation, the Court has continuously held that this prong’s analysis is one of degree, recognizing that some government entanglement with religion is inescapable.<sup>205</sup>

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<sup>201</sup> *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970); see also *Cote*, *supra* note 28, at 1186–88 (describing the evolution of the excessive entanglement prong).

<sup>202</sup> *Walz*, 397 U.S. at 674.

<sup>203</sup> *Id.*

<sup>204</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>205</sup> See *Walz*, 397 U.S. at 674 (explaining that the amount of entanglement is “one of degree”); see also *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (“Interaction between church and state is inevitable . . .”).

In *Lemon*, the Court unanimously invalidated statutes that gave supplemental teacher salaries, textbooks, and instructional materials for secular subjects to religiously affiliated private schools.<sup>206</sup> The Court found that the “continuing state surveillance” needed to ensure enforcement of the statute resulted in an excessive entanglement of the state in religious affairs by analyzing (1) the nature of the “institutions that are benefited”; (2) the “aid that the State provides”; and (3) the “resulting relationship between the government and the religious authority.”<sup>207</sup>

As discussed earlier, the Court’s largest concern in *Lemon* was that, even without proof that religious instruction was seeping into the secular subjects, there were enough triggering factors to demonstrate that the school and teachers would “experience great difficulty in remaining religiously neutral.”<sup>208</sup> These factors included finding that the school principals and most of the teachers were nuns, there were thirty minutes a day of religious instruction and religiously oriented extracurricular activities, and the schools were located near parishes.<sup>209</sup> According to the Court, such a risk requires “a comprehensive, discriminating, and continuing state surveillance . . . to ensure that . . . the First Amendment [is] otherwise respected.”<sup>210</sup> Inevitably, this kind of oversight would constitute an excessive entanglement between church and state.<sup>211</sup>

Finally, the Court noted that excessive entanglement was also caused by the statute’s potential to create “divisive political potential.”<sup>212</sup> It was inevitable, the Court found, that voters and representatives of the district would have to face the issue of whether to pass state aid to religious schools, given the rising costs of private, parochial schools.<sup>213</sup> Such political issues would cause the division of votes to be “aligned with their faith,” a result contrary to the principles of the First Amendment.<sup>214</sup>

With KGIA and Ben Gamla, to ensure that a constitutionally impermissible effect does not occur would also require excessive entanglement. Unlike in

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<sup>206</sup> *Lemon*, 403 U.S. at 607.

<sup>207</sup> *Id.* at 615–19.

<sup>208</sup> *Id.* at 618.

<sup>209</sup> *Id.* at 615–18.

<sup>210</sup> *Id.* at 619.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 622.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* Such divisions in the political arena are likely to be intensified by the need for “continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.” *Id.* at 623.

*Agostini* and *Lemon*, the state is not indirectly or partially funding a private, religious institution. Rather, the state is fully funding—with taxpayer dollars—a school that poses a substantial risk of using its power for non-neutral purposes.<sup>215</sup>

While KGIA claims to offer institutional oversight in the classrooms where noncertified teachers are present, such oversight is a sham. Certified teachers who cannot speak Arabic will be of little help to ensure that the teachers, speaking Arabic in their classrooms, will not let religion seep into their curricula.<sup>216</sup> Thus, more serious oversight is necessary at culturally and linguistically centered schools than merely putting a board-certified teacher in a classroom, just as it was necessary in *Lemon*.

Finally, the same political divisiveness issues that were found in *Larkin* are likely to occur when states approve funding and charters for charter schools and new school initiatives. The controversy that began even before the two schools opened in August of 2007 is a good indicator that this issue will continue to divide state and local officials in the coming months and years.<sup>217</sup> While a court analyzing these schools will be able to research the legislative history of these schools, this divisiveness is likely to cause voting that is influenced largely by one's own religious beliefs.<sup>218</sup>

## 2. *Delegating Governmental Functions*

The Court in *Larkin* identified another way that a governmental act can fail the excessive entanglement prong: by giving uniquely governmental functions to religious groups. In *Larkin*, churches were essentially given a veto power over the municipal zoning of liquor licenses, a function that is traditionally left to the government.<sup>219</sup> Similarly, the people of Kiryas Joel were given the power to run a school district, also a function traditionally left to the government.<sup>220</sup> Such functions, when given to individuals or groups

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<sup>215</sup> See Feldman, *supra* note 1 (describing the risk that both KGIA and Ben Gamla pose of using public funds to infuse secular subjects with religious meaning).

<sup>216</sup> See Second Letter from Gaffney, *supra* note 14 (discussing how an Arabic speaking teacher's curriculum should be viewed with suspicion).

<sup>217</sup> See Feldman, *supra* note 1 (detailing the divisiveness of having language-based charter schools).

<sup>218</sup> *Id.*

<sup>219</sup> *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 121–22 (1982).

<sup>220</sup> See generally *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994). While the Court in *Kiryas Joel* does not explicitly refer to the prongs of the *Lemon* test, it does so implicitly by adopting the reasoning of *Larkin* and using its holding as the centerpiece illustration for why the New York statute was unconstitutional. *Id.* at 696.

characterized by their religious beliefs, create the kind of “fusion of governmental and religious functions” that the Framers sought to avoid.<sup>221</sup>

The delegation of governmental power to run a school is eerily similar to the unconstitutional delegation of power found in *Kiryas Joel*. Here, because of the unique nature of charter schools and new school initiatives, administrators at KGIA and Ben Gamla are given full reign over the curriculum, finances, and daily decisions at their schools.<sup>222</sup> While this delegation to private individuals would not normally violate the Establishment Clause, the state crosses the line here because the schools selected the principals and administrators with regard to their religious beliefs.<sup>223</sup> Such a delegation, like the unrestricted freedom in *Kiryas Joel* and *Larkin*, is unconstitutional.

### 3. Making Sense of *Agostini*

If at first glance *Agostini* suggests the death of the *Lemon* test—and, more specifically, the excessive entanglement prong—a closer reading indicates otherwise. Rather than overturning *Lemon*, *Larkin*, or *Kiryas Joel*, the Court instead applied the formulation of the *Lemon* test that was originally envisioned in *Walz*.<sup>224</sup> More explicitly, it chose to read the excessive entanglement prong as part of the effect prong.<sup>225</sup>

This formulation, however, does not change the analysis of schools like KGIA and Ben Gamla. *Agostini* does not dispense with the excessive entanglement prong; rather, entanglement may, itself, be an illegitimate advancement or inhibition of religion.<sup>226</sup> Thus, in the case of culturally and linguistically centered schools, once the Court finds, as previously established, that such schools fail the effect prong, it would continue with its analysis of whether the risk of non-neutral and ideological uses of the government conferred power would require or create an excessive entanglement between church and state.<sup>227</sup>

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<sup>221</sup> *Larkin*, 459 U.S. at 126.

<sup>222</sup> See *supra* Part I (discussing KGIA and Ben Gamla).

<sup>223</sup> See *supra* Part III.A.2 (discussing the hiring of administrators).

<sup>224</sup> See *supra* notes 202–03 and accompanying text.

<sup>225</sup> See *supra* notes 202–03 and accompanying text.

<sup>226</sup> *Agostini v. Felton*, 521 U.S. 203, 233–34 (1997).

<sup>227</sup> *Id.*

As the Court notes, not all excessive entanglements have the effect of advancing religion, and thus this third prong is necessary only in cases where such an effect is possible.<sup>228</sup> The Court held in *Agostini* that public school teachers supplying remedial teaching in religious private schools, largely of a denomination other than their own, posed little risk of an impermissible effect.<sup>229</sup> Because of this, there was no need to worry about entanglement, since pervasive monitoring of the teachers was not required.<sup>230</sup>

While the Court's decision to collapse the two prongs into one reworked the mechanics of the test, the Court's holding does not reveal a broader approach to the principles underlying the *Lemon* test. Rather, the Court grounded much of its reasoning in matters of practical form and adjudicative efficiency.<sup>231</sup> Moreover, this shift does not change the conclusion that government support for either KGIA and Ben Gamla fails the excessive entanglement prong, and thus is unconstitutional under the Establishment Clause of the First Amendment.

However, if *Agostini* represents any significant shift at all, it exemplifies the willingness of the Court to consider modifications to *Lemon* in light of ever-evolving circumstances. Written by Justice O'Connor, the decision also culminates her efforts over the last twenty years to encourage the Court to adopt the "endorsement test," which Part IV will discuss.<sup>232</sup> As the remainder of this Comment argues, the Court would do the most justice to the Establishment Clause by adopting this test—a move that would ensure that future decisions will be more predictable and sounder.

#### IV. RECONCILING THE PAST AND LOOKING TOWARD THE FUTURE OF ESTABLISHMENT CLAUSE DOCTRINE: THE ENDORSEMENT TEST

##### A. *Dissent Among the Ranks*

While *McCreary* served to once again validate the *Lemon* test and its foundation, the sharply divided 5–4 decision also encapsulated the doctrinal fight that has brewed between two sides of the Court: one that supports

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<sup>228</sup> *Id.* at 233.

<sup>229</sup> *Id.* at 234.

<sup>230</sup> Compare *id.*, with *Aguilar v. Felton*, 473 U.S. 402, 412–13 (1985).

<sup>231</sup> See *Agostini*, 512 U.S. at 232 (noting that the factors the Court uses to assess whether there is excessive entanglement are similar to those used to examine impermissible effects).

<sup>232</sup> See Heinrich, *supra* note 31 (discussing Justice O'Connor's approach to Establishment Clause cases).

government neutrality (the majority in *McCreary*), and another that advocates for the replacement of the test with something less stringent.<sup>233</sup> Specifically, Justice Scalia's colorful dissent chastised the Court for its following of a "brain-spun" test that lacks any sort of consistency in its application.<sup>234</sup>

Thus, over the last twenty years, each Justice has developed his or her own opinion of the *Lemon* test, and many have proposed new formulations to modify it or take its place. Some of the more prominent ideas include Justice Kennedy's coercion test, strict scrutiny analysis, and Justice O'Connor's endorsement test.<sup>235</sup>

The ambiguity regarding which test should be applied has resulted in various splits among circuit courts, significant confusion, and in some cases, misapplication at the district court level.<sup>236</sup> Indeed, Justice Powell accurately predicted this result in *Wallace*, stating that "continued criticism of [*Lemon*] could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis."<sup>237</sup>

The best example of this confusion comes from the *Kiryas Joel* decision.<sup>238</sup> Although the Supreme Court ruled 6–3 to strike down the New York statute, this decision was not the final word on the matter.<sup>239</sup> One month after the Supreme Court's decision, the state legislature passed a replacement statute,<sup>240</sup> seeking to capitalize on the language of the separate concurring opinions by Justices O'Connor and Kennedy, and the statute was again challenged.<sup>241</sup>

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<sup>233</sup> *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005); see also WITTE, EXPERIMENT, *supra* note 32, at 199–200 (describing in detail this tension as a clash between "neutrality" and "equal treatment" theories of disestablishment analysis).

<sup>234</sup> *McCreary County*, 545 U.S. at 890 (Scalia, J., dissenting). Justice Scalia further commented, "As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve." *Id.* at 900.

<sup>235</sup> See, e.g., John Wickman, *Public Education*, 24 STETSON L. REV. 599 (1995) (describing all of the alternatives to *Lemon* that were suggested in *Kiryas Joel*).

<sup>236</sup> See generally Heinrich, *supra* note 31; Wood & Cornelius, *supra* note 94, at 235.

<sup>237</sup> *Wallace v. Jaffree*, 472 U.S. 38, 63 (1985) (Powell, J., concurring).

<sup>238</sup> See Wood & Cornelius, *supra* note 94, at 230–32.

<sup>239</sup> Four Justices found the statute unconstitutional on similar bases. Only one Justice argued to preserve the *Lemon* test, while the opinion of the Court and the other two Justices largely ignored its existence. See *id.* at 231–32.

<sup>240</sup> See *id.* at 233. The statute gave a municipality the right to form its own school district, provided it can enroll at least 2,000 students and meet other preliminary tax requirements. *Id.*

<sup>241</sup> *Id.* The holding of the opinion was muddled by Justice O'Connor's and Justice Kennedy's separate concurring opinions. Both argued that such accommodations must be made equally available to any group through neutral state law. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 715–16 (1994) (O'Connor, J., concurring); *id.* at 728 (Kennedy, J., concurring). Further, Justice O'Connor explicitly

Despite its broader application, the New York Court of Appeals held that the law still violated the Establishment Clause.<sup>242</sup> The Court, however, explicitly noted the confusion regarding which test to apply to Establishment Clause cases and thus evaluated the statute under several tests: *Lemon*, *Agostini*'s formulation, and strict neutrality.<sup>243</sup> In sum, the confusion over what kinds of legislation pass muster and which Establishment Clause test to apply led the Kiryas Joel village to twelve years of intense litigation, exemplifying the need for a consensus around a new formulation.<sup>244</sup>

### B. A Promising Endorsement

Justice O'Connor spent over twenty years arguing for a test that would hold true to the underlying purpose of *Lemon*, but that would replace its rigid, unitary jurisprudence.<sup>245</sup> Justice O'Connor believed, like many others, that the test was problematic because of its inconsistent application and broad, open-ended prongs.<sup>246</sup> Instead, it was necessary to have a test that would "frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems."<sup>247</sup>

First introduced in *Lynch v. Donnelly*<sup>248</sup> and more fully pronounced one year later in *Wallace*, to Justice O'Connor the endorsement test was just the solution.<sup>249</sup> In *Wallace*, she described the refined test as one that would turn the analysis of the purpose and effect prongs into an examination of "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."<sup>250</sup> Such a result is impermissible to the

argued against the continued use of *Lemon*. *Id.* at 718–21 (O'Connor, J., concurring). This law, which lacked explicit reference to the Kiryas Joel village, was clearly anticipating future litigation; by seeking the votes of Justice O'Connor and Justice Kennedy and still retaining the three dissenters, the state could hope for a new majority in their favor. See Wood & Cornelius, *supra* note 94, at 233–34. This time, the trial court upheld the law, finding that the broader legislation met all three prongs of the *Lemon* test. *Id.*

<sup>242</sup> *Grumet v. Pataki*, 720 N.E.2d 66, 67 (N.Y. 1999), *cert. denied*, 528 U.S. 946 (1999). The Kiryas Joel saga does not end here. For a continuing story of the legal difficulties of the Kiryas Joel village, see Tamar Lewin, *Controversy Over, Enclave Joins School Board Group*, N.Y. TIMES, Apr. 20, 2002, at B4.

<sup>243</sup> *Grumet*, 720 N.E.2d at 74–75.

<sup>244</sup> See Lewin, *supra* note 242 (discussing the Kiryas Joel saga).

<sup>245</sup> See Heinrich, *supra* note 31 (discussing Justice O'Connor's approach to Establishment Clause cases).

<sup>246</sup> See *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in judgment) (noting that applying the *Lemon* test is problematic).

<sup>247</sup> *Id.* at 69 (citation omitted) (internal quotation marks omitted).

<sup>248</sup> 465 U.S. 668, 693 (1984).

<sup>249</sup> *Wallace*, 472 U.S. at 69.

<sup>250</sup> *Id.*

extent that it “sends a message” to those that adhere to the religion that they are insiders and “favored members of the political community,” while it simultaneously conveys a message to non-adherents that they are outsiders.<sup>251</sup>

The endorsement test recognizes that it is impractical to use a test of strict neutrality because religion and government interact on many levels that are not always unconstitutional.<sup>252</sup> In its actual application, the test would require the Court to decide whether an objective observer, acquainted with the statute and its implementation, would find it to be an endorsement of religion.<sup>253</sup> By turning the analysis to an objective observer, the test addresses head-on the concern that legislators can hide their sectarian purposes, and ensures that statutes are examined equally by all courts in their entirety—the text, the implementation, and the results.<sup>254</sup> Thus, the test has the practical and efficient result of giving more content to the first and second *Lemon* prongs, thereby helping to guide lower courts in their review of Establishment Clause cases.

The test is also more in line with the purpose of the Establishment Clause—to ensure that the government is not curtailing religious freedom.<sup>255</sup> This right is largely an individual right.<sup>256</sup> By looking from the vantage point of an objective observer, the Court would put the focus on individuals, making certain that they do not feel pressured to conform to a certain religion, or even nonreligion, or to feel any more or less favored by the government.<sup>257</sup>

Applying the endorsement test to culturally and linguistically centered schools such as KGIA and Ben Gamla would yield more predictable results. As this Comment has shown thus far, there can be little doubt that an objective observer would view these schools as the government’s implicit endorsement of the specific cultures and religions fostered by the teachers and administrators.<sup>258</sup>

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<sup>251</sup> *Id.*

<sup>252</sup> See Heinrich, *supra* note 31, at 1287–88. For example, statutes prohibiting polygamy have religious effects, but this is permissible. *Id.*

<sup>253</sup> See *Wallace*, 472 U.S. at 76 (explaining what is relevant in determining if an action is a state endorsement of religion).

<sup>254</sup> See Heinrich, *supra* note 31, at 1287 (discussing the benefits of this test).

<sup>255</sup> See *Wallace*, 472 U.S. at 49 (majority opinion) (explaining the purpose of the First Amendment).

<sup>256</sup> See generally Cote, *supra* note 28 (discussing how an individual’s right to free exercise is “supreme”).

<sup>257</sup> See Heinrich, *supra* note 31, at 1288 (comparing the “old” *Lemon* test to Justice O’Connor’s endorsement approach).

<sup>258</sup> See *supra* Part III.B.

### C. *The Endorsement Test: A Logical Development*

Finally, while Justice O'Connor is no longer on the Court, the endorsement test is still a viable option for the Court to officially adopt, as it follows a logical development of the Court's decisions in the last twenty years. As evidenced through both opinions of the Court and concurring opinions, Justice O'Connor's refinement of the *Lemon* test has seeped into nearly every decision since *Lynch*.<sup>259</sup>

In *Wallace*, while the Court did not explicitly adopt the endorsement test, it stated that a relevant question was "whether the government intends to convey a message of endorsement or disapproval of religion," citing to Justice O'Connor's concurring opinion in *Lynch*.<sup>260</sup> Most recently in 2007, writing for the Court in *McCreary County*, Justice Souter again quoted language from Justice O'Connor's concurrence in *Lynch*, and discussed in great detail the need to ensure that the government does not favor one religion over another.<sup>261</sup>

As the Court's reliance on "endorsement" and "favoring" language suggests, the endorsement test has slowly become a fixture in Establishment Clause cases, regardless of the fact that it has not been officially sanctioned as an independent test. Thus, just as the *Lemon* test was gleaned from a "consideration of the cumulative criteria developed by the Court over many years,"<sup>262</sup> so too can the endorsement test be gleaned from the last twenty years of Establishment Clause jurisprudence.

## CONCLUSION

The doors of KGIA and Ben Gamla have been open for almost two years now, and the controversy surrounding their existence has anything but dimmed. While states continue to reanalyze their charter laws and more culturally and linguistically centered schools emerge to assert their right to a segregated, targeted school, it appears to be only a matter of time before courts are confronted with their constitutionality.

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<sup>259</sup> See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (explaining that the government must not favor one religion over another); *Wallace*, 472 U.S. at 61 (asking whether there was an endorsement of religion); *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (finding that the crèche was not an endorsement of religion).

<sup>260</sup> *Wallace*, 472 U.S. at 61.

<sup>261</sup> *McCreary County*, 545 U.S. at 860.

<sup>262</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

The history of Establishment Clause jurisprudence has been a long and inconsistent one. Despite these inconsistencies and the current dissatisfaction of some members of the Court with the *Lemon* test, its underlying principle of ensuring that the government does not endorse or promote any religion over another has pervaded all of the current formulations of *Lemon*.<sup>263</sup> If litigation over these schools reaches the Supreme Court, there can be no predicting which formulation the Court would use. What is more certain, however, is that the Court has before it forty years of precedent that compels it to find that government support for such schools violates the Establishment Clause of the First Amendment.

When a court is faced with this issue, it must also grapple with the significant policy issues that such a sensitive subject produces. Such cases deal with an institution which the Court in *Brown* called “perhaps the most important function of state and local governments.”<sup>264</sup> Thus, it is even more crucial that the Court establish a jurisprudence that will be consistent and have the longevity to stand the test of time, regardless of the ideological composition of the Court.

The implications of the decision cannot be understated. If the Court chooses to uphold such schools, it opens the door for a flood of applications from groups and individuals seeking to avoid the high costs of private school, but who desire to keep their children in culturally segregated and controlled environments.<sup>265</sup> While the United States has been enriched both demographically and ideologically by pluralism, our public school system has been mandated to operate in a truly secular and integrated way. A public education system—sanctioned by the Supreme Court—that moves ever-faster toward a disjointed, sectarian system would surely be a travesty to both the Establishment Clause, and primary and secondary education as a whole.

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<sup>263</sup> See *supra* Part III (analyzing the progression of the entanglement tests).

<sup>264</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

<sup>265</sup> Ironically, such applications could not be easily denied, as this would lead to challenges that the law favors only certain beliefs and is not applied in a neutral manner.

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