

Kitzmiller v. Dover Area School District:
The First Judicial Test for Intelligent Design

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I. Introduction

[1] On October 18, 2004, the Dover Area School District Board of Directors passed a curriculum requirement mandating that students be notified of “gaps/problems” in the biological theory of evolution and that alternative theories exist, such as intelligent design.¹ A subsequent press release informed parents and the general community that biology teachers would read a statement to ninth-grade biology students, prior to teaching the unit on evolution, acknowledging that evolution is simply theory and not fact.² The statement offers intelligent design as an

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¹ The resolution stated: “Students will be made aware of gaps/problems in Darwin’s theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught.” *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 708 (M.D. Pa. 2005).

² The full statement approved by the board read as follows:

The Pennsylvania Academic Standards require students to learn about Darwin’s Theory of Evolution and eventually take a standardized test of which evolution is a part.

alternative theory, and it directs students who are interested in intelligent design to a textbook found in the school library.³

[2] The School Board's actions prompted some parents of the District's students to file a lawsuit against the District.⁴ Finding violations of both the Establishment Clause of the First Amendment of the U.S. Constitution⁵ and Article I, Section 3 of the Pennsylvania Constitution,⁶

Because Darwin's Theory is a theory, it continues to be tested as new evidence is discovered. The Theory is not a fact. Gaps in the Theory exist for which there is no evidence. A theory is defined as a well-tested explanation that unifies a broad range of observations.

Intelligent Design is an explanation of the origin of life that differs from Darwin's view. The reference book, *Of Pandas and People*, is available for students who might be interested in gaining an understanding of what Intelligent Design actually involves.

With respect to any theory, students are encouraged to keep an open mind. The school leaves the discussion of the Origins of Life to individual students and their families. As a Standards-driven district, class instruction focuses upon preparing students to achieve proficiency on Standards-based assessments.

Id. at 708-09; *see also* Dover Area School District, "Letter to Parents," (posted Jan. 7, 2005) (on file with author), http://www.dover.k12.pa.us/doversd/lib/doversd/_shared/Letter%20to%20Parents%20about%20Biology%20Curriculum--01105.pdf (last visited Nov. 11, 2005).

³ Dover Area School District, "Letter to Parents," *supra* note 2. The letter also stated: "Teachers will not be teaching Intelligent Design or the Origin of Life." *Id.* It gave parents the option of having their children excused from the portion of class in which the statement is read. *Id.*

⁴ *Kitzmiller*, 400 F. Supp. 2d at 709.

⁵ The First Amendment holds: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend I.

⁶ Article I, Section 3 of the Pennsylvania Constitution holds that:

All men have a natural and infeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; no human authority can, in any case whatever, control or interfere

the Honorable John E. Jones III of the Middle District of Pennsylvania struck down the District's policy.⁷ In addition, the trial's media coverage sparked a nationwide debate about Darwin's theory of evolution, alternatives to that theory such as intelligent design, and the place of those alternatives within the public school classroom.⁸ The debate is far from over. As Dover's policy came crashing down, other jurisdictions wrestled with similar sets of issues.⁹ The events that

with the rights of conscience, and no preference shall ever be given by law to any religious establishments or modes of worship.

PA. CONST. art. I, § 3 (2005).

⁷ *Kitzmiller*, 400 F. Supp. 2d at 709. Judge Jones so ruled after a six-week trial in which the Court made all findings of fact and conclusions of law after reviewing evidence presented at trial. *Id.* at 711.

⁸ A U.S. Senator spoke out first in support of the Dover policy, then he retracted his position after Judge Jones issued his opinion. *See, e.g.*, Carrie Budoff and Paul Nussbaum, *Santorum Now Critical of Dover Case*, THE PHILA. INQUIRER, Dec. 22, 2005, at A1. President Bush has also weighed in on the issue. *See, e.g.*, Peter Baker and Peter Slevin, *Bush Remarks on "Intelligent Design" Theory Fuel Debate*, THE WASH. POST, Aug. 3, 2005, at A1. Columnists have written about everything from the place of this issue within the courtroom to whether a conflict between evolutionary theory and religion even exists. *See, e.g.*, Michael Balter, Op-Ed., *Let "Intelligent Design" and Science Rumble*, L.A. TIMES, Oct. 2, 2005, at M3; Charles Krauthammer, Op-Ed., *Phony Theory, False Conflict*, THE WASH. POST, Nov. 18, 2005, at A23. Organizations such as the ACLU and the Discovery Institute have been and still are waging war over the issue. *See, e.g.*, *ACLU Hails Historic Ruling in Dover, Pennsylvania "Intelligent Design" Case*, ACLU, Dec. 20, 2005, <http://www.aclu.org/religion/intelligentdesign/23158prs20051220.html>; John G. West, *Dover in Review*, DISCOVERY INSTITUTE – ARTICLE DATABASE, Jan. 6, 2006, <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=3135&program=CSC%20-%20Science%20and%20Education%20Policy%20-%20News%20and%20Articles>. Finally, the Dover trial prompted *Newsweek* magazine to feature stories on the Dover trial and on Charles Darwin, and the magazine even put Darwin himself on the cover. William Lee Adams, *Other Schools of Thought*, NEWSWEEK, Nov. 28, 2005, at 57; Jerry Adler, *Charles Darwin: Evolution of a Scientist*, NEWSWEEK, Nov. 28, 2005, at 50.

⁹ *See, e.g.*, Jodi Wilgoren, *Kansas Board Approves Challenges to Evolution*, THE N.Y. TIMES, Nov. 8, 2005, at A14; Monica Davey & Ralph Blumenthal, *Fight over Evolution Shifts in Kansas School Board Vote*, THE N.Y. TIMES, Aug. 3, 2006, at A15; Kirk Johnson, *Anti-Darwin Bill Fails in Utah*, THE N.Y. TIMES, Feb. 28, 2006, at A15; Catherine Candisky, *State Drops Analysis of Evolution – Reversal Represents a Setback to Backers of Intelligent Design in Science*, THE

took place in Dover have simply become yet another installment in the age-old debate over the presence of evolution in public schools and evolution's alleged conflict with religious views of creation.¹⁰ The goals of this note are: 1) to give a brief history of courts' treatment of the creation/evolution debate and the place of each within public school science curricula, giving particular attention to courts' treatment of the recent trend of evolution "disclaimers;" 2) to review in detail the Middle District of Pennsylvania's opinion, which evaluated Dover's policy under both the "*Lemon* test" and the "endorsement test" for Establishment Clause¹¹ violations; and 3) to argue that though its outcome was correct, the Middle District of Pennsylvania issued too broad a ruling. This note does not take a position on whether intelligent design is religion or science.

II. The Evolution Debate within Establishment Clause Jurisprudence

[3] In its denial of the Dover School Board's motion for summary judgment, the Middle District of Pennsylvania held that there existed genuine issues of material fact as to whether Dover's policy had a secular purpose and whether the policy's primary effect advanced or

COLUMBUS DISPATCH, Feb. 15, 2006, at 1A; *Dover Decision on Intelligent Design "Legally Irrelevant for Ohio's Critical Analysis of Evolution Model Science Curriculum," Says Legal Scholar*, DISCOVERY INSTITUTE – ARTICLE DATABASE, Dec. 22, 2005, <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=3115&program=News&callingPage=discoMainPage>.

¹⁰ Even before Judge Jones issued his opinion, political repercussions ensued in Dover. Citizens of Dover voted to replace eight members of its school board in the November 8, 2005, elections. Martha Raffaele, *Dover Says No to Intelligent Design*, THE PHILA. INQUIRER, Nov. 9, 2005, at B1. The new board members replaced those who implemented the District's policy on evolution. *Id.* This election prompted Christian televangelist Pat Robertson to further fuel the debate by publicly chastising the citizens of Dover, saying that they voted to "reject God from [their] city." See Alan Elsner, *Robertson Says Town Rejects God*, THE WASH. POST, Nov. 11, 2005, at A3.

¹¹ See *supra* note 5.

inhibited religion.¹² It seemed then that the court would evaluate the facts under the *Lemon* test of Establishment Clause jurisprudence.¹³ Today's *Lemon* test provides that "a government-sponsored message violates the Establishment Clause of the First Amendment if: 1) it does not have a secular purpose, and 2) its principal or primary effect advances or inhibits religion."¹⁴ In its post-trial opinion, however, the court first analyzed Dover's policy under the endorsement test,¹⁵ and only after that did it apply the *Lemon* test to the policy.¹⁶

A. The Supreme Court

¹² *Kitzmiller v. Dover Area Sch. Dist.*, No. 04-CV-2688, 2005 WL 2230024 at *3 (M.D. Pa. Sept. 13, 2005).

¹³ *Id.* at *3 (explaining, in *Lemon* test terms, the court's upcoming task of sorting out issues of material fact).

¹⁴ *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding that Rhode Island and Pennsylvania statutes providing funds to nonpublic schools and their employees violated the Establishment Clause by implicating the "excessive entanglement" prong of the *Lemon* test)). *Lemon* initially established a third requirement that the government-sponsored message must "not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 613 (citation omitted). The Supreme Court later held, however, that the factors used to assess the "excessiveness" of an entanglement are similar to those used to examine the effect of the statute or policy. *Agostini v. Felton*, 521 U.S. 203, 232-33 (1997). The *Kitzmiller* plaintiffs also expressly disclaimed entanglement problems; thus, only the first two *Lemon* prongs apply. *Kitzmiller*, 2005 WL 2230024 at *3 n.1.

¹⁵ *Kitzmiller*, 400 F. Supp. 2d at 714. The endorsement test was first articulated by Justice O'Connor in a concurring opinion: "The . . . more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and a[] . . . message to adherents that they are insiders, favored members of the political community." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). The test involves an inquiry into "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of [religion]." *Kitzmiller*, 400 F. Supp. 2d at 712-13 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding that a school district's policy of permitting student-led prayer before school functions violated the Establishment Clause)).

¹⁶ *Kitzmiller*, 400 F. Supp. 2d at 714, 746.

[4] The Supreme Court has adjudicated two Establishment Clause cases that address statutes modifying the teaching of evolution in public school science courses. Prior to its articulation of the *Lemon* test, the Supreme Court invalidated an Arkansas statute that prohibited public schools from teaching “the theory that man evolved from other species of life.”¹⁷ The Court invalidated the statute because it had the purpose¹⁸ of ensuring that the school curriculum did not interfere with the belief that the Book of Genesis accounts for the origin of man.¹⁹

[5] The Supreme Court more recently invalidated what was known as Louisiana’s “Creationism Act” for violation of the Establishment Clause.²⁰ The Act forbade teaching the theory of evolution in public schools unless the curriculum also included instruction in creation science.²¹ The Court held that the statute failed the purpose prong of the *Lemon* test because its primary purpose was to “endorse a particular religious doctrine”²² by “requiring either the

¹⁷ *Epperson v. Arkansas*, 393 U.S. 97, 98 (1968).

¹⁸ G. Sidney Buchanan, *Evolution, Creation-Science, and the Meaning of Primary Religious Purpose*, 58 SMU L. REV. 303, 307 (Spring 2005) (suggesting that though the decision predated *Lemon*, the statute was invalid because it essentially violated what was to become *Lemon*’s purpose prong).

¹⁹ *Epperson*, 393 U.S. at 107. The Court held that, even though the law made no reference to creationism or to the Book of Genesis, “there can be no doubt Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief . . . that the Book of Genesis must be the exclusive source of doctrine as to the origin of man.” *Id.* The Court concluded that “[i]t is clear that fundamentalist sectarian conviction was . . . the law’s reason for existence.” *Id.* at 107-08.

²⁰ *Edwards v. Aguillard*, 482 U.S. 578, 596-97 (1989).

²¹ *Id.* at 581. The Act also provided that public schools did not have the obligation to teach either evolution or creation science. *Id.* It simply required that if one were taught, the other also had to be taught. *Id.*

²² *Id.* at 594.

banishment of . . . evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety.”²³

[6] The Court found that the Louisiana State Legislature’s stated purpose of protecting academic freedom was insincere, and that its true purpose was to “discredit[] ‘evolution by counterbalancing its teaching . . . with the teaching of creationism.’”²⁴ It also found that the legislative history showed that “the Act’s primary purpose was to change the science curriculum of public schools in order to provide . . . advantage to a particular religious doctrine.”²⁵

B. A District Court Takes an Extra Step

[7] Lower courts have applied the *Lemon* test to evolution cases as well. In 1982 the Eastern District of Arkansas invalidated a statute requiring public schools to “give balanced treatment to creation-science and to evolution-science.”²⁶ The court held that the statute failed the *Lemon*

²³ *Id.* at 596. In *Edwards* the Supreme Court noted that under a *Lemon* “purpose” analysis, a court may find that a statute has an improper purpose by examining “the statute on its face, its legislative history, or its interpretation by a reasonable administrative agency.” *Id.* at 594. The Court also noted that “in determining the legislative purpose of a statute, [it may consider] the historical context of the statute.” *Id.* at 595. Furthermore, the Court acknowledged that while it normally defers to a proponent’s stated purpose, that statement must be “sincere and not a sham.” *Id.* at 586-87.

²⁴ *Id.* at 589. According to the Court, promoting academic freedom was accomplished neither by “outlawing the teaching of evolution [nor] by requiring the teaching of creation science.” *Id.* at 586. In its examination of the statute’s legislative history, the Court found that the purpose of its sponsor, Senator Bill Keith, was to narrow the science curriculum. *Id.* at 587. The Court found the statute to restrict teachers’ flexibility rather than increase it. *Id.*

²⁵ *Id.* at 592. The Court acknowledged the existence of “historic and contemporaneous antagonisms” between certain religious teachings and the teaching of evolution, and it decided that the Louisiana State Legislature had the purpose “to advance the religious viewpoint that a supernatural being created humankind.” *Id.* at 591. Furthermore, the Court noted that the legislative sponsor, Senator Keith, said during legislative hearings that his position stemmed from “the support that evolution supplied to views contrary to his own religious beliefs.” *Id.* at 592.

²⁶ *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

test's purpose *and* effect inquiries.²⁷ *McLean* is significant because the court's analysis was more expansive than that of the Supreme Court in both *Epperson* and *Edwards* in that the district court examined the merits of "creation science" as genuine science.²⁸ The court even went so far as to provide a legal definition of "science" based upon expert witness testimony.²⁹ The court also refuted the proponents' claim that an invalidation of the law would restrict academic freedom.³⁰

C. Disclaimers Accompanying Instruction on Evolution

²⁷ *Id.* at 1264. The court examined the circumstances surrounding the passage of the statute and held that "the State failed to produce any evidence which would warrant an inference or conclusion that at any point in the process anyone considered the legitimate educational value of the [statute]. It was simply and purely an effort to introduce the Biblical version of creation into the public school curricula." *Id.* The court also examined the express language of the statute and concluded that its definition of creation science is "identical and parallel" to "the literal interpretation of Genesis . . . [and] to no other story of creation." *Id.* at 1265. Furthermore, the court analyzed the scientific legitimacy of "creation science" and held that "since creation science is not science, the conclusion is inescapable that the only real effect of [the Act] is the advancement of religion." *Id.* at 1272. The state did not appeal the decision on the merits. *McLean v. Ark. Bd. of Educ.*, 723 F.2d 45, 47 (8th Cir. 1984) (affirming the district court's allocation of attorneys' fees).

²⁸ *McLean*, 529 F. Supp. at 1266-74.

²⁹ *Id.* at 1267. The court enumerated the following "essential characteristics of science": 1) it is guided by natural law; 2) it is explanatory by reference to natural law; 3) it is testable against the empirical world; 4) its conclusions are tentative, i.e., are not necessarily the final word; and 5) it is falsifiable. *Id.* Judge Overton, author of the *McLean* opinion, relied upon the expert testimony of philosopher of science Michael Ruse in developing this list of characteristics. *Id.*; see David K. DeWolf et al., *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 67 (2000). The court analyzed each provision of the statute's definition of creation science and held that each failed to meet science's "essential characteristics." *McLean*, 529 F. Supp. at 1267-68.

³⁰ *McLean*, 529 F. Supp. at 1273. The court reasoned that under the statute, teachers would be required to teach material supporting creation science that the teachers themselves did not find academically sound. *Id.* The court also observed that the statute would have had a negative impact upon college-bound students because "[e]volution is the cornerstone of modern biology." *Id.*

[8] Statutes designed to limit the teaching of evolution in public schools, to promote the study of creation-science in public schools, or to arrange a balance between the two have consistently been found unconstitutional by U.S. courts.³¹ A more recent attempt to modify public school science curricula has been to provide disclaimers regarding evolution, given either verbally before a lesson on evolution or by way of text placed in biology textbooks.

[9] The first of these attempts came by way of a 1974 Tennessee statute mandating that all biology textbooks discussing evolutionary theory were prohibited unless the books 1) contained a written statement that evolutionary theory is “just a theory . . . and is not represented to be scientific fact” and 2) devoted equal attention to the “origins and creation of man . . . including, but not limited to, the Genesis account in the Bible.”³² The Sixth Circuit declared the statute to have a “clearly defined preferential position for the Biblical version of creation as opposed to any [version] based on scientific research and reasoning.”³³ The court purported to apply the *Lemon* test,³⁴ but it did not explain whether its finding regarding the disclaimer and Biblical provisions of the statute violated the purpose prong, the effect prong, or both.³⁵

³¹ See discussion *supra* Part I.A-B.

³² *Daniel v. Waters*, 515 F.2d 485, 487 (6th Cir. 1975) (citing 1973 Tenn. Pub. Acts, Chap. 377). The statute also declared that the Bible would not be considered a “textbook” for purposes of the disclaimer requirement and that the Bible could be used as a reference book. *Id.*

³³ *Daniel*, 515 F.2d at 489. The court formulated this conclusion based on the disclaimer’s language attacking the scientific basis of evolution and the statute’s provision mandating that textbooks include the Biblical account of creation. *Id.* at 489.

³⁴ *Id.* at 491.

³⁵ *Id.* The court merely stated that the Establishment Clause violations were “patent and obvious on the face of the statute.” *Id.*

[10] In 1994 the Tangipahoa Parish Board of Education required high school and elementary school teachers in a Louisiana school district to read a statement³⁶ before teaching evolution.³⁷

Parents of public school children sued to enjoin the Board from requiring that this disclaimer be read.³⁸

[11] The Fifth Circuit applied the *Lemon* test to decide whether the Board's statement violated the Establishment Clause.³⁹ It found that the Tangipahoa Board's policy had the legitimate

³⁶ The statement read:

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept;

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion."

Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 341 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).

³⁷ *Freiler*, 185 F.3d at 341.

³⁸ *Id.*

³⁹ *Id.* at 342-44. The Fifth Circuit articulated that there were, in fact, "three complementary (and occasionally overlapping) tests" established by the Supreme Court for evaluating Establishment Clause cases. *Id.* at 343 (citation omitted). The first of these is the *Lemon* test. The second, known as the "endorsement test," seeks to determine whether the government endorses religion by means of the challenged action." *Freiler*, 185 F.3d at 343; *see, e.g.* *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) (holding that the display of a crèche on the county courthouse violated the First Amendment, but the display of a menorah as part of a secular exhibit was constitutional). The third test, known as the "coercion test," analyzes school-sponsored religions activity in terms of the coercive effect it has on students. *Freiler*, 185 F.3d at 343. Under this test an activity violates the Establishment Clause when "1) the government directs 2) a formal religious exercise 3) in such a way as to oblige the participation of objectors." *Id.* (citing *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992)); *see also* *Lee v. Weisman*,

secular purposes, as articulated by the Board, of 1) “disclaim[ing] any orthodoxy of belief inferred from exclusive placement of evolution in the curriculum” and 2) “reduc[ing] offense to the sensibilities of any student or parent caused by the teaching of evolution.”⁴⁰ The Fifth Circuit, however, invalidated the disclaimer based on the effect prong of the *Lemon* test, holding that the primary effect of the disclaimer was to “protect and maintain a certain religious viewpoint, namely belief in the Biblical version of creation.”⁴¹ The court reasoned that the disclaimer actually encouraged students to think about religious theories of “the origin of life and matter” as an alternative to the state-mandated curriculum of evolution.⁴² The court specified

505 U.S. 577 (1992) (invalidating a school district’s policy of allowing school principals to invite clergy to give invocations and benedictions at graduation ceremonies). The Fifth Circuit chose the *Lemon* test because the Supreme Court had recently reaffirmed the test’s viability in *Agostini*. *Freiler*, 185 F.3d at 344.

⁴⁰ *Freiler*, 185 F.3d at 344-46. The Board offered a third purpose for its disclaimer, that it sought “to encourage informed freedom of belief.” *Id.* at 344. The Fifth Circuit held that this purpose was what *Edwards* called a “sham,” and that it actually furthered the contrary purpose of “protect[ing] and maintain[ing] . . . a particular religious viewpoint.” *Id.* at 344-45. Because students would perceive that evolutionary teaching was “not intended to . . . dissuade the Biblical version of Creation,” students would understand that the material to be taught was not supposed to affect the knowledge they had already acquired, thus *discouraging* critical thinking. *Id.* at 345. The court found that the other two stated objectives were both sincere and permissible, and it acknowledged that “purpose is no less secular simply because it is infused with a religious element” and that “school boards need not turn a blind eye to concerns of [those] troubled by the teaching of evolution in public classrooms. *Id.* at 345-46.

⁴¹ *Freiler*, 185 F.3d at 346. The court relied on three factors: “1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; 2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and 3) the Biblical version of Creation as the only alternative theory explicitly referenced in the disclaimer.” *Id.*

⁴² *Id.* at 347.

that the “benefit to religion conferred by [this disclaimer] is more than indirect, remote, or incidental.”⁴³

[12] Parents of students and residents of Cobb County, Georgia, challenged the constitutionality of a sticker placed inside science textbooks that commented on the theory of evolution.⁴⁴ The text of the sticker read: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.”⁴⁵ Though the Eleventh Circuit vacated the decision and remanded the case, because evidence crucial to the district court’s ruling was omitted from the appellate record,⁴⁶ it remains useful to examine the district court’s analysis of the issue. The district court applied the *Lemon* test to determine the sticker’s validity under the Establishment Clause.⁴⁷ The court held that the School District’s policy had two “clearly secular” purposes: 1) to foster critical thinking,⁴⁸ and 2) to “reduce[] offense to students and parents whose beliefs may conflict with the teaching of evolution.”⁴⁹

⁴³ *Id.* at 348. *But see* *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1251 (2000) (Scalia, J., dissenting) (criticizing the *Lemon* test and arguing that the effect of the Tangipahoa disclaimer was to “advance the freedom of thought”).

⁴⁴ *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1288 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006).

⁴⁵ *Id.* at 1292. The stickers were placed in textbooks as early as March 2002. The court acknowledged that 1) evolution is the only theory mentioned in the sticker; and 2) there is no sticker in the textbooks related to any other “theory, topic, or subject covered in the Cobb County School District’s curriculum.” *Id.*

⁴⁶ *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1322 (11th Cir. 2006).

⁴⁷ *Selman*, 390 F. Supp. 2d at 1298-99.

⁴⁸ *Id.* at 1305. The court acknowledged the absence of a statement articulating the sticker’s purpose, so it turned to the School District’s official policy, which “[was] to foster critical thinking among students, to allow academic freedom . . . to promote tolerance . . . and to ensure a posture of neutrality toward religion. *Id.* at 1301-02. The court distinguished this from the

[13] Like the Fifth Circuit in *Freiler*, the Northern District of Georgia used the effect prong of the *Lemon* test to invalidate the sticker.⁵⁰ Here, the court reasoned that “an informed, reasonable observer would interpret the Sticker to convey a message of endorsement of religion.”⁵¹ The court held that the sticker sends the message to opponents of evolution that they are favored members of the political community, while others are political outsiders.⁵² The court also held that a violation arose from the sticker’s statement that “evolution is a theory, not a fact, concerning the origin of living things,” because this language had the implicit effect of bolstering religious theories of origin.⁵³ The court seemed to rely on the social history of the “evolution

Tangipahoa Board’s similar statement of purpose that had been declared invalid, because the Cobb County sticker did not refer to religion, and because it did not explicitly mention any alternative theories of origin. *Id.* at 1302.

⁴⁹ *Id.* at 1305. The court acknowledged that this was the School Board’s primary purpose, and that the board members implemented the policy to accommodate religious views held by parents. *Id.* at 1303-05. The court still found this to be a valid secular purpose, and it noted that “religious motivations of individual School Board members cannot invalidate the Sticker.” *Id.* at 1304.

⁵⁰ *Id.* at 1312.

⁵¹ *Id.* at 1306.

⁵² *Selman*, 390 F. Supp. 2d at 1306. The district court specifically noted that the sticker would appear to advance the religious views of Christian fundamentalists who were active in the textbook adoption process. *Id.* at 1306-07. The court held that this process, combined with the School Board’s actions’ coinciding with the beliefs of a particular religion, conveyed such a message of political favoritism. *Id.* at 1308.

⁵³ *Id.* at 1308-09. The court stated that the School District, in selecting this language, violated the Establishment Clause by “appearing to take a position on questions of religious belief.” *Id.* at 1307 (citing *County of Allegheny*, 492 U.S. at 593-94 (1989)).

versus creation” issue in forming its conclusion.⁵⁴ Alabama remains the only state to use textbook disclaimers that encourage students to critically evaluate the theory of evolution.⁵⁵

III. *Kitzmiller*: Intelligent Design’s Complete Failure in its First Judicial Test

[14] Though Dover Township’s policy was decimated by Judge Jones’ opinion,⁵⁶ its demise really began when the citizens of Dover Township voted to replace eight of nine members of the School Board that implemented the policy.⁵⁷ After the case’s adjudication, the newly elected Board unanimously voted to rescind the policy and remove any mention of intelligent design from its high school biology classes.⁵⁸ The Board also resolved not to appeal the decision by an 8-1 vote.⁵⁹ The Dover policy has been eliminated and will not be litigated again; nevertheless, Judge Jones’ opinion is likely to be scrutinized as the nationwide debate on this issue rages.

⁵⁴ The *Selman* court examined the social history of this issue and noted that the question of “whether evolution is referenced as a theory or fact is . . . a loaded issue with religious undertones.” *Selman*, 390 F. Supp. 2d at 1307 (citation omitted). The court added that the sticker implicitly supported religious theories of origin by suggesting that evolution is problematic in the field of science, persuaded by witnesses, including those of the defendant School Board, that evolution is “the dominant scientific theory of origin accepted by the majority of scientists.” *Id.* at 1309.

⁵⁵ See David J. Hacker, *Warning! Evolution Lies Within: Preserving Academic Freedom in the Classroom with Secular Evolution Disclaimers*, 16 WASH. U. J. L. & POL’Y 333, 333 (2004). Hacker describes recent attempts to implement similar textbook disclaimers in Louisiana, South Carolina, and Oklahoma that failed at either the school board or state legislative level. Hacker, *supra*, at 334-39. See also Samira Jafari, *State Will Keep Theory Disclaimer in Biology Books*, THE HUNTSVILLE TIMES, Nov. 11, 2005, at 1A.

⁵⁶ *Kitzmiller*, 400 F. Supp. 2d 707.

⁵⁷ Raffaele, *supra* note 10.

⁵⁸ Amy Worden, *Dover Drops Intelligent Design in Vote*, THE PHILA. INQUIRER, Jan. 4, 2006, at B1.

⁵⁹ *Id.* The lone dissenter was the only remaining member of the board that supported the intelligent design policy. *Id.* She argued that the Thomas More Law Center, which represented the defendants in *Kitzmiller*, should be granted an opportunity to continue its fight to legitimize

A. The Tests for Constitutional Validity Used in *Kitzmiller*

[15] The court invalidated Dover’s policy under both the *Lemon* test and the endorsement test of Establishment Clause jurisprudence.⁶⁰ A *Lemon* test analysis was expected, because in denying the Board’s motion for summary judgment, the court acknowledged that both parties conceded that the *Lemon* test was applicable to the facts.⁶¹ The *Lemon* test was used by the Supreme Court in *Edwards*,⁶² by the Fifth Circuit in *Freiler*,⁶³ by the Eastern District of Arkansas in *McLean*,⁶⁴ and by the Northern District of Georgia in *Selman*.⁶⁵ Furthermore, it can be argued that the Supreme Court decided *Epperson* on *Lemon* test purpose grounds even though the case predated *Lemon*.⁶⁶

intelligent design as science. *Id.* In the *Kitzmiller* opinion, Judge Jones had asserted that intelligent design is not science but rather “an interesting theological argument.” *Kitzmiller*, 400 F. Supp. 2d at 746.

⁶⁰ *Kitzmiller*, 400 F. Supp. 2d at 714; *see supra* notes 14-16 and accompanying text.

⁶¹ *Kitzmiller v. Dover Area Sch. Dist.*, No. 04-CV-2688, 2005 WL 2230024 at *3 (M.D. Pa. Sept. 13, 2005).

⁶² *Edwards v. Aguillard*, 482 U.S. 578, 596 (1987) (holding that Louisiana’s Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act violated the purpose prong of the *Lemon* test); *see supra* note 23 and accompanying text.

⁶³ *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344-48 (5th Cir. 1999) (conducting an analysis under the *Lemon* test before holding that the policy at issue violated both the effect prong of the *Lemon* test and the endorsement test, since the *Lemon* “effect” inquiry is identical to the endorsement inquiry); *see supra* notes 39, 41 and accompanying text.

⁶⁴ *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255, 1264 (E.D. Ark. 1982) (holding that Arkansas’s Balanced Treatment Act violated *Lemon*’s purpose test); *see supra* note 27 and accompanying text.

⁶⁵ *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1299-1300 (N.D. Ga. 2005), *vacated*, 449 F.3d 1320 (11th Cir. 2006); *see supra* notes 50-53 and accompanying text.

⁶⁶ *See supra* note 18.

[16] The *Kitzmiller* court found, however, that the Supreme Court has decided a number of recent Establishment Clause cases using the endorsement test.⁶⁷ Moreover, the court found that Third Circuit precedent requires the endorsement test to be used in conjunction with the *Lemon* test, and perhaps most importantly, that courts should conduct an endorsement test analysis *before* conducting a *Lemon* test analysis.⁶⁸

B. The Dover Policy’s Violation of the Endorsement Test

[17] The court noted that its task under the endorsement test was to determine the nature of the message conveyed by the Dover policy to a reasonable observer who is familiar with “the policy’s language, origins, legislative history, as well as the history of the community and the broader social and historical context in which the policy arose.”⁶⁹ The court first held that under this test, an objective, reasonable observer would know that both intelligent design and a plan to inform students of problems with evolutionary theory are “creationist, religious strategies.”⁷⁰ The court supported this notion by citing to courtroom testimony indicating that the ideas behind

⁶⁷ *Kitzmiller*, 400 F. Supp. 2d at 712-13; *see, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 652-53 (2002) (applying the endorsement test to a school-voucher program); *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying the endorsement test to invalidate school-sponsored prayer at school football games).

⁶⁸ *Kitzmiller*, 400 F. Supp. 2d at 713-14 (citing *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 530-35 (3d Cir. 2004); *Freethought Soc’y v. Chester County*, 334 F.3d 247, 261 (3d Cir. 2003) (applying both the endorsement and *Lemon* tests to decide whether a Ten Commandments display on the county courthouse violated the Establishment Clause)); *see* discussion *infra* Part III.B.

⁶⁹ *Kitzmiller*, 400 F. Supp. 2d at 714-15 (citing *McCreary County v. ACLU*, 125 S.Ct. 2722, 2736-37 (2005); *Santa Fe*, 530 U.S. at 308; *Selman*, 390 F. Supp. 2d at 1306).

⁷⁰ *Kitzmiller*, 400 F. Supp. 2d at 716. The court provided a lengthy discussion of prior legal jurisprudence, which included *Epperson*, *McLean*, and *Edwards*. *Id.* at 716-18.

the intelligent design movement have religious origins⁷¹ and that proponents of the intelligent design movement have a religious agenda.⁷²

[18] The court then undertook an analysis of the wording of the statement as heard in the classroom by a listening, objective student to determine whether Dover's disclaimer constituted an official endorsement of religion.⁷³ The court concluded that a student would perceive the statement as an official endorsement of religion because the statement singles out evolution for special treatment, weakens the student's perception of scientific bases for evolution, presents students with a religious alternative to evolution and an accompanying religious text, and encourages students to seek instruction on the matter in places other than the classroom.⁷⁴

⁷¹ The court cited to the testimony of plaintiffs' expert, theologian John Haught, who testified that one hallmark of intelligent design is that where complex design exists in nature, it must be the product of a designer, and that because certain aspects of nature are complex, nature must have had an "intelligent designer." *Id.* at 718. Haught traced this idea to the thirteenth-century religious figure Thomas Aquinas. *Id.* The court compared this argument with that of the defendants' experts, Professors Michael Behe and Scott Minnich, who testified that intelligent design does not acknowledge that God is the designer. *Id.*

⁷² *Id.* at 718-23. This evidence included expert testimony that the Discovery Institute's Center for Renewal of Science and Culture developed a "Five Year Strategic Plan Summary," which indicated that the goal of the intelligent design movement is to "replace science as currently practiced with 'theistic and Christian science.'" *Id.* at 720. The court also found that a tenet of intelligent design is the existence of a supernatural designer, and that defense experts were unable to explain how such a supernatural being could be anything other than a religious one. *Id.* at 721. Finally, after reviewing drafts of the textbook *Of Pandas and People*, which was offered to Dover students as an intelligent design reference book, the court found that the text originally was based upon creation science until the *Edwards* decision in 1987, at which time intelligent design became the book's focus. *Id.* at 721-22.

⁷³ *Id.* at 723-29; *see supra* note 2 for text of statement.

⁷⁴ *Id.* at 728-29. The court conducted a paragraph-by-paragraph analysis of the statement, finding that the first and second paragraphs falsely detracted from the scientifically-accepted validity of evolution, thus undermining students' education. *Id.* at 724-25. The court found that the third paragraph presented an "explanation" of intelligent design, which the statement held in opposition to "Darwin's 'view,'" implicitly suggesting the former "explanation" is the stronger theory. *Id.* at 725. Finally the court found that the fourth paragraph, leaving discussion of

[19] Because the Dover School Board publicized its policy change in the local community, the court also analyzed whether an objective adult citizen would understand the policy to be an endorsement of religion.⁷⁵ The court concluded that such an adult would also perceive the statement to be religious endorsement because public meetings of the Board of Education consisted of religious discussion,⁷⁶ newsletters sent to Dover’s citizens informed them of the policy attacked evolution,⁷⁷ and reports and editorials in York, Pennsylvania, newspapers illustrated that the community understood the controversy to be about whether a religious idea should be permitted in public schools.⁷⁸

“Origins of Life” to each student and his or her family, was similar to that which was struck down in *Freiler*. *Id.* at 726; *see supra* note 36 for text of the *Freiler* disclaimer. The court found that both statements encouraged students to keep an open mind about evolution while offering religion-based alternatives, and that both stifled critical thinking by telling students that school instruction need not affect that which their parents have already taught them. *Kitzmiller*, 400 F. Supp. 2d at 726 (citing *Freiler*, 185 F.3d at 344-47); *see also supra* note 40 and accompanying text.

⁷⁵ *Kitzmiller*, 400 F. Supp. 2d at 730.

⁷⁶ *Id.* at 730. The court found that at the public board meetings, school board members promoted the intelligent design policy in “expressly religious terms,” and that two board members used religious terms when defending the proposal in the local media. *Id.*

⁷⁷ *Id.* at 731. Newsletters were sent to every Dover household in February 2005. *Id.* The newsletter did not explain the issue in a neutral fashion, but rather argued in support of the intelligent design policy and attacked the theory of evolution. *Id.* The newsletter contained several references to religion and also hinted that evolutionary theory was the equivalent of atheism. *Id.* at 730-31.

⁷⁸ *Id.* at 732-35. Local newspaper articles and letters to the editor were admitted as evidence of how the local community understood the controversy. *Id.* at 732-33. In admitting these materials into evidence to show their effect on the community at large, the court cited the Supreme Court’s use of letters to the editor in a local Arkansas newspaper in *Epperson*. *Id.* at 734 (citations omitted). The Supreme Court in *Epperson* used the letters to support its finding that Arkansas’s statute had been passed as a result of “fundamentalist sectarian conviction.” *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968).

[20] After the court found that both an objective high school biology student and an objective adult in the Dover community would find Dover’s policy to endorse religion, the court then proceeded to determine whether intelligent design is, in fact, science.⁷⁹ It concluded, based primarily upon the testimony of plaintiffs’ and defendants’ experts, that intelligent design cannot be considered science.⁸⁰ The court found that intelligent design violates the ground rules of science;⁸¹ that the allegedly scientific arguments behind it, such as “irreducible complexity”⁸² and “purposeful arrangement of parts,”⁸³ are flawed;⁸⁴ that intelligent design’s negative attacks

⁷⁹ *Kitzmiller*, 400 F. Supp. 2d at 735-46.

⁸⁰ *Id.* at 745-46.

⁸¹ The court held that scientific ideas are given merit through their testability, and that scientific inquiries are limited to “testable, natural explanations about the natural world.” *Id.* at 735-36. The court found that intelligent design is premised upon supernatural causation for natural phenomena, and, as such, is not testable. *Id.* at 736. The court referred to the book *Of Pandas and People*, which states that “[i]ntelligent design means that various forms of life began abruptly, through an intelligent agency, with their distinctive features already intact – fish with fins . . . , etc.” *Id.* at 736 (citation omitted). The court noted that defense experts “acknowledged” that the textbook passage suggests that animals, rather than evolving naturally, were created abruptly by a non-natural designer. *Id.* The court discussed the Discovery Institute’s “Wedge Document,” which supports a scientific revolution in which science looks beyond the material world. *Id.* at 737; *see supra* note 72.

⁸² Professor Behe has defined “irreducible complexity” as “a single system which is composed of several well-matched, interacting parts that contribute to the basic function, wherein the removal of any one of the parts causes the system to ineffectively cease functioning. [Such a system] cannot be produced directly by slight, successive modifications of a precursor system.” *Id.* at 739 (citation omitted); *see, e.g.*, Francis J. Beckwith, *Science and Religion Twenty Years After McLean v. Arkansas: Evolution, Public Education, and the New Challenge of Intelligent Design*, 26 HARV. J.L. & PUB. POL’Y 455, 480-82 (Spring 2003); Theresa Wilson, *Evolution, Creation, and Naturally Selecting Intelligent Design out of the Public Schools*, 34 U. TOL. L. REV. 203, 210 (Winter 2003).

⁸³ According to Professor Behe, this argument suggests that design can be inferred from parts that appear to be arranged for a purpose, and that “the more parts that are arranged and the more intricately they interact, the stronger is our confidence in design.” *Kitzmiller*, 400 F. Supp. 2d at 741-42.

on evolution have been rejected by the majority of scientists;⁸⁵ and that intelligent design has not been recognized by the mainstream scientific community.⁸⁶ The court held that any one of these points would enable it to conclude that intelligent design is not science, yet it discussed each in detail.⁸⁷

C. The Dover Policy's Violation of the *Lemon* Test

[21] After concluding that the Dover Board's policy violated the endorsement test, the court analyzed the policy under the *Lemon* test.⁸⁸ The court concluded that, even though the School Board argued that it enacted the policy for the purposes of improving the science curriculum and promoting critical thinking skills,⁸⁹ the Board's true purpose was to promote religion in the

⁸⁴ The court pointed to Professor Behe's failure to update his research in irreducible complexity and to other experts' criticism of his theory to denigrate Behe's theory and to show that even if Behe's tests and conclusions were accepted by the scientific community, they would still fall under the umbrella of "evolution" and not "intelligent design." *Id.* at 739-42. The court also found that "purposeful arrangement of parts" cannot be tested by scientific means and is thus not considered "science." *Id.* at 742-43.

⁸⁵ *Id.* at 743-45 (holding that expert testimony showed that evolution is "overwhelmingly accepted" by the scientific community and that the textbook *Of Pandas and People* contains misrepresentations of principles of evolution, molecular biology, and genetics).

⁸⁶ *Id.* at 745 (holding that expert testimony revealed that there are no peer-reviewed publications supporting the theory of intelligent design, an important step by which any theory might gain scientific recognition).

⁸⁷ *Id.* at 735.

⁸⁸ *Kitzmiller*, 400 F. Supp. 2d at 746. The court first analyzed whether the Dover School Board's primary purpose was to advance religion, then considered if its policy had the primary effect of promoting religion. *Id.*; see *supra* note 14 and text accompanying.

⁸⁹ *Kitzmiller*, 400 F. Supp. 2d at 762.

District's public schools.⁹⁰ In reaching this conclusion, the court analyzed the policy's plain language, its legislative history, and the historical context under which the policy arose.⁹¹

[22] The court presented a detailed chronology of events leading to the Dover policy's passage that depicts the religious agenda of the School Board.⁹² The movement for a curriculum change began in early 2002 when a board member expressed interest in injecting religious ideas, such as creationism and school prayer, into the school system.⁹³ That board member later confronted high school biology teachers about their lessons on evolution, which resulted in the teachers' elimination of certain lessons on evolution.⁹⁴ The Board also contacted the Discovery Institute in early 2004 to discuss the legality of teaching about gaps in the theory of evolution and about intelligent design.⁹⁵

[23] While this took place, controversy arose over the purchase of a new biology textbook.⁹⁶ Though funding for new science textbooks had been approved in June 2003, the Board delayed its purchase of the new biology textbook for a year.⁹⁷ In the summer of 2004, the textbook issue was hotly debated in board meetings, at which some board members expressed interest in

⁹⁰ *Id.* at 763.

⁹¹ *Id.* at 747.

⁹² *Id.* at 748-62.

⁹³ *Id.* at 748-49.

⁹⁴ *Kitzmiller*, 400 F. Supp. 2d at 749-50.

⁹⁵ *Id.* at 750.

⁹⁶ *Id.*

⁹⁷ *Id.*

obtaining a textbook that taught evolution in conjunction with creationism.⁹⁸ The Board Curriculum Committee met with biology teachers that summer, and the teachers agreed to review Discovery Institute materials in exchange for the Board's approval of the new biology textbooks.⁹⁹ At the same time, some board members advocated the purchase of *Of Pandas and People* rather than the approved biology text, and teachers, in order to diffuse the controversy, agreed that *Pandas* could be used as a reference text.¹⁰⁰ Finally, in October 2004, the Board Curriculum Committee drafted the curriculum change without the assistance of any science teachers, deviating from its standard procedure for adopting changes.¹⁰¹ The court found most telling that intelligent design was never discussed in any board meetings leading up to the curriculum change, but that creationism was discussed at the meetings.¹⁰² Finally, the court described teachers' assertions that intelligent design is not science and the teachers' refusal to read the statement to their classes.¹⁰³

⁹⁸ *Id.* at 751-52. These meetings also contained overtly religious speeches that included scripture passages. *Id.* at 752.

⁹⁹ *Kitzmiller*, 400 F. Supp. 2d at 753. Teachers were also forced to agree that there would be no more classroom murals depicting evolution in exchange for the new biology textbooks. *Id.* The court viewed this as evidence that the policy did not serve the defendants' stated purposes of encouraging critical thinking and improving science education. *Id.* at 750.

¹⁰⁰ *Id.* at 754-55. These books were acquired by donations in a church collection. *Id.* at 756.

¹⁰¹ Such deviations also included prompt implementation of the changes, rather than waiting at least one-year between passage and implementation of the changes. *Id.* at 757.

¹⁰² *Id.* at 758-59. Also, not one of the six board members voting in favor of the change had any detailed understanding of the intelligent design theory. *Id.* at 759. Furthermore, the court noted that the Board did not consult any outside scientific or educational organizations for information about intelligent design or science education, but rather that it simply consulted the Discovery Institute and the Thomas More Law Center for legal advice. *Id.*

¹⁰³ *Id.* at 761.

[24] The court used this evidence to hold that the School District's stated purpose for its curriculum change was a "sham."¹⁰⁴ Though it held that the policy failed the *Lemon* test's purpose inquiry, the court also applied the effect prong, but it did so by simply adopting its previous endorsement test analysis and finding that the policy had the effect of imposing religious views into the curriculum.¹⁰⁵ The court finally concluded that: 1) the Dover policy failed both the endorsement test and *Lemon* test and therefore violated the Establishment Clause; 2) intelligent design is not science; and 3) intelligent design is intertwined with creationist and religious theories that have been outlawed by courts of the past.¹⁰⁶

IV. A Correct Decision, But on Grounds Too Broad

[25] The court's decision in *Kitzmiller* to strike down the Dover School Board's policy seems correct, especially in light of the Dover board members' attempts to inject religion into their public school.¹⁰⁷ The scope of the court's decision wrongly exceeded the board members' actions, however, and it placed the courts further into the center of a larger scientific and philosophical debate about the legitimacy of intelligent design.

¹⁰⁴ *Kitzmiller*, 400 F. Supp. 2d at 763 (citing *Edwards*, 482 U.S. at 586-87). The court indicated that the proper steps for the school to have taken to improve science education would have included consulting scientific materials, science organizations, and/or science teachers. *Id.* at 763.

¹⁰⁵ *Kitzmiller*, 400 F. Supp. 2d at 763-64. The court held specifically that "[t]he effect of . . . the curriculum change was to impose a religious view of biological origins into the biology course." *Id.* at 764. The court reasoned that: 1) because intelligent design is not science, the effect of the policy was the endorsement of religion; 2) reading the disclaimer to students had the effect of bolstering a religious theory of origin by suggesting there are problems with evolutionary theory; and 3) the board implied that it approved religious principles rather than the materials taught in the classroom. *Id.*

¹⁰⁶ *Id.* at 765.

¹⁰⁷ See *supra* notes 92-104 and accompanying text.

A. *Kitzmiller* Under the Evolution Cases: Stopping the Inquiry at the School Board's Purpose

[26] When comparing this court's analysis of the Dover Board's policy with other courts' dispositions of statutes and policies affecting the teaching of evolution in public schools,¹⁰⁸ it is evident that Dover's policy would have been struck down on different grounds than those used by the Middle District of Pennsylvania. In fact, under the cases that previously dealt with this issue, the scientific basis of intelligent design most likely would have escaped judicial evaluation.

[27] Under the Supreme Court's analysis of *Epperson*,¹⁰⁹ Dover's policy would most likely have failed because Dover's board members implemented the policy out of their well-documented interest in inserting religious ideas into the school system.¹¹⁰ While the source of the Arkansas law struck down in *Epperson* was the religious views of Arkansas citizens,¹¹¹ the source of the Dover policy was the religious views of its board members.¹¹² If we still existed in a pre-*Lemon* test world, *Epperson* suggests that the religious source of the Dover policy would have been sufficient for a court to invalidate it.¹¹³

¹⁰⁸ See discussion *supra* Part I.A-C.

¹⁰⁹ See *supra* notes 18-19 and accompanying text.

¹¹⁰ See *supra* notes 92-104 and accompanying text.

¹¹¹ *Epperson v. Arkansas*, 393 U.S. 97, 107-08 (1968) (concluding that "fundamentalist sectarian conviction was . . . the law's reason for existence").

¹¹² See *supra* notes 92-104 and accompanying text.

¹¹³ The Supreme Court in *Epperson* justified its conclusion with evidence of an advertisement for the law in the *Arkansas Gazette* which stated: "The Bible or Atheism, Which? All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1." *Epperson*, 393 U.S. at 108 & n.16. This tactic was similar to the Dover Board's mailing of a newsletter to all Dover households that criticized evolutionary theory and hinted that

[28] Under the Supreme Court’s analysis of the Louisiana Creationism Act in *Edwards*, the Dover policy would also have been struck down based upon the religious motives of the board members in implementing the policy. The *Edwards* court, applying the *Lemon* test, stated: “If the law was enacted for the purpose of endorsing religion, ‘no consideration of the second or third criteria [of *Lemon*] is necessary.’”¹¹⁴ The *Edwards* court halted its analysis after concluding that the purpose of the curriculum change was to endorse religion.¹¹⁵ A review of the Dover board members’ interest in injecting religious views into the school system and of the significant role that religion played in the adoption of a new biology textbook¹¹⁶ suggests that the analysis could have ended and the policy could have been invalidated at this point.¹¹⁷

[29] The result would have been similar under the analyses of both the Fifth Circuit in *Freiler* and the Northern District of Georgia in *Selman* with respect to the evolution disclaimers examined by those courts.¹¹⁸ In both *Freiler* and *Selman*, the courts found that each defendant

evolution has “atheistic implications.” *Kitzmilller*, 400 F. Supp. 2d at 730-31; *see also supra* note 77 and accompanying text.

¹¹⁴ *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987) (citing *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985)). The *Kitzmilller* court also noted that “[the Board’s] actions have failed to pass constitutional muster . . . pursuant to the purpose prong of *Lemon*, . . . making further inquiry unnecessary.” *Kitzmilller*, 400 F. Supp. 2d at 763.

¹¹⁵ *Edwards*, 482 U.S. at 596-97.

¹¹⁶ *See supra* notes 92-104 and accompanying text.

¹¹⁷ The court, like in *Edwards*, would still have undertaken an analysis of the Board’s stated purposes for adopting the policy. *See Edwards*, 482 U.S. at 586-87 (articulating the legislature’s stated purpose for the law and holding that its stated purpose must not be a “sham” before ultimately concluding that it was, in fact, a sham). The *Kitzmilller* court concluded that the steps taken by the Board suggest that the Board’s stated purposes of improving the science curriculum and promoting critical thinking skills were false. *Kitzmilller*, 400 F. Supp. 2d at 763.

¹¹⁸ The Sixth Circuit’s analysis of *Daniel v. Waters* does not provide much assistance, because there the court held that “the requirement of preferential treatment of the Bible clearly offends

had legitimate secular purposes for their respective disclaimers.¹¹⁹ The *Kitzmiller* court, on the other hand, evaluated each purpose asserted by the Dover School Board and found that the stated purposes of “improv[ing] science education” and “exercis[ing] critical thinking skills” were not the Board’s true purposes.¹²⁰ Because the court concluded that the Dover Board had no legitimate secular purposes, no analysis of the effect of Dover’s policy under the *Lemon* test would have been necessary under *Freiler* and *Selman*.

[30] Of cases that have evaluated restrictions on teaching evolution under the Establishment Clause, the *Kitzmiller* court’s analysis is most comparable to that of *McLean*.¹²¹ There the court found, based on the legislative history of the statute at issue, that the legislature did not have a legitimate secular purpose.¹²² The court then proceeded to analyze the express words of the Act and found a violation of the effect prong of the *Lemon* test.¹²³ Likewise, the *Kitzmiller* court

the Establishment Clause of the First Amendment,” *Daniel v. Waters*, 515 F.2d 485, 491 (6th Cir. 1975), but the court neglected to indicate which prong of the *Lemon* test the preferential treatment violated. In his dissent, however, Judge Celebrezze suggested that the court could have, under *Lemon*, analyzed the Tennessee legislature’s defense of the statute. *Daniel*, 515 F.2d at 495 (Celebrezze, J., dissenting). In *Edwards* the Court did this by analyzing the sincerity of the defendants’ stated purposes. *See supra* note 23.

¹¹⁹ In *Freiler*, the court found that the Tangipahoa Parish Board of Education adopted the disclaimer for the permissible objectives of “disclaim[ing] any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum” and “reduc[ing] offense to . . . any student or parent caused by the teaching of evolution.” *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344-45 (5th Cir. 1999). Likewise, the *Selman* court found that the school district had the permissible secular purposes of fostering critical thinking and reducing offense to students and parents. *Selman*, 390 F. Supp. 2d at 1305; *see* notes 46-47 and accompanying text.

¹²⁰ *Kitzmiller*, 400 F. Supp. 2d at 762-63.

¹²¹ *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

¹²² *McLean*, 529 F. Supp. at 1264; *see also supra* note 27 and accompanying text.

¹²³ *McLean*, 529 F. Supp. at 1264-72; *see also supra* note 27 and accompanying text.

analyzed the specific wording of the Dover disclaimer and determined its effect on students.¹²⁴ Finally, while the *McLean* court analyzed whether creation science truly is science,¹²⁵ the *Kitzmiller* court analyzed whether intelligent design truly is science.¹²⁶ A problem with the comparison between *McLean* and *Kitzmiller* lies with the fact that the U.S. Supreme Court neglected to evaluate both *Lemon* test prongs in *Edwards*, a case decided five years after *McLean*, and the Court has continued to limit its *Lemon* test application in recent Establishment Clause cases after it has discovered a primary religious purpose.¹²⁷

B. Third Circuit Establishment Clause Methodology and Recent Supreme Court Methodology Allowed the *Kitzmiller* Court to Advance Beyond the *Lemon* Test’s Purpose Prong

[31] Many legal scholars and law students who recognized a coming judicial clash between intelligent design and evolution as part of public school science curricula predicted that the *Lemon* test would be used in an Establishment Clause challenge.¹²⁸ The *Kitzmiller* court

¹²⁴ *Kitzmiller*, 400 F. Supp. 2d at 723-26; see also *supra* notes 73-74 and accompanying text. The *Kitzmiller* court purported to conduct this analysis as part of the endorsement test; however, it later noted that “because the *Lemon* effect test largely covers the same ground as the endorsement test, [it would] incorporate [its] . . . factual findings and legal conclusions made under the endorsement analysis by reference.” *Kitzmiller*, 400 F. Supp. 2d at 764.

¹²⁵ The *McLean* court did so under a *Lemon* test-effect prong analysis. *McLean*, 529 F. Supp. at 1266-72; see also *supra* notes 27-29 and accompanying text.

¹²⁶ The *Kitzmiller* court did so as part of its endorsement test analysis. *Kitzmiller*, 400 F. Supp. 2d at 735-46; see also *supra* notes 79-87 and accompanying text.

¹²⁷ See, e.g., *McCreary County v. ACLU*, 125 S.Ct. 2722, 2738-39, 2745 (2005) (using the purpose prong of the *Lemon* test to uphold an injunction that prevented two counties in Kentucky from displaying the Ten Commandments in their courthouses, because the purposes of the displays were to “emphasize and celebrate the Commandments’ religious message”). *But cf.* *Kitzmiller*, 400 F. Supp. 2d at 711 (citing to *McLean* first in its analysis of the federal legal landscape).

¹²⁸ See, e.g., Chad Edgington, Comment, *Disclaiming Darwin Without Claiming Creation: The Constitutionality of Textbook Disclaimers and their Mutually Beneficial Effect on Both Sides of*

indicated, however, that the Supreme Court's use of the endorsement test has increased since the Court first applied the test in *County of Allegheny v. ACLU*,¹²⁹ and it has used the test often in cases involving religion in public schools.¹³⁰ The court cited several Supreme Court cases which it claims applied the endorsement test to public schools' alleged adoption of a religious message.¹³¹ In response, the School Board argued that in *Edwards*, the Supreme Court applied

the Origins Debate, 35 TEX. TECH L. REV. 135, 160 (2004) (predicting that the *Selman* court would apply the *Lemon* test to the issue); F. Arthur Jones III, *A Creative Solution?: Assessing the Constitutionality of a New Creation/Evolution Disclaimer*, 49 LOY. L. REV. 519, 536-45 (2003) (predicting the results of a challenge to a disclaimer on evolution under the *Lemon*, endorsement, and coercion tests, in that order); T. Mark Moseley, Comment, *Intelligent Design: A Unique Perspective to the Origins Debate*, 15 REGENT U. L. REV. 327, 338-44 (2002-03) (evaluating how a proposed law placing intelligent design in public schools would be disposed of under the *Lemon* test and endorsement test); Wendy F. Hanakahi, Comment, *Evolution-Creationism Debate: Evaluating the Constitutionality of Teaching Intelligent Design in Public School Classrooms*, 25 U. HAW. L. REV. 9, 31 (2002) (evaluating a law requiring the teaching of intelligent design in public schools under the *Lemon*, endorsement, and coercion tests); Stephen L. Marshall, Note, *When May a State Require Teaching Alternatives to the Theory of Evolution? Intelligent Design as a Test Case*, 90 KY. L. J. 743, 768-85 (2001-02) (evaluating such a law under the *Lemon* test); David K. DeWolf et al., *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 95-98 (2000) (evaluating the teaching of intelligent design theory under the *Lemon* test); Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 457 (1997) (evaluating the teaching of intelligent design theory under the *Lemon* test despite recent criticism of that test).

¹²⁹ *County of Allegheny v. ACLU*, 492 U.S. 573, 592-94 (1989) (applying the endorsement test to the constitutionality of a crèche located inside a county courthouse under the Establishment Clause).

¹³⁰ *Kitzmiller*, 400 F. Supp. 2d at 712-13 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (“defining” the endorsement test by noting that “one of the relevant questions is ‘whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement’”).

¹³¹ *Kitzmiller*, 400 F. Supp. 2d at 713 (citing *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Agostini v. Felton*, 521 U.S. 203 (1997); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)). However, several of the cases cited by the *Kitzmiller* court simply use the term “endorsement” within its Establishment Clause analysis, as opposed to applying what is now known as the “endorsement test.” See, e.g., *Zelman*, 536 U.S. at 652-53 (holding

the *Lemon* test rather than the endorsement test.¹³² The *Kitzmiller* court attempted to distinguish *Edwards* by claiming that “*Edwards* is a ‘purpose’ case, so it would have been unnecessary for the Supreme Court to delve into a full-scale endorsement analysis even had the test existed at the time, as the test is most closely associated with *Lemon*’s ‘effect’ prong, rather than its ‘purpose’ prong.”¹³³ This rationale is weak, given that *Kitzmiller* seems to be as much of a “purpose case” as *Edwards*.¹³⁴ So why was there a need for a “full-scale endorsement analysis”?

[32] The *Kitzmiller* court answered this question using Third Circuit precedent, because the Third Circuit has applied both the *Lemon* test and endorsement test to the most recent Establishment Clause challenges.¹³⁵ Moreover, the court found that the Third Circuit applies the endorsement test *before* it applies the *Lemon* test.¹³⁶ Therefore, the court was able to examine the purposes behind the board members’ actions *after* an extensive endorsement test analysis.

that the state government maintained its neutrality toward religion in a school-voucher program because the program ensured that parents were the ones choosing a religious school for the children, thus breaking the “circuit between government and religion”). The *Zelman* court stated that “the . . . perceived endorsement of a religious message[] is reasonably attributable to the individual recipient, not to the government.” *Id.*

¹³² *Kitzmiller*, 400 F. Supp. 2d at 713. The court countered with the fact that *Edwards* had been decided before the Supreme Court first used the endorsement test in *County of Allegheny*. *Id.*

¹³³ *Id.*

¹³⁴ See discussion *supra* parts II.C, III.A.

¹³⁵ *Kitzmiller*, 400 F. Supp. 2d at 713-14 (citing *Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514 (3d Cir. 2004); *Modrovich v. Allegheny County*, 385 F.3d 397 (3d Cir. 2004); *Freethought Soc’y v. Chester County*, 334 F.3d 247 (3d Cir. 2003).

¹³⁶ *Kitzmiller*, 400 F. Supp. 2d at 714 (citations omitted). In *Child Evangelism Fellowship*, the Third Circuit applied the endorsement test, the *Lemon* test, and the coercion test, in that order, in holding that a school did not violate the Establishment Clause by permitting a religious organization to distribute its materials through faculty, on school walls, or on bulletin boards. *Child Evangelism Fellowship*, 386 F.3d at 530-35. In both *Modrovich* and *Freethought Soc’y*, the Third Circuit applied both the endorsement and *Lemon* tests, in that order, in holding that

C. The Court Could Have Applied the Endorsement Test to Strike Down the Dover Policy Without Judging Intelligent Design’s Scientific Merits

[33] The *Kitzmiller* court developed its endorsement test framework from *Santa Fe*, a case in which the Supreme Court defined the endorsement test as “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as state endorsement of [religion].”¹³⁷ That Court applied the endorsement test to a school district’s policy of permitting student-led, student initiated prayer before school functions.¹³⁸ The Court searched for “actual or perceived endorsement of religion” by examining the text of the policy, the history and evolution of the policy, and extrinsic factors such as the circumstances under which the prayer was delivered.¹³⁹

[34] In its most recent application of the endorsement test,¹⁴⁰ the Third Circuit added that “the challenged practice must be considered from the perspective of a hypothetical reasonable

plaques with the text of the Ten Commandments that were affixed to the outer walls of two county courthouses did not violate the Establishment Clause. *Modrovich*, 385 F.3d at 406-14; *Freethought Soc’y*, 334 F.3d at 262-69. *But cf. Modrovich*, 385 F.3d at 403 (acknowledging that “[a]lthough the [Third Circuit in *Freethought Soc’y*] decided the case under the endorsement test, it also applied the *Lemon* test, as the Supreme Court could still potentially review the issue under *Lemon*”).

¹³⁷ *Kitzmiller* 400 F. Supp. 2d at 712-13 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)). The court further explained: “School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” *Kitzmiller*, 400 F. Supp. 2d at 713 (quoting *Santa Fe*, 530 U.S. at 309-10).

¹³⁸ *Santa Fe*, 530 U.S. at 295-98.

¹³⁹ *Id.* at 307-10.

¹⁴⁰ *See also supra* note 136.

observer who is ‘aware of the history and context of the community and forum.’”¹⁴¹ In *Child Evangelism Fellowship*, the court held that a religious organization was permitted to distribute and post its promotional materials within public elementary schools without violating the endorsement test.¹⁴² The court cited to the language on the flyers, the school’s general policy of assisting a range of community groups, and the policy’s effect on students in holding that the school would not endorse a religious viewpoint by permitting the organization to post its materials.¹⁴³

[35] The *Kitzmiller* court set out its task under the endorsement test in similar terms: “The test . . . determin[es] what message a challenged . . . policy . . . conveys to a reasonable, objective observer who knows the policy’s language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose.”¹⁴⁴ The court focused on the message conveyed by the school to both the reasonable, observing student and to the reasonable, observing adult citizen, because although the statement at issue was read aloud only to students in the classroom, the School Board sent a newsletter explaining and promoting the policy to every household in the School District.¹⁴⁵

¹⁴¹ *Child Evangelism Fellowship*, 386 F.3d at 531 (citation omitted).

¹⁴² *Id.* at 534.

¹⁴³ *Id.* at 531-34.

¹⁴⁴ *Kitzmiller*, 400 F. Supp. 2d at 714-15 (citing *McCreary County*, 125 S.Ct. at 2736-37). The court also defined “reasonable observer,” and it indicated that the reasonable observer “looks to that evidence to ascertain whether the policy ‘in fact conveys a message of endorsement or disapproval’ of religion, irrespective of what the government might have intended by it.” *Kitzmiller*, 400 F. Supp. 2d at 715 (citation omitted).

¹⁴⁵ *Id.* at 715-16; *see also supra* notes 73, 75 and accompanying text.

[36] The court then explained the historical and cultural background behind the public school controversy regarding evolution and religion, including the cultural history of the United States with regard to Christian fundamentalism and the federal legal landscape.¹⁴⁶ The court concluded that the “religious nature” of intelligent design “would be readily apparent to an objective . . . adult or child,”¹⁴⁷ and it supported this conclusion with expert testimony during trial about intelligent design’s religious “nature.”¹⁴⁸

[37] In its analysis of whether an objective student “enlightened by its context and . . . legislative history”¹⁴⁹ would view the policy as an endorsement of religion, the court examined the following: the text of the policy,¹⁵⁰ the classroom presentation of the disclaimer,¹⁵¹ the prohibition on discussion of the disclaimer,¹⁵² the disclaimer’s “opt-out feature,”¹⁵³ students’

¹⁴⁶ *Id.* at 716-18.

¹⁴⁷ *Id.* at 718.

¹⁴⁸ *See id.* at 718-23. Examples include the trial testimony of theologian John Haught regarding intelligent design’s similarity to the ideas of Thomas Aquinas and the trial testimony regarding early drafts of *Of Pandas and People*; *see supra* notes 71-72.

¹⁴⁹ *Kitzmiller*, 400 F. Supp. 2d at 724.

¹⁵⁰ *See note 74* and accompanying text.

¹⁵¹ *Kitzmiller*, 400 F. Supp. 2d at 726-27. The court discussed students’ likely perceptions based on teachers’ refusal to read the disclaimer and the subsequent special appearances made by administrators in biology classes to read the disclaimer. *Id.* at 727. The court found that the students would surmise that teachers thought they were ethically forbidden from reading the statement and that students would conclude that the School District was advocating a religious viewpoint. *Id.*

¹⁵² An expert witness testified that the student observer would perceive the religious nature of intelligent design from the announcement that teachers would not field questions on the issue. *Id.* at 727.

¹⁵³ The court found that the announcement excusing students who did not wish to hear the disclaimer (or whose parents did not wish their children to hear it) both “enhance[ed] the

alleged knowledge of the School Board's discussion of the disclaimer in religious terms,¹⁵⁴ and the fact that evolution was the only subject matter given special treatment.¹⁵⁵ The court found that these cumulative circumstances showed that an objective student would perceive the school's policy to be an official endorsement of "religion or a religious viewpoint."¹⁵⁶

[38] The court also concluded that an objective adult member of the Dover community would perceive the Dover policy as an official endorsement of religion.¹⁵⁷ In so concluding, the court pointed to the religious content of newsletters sent to each Dover household,¹⁵⁸ the religious terms in which the adoption of the policy was discussed during public board meetings,¹⁵⁹ and the debate that spilled into the community via two local newspapers.¹⁶⁰

importance of the disclaimer in the students' eyes" and conveyed the message to excused students that they were "outsiders [and] not full members of the political community." *Id.* at 728.

¹⁵⁴ The court presumed that Dover students were aware that the community debate over the inception of the policy was undertaken in "expressly religious terms." *Id.*

¹⁵⁵ The court presumed that Dover students knew that programs designed to single out evolution as a scientific theory open to attack have historically been tactics of "anti-evolutionists with religious motivations." *Id.*

¹⁵⁶ *Id.* at 729.

¹⁵⁷ *Kitzmiller*, 400 F. Supp. 2d at 734.

¹⁵⁸ *Id.* at 730-31; *see also supra* note 77 and accompanying text.

¹⁵⁹ *Id.* at 730-31; *see also supra* note 76 and accompanying text.

¹⁶⁰ *Id.* at 732-34. The court, after reviewing 225 letters to the editor and sixty-two editorials in the *York Daily Record* and the *York Dispatch*, found that community members understood intelligent design to be an inherently religious concept, that the policy adopted by the school system was government approval of a religious viewpoint, and that community members thus perceived the School Board as divided over the issue of incorporating religion into the public school science curriculum. *Id.* at 733-34; *see also supra* note 78 and accompanying text.

[39] At this point of its analysis, the court had made its case for invalidating the Dover policy under the endorsement test. The court completely fulfilled the endorsement test requirements set forth in *Santa Fe* and *Child Evangelism Fellowship*¹⁶¹ first by examining the cultural and legal backdrop of similar challenges to the teaching of evolution in public schools and then by examining policy’s text, legislative history within the board meetings, and presentation to the student body and the community at large before reaching its conclusion. The policy could have been invalidated under the endorsement test on these grounds without the court’s subsequent discussion of whether intelligent design itself is science.¹⁶²

D. A Different Result in Different Jurisdictions?

[40] The controversy surrounding attempts to teach a theory that may conflict with evolutionary theory was settled in Dover, but the battle has continued in other areas of the country, including Kansas, which has gone back and forth on the issue of criticism of evolution in its schools, and Ohio, whose state Board of Education recently voted to eliminate a science standard and lesson plan encouraging students to “critically analyze” evolution.¹⁶³ How would a case with facts similar to those of *Kitzmiller* fare in the Tenth Circuit and Sixth Circuit, where Kansas and Ohio are respectively situated?

[41] In its most recent Establishment Clause challenge, the Tenth Circuit reaffirmed its use of the *Lemon* test, noting that “[u]ntil the Supreme Court overrules *Lemon* . . . it remains binding

¹⁶¹ See *supra* notes 137-43 and accompanying text.

¹⁶² See *Kitzmiller*, 400 F. Supp. 2d at 735. Furthermore, the court later acknowledged that even the members of the Board who voted for the curriculum change had no understanding of the intricacies of intelligent design. *Id.* at 758-59; see *supra* note 102.

¹⁶³ See *supra* note 9.

law in this circuit.¹⁶⁴ The court uses the endorsement test as a guide for applying the *Lemon* test.¹⁶⁵ Thus, if the Tenth Circuit were to evaluate *Kitzmiller*, it, like the Supreme Court in *Edwards*, presumably would use only the purpose prong of the *Lemon* test to invalidate the policy, as it would most likely find that the Dover School Board had acted with the purpose of endorsing religion.¹⁶⁶

[42] The Sixth Circuit likewise would incorporate the endorsement test into a *Lemon* test analysis. That court¹⁶⁷ found that the *Lemon* test has two “reformulated” prongs: 1) whether the government has a secular purpose that predominates over any purpose to advance religion;¹⁶⁸ and 2) whether the government action has the purpose or effect of endorsing religion.¹⁶⁹ The court noted that recent Sixth Circuit decisions have consistently “applied *Lemon*, including the

¹⁶⁴ *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1224 (10th Cir. 2005) (holding that a public university’s display of a sculpture allegedly hostile to the Roman Catholic faith, as part of an art exhibit, did not violate the Establishment Clause). *But see O’Connor*, 416 F.3d at 1224 (citing *Van Orden v. Perry*, 125 S.Ct. 2854, 2869 (2005) (Breyer, J., concurring in the judgment)) (acknowledging Supreme Court sentiment that “no single mechanical formula [] can accurately draw the constitutional line in every [Establishment Clause] case”).

¹⁶⁵ “In examining challenges to governmental action under the Establishment Clause, this circuit has interpreted the purpose and effect prongs of *Lemon* in light of [the] endorsement test.” *O’Connor*, 416 F.3d at 1224 (citation omitted). “The purpose prong of the endorsement test asks whether ‘the government’s actual purpose is to endorse or disapprove of religion.’” *Id.* (citation omitted). “The ‘effect’ prong of the endorsement test asks whether a reasonable observer aware of the history and context of the forum would find the display had the effect of . . . disfavoring a certain religion.” *Id.* at 1227-28 (citation omitted).

¹⁶⁶ *See supra* notes 115-17 and accompanying text.

¹⁶⁷ *ACLU v. Mercer County*, 432 F.3d 624 (6th Cir. 2005) (upholding a display of the Ten Commandments in a county courthouse).

¹⁶⁸ *Mercer County*, 432 F.3d at 635 (citing *McCreary County*, 125 S.Ct. at 2733; citing *id.* at 2757 (Scalia, J., dissenting)).

¹⁶⁹ *Mercer County*, 432 F.3d at 635 (citations omitted).

endorsement test,”¹⁷⁰ and that since “*McCreary County* and *Van Orden* do not instruct otherwise,” that it would so continue.¹⁷¹ Therefore, in the Sixth Circuit a case like *Kitzmiller* would likely be evaluated under the *Lemon* test’s purpose prong without reaching the policy’s effect or the scientific validity of intelligent design.

[43] The Tenth Circuit and Sixth Circuit examples show that while Third Circuit precedent permitted the *Kitzmiller* court to evaluate the facts under the endorsement test and the *Lemon* test, in that order, other circuit courts might still approach a similar fact pattern under the *Lemon* test and strike down the policy at issue strictly because of the School Board’s religious purpose.¹⁷²

V. Conclusions

[44] The debate over the place of public school science curricula promises to continue despite the outcome of *Kitzmiller*.¹⁷³ In addition, even though the Middle District of Pennsylvania struck a blow to the intelligent design theory,¹⁷⁴ its proponents will continue to make the case for its

¹⁷⁰ *Id.* at 636 (citing *ACLU v. Ashbrook*, 375 F.3d 484, 490 (6th Cir. 2004); *Adland v. Russ*, 307 F.3d 471, 479 (6th Cir. 2002); *ACLU v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 (6th Cir. 2001) (en banc)).

¹⁷¹ *Mercer County*, 432 F.3d at 636.

¹⁷² See, e.g., *Edwards*, 482 U.S. at 578 (striking down the Louisiana Creationism Act solely because it was passed with the purpose of endorsing a religious doctrine); see also discussion *supra* Part III.A.

¹⁷³ See, e.g., Johnson, *supra* note 9, at 15 (discussing an attempt within the Utah legislature to pass a bill that challenged the theory of evolution in high school science classes); Candisky, *supra* note 9, at 1A (illustrating a recent conflict within Ohio Board of Education regarding the implementation of a science curriculum standard mandating that students be encouraged to seek evidence for and against evolution); Wilgoren, *supra* note 9, at A14 (illustrating the diverse opinions on the issue amongst the Kansas Board of Education).

¹⁷⁴ “[Intelligent design] is an interesting theological argument, but . . . it is not science.” *Kitzmiller*, 400 F. Supp. 2d at 746.

scientific validity.¹⁷⁵ This note does not evaluate whether intelligent design is science, religion, or some combination of the two. Certainly, Judge Jones' findings of fact make a strong case for his assertion that intelligent design is a religious concept.¹⁷⁶ But some criticized his opinion immediately after it was issued, alleging that inaccuracies in the court's findings of fact led to an incorrect conclusion.¹⁷⁷

¹⁷⁵ See, e.g., Dr. Michael J. Behe, *Whether Intelligent Design is Science: A Response to the Opinion of the Court in Kitzmiller v. Dover Area School District*, DISCOVERY INSTITUTE CENTER FOR SCIENCE & CULTURE, Feb. 3, 2006, available at <http://www.discovery.org/scripts/viewDB/filesDB-download.php?command=download&id=697> (last visited Mar. 10, 2006) (disputing the *Kitzmiller* court's conclusion that intelligent design is not science).

¹⁷⁶ The *Kitzmiller* court, for example, found that “[intelligent design] is predicated on supernatural causation,” which violates the position taken by the National Academy of Sciences (“NAS”), which is that science is limited to “empirical, observable and ultimately testable data.” *Kitzmiller*, 400 F. Supp. 2d at 735. The court also noted that some defense experts testified that their goal was to change the ground rules of science to allow for supernatural causation. *Id.* at 746. Law professor Jay D. Wexler noted that “the Supreme Court has long recognized that belief in a supernatural creator of mankind is the essence of traditional religious belief.” Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 818 (April 2003) (citations omitted). The court also found that the NAS and the American Association for the Advancement of Science have held that theories that include supernatural intervention are not science. *Kitzmiller*, 400 F. Supp. 2d at 737-38. The court found that the scientific bases for intelligent design, if scientific at all, are simply negative arguments against evolution. *Id.* at 738-43. Finally, it found that intelligent design is not supported by peer-reviewed research, data, or publications. *Id.* at 745.

¹⁷⁷ For example, biochemistry professor and intelligent design proponent Dr. Michael J. Behe criticized the court's “restricted sociological view of science,” arguing for a broader view of science that is “an unrestricted search for the truth about nature based on reasoning from physical evidence.” Behe, *supra* note 175, at 2. Behe listed twenty criticisms of the findings of fact and conclusions made by the court in the section of its opinion titled “Whether ID is Science.” *Id.* at 2-10 (referring to *Kitzmiller*, 400 F. Supp. 2d at 735). For example, Behe attacks the court's conclusion that intelligent design's negative attacks on evolution have been “refuted” by the scientific community. Behe, *supra* note 175, at 3. He also argues that the court fails to make a necessary distinction between the intelligent design theory itself and implications that arise from that theory, namely supernatural causation. *Id.* at 2-3 (comparing intelligent design with the Big Bang theory which, he argues, could have supernatural implications yet is accepted by the science community). Also, some contend that there are in fact peer-reviewed articles supporting

[45] This opinion, though dispatching of a policy in violation of the Establishment Clause, raises deeper questions that may need to be answered in years to come. Should courts establish legal definitions for what qualifies as science¹⁷⁸ and as religion?¹⁷⁹ How far should courts venture into the world of science and particularly into the origins of man, where the lines of science, philosophy, and religion merge? It should not be the role of the courts to provide theories such as intelligent design an avenue through which to enter the mainstream, whether in public schools or elsewhere; rather, it should be the role of scientists themselves. Likewise, it should not be the role of the courts to suggest that the work and observations of Dr. Behe, for example, are inherently religious. Ultimately the scientific process itself should be the means by which a theory such as intelligent design wins or loses credibility.

[46] Perhaps there theoretically could exist a factual scenario in which the motives of those who write intelligent design into a public school science curriculum are nonreligious, and in which the *only* way for a court to ascertain whether the policy has the effect of an actual or perceived endorsement of religion is to determine whether intelligent design is or is not science. *Kitzmiller* was not such a case, however, and until that case arises, courts should strike down

intelligent design. See West, *supra* note 8; Francis J. Beckwith, *Science and Religion Twenty Years After McLean v. Arkansas: Evolution, Public Education, and the New Challenge of Intelligent Design*, 26 HARV. J.L. & PUB. POL'Y 455, 470-85 (Spring 2003).

¹⁷⁸ The Eastern District of Arkansas did just that in *McLean*, outlining five “essential characteristics of science” developed from the expert testimony of philosopher of science Michael Ruse. *McLean*, 529 F. Supp. at 1267. Cf. David K. DeWolf, *supra* note 29, at 77 (discussing the Supreme Court’s qualifications for “science” within the scope of the Federal Rules of Evidence).

¹⁷⁹ See, e.g., *Alvarado v. City of San Jose*, 94 F.3d 1223, 1229 (9th Cir. 1996) (citing *Africa v. Pennsylvania*, 662 F.2d 1025, 1032 (3d Cir. 1981)) (identifying three “useful indicia” for determining the existence of religion); see also David D. DeWolf, *supra* note 29, at 80-90 (discussing the circuits’ tests for identifying religion and whether religious implications of a theory could turn that theory into “religion” itself).

such policies on narrower grounds. The *Kitzmiller* court could have struck down Dover's policy under either the *Lemon* test's purpose prong or under the endorsement test without judging the scientific validity of intelligent design.