Special "Effects": *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), and the Fate of Intelligent Design in Our Public Schools

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Note

Philip Sparr*

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I. INTRODUCTION

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.1

Despite modern society's attempts at political correctness and increasingly liberal social mores, certain issues continue to divide

friends, families, and nations. Religion is one such issue. The conflict over religion's proper place in society is not limited to local coffee shop banter, the purview of social commentators, or dinner conversation in a gated suburban home. The Supreme Court has similarly struggled to define a border in the morass between secular and sectarian. The broad language of the First Amendment lends itself to diverse interpretations and conflicting opinions, stating in part, "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof." This language has led to disagreement between Supreme Court Justices and inconsistent employment of Establishment Clause "tests."  

The ongoing debate over the Establishment Clause's meaning recently surfaced in *Kitzmiller v. Dover Area School District.* In *Kitzmiller*, the Dover, Pennsylvania, school board passed a resolution requiring a verbal disclaimer be read to high school biology students. The disclaimer stated in part that there are unexplained gaps in the theory of evolution and directed students to materials related to the alternative theory of intelligent design ("ID"). The *Kitzmiller* court held the disclaimer violated the Establishment Clause and also determined that ID was a non-scientific, and hence theological, argument for creation.

The court in *Kitzmiller* relied on two Supreme Court tests to determine whether the Dover school board policy violated the Establishment Clause. The first, articulated in *Lemon v. Kurtzman* states, "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." The second test, known as the endorsement test and written by Justice O'Connor in *Lynch v. Donnelly*, provides that the key inquiry is the subjective intent of the speaker and the objective meaning of the speech to a member of the community. If the subjective intent of the speaker is to endorse or

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2. U.S. Const. amend. I.
3. See, e.g., Wallace v. Jaffree, 472 U.S. 38 (1985) (utilizing the Lemon test in the majority opinion, id. at 55-61, while the dissent argued Lemon was built upon a fundamental misreading of the First Amendment, id. at 112-13 (Rehnquist, J. dissenting)).
4. Id. at 63 n.4 (Powell, J., concurring) (noting the Court failed to utilize the Lemon test in *Marsh v. Chambers*, 463 U.S. 783 (1983) because there was a historical acceptance of opening each Nebraska legislative session with a chaplain-led prayer).
6. Id. at 708-09.
7. Id. at 745-46.
9. Id. at 612-13 (internal citations omitted).
disapprove of religion or the objective effect of the speech endorses or disapproves religion, a constitutional violation is present.\footnote{Id. at 690 (O'Connor, J., concurring).} Despite the prevalence of these tests, the Supreme Court has yet to pronounce a bright-line rule that is malleable enough to consistently adapt to diverse factual situations.\footnote{See Wallace v. Jaffree, 472 U.S. 38, 110–11 (1985) (Rehnquist, J. dissenting) (noting the fractured plurality opinions in the wake of Lemon).}

The purpose of this Note is to analyze the contribution \textit{Kitzmiller} has made to Establishment Clause jurisprudence and to determine what the decision means for the ongoing controversy regarding the teaching of evolution and intelligent design in public schools. In order to fully analyze the court's holding in \textit{Kitzmiller}, one must first gain a firm grasp of antecedent judicial opinions. Accordingly, section II.A provides a summary of key Establishment Clause decisions from the United States Supreme Court with an emphasis on cases involving public schools. Given this contextual background, section III analyzes the facts and holding of \textit{Kitzmiller}.

In analyzing the \textit{Kitzmiller} opinion, section IV of this Note explores two issues. First, in section IV.A, the author discusses whether \textit{Kitzmiller} serves as a guiding light of judicial clarity or as a continuation of the splintered Supreme Court decisions that fail to clearly define the division between church and state. Upon considering the Court's Establishment Clause precedent, the author argues that while \textit{Kitzmiller} fails to provide a unique test capable of drawing a bright line, the opinion creates a useful roadmap under existing Establishment Clause tests for courts analyzing proposals advocating or mentioning ID and/or criticizing evolution in public schools. Second, in section IV.B, this Note explores whether the scientific legitimacy of ID is now a foregone conclusion following \textit{Kitzmiller's} scathing rebuke. Furthermore, section IV.B analyzes whether the teaching of ID in public schools can pass constitutional muster under a purpose or effects prong analysis following \textit{Kitzmiller}. In particular, this section will consider \textit{Kitzmiller's} thorough dissection of the ID movement and argues that the court's analysis has permanently tainted the ID movement's scientific legitimacy and its hopes of constitutionally entering the public school classroom under a purpose or effects prong analysis. Section IV.B also recognizes that ID proponents have a slim chance of giving light to their movement, but perhaps only at the cost of their apparent goal of neutralizing evolution.
II. BACKGROUND: ESTABLISHMENT CLAUSE JURISPRUDENCE

In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."\textsuperscript{13}

The Supreme Court's citation to Thomas Jefferson in \textit{Everson v. Board of Education}\textsuperscript{14} has become an oft-quoted metaphor in the subsequent sixty years of Establishment Clause jurisprudence. In \textit{Everson}, the Court considered a New Jersey school board resolution that directly reimbursed parents for money spent transporting their children to and from school on public buses.\textsuperscript{15} The money was given to the parents of public school children and parochial school children.\textsuperscript{16} Justice Black, delivering the opinion of the Court, held the New Jersey resolution did not breach the wall of separation between church and state. Black stated the resolution did not provide money to parochial schools, but merely helped parents, regardless of their religion, get their children to school unharmed.\textsuperscript{17} The Court noted that if the plaintiff's argument for separation was taken to its logical extreme, the government would not be allowed to supply traffic officers to ensure safe crossing of streets or basic services such as water and sewers.\textsuperscript{18}

The dissent, led by Justice Rutledge, rejected Justice Black's argument that traffic officers or basic services would be impermissible under a strict enforcement of the Establishment Clause by noting these are common rights, which are essential for safety.\textsuperscript{19} The dissent championed the "wall of separation" metaphor too, but argued for a stricter division of the realms of church and state and criticized the majority's decision by stating even minor transgressions, such as transportation reimbursement, corrode the "wall."\textsuperscript{20} The dissent argued the majority had breached the impregnable wall between church and state and that the First Amendment's purpose was to completely and permanently separate church and state.\textsuperscript{21}

\textsuperscript{13} \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).
\textsuperscript{14} \textit{Id.} at 16.
\textsuperscript{15} \textit{Id.} at 3.
\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id.} at 18. Justice Black further stated that the "wall" between church and state must be kept "high and impregnable." \textit{Id.}
\textsuperscript{18} \textit{Everson v. Bd. of Educ.}, 330 U.S. 1, 17-18 (1947).
\textsuperscript{19} \textit{Id.} at 60–61 (Rutledge, J., dissenting).
\textsuperscript{20} \textit{Id.} at 63 (Rutledge, J., dissenting) ("The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents.").
\textsuperscript{21} \textit{Id.} at 31–32 (Rutledge, J., dissenting) (stating the First Amendment comprehensively forbids every form of aid or support for religion). For an alternative view of
stated the majority failed to apply the very principles it avowed. The fact that both the majority and dissent utilized the “wall of separation” metaphor to arrive at divergent conclusions demonstrates that even the Supreme Court had difficulty interpreting the Establishment Clause and the metaphors premised upon it. Following Everson, subsequent Supreme Court Justices nurtured the concept of a wall separating church and state and warned against a progressive weakening of the Establishment Clause. Despite pronouncing the “wall of separation” metaphor, commentators have noted that the Court still lacked an Establishment Clause test to give effect to the metaphor.

Though it did not explicitly employ an Establishment Clause test to arrive at its holding, the Supreme Court again referenced Jefferson's “wall of separation” in Epperson v. Arkansas. The Epperson Court struck down a forty-year-old Arkansas state statute which prohibited teaching evolution in public schools or universities. The statute was modeled after Tennessee's infamous “monkey law” which was upheld in the landmark decision of Scopes v. Tennessee. In Epperson, a public school teacher was dismissed for teaching evolution to her tenth grade biology students; she sought to enjoin her dismissal and to have the Arkansas statute declared unconstitutional. The Court, perhaps starting to define an Establishment Clause test, cited a test which analyzes the purpose and primary effect of an enactment and held that the Arkansas statute was intended to “blot out” the teaching of evolution because it conflicted with the Biblical view of divine creation. The Court noted that the state could not produce any justification, other than its citizens' religious beliefs, for the statute. The Court held that while a state has the right to decide curriculum for its schools, it cannot forbid the teaching of a doc-

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23. Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (“The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . .”).
26. Id. at 99 n.3 (reviewing a statute that stated in part “It shall be unlawful for any teacher or other instructor in any University, College, Normal, Public School . . . to teach the theory or doctrine that mankind ascended or descended from a lower order of animals . . . .”).
27. 289 S.W. 363 (Tenn. 1927).
28. Epperson, 393 U.S. at 100.
30. Epperson, 393 U.S. at 108–09.
31. Id. at 107.
trine if the reason for such prohibition contravenes the First Amendment.32

Three years after Epperson, the Court, expanding on its Epperson decision, found guidance by constructing an influential Establishment Clause test in Lemon v. Kurtzman.33 In Lemon, the Court invalidated two statutes, one from Pennsylvania and the other from Rhode Island.34 The Pennsylvania statute allowed the state to directly reimburse nonpublic schools for pedagogical materials, textbooks, and teachers’ salaries—provided that the subjects taught were secular in nature.35 Similarly, the Rhode Island statute allowed the state to directly supplement nonpublic school teachers' salaries so long as the courses taught by the teachers were secular and the teachers agreed, in writing, not to teach any course in religion while receiving the salary supplement.36

In invalidating both statutes, Chief Justice Burger, writing for the Court, finally pronounced an Establishment Clause test: “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.”37 In applying the subsequently coined “Lemon test,” the Court determined that both statutes’ purported purposes passed constitutional muster since there was no indication either legislature intended to advance religion.38 The Court further determined that it did not need to pursue an effect prong analysis due to the presence of an excessive entanglement of church and state.39 The Lemon Court found that the intense government oversight the statute would require created a situation “pregnant with dangers” of excessive entanglement of government and religion.40 Chief Justice Burger and the majority opinion rejected the traditional “wall of separation” metaphor pronounced in Everson and 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 relation-

32. Id. at 107–09.
33. 403 U.S. 602 (1971).
34. Id. at 606–07.
35. Id. at 607–09.
36. Id.
37. Id. at 612–13 (internal citations omitted).
39. Id. at 613–15. The entanglement prong of Lemon has subsequently been subsumed by the effect prong. See Agostini v. Felton, 521 U.S. 203 (1997) (noting that the factors used to assess “entanglement” are the same as those used to assess “effect”).
40. Lemon, 403 U.S. at 620–21 (noting that the States would be forced to maintain surveillance over school records to quantify separate secular and sectarian expenditures).
Burger's characterization of the metaphor was not contradicted by any other member of the Court. Burger's opinion in *Lemon* opinion coalesced past precedent into a constitutional test whose influence has persisted but has also been increasingly subject to criticism.42

Following *Lemon*, the Court's three-prong test was uniformly applied, despite one notable case which disregarded its directives entirely.43 In *Edwards v. Aguillard*,44 a case cited repeatedly throughout *Kitzmiller*, parents, teachers, and religious leaders challenged Louisiana's "balanced treatment" act which forbade the teaching of evolution in public schools unless it was accompanied by a course in "creation science."45 Neither evolution nor "creation science" was a required course in Louisiana's public schools, but if one subject was taught, it was required that it be "balanced" by its rival.46 The Court in *Edwards*, employing *Lemon*, held that the act served no secular purpose and impermissibly advanced religion.47 The Court arrived at this determination by analyzing the legislative history of the act, which revealed earlier drafts explicitly defining "creation science" in accordance with the Biblical account of creation.48 In its opinion, the *Kitzmiller* court noted that the concept of ID came into existence only after the decision in *Edwards*.49

In an attempt to clarify the *Lemon* test, Justice O'Connor proposed a new paradigm in *Lynch v. Donnelly*.50 In *Lynch*, the Supreme Court utilized the *Lemon* test and found that a crèche displayed in a public park alongside traditional Christmas decorations, such as Santa Claus and his reindeer, did not violate the Establishment Clause.51 The Court found the crèche was a passive acknowledgement of a holiday that has been officially recognized for twenty centuries.52 The Court held that this recognition of the holiday, and its historical ori-

41. Id. at 614.
42. See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., dissenting). In a humorous and scathing critique, Justice Scalia compares the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," lamenting *Lemon's* continued influence on the Court's Establishment Clause jurisprudence. Id. at 398.
43. See Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the Nebraska Legislature's practice of opening each legislative session with a chaplain-led prayer on the grounds of its unique, historical tradition without applying the *Lemon* test).
44. 482 U.S. 578 (1987).
45. Id. at 580–81.
46. Id.
47. Id. at 596–97.
48. Id. at 598–604 (Powell, J., concurring).
51. Id. at 694.
52. Id. at 686–87.
gins, constituted a secular purpose for placing the crèche in the display and that the crèche did not impermissibly advance religion or result in excessive entanglement of church and state.\textsuperscript{53} In a concurring opinion, Justice O'Connor added to the Court's Establishment Clause jurisprudence when she penned what is now referred to as the endorsement test.\textsuperscript{54}

The endorsement test analyzes the subjective intent of government practice (purpose) and the objective interpretation of that practice when viewed from the perspective of a member of the community (effect). If either the subjective intention of the government's practice is to endorse or disapprove of religion or the objective effect of the practice endorses or disapproves religion, a constitutional violation is present.\textsuperscript{55} O'Connor felt she clarified \textit{Lemon}'s effect prong by stating that the key inquiry is whether a government practice has the effect, whether intentional or unintentional, of displaying a message of government endorsement or disapproval of religion.\textsuperscript{56} O'Connor considered the endorsement test's focus on entanglement and endorsement or disapproval of religion as a clarification of \textit{Lemon} as an analytical tool, as opposed to an out-and-out replacement.\textsuperscript{57}

The endorsement test was narrowly adopted as a general approach to Establishment Clause cases in a 5-4 Supreme Court decision in \textit{County of Allegheny v. ACLU Greater Pittsburgh Chapter}.\textsuperscript{58} The court in \textit{Allegheny} held that a freestanding crèche on the staircase of a county courthouse which displayed a sign reading, "Glory to God in the Highest," violated the Establishment Clause. The Court noted that unlike the display in \textit{Lynch}, this crèche was not surrounded by other, traditional Christmas decorations which would detract from the sign's inherently religious message and prevent the appearance of an endorsement of a particular religious sect.\textsuperscript{59} In \textit{Allegheny}, Justice Blackmun, writing for the Court, analyzed the case using O'Connor's endorsement test and held that the courthouse display was unconstitutional.\textsuperscript{60} The Court's endorsement analysis focused on the effect of the crèche, leaving a purpose or entanglement prong analysis to the

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} at 685.
\item \textsuperscript{54} \textit{Id.} at 688 (1984) (O'Connor, J., concurring) ("Endorsement sends a 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 of the political community.").
\item \textsuperscript{56} \textit{Id.} at 690–93 (O'Connor, J., concurring) (noting that government practice may in fact result in advancement or inhibition of religion yet not offend the Establishment Clause because the government practice does not thereby communicate a message of endorsement or disapproval).
\item \textsuperscript{57} \textit{Id.} at 688–89.
\item \textsuperscript{58} 492 U.S. 573 (1989).
\item \textsuperscript{59} \textit{Id.} at 581.
\item \textsuperscript{60} \textit{Id.} at 621.
\end{itemize}
lower court upon remand. In adopting the endorsement test, the Court noted that the Establishment Clause forbids making belief in religion relevant to a citizen's standing in the community. Due to the location of the creche and its religious message exclaiming glory to God, the Court in Allegheny held the display impermissibly endorsed a particular religion.

Allegheny's main contribution is that it brought the concept of the reasonable observer to the forefront; however, a majority of the Court did not adopt the concept of a reasonable observer as the proper frame with which to view the endorsement test's effect prong analysis. The reasonable observer concept finds its origin in O'Connor's concurrence in Lynch, but was given true definition in a later O'Connor opinion. Echoing O'Connor's earlier concurrence, Blackmun felt the effect prong of the endorsement test must be viewed from the perspective of a reasonable observer familiar with the "history and ubiquity" of a practice. Justice Brennan, concurring in part and dissenting in part, joined by Justices Marshall and Stevens, criticized the reasonable observer concept. Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, proposed a far narrower Establishment Clause standard which would invalidate a government practice only if an individual was coerced into supporting or practicing religion. Justice Kennedy went so far as to claim the endorsement test was "unworkable in practice."

Although a majority of the Court in Allegheny did not adopt the reasonable observer for an inquiry into the effect of a government practice, it eventually gained acceptance. The concept of a reasonable observer has been consistently utilized in modern endorsement

61. Id. at 621.
62. Id. at 593–94 (quoting Lynch v. Donnelly, 465 U.S. at 687 (O'Connor, J., concurring)).
63. Allegheny, 492 U.S. at 621.
64. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) ("The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.").
66. Allegheny, 492 U.S. at 642–43 (Brennan, J., dissenting) ("I shudder to think that the only 'reasonable observer' is one who shares the particular views on perspective, spacing, and accent expressed in Justice Blackmun's opinion, thus making analysis under the Establishment Clause look more like an exam in Art 101 than an inquiry into constitutional law.").
67. Id. at 670 (Kennedy, J., dissenting).
68. Id. at 669.
analyses, including the Kitzmiller opinion.\textsuperscript{70} Notwithstanding greater
acceptance by the Court, the reasonable observer has been subject to
criticism. Many commentators have rejected the reasonable observer
concept, refuting the contention that a reasonable observer could ar-
rive at a singular conclusion and questioning the amount of knowl-
edge attributed to a reasonable observer.\textsuperscript{71} In a response to the
difficulty of applying Lemon and the endorsement test in certain
cases, some Supreme Court Justices have proposed a different ap-
proach in recent years.

In Van Orden v. Perry,\textsuperscript{72} Justice Breyer contended the exercise of
sound legal judgment must trump a constitutional test.\textsuperscript{73} In Van
Orden, the Court upheld the constitutionality of a Ten Command-
ments monument located on the grounds of the Texas State Capitol in
Austin based on its ancillary secular message and passive presence for
the preceding forty years.\textsuperscript{74} The Court determined that the context in
which the Ten Commandments were used conveyed a secular message
of proper social conduct and the relation of such conduct to the law.\textsuperscript{75}
Justice Breyer reasoned that the purpose of the First Amendment was
to avoid division amongst the people.\textsuperscript{76} Accordingly, he determined
that the existence of a secular purpose and the Texas monument's
non-divisive nature foreclosed any question of its constitutionality.\textsuperscript{77}
In a recent publication, the Harvard Law Review used the Kitzmiller
decision as a platform to champion Breyer's divisiveness analysis.\textsuperscript{78}
The article argued that divisiveness was the “Minotaur lurking in the
depths of the Establishment Clause”\textsuperscript{79} and that Breyer's test would be
superior to the established Supreme Court tests utilized in Kitz-
miller.\textsuperscript{80} The article proposes an interesting approach, but fails to ad-
dress the \textit{ad hoc} pitfalls of a potential “Breyer test.”

\begin{itemize}
\item \textsuperscript{70} See infra section IV.A.
\item \textsuperscript{71} See generally Kristi L. Bowman, Seeing Government Purpose Through the Objec-
Pub. Pol'y 417 (2006) (Analyzing the impressive amount of knowledge the courts
have imported to the reasonable observer following Lynch, the author noted that
“today’s reasonable observer is a veritable Jeopardy! Champion.”). \textit{Id.} at 454.
\item \textsuperscript{72} 545 U.S. 677 (2005).
\item \textsuperscript{73} \textit{Id.} at 698 (Breyer, J., concurring) (noting a mechanical formula cannot determine
the constitutional borderline in all cases).
\item \textsuperscript{74} \textit{Id.} at 681–83 (majority opinion).
\item \textsuperscript{75} \textit{Id.} at 687–92.
\item \textsuperscript{76} \textit{Id.} at 703–04 (Breyer, J., concurring).
\item \textsuperscript{77} Van Orden v. Perry, 545 U.S. 677, 703–05 (2005) (Breyer, J., concurring).
\item \textsuperscript{78} Recent Case, Middle District of Pennsylvania Holds That the Teaching of Intelli-
\item \textsuperscript{79} \textit{Id.} at 2275.
\item \textsuperscript{80} \textit{Id.} at 2270 (noting that “belts and suspenders’ may be of little use when the
emperor has no clothes”).
\end{itemize}
In a separate opinion decided on the same day as *Van Orden*, the Court utilized the reasonable observer standard, previously confined to an effect prong analysis, to determine the purpose of a government practice.\(^8\) In *McCreary County v. ACLU*, the Court upheld a district court injunction that required the removal of Ten Commandments displays from two Kentucky county courthouses.\(^8\) The Court found the posting of the Ten Commandments unconstitutional and stepped into new territory by employing the perspective of a reasonable observer for an analysis of government purpose.\(^8\) In utilizing the reasonable person for a purpose analysis, the Court noted that "[t]he eyes that look to purpose" should be objective.\(^8\) The Court affirmed the injunction by noting that a reasonable observer, despite post-litigation alteration of the displays, would suspect the counties' purpose was to keep religious documents in plain view at all costs.\(^8\) The ultimate ramifications of the Court's opinion have yet to materialize, but the importation of the reasonable observer to a purpose prong analysis has piqued academic interest.\(^8\) This interest is due to the fact the Court had previously limited the reasonable observer concept to an analysis of the effect of a government practice.\(^8\)

The key difference between the monument upheld in *Van Orden* and the monument struck down in *McCreary* appears to boil down to the prominence of the respective monuments and the persistence of time. In *Van Orden*, the monument on the grounds of the Texas Capitol was flanked by seventeen other monuments on the capitol grounds and had existed without challenge for forty years.\(^8\) Conversely, in *McCreary*, the monuments were freestanding, highly visible exhibits which were immediately challenged by the ACLU.\(^8\) The Court's decision in both cases seems to echo the distinction made between the crèche in *Lynch*, surrounded by other Christmas decorations, and the crèche in *Allegheny*, which was freestanding.\(^8\) If the Dover School Board in *Kitzmiller* had required disclaimers for several different curriculum courses, their actions may have passed muster like the monument in *Van Orden*. However, the Dover resolution's solitary and conspicuous criticism of evolution helped seal its fate. Despite bur-

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82. *Id.* at 880–81.
83. *Id.* at 861–66.
84. *Id.* at 862.
85. *Id.* at 873–74.
87. *Id.* at 366.
89. *McCreary*, 545 U.S. at 844.
geoning Supreme Court analyses, the *Lemon* test, the endorsement test, and the viewpoint of the reasonable observer remain entrenched in the Court’s Establishment Clause jurisprudence canon.

### III. *KITZMILLER V. DOVER AREA SCHOOL DISTRICT*

In November of 2004, the Dover Area School District in Pennsylvania announced that beginning in January 2005, science teachers at Dover High School would be required to read the following statement to their ninth grade biology students:

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

> 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.\(^91\)

On December 14, 2004, eleven plaintiffs filed suit in federal district court for the middle district of Pennsylvania against the Dover Area School District and its board of directors.\(^92\) The plaintiffs alleged that the school district’s policy, which required reading the aforementioned statement, violated the First Amendment.\(^93\) Students were allowed to “opt out” of a reading of the disclaimer if their parents signed a release form.\(^94\) The *Kitzmiller* court criticized the “opt out” policy because it forced students to either submit to a reading of the policy or leave the classroom entirely.\(^95\) The disclaimer thereby placed students in the precarious position which the Establishment Clause protects against, namely making non-adherents to government practice outsiders.\(^96\) The plaintiffs, all parents of Dover School District students, sought to enjoin the school district from maintaining its disclaimer policy.\(^97\) Employing a “belt and suspenders” approach, the court analyzed the

\(^92\) *Id.* at 709.
\(^93\) *Id.*
\(^94\) *Id.* at 727–28 & n.8.
\(^95\) *Id.*
\(^97\) *Id.* at 709–10.
school district's ID policy separately under both the \textit{Lemon} test and the endorsement test.\textsuperscript{98} Utilizing a reasonable observer's perspective, the court held that the Dover Area School District's policy was impermissible under the Establishment Clause and enjoined the district from maintaining its policy.\textsuperscript{99}

In arriving at this conclusion, the court exhaustively chronicled the historical foundations of the ID movement (e.g., creationism and creation science) and adjudged ID a non-scientific, religious argument.\textsuperscript{100} The court noted that ID allows for supernatural explanations of natural phenomena, which is in complete contrast to the scientific method requiring testability.\textsuperscript{101} Though many organizations seek to criticize or marginalize evolutionary theory,\textsuperscript{102} the Discovery Institute ("the Institute") has assumed a prominent role nationally. The Institute, and one of its Center for Science and Culture\textsuperscript{103} senior fellows, Professor Michael Behe,\textsuperscript{104} played key roles in \textit{Kitzmiller}. The Institute, based in Seattle, is a think tank which promotes and funds ID research and criticism of evolutionary theory. The Institute is one of ID's biggest proponents, and seeks to legitimize ID as an alternative scientific theory.

The Institute filed an amicus brief on behalf of the Dover Area School District, supporting the district's disclaimer and highlighting ID's secular goal of promoting critical consideration of science.\textsuperscript{105} It is apparent from the \textit{Kitzmiller} opinion that members of the Dover School Board had contact with an Institute lawyer during the development of their ID policy. A Dover board member even arranged for Dover High School's science teachers to watch an Institute video entitled "Icons of Evolution."\textsuperscript{106} Furthermore, one of the Institute's most prominent fellows, Professor Behe, served as lead defense expert, representing the scientific aspirations of the ID movement. The importance of Behe's presence in the \textit{Kitzmiller} court cannot be underestimated. By analyzing the arguments of one of the most prominent and respected ID supporters in the country, the \textit{Kitzmiller}

\begin{itemize}
\item \textsuperscript{98} \textit{Id.} at 714 n.4.
\item \textsuperscript{99} \textit{Id.} at 765–66.
\item \textsuperscript{100} \textit{Id.} at 765. ("[W]e have addressed the seminal question of whether ID is science. We have concluded that it is not, and moreover that ID cannot uncouple itself from its creationist, and thus religious, antecedents.")
\item \textsuperscript{101} \textit{Kitzmiller} v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 735 (M.D. Pa. 2005).
\item \textsuperscript{102} \textit{See}, e.g., \textit{Intelligent Design Network: Seeing Objectivity in Origins Science}, \url{http://www.intelligentdesignnetwork.org/} (last visited Oct. 24, 2007).
\item \textsuperscript{103} Center for Science and Culture, Discovery Institute, \url{http://www.discovery.org/csc/} (last visited Oct. 24, 2007).
\item \textsuperscript{104} Biography of Dr. Michael Behe, Lehigh Department of Biological Sciences, \url{http://www.lehigh.edu/~inbios/faculty/behe.html} (last visited Oct. 24, 2007).
\item \textsuperscript{105} \textit{Kitzmiller} v. Dover Area Sch. Dist., No. 4:04-CV-2888, 2005 WL 3628833 (M.D. Pa. Oct. 17, 2005).
\item \textsuperscript{106} \textit{Kitzmiller}, 400 F. Supp. 2d at 750.
\end{itemize}
court’s opinion went to the heart of the ID movement and created an
analytical roadmap for other courts to follow.

In rejecting Behe’s purported scientific arguments for ID, the Kitz-
miller court focused on three primary grounds. First, ID allows for
supernatural explanation of natural phenomena, which is contrary to
the scientific method which requires testability.107 Second, ID’s de-
sign argument for irreducible complexity,108 like its predecessors,
seeks to strengthen its own cause by criticizing evolution.109 Third,
ID’s negative arguments, such as irreducible complexity, are refuted
by the scientific community.110 The initial ground cited by the court
questions ID’s permissive use of supernatural explanations, e.g., cre-
tation by an intelligent designer, for natural phenomena.111 The court
noted that every scientific group or association that maintained a posi-
tion on ID had, without reservation, declared ID non-scientific be-
cause its theory was not testable or subject to being disproved.112
Furthermore, the court held that acceptance of ID would force the
very definition and nature of science to be broadened to include non-
testable, supernatural theories.113 This scientific sea change was one
of the purported goals of the Institute.114

The second and third grounds the court discussed in questioning
ID’s scientific credentials involved a thorough analysis of the ID con-
cept of irreducible complexity. The court initially noted that irreduci-
ble complexity is not an argument for ID as much as it is an argument
against evolution.115 Irreducible complexity is akin to the concept of a
car engine, in that all individual pieces, e.g., sparks plugs, pistons,
etc., are required for the entire system to function. Behe conceded
that there were no peer-reviewed publications that showed complex
molecular systems were intelligently designed.116 Therefore, it must
be inferred that ID’s irreducible complexity is an argument of mere

108. Id. at 739. Defense witness Michael Behe defined “irreducibly complex” 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 effectively cease functioning.” Id.
109. Id. at 738.
110. Id. at 735.
111. Id. at 736 (“Darwinists object to the view of intelligent design because it does not
give a natural cause explanation of how the various forms of life started in the
first place,” quoting the ID textbook Pandas.).
114. Id. (referencing the Institute’s “Wedge Document,” which outlines ID’s strategy
for replacing science in its current form with a theistic form of science (i.e., ID)).
See also The “Wedge Document”: “So What?,” http://www.discovery.org/scripts/
viewDB/filesDB-download.php?id=349 (last visited Oct. 24, 2007) (containing the
full text of the “document” and the Institute’s response to the controversy).
116. Id. at 745.
assertion, which lacks evidentiary support and which is not subject to the scientific scrutiny applied to evolutionary theories. The district judge rejected Behe's contentions, holding ID's arguments against evolution required proof of evolution to such a degree that it created too high of a burden of proof. Following this extensive refutation of ID's arguments against evolution, the court analyzed *Of Pandas and People* ("Pandas"), the ID text Dover students were directed to by the district's disclaimer.

Thanks to unrebutted testimony of the plaintiffs' expert, the court determined *Pandas* contained misrepresentations, exclusion of key scientific theories, and obsolete concepts. The court also looked to earlier editions of *Pandas* and made a startling discovery. The court discovered that prior to the Supreme Court's decision in *Edwards*, *Pandas* definition of creation science was identical to the current definition of ID. Furthermore, the *Kitzmiller* court noted that shortly after the Court's condemnation of creation science in *Edwards*, the *Pandas* text systematically removed all references to creation science and replaced them with references to ID.

In holding ID is not science, the *Kitzmiller* court noted that ID is not supported by peer-reviewed journals or publications, and the ID movement does not engage in research and testing. Behe failed to convince the court ID was anything more than an "interesting theological argument." Under its application of the endorsement test, the court held that an objective reasonable observer, whether a Dover student or adult, would view the school's disclaimer as an official endorsement of religion. The court buttressed its holding by noting that official disclaimers highlighting fallacies and/or gaps in theory were not proposed in any other scientific courses. Furthermore, there was no showing that disclaimers had previously been used in any other course in the school's entire curriculum. Though the opinion was written after the Supreme Court's decision in *McCreary*, the *Kitzmiller* court did not import a reasonable person analysis to the purpose prong despite the Court taking that step in *McCreary*.
Under an application of the Lemon test, the court determined the purpose and principal effect of the school board's policy was to advance religion. Citing Supreme Court precedent for its inquiry, the court's purpose prong inquiry took special note of the sequence of events leading to adoption of the policy and determined the ostensible purpose of improving scientific education was a sham. The court noted that the board's president, Alan Bosnell, stated creationism and school prayer were his highest priorities during a Dover School Board retreat. A school board member further testified that Mr. Bosnell stated that he did not believe in evolution and wanted creationism to be taught alongside evolution. Additionally, it was revealed that copies of the ID textbook Of Pandas and People were purchased with money donated at the Sunday service of a board member's church after he described the intended use of the funds. Following its purpose prong inquiry, the court held that under the endorsement test and the purpose prong of Lemon, the district's disclaimer was unconstitutional.

The court then briefly analyzed the disclaimer under the effect prong of Lemon. The Kitzmiller court held that, following its determination that ID was not science, the effect of the disclaimer impermissibly advanced religion by questioning evolution's scientific credentials and subsequently directing students to an alternative religious concept. Given the court's endorsement analysis, the non-scientific nature of ID itself, and a purpose and effects prong analysis, the court entered a declaratory judgment enjoining the Dover Area School District from enforcing the ID disclaimer.

IV. ANALYSIS

There is no end in sight for the ongoing struggle to define a universal rule in Establishment Clause cases. The endorsement and Lemon tests continue to be used extensively by courts across the nation, but have been deemed mere guideposts by some. The Supreme Court has given the endorsement test primacy in recent decisions, leading some, despite Justice O'Connor's own view of her endorsement test,
to proclaim that the *Lemon* test has been abandoned.\(^{139}\) It is not the aim of this Note to propose a new analytical weapon for the Supreme Court's quiver, though many such proposals exist.\(^{140}\) Rather, the aim of this Note is to determine the contribution of the court's opinion in *Kitzmiller* to Establishment Clause jurisprudence and its effect on the ID movement.

A. *Kitzmiller*’s Contribution to Establishment Clause Jurisprudence

In short, the *Kitzmiller* decision fails to provide a fresh approach to the Establishment Clause quagmire. The court's analysis is thorough and supported by Supreme Court precedent, but it serves as a mere continuation of established tests, as opposed to a guiding light for the future. However, given the doctrine of *stare decisis*, *Kitzmiller*’s adherence to Supreme Court precedent is a requirement, not a failure of creativity.\(^{141}\) By focusing on the question of ID's scientific legitimacy,\(^{142}\) the *Kitzmiller* court created a persuasive roadmap for subsequent adjudication. By adhering to established Supreme Court tests, *Kitzmiller*’s framework allows other courts to competently analyze issues addressing ID and/or criticizing evolution in the nation's classrooms. Despite its adherence to precedent, *Kitzmiller* took an interesting approach by utilizing the endorsement test and the *Lemon* test, separately and distinctly, in a “belt and suspenders” approach to analysis of the Dover disclaimer.\(^{143}\) The court explained its decision to use both tests noting the evolving nature of Establishment Clause case law and the fact that its Third Circuit brethren had applied both tests in its past decisions.\(^{144}\) One of the Third Circuit cases followed by *Kitzmiller* determined it was best to analyze an Establishment Clause case under both *Lemon* and the endorsement test because a reviewing court might prefer one test to the other.\(^{145}\)


\(^{141}\) “*Stare decisis*” is defined as “the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation.” BLACK'S LAW DICTIONARY 1443 (8th ed. 2004).

\(^{142}\) See infra section IV.B.


\(^{144}\) Id. at 713--14 & n.4.

\(^{145}\) Freethought Soc'y of Greater Philadelphia v. Chester County, 334 F.3d. 247, 261 (3rd Cir. 2003) (noting that a higher court may prefer to analyze an Establish-
Following the Supreme Court’s lead, the Kitzmiller court’s endorsement analysis focused on whether the ID policy marginalized students and whether it had the effect of evincing a message of endorsement or disapproval of religion.146 The court noted that the district’s “opt out” policy marginalized students who did not wish to be exposed to the disclaimer.147 Mirroring O’Connor’s concurring language in Lynch, the court held that forcing students to either submit to hearing the disclaimer or be excused from the classroom during the reading of the disclaimer would have presented a message to non-participating students that they were “not full members of the political community . . .”148 The Kitzmiller court’s endorsement test analysis adopted the post-Lynch, majority opinions of the Supreme Court by analyzing the Dover Area School District’s practice from the perspective of a reasonable, objective observer. Specifically, the court looked to the perspective of an objective Dover adult, student, and citizen.149 Given the forum in which the disclaimer was delivered, a public high school, the perspective of a reasonable observer seems particularly apt. An objective Dover adult, student, or citizen is the proper lens with which to view the district’s disclaimer because it places the court in the position of those whom the disclaimer directly affected. The thorough and cogent inquiry into the perspective of a reasonable observer in Kitzmiller stands in stark contrast to one Supreme Court Justice’s contention that the concept of a reasonable observer was closer to an art exam than a judicious inquiry into constitutional law.150

In Kitzmiller, the court imbued each reasonable observer with an impressive awareness of historical and cultural backgrounds including intricate knowledge of Supreme Court opinions and the development of the ID movement.151 It may be difficult to fathom that an objective observer, regardless of their location, would be personally familiar with the Supreme Court’s Establishment Clause jurisprudence over the past forty years. The amount of information and keen awareness of historical and cultural contexts imported to the court’s reasonable observer in Kitzmiller may seem unrealistic at first blush and is, perhaps, why there is such vehement criticism of the reasonable observer concept. However, the court’s actions do not constitute a mas-

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146. Kitzmiller, 400 F. Supp. 2d at 715 (“[T]he endorsement test is designed to ascertain the objective meaning of the statement that the District’s conduct communicated in the community by focusing on how ‘the members of the listening audience’ perceived the conduct . . .”)

147. Id. at 727-28.

148. Id. at 728 (internal citations omitted).

149. Id. at 715-16.

150. See supra note 66.

querade whereby the court injects its own knowledge into the vessel of a reasonable resident of Dover. The amount of knowledge attributed to a reasonable observer in *Kitzmiller* is supported by the widespread discussion of ID in print and other media and considerable Supreme Court precedent. Since O'Connor's concurrence in *Lynch*, the reasonable observer's depth of knowledge has continued to grow, despite criticism.\(^1\)

At the outset, the court determined that the relevant inquiry into the disclaimer's potential endorsement of religion should be analyzed from the perspective of a Dover student.\(^2\) In its analysis of an objective Dover student, the court in *Kitzmiller* stated, "a reasonable, objective student is not a specific, actual student, or even an amalgam of actual students, but is instead a hypothetical student, on to whom the reviewing court imputes detailed historical and background knowledge..."\(^3\) The amount of information presumed available to the *Kitzmiller* court's observer ranges from the historical context of ID, including its origins in creationism and creation science, to an awareness of the Dover disclaimer's message. In dissecting the language of the Dover disclaimer itself, the court determined the disclaimer sent a message to students that evolution is a problematic theory that the state *requires* the school to teach.\(^4\) Furthermore, the disclaimer denotes gaps in evolutionary theory, without mentioning gaps in any other scientific field or any of the arguments refuting ID.\(^5\) The court's discussion of the perspective of an objective Dover student stands to reason. Considering that the school had no history of reading disclaimers in any other curricular courses, it is more than likely a student hearing the disclaimer would hold evolution to a level of scrutiny not applied to other school courses.

The court took the additional step of viewing the endorsing effect of the disclaimer from the perspective of an objective Dover adult and citizen.\(^6\) The court's reasonable adult was presumed to know that ID is the progeny of creationism and that the prominent ID textbook, *Of Pandas and People*, is published by a Christian organization.\(^7\) The court further determined a reasonable observer would be aware

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152. *See* Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 800 n.5 (1995) (Stevens, J., dissenting) (Referring to O'Connor's reasonable observer, Justice Stevens stated: "I think this enhanced tort-law standard is singularly out of place in the Establishment Clause context. It strips of constitutional protection every reasonable person whose knowledge happens to fall below some "ideal" standard.").


154. *Id.* at 723.

155. *Id.* at 724 (emphasis added).

156. *Id.* at 724–25.

157. *Id.* at 727–28.

158. *Id.* at 721.
that ID's proposal of a "master intellect" as the designer of the universe is a thinly veiled euphemism for God.\textsuperscript{159} Aside from a sidestep into the realm of science fiction, a plain consideration of the term "master intellect"\textsuperscript{160} would invariably lead to the conclusion that the sentient being referenced in \textit{Pandas} is God. The \textit{Kitzmiller} court's presumption regarding the euphemistic "intellect" is thoroughly realistic considering the amount of press the ID movement has received in recent years. Even an objective student would, more than likely, be familiar with ID and its ostensible goal of professing alternative approaches to evolution. Ultimately, the court determined that any of the objective observers would find the district's disclaimer policy an endorsement of religion because of the social context in which the policy arose.\textsuperscript{161}

In keeping with the recent trend of other Third Circuit cases,\textsuperscript{162} the \textit{Kitzmiller} court buttressed its endorsement analysis of the Dover disclaimer with a \textit{Lemon} analysis. The court noted that the Supreme Court has looked to the context of the government's words and the sequence of events leading to passage of a resolution in order to determine legislative purpose.\textsuperscript{163} Accordingly, the \textit{Kitzmiller} court chronicled the events that led to passage of the ID policy. Alan Bosnell, the president of the Dover school board, confided in a fellow board member that he did not believe in evolution and fervently desired that creationism be taught alongside evolution.\textsuperscript{164} The court recounted various statements by board members during a 2004 board meeting that included statements to the effect that the separation of church and state is a myth and that creationism should be taught at Dover High School.\textsuperscript{165}

It was also revealed that Buckingham had overseen the removal and burning of an evolution mural from the Dover school.\textsuperscript{166} Perhaps most damaging was the revelation that Buckingham had solicited donations from his church and used the money to purchase copies of \textit{Of Pandas and People} for use at Dover High School.\textsuperscript{167} Given these events, the court held that Dover's purported purpose of improving

\textsuperscript{159} \textit{Id.} at 718-19 (quoting an excerpt of \textit{Pandas}, which leaves the identity of the ultimate "intelligent agent" to religion and philosophy).
\textsuperscript{160} \textit{Id.}
\textsuperscript{161} \textit{Id.} at 734.
\textsuperscript{162} See supra notes 144–45.
\textsuperscript{163} \textit{Kitzmiller}, 400 F. Supp. 2d at 746-747 (citing Edwards v. Aguillard, 482 U.S. 578, 595 (1987)).
\textsuperscript{164} \textit{Id.} at 748-49.
\textsuperscript{165} \textit{Id.} at 751–52.
\textsuperscript{166} \textit{Id.} at 753 (noting Buckingham "gleefully watched it burn" and subsequently demanded Dover's teachers agree never to place an evolution mural in a classroom again).
\textsuperscript{167} \textit{Id.} at 756.
science education was a sham.\(^{168}\) All of the actions and statements of the board show that the disclaimer policy, and ID itself, was directly related to personal, religious beliefs. In adhering to the same kind of legislative purpose inquiry employed in \textit{Epperson},\(^{169}\) \textit{Kitzmiller} rejuvenates the importance of the \textit{Lemon} test and serves as a model for courts analyzing legislative statements made during the development of acts which advocate for or mention ID and/or criticize evolution in public schools. \textit{Kitzmiller} shows that it is not so much the test that results in ambiguity as it is how the test is \textit{applied}. Those awaiting a clarion Supreme Court opinion which will pronounce an unambiguous, uniform Establishment Clause test will likely be waiting for some time. In the interim, opinions such as \textit{Kitzmiller} show that existing tools, despite some criticism, can serve us well if properly used.

Though it did not do so, the court’s analysis could have potentially utilized the concurring opinion of Justice Breyer in which he argued that the First Amendment seeks to prevent division amongst the people.\(^{170}\) The court quoted a Dover resident to show the divisive effect of the school board’s policy: “Well, it's driven a wedge where there hasn’t been a wedge before. People are afraid to talk to people for fear, and that’s happened to me. They’re afraid to talk to me because I’m on the wrong side of the fence.”\(^{171}\) Additionally, one \textit{Kitzmiller} plaintiff’s motives were questioned by her own daughter.\(^{172}\) In stark contrast to its purported goal of enhancing the critical thinking of its students, the declaration, as read by Dover administrators following the protest of Dover High’s science teachers, stated there would be no further discussion of ID, and Dover teachers would not answer questions regarding ID.\(^{173}\) It is ironic that that the Dover school board would nullify any teacher-student discussion of the concept of ID when one of the supposed goals of the disclaimer was to encourage an open mind. In a similar manner to their endorsement analysis, the court held that, due to ID's non-scientific nature, the curriculum change pursued by

\(^{168}\) \textit{Kitzmiller v. Dover Area Sch. Dist.}, 400 F. Supp. 2d 707, 762–63 (M.D. Pa. 2005) (noting the school board contacted no scientific authorities and disregarded the district’s own science teachers and relied on the advice of religious institutions in creating the disclaimer).

\(^{169}\) See supra notes 30–31 and accompanying text.


\(^{171}\) \textit{Kitzmiller}, 400 F. Supp. 2d at 762.

\(^{172}\) See Margaret Talbot, \textit{Darwin In the Docket: Intelligent Design Has Its Day in Court}, \textit{The New Yorker}, Dec. 5, 2005, at 66 (quoting plaintiff Julie Smith’s daughter following a discussion with friends at Dover High School, “Mom, evolution is a lie. What kind of a Christian are you?’”).

\(^{173}\) \textit{Kitzmiller}, 400 F. Supp. 2d at 727 (noting that by refusing to discuss ID further, the school district sends the message that ID is some sort of secret science that no one can discuss).
the Dover school board had the purpose and effect of unconstitution-
ally advancing religion. Though the *Kitzmiller* opinion fails to propose a fresh approach to existing Establishment Clause tests, its impact on a purpose or effects prong analysis of ID and/or criticism of evolution in public schools is where the *Kitzmiller* case makes a lasting mark. It would be taxing, to say the least, to construct a post-*Kitzmiller* set of facts in which a school board could survive either a purpose or effect prong analysis of a policy that endorsed or implied the use of ID or criticized evolution. That is not to say proponents of ID, or its potential successor, will discontinue their efforts to gain a place in the consciousness of America's youth. However, *Kitzmiller*’s purpose and effects prong analysis caused irreparable damage to ID's ability to enter America's classrooms. Utilizing existing Supreme Court tests, the court in *Kitzmiller* effectively pinned ID and its criticism of evolution to religion and created a thorough and cogent roadmap subsequent courts will have difficulty resisting.

**B. *Kitzmiller*’s Impact on the Intelligent Design Movement**

The Court is confident that no other tribunal in the United States is in a better position than we to trample into this controversial area. Finally, we will offer our conclusion on whether ID is science not just because it is essential to our holding that an Establishment Clause violation has occurred in this case, but also in the hope that it may prevent the obvious waste of judicial and other resources which would be occasioned by a subsequent trial involving the precise question which is before us.

Although *Kitzmiller* fails to propose a unique and unifying Establishment Clause test, District Judge John E. Jones III dealt a crippling blow to ID's hopes of pedagogical legitimacy. Jones' thorough opinion directly addressed and ultimately refuted ID's scientific credentials. The *Kitzmiller* opinion meticulously traced ID's lineage from earlier rivals of evolution (e.g., creationism and creation science) and exposed its theistic underpinnings. Accordingly, *Kitzmiller* severely, if not completely, hindered the prospect of constitutionality teaching ID and criticism of evolution in public schools under a purpose or effects prong analysis. Just as creationism and creation science were used to sterilize the effect of evolution in previous generations, ID has become the modern weapon of choice in an ongoing confrontation between secular and sectarian views. President George W. Bush lent strength, even if tacitly, to ID's cause in the following exchange with reporters during a roundtable interview in the Roosevelt Room of the White House in 2005.

174. Id. at 764.
175. Id. at 735.
176. Id. at 716–19.
Q: I wanted to ask you about the—what seems to be a growing debate over evolution versus intelligent design. What are your personal views on that, and do you think both should be taught in public schools?

The President: "I said that, first of all, that decision should be made to local school districts, but I felt like both sides ought to be properly taught."

Q: Both sides should be properly taught?

The President: "Yes, people—so people can understand what the debate is about."

Q: So the answer accepts the validity of intelligent design as an alternative to evolution?

The President: "I think that part of education is to expose people to different schools of thought, and I'm not suggesting—you're asking me whether or not people ought to be exposed to different ideas, and the answer is yes."177

The words of the President serve as further evidence of the pervasive nature of this divisive issue. In addition to Bush's comments, the ID movement has been pushed to the forefront of a national debate in recent years due to school board actions in Dover, Pennsylvania,178 Lebec, California,179 and Cobb County, Georgia.180 This truncated list is far from complete, but it serves to highlight the prominence of the ID-evolution debate.

Following the re-definition of Kansas state science standards in 2005,181 the Discovery Institute182 heaped praise on Kansas' new standards that altered the definition of science to allow for supernatural explanations of natural phenomena.183 This victory for the ID movement led to nationwide criticism of the Kansas board, including a tongue-in-cheek retort which pronounced its own unique version of in-

180. See Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286 (N.D. Ga. 2005), vacated by, 449 F.3d 1320 (11th Cir. 2006) (Refusing to make a ruling on any legal issues, the Eleventh Circuit Court remanded the case for further factfindings due to evidentiary uncertainties.).
182. See supra notes 102–05 and accompanying text.
183. MSNBC News Services, Kansas Education Board Downplays Evolution: State School Board OKs Standards Casting Doubts on Darwin, MSNBC, Nov. 8, 2005, http://msnbc.msn.com/id/9987813/ (An Institute spokesperson stated, "Students will learn more about evolution, not less as some Darwinists have falsely claimed.").
Meanwhile, others have gone so far as to proclaim Kansas' standards unconstitutional. Following the adoption of Kansas' new science standards, a University of Kansas professor, Paul Mirecki, created a course entitled "Special Topics in Religion: Intelligent Design, Creationism, and other Religious Mythologies." A storm of controversy followed, the KU course was dropped and, to add insult to injury, Mirecki was assaulted. ID proponents have similarly mocked, though perhaps less deftly, evolution's theory on the origins of life.

Following an extensive and cogent analysis, the court held that while ID may be an interesting supernatural theory, it is not science. Not long after the Kitzmiller decision was handed down, Behe penned a point-by-point response to the court's opinion. In his response, Behe defined science as "an unrestricted search for the truth about nature based on reasoning from physical evidence." Under this broad definition, Behe stated ID is science.

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184. See Bobby Henderson, Church of the Flying Spaghetti Monster, http://www.ven-ganza.org/ (last visited Oct. 24, 2007) (introducing the satirical "Flying Spaghetti Monster," whose "noodly appendage" is claimed to have created the universe and further noting that the Flying Spaghetti Monster is angered if followers do not wear "His" chosen outfit, full pirate regalia).


188. See ANN COULTER, GODLESS: THE CHURCH OF LIBERALISM 214 (Doug Pepper & Jed Donahue eds., Crown Forum 2006) (postulating that the theory of evolution is as farcical as the possibility that a giant raccoon, who passed gas long ago, could account for all the diversity of life we see today). In her "Acknowledgements" Coulter thanks Michael Behe and William Dembski for their tutelage regarding evolution. Id. at 303. Both Behe and Dembski are fellows for the Discovery Institute's Center for Science and Culture, and Behe served as a key witness for the Dover School District in Kitzmiller.

189. Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 745–46 (M.D. Pa. 2005) (Rejecting the defendant's argument that the disclaimer was intended to promote critical thinking, the court responded by stating, "The goal of the IDM is not to encourage critical thought, but to foment a revolution which would supplant evolutionary theory with ID.").


191. Id. at 2 (emphasis added).

192. Id.
course of its analysis and further claimed that the Big Bang Theory, like ID's supernatural designer, cannot be explained via natural causes. Behe concluded by noting that biological realities, despite Kitzmiller, are not subject to adjudication and that there are still no non-design explanations for the complex machinery of life. Commentators have disagreed over the wisdom of the Kitzmiller court's adjudication of ID's scientific worthiness.

Notwithstanding Behe's refutation and other critical commentary, Kitzmiller dealt a severe blow to the ID movement and its hopes of expanding its sphere of influence into America's public schools. By directly tracing ID's lineage to creationism and creation science, Kitzmiller attenuated ID's hopes of nurturing a theory that would rival and supplant evolution in the classroom. While Kitzmiller is not a Supreme Court—or even United States Court of Appeals—decision, the court's opinion will serve as persuasive authority in future debates regarding the constitutionality of teaching ID or directing students to ID and its criticism of evolution. The Kitzmiller opinion has likely foreclosed any question of ID's scientific credentials and its hopes of attaining a foothold in public school classrooms. Under a purpose or effects prong analysis, any court would struggle mightily to separate ID from its historical baggage and its endorsement of supernatural creation. The Kitzmiller court itself noted that "since ID is not science, the conclusion is inescapable that the only real effect of the ID Policy is the advancement of religion." Given the in-depth examination of ID and, through this examination, the conclusion that ID is inextricably linked to creationism and creation science, it would seem that ID, or its next incarnation, would face a formidable task in entering public school science classes under an effects prong analysis. If courts are willing to imbue the reasonable observer with knowledge of Supreme Court precedent and ID's historical development, surely the

193. Defined under "cosmology," "[A]t the beginning of time, all of the matter and energy in the universe was concentrated in a very dense state, from which it 'exploded,' with the resulting expansion continuing until the present." The Columbia Encyclopedia 663 (5th ed. 1993).

194. See supra note 190 at p. 3 (refuting the Kitzmiller court's contention that all science is explained by natural phenomena).

195. Id. at p. 11.

196. Compare Jay D. Wexler, Kitzmiller and the "Is it Science?" Question, 5 First Amendment L. Rev. 90 (2006) (contending that while Kitzmiller got it "95% correct", the court's analysis of whether ID is science was superfluous to whether the school's disclaimer advanced religion), with Richard B. Katskee, Why It Mattered to Dover that Intelligent Design Isn't Science, 5 First Amendment L. Rev. 112 (2006) (providing commentary by a principal attorney for plaintiffs in Kitzmiller, which claims that the court in Kitzmiller had to address the ID's scientific basis, or lack thereof, in order to determine the purpose and effect of the school's disclaimer).

high profile nature of the Kitzmiller decision will place the reasonable observer on further notice of what is truly being said when ID or its texts are mentioned.

Although Kitzmiller may have dashed any hopes of ID supplanting or rivaling evolution in the nation’s public schools, it will certainly not stop the ID movement itself. The logical question to be asked is, what is the next step for ID proponents? Just as creationism and creation science transformed into ID, the current incarnation of ID will, like a chameleon, adapt to the landscape and seek other means to its goals. The Supreme Court has noted, “[I]t might well be said that one’s education is not complete without a study of comparative religion or the history of religion.”198 In Abington, the Court also notes that “[n]othing we have said here indicates that . . . study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.”199 Accordingly, ID may be able to survive judicial proscription if offered as an elective course.

However, this would require ID proponents to accept defeat, at least temporarily, in the area of science and focus on elective courses discussing philosophy or the history of religion as an end-run around judicial inquiry into the purpose or effect of such a course discussing ID. One school district’s elective course addition was unsuccessful.200 Following the Court’s opinion in Abington, a school board would have to walk a fine line between the devotional practice of religion and the educational study of religion. While the former approach would not pass muster under Lemon or the endorsement test, the latter would have a chance. However, given ID’s dependence on an “intelligent designer” or “master intellect,” any elective course would likely have to discuss several different theories as part of a survey course in religious history or philosophy in order to avoid offending the First Amendment. Nevertheless, ID proponents seeking to neutralize the effect of Darwinism and evolution may not consider this slim foothold a positive step in the first place.

Even if ID proponents do not choose this path, future courts may limit Kitzmiller’s holding to its own facts. Additionally, a less conspicuous school board policy may neglect to mention ID by name and take its chances. Any of these possibilities could potentially prevent an application of Kitzmiller. However, given the near ubiquitous presence of ID and the Kitzmiller decision, subsequent courts would be remiss to refuse the roadmap Kitzmiller created. The constitutional approaches available to ID were discussed by one commentator

199. Id.
200. See supra note 179.
shortly before *Kitzmiller* was decided. The commentator suggested ID may be able to successfully pursue alternative approaches including elective courses and after school clubs. However, the commentator concluded that ID faces an uphill battle given the overwhelming evidence supporting evolution.

The *Kitzmiller* court stated its goal in exploring whether ID was science was to prevent the future waste of judicial efforts regarding ID's scientific credentials; this goal may have been attained. While no prominent ID cases have yet to surface in the wake of *Kitzmiller*, the effect of the court's opinion has already been felt outside the courtroom. The Kansas science standards, trumpeted by ID proponents as a major victory, may soon return to the traditional definition of science. The voters of Kansas recently ousted two conservative members of the Kansas Board of Education who favored science standards challenging evolution. A New York Times article noted that several of the newly elected board members promised to revisit the controversial standards in order to prevent criticism of evolution. The article also stated the Kansas election results were the third major defeat of the ID movement in recent years, counting the *Kitzmiller* decision and Ohio's post-*Kitzmiller* decision to drop a portion of their state science standards that allowed for critical analysis of evolution as the other major defeats.

V. CONCLUSION

The question of the origins of life is eternal and certainly will not be conclusively determined or decided by the opinion of a court. Views regarding the origins of life and their place in our schools have led to a division of opinion. The ID controversy highlighted in *Kitzmiller* serves as a reminder of this division. The *Kitzmiller* opinion will not change the beliefs of ID proponents; in fact, the opinion may serve to stoke their fires further. However, the legal importance of the *Kitz-

202. Id. at 684–88 (noting students who are objectively exposed to a non-critical version of ID, evolutionary theory, and other discussions of the origins of life will be able to weigh the merits of each and decide for themselves which course they choose).
203. Id. at 695.
204. See supra note 175.
205. See supra note 181.
207. Id.
209. Davey & Blumenthal, supra note 206.
miller decision cannot be minimized. As discussed above, the court's thorough analysis led to the determination that ID is not science.\textsuperscript{210} In arriving at this conclusion, the court placed ID's hopes of entering America's schools on the precipice of defeat. By exhaustively tracing ID's heritage to creationism and creation science, the court effectively foreclosed the questions of ID's scientific legitimacy under a purpose or effects prong analysis. The \textit{Kitzmiller} court did so by relying on the established canon of Establishment Clause tests provided by the Supreme Court.

The question to be asked is whether evolution and religious convictions can coexist. In its conclusion, the \textit{Kitzmiller} court answers in the affirmative.\textsuperscript{211} However, the court is silent as to how the two can reasonably coexist. The court notes that one of the main concerns of ID proponents is the effect of "scientific materialism" (i.e., evolution).\textsuperscript{212} ID proponents feel that "scientific materialism" looks strictly to scientific explanations and denies the moral and religious aspects of the pursuit of knowledge. The fear of a science detached from morality should not be dismissed easily. One commentator, discussing this very concern, noted that scientists should focus on the \textit{appropriate uses} of scientific knowledge and not just discovery in and of itself.\textsuperscript{213} How religious convictions and science should interact is a very personal question which \textit{Kitzmiller} cannot be expected to resolve. What \textit{Kitzmiller} means to the conflict of religion and science is that ID, or its potential successor, will have to overcome the albatross of religious association before it can successfully enter the nation's science classrooms. In a pre-emptive strike against critics of his opinion in \textit{Kitzmiller}, Judge Jones III offered the following:

Those who disagree with our holding will likely mark it as the product of an activist judge. If so, they will have erred as this is manifestly not an activist Court. Rather, this case came to us as the result of the activism of an ill-informed faction on a school board, aided by a national public interest law firm eager to find a constitutional test case on ID, who in combination drove the Board to adopt an imprudent and ultimately unconstitutional policy.\textsuperscript{214}

The \textit{Kitzmiller} opinion may have stuck a severe blow to ID and proponents of a theistic version of science, but the pendulum is sure to

\textsuperscript{211} Id. at 765 ("Plaintiffs' scientific experts testified that the theory of evolution represents good science, is overwhelmingly accepted by the scientific community, and that it in no way, conflicts with, nor does it deny, the existence of a divine creator.").
\textsuperscript{212} Id. at 737 n.14 (referring to the effects of such materialism as "devastating," and promoting a science in line with Christian convictions).
\textsuperscript{214} Kitzmiller, 400 F. Supp. 2d at 765.
swing back. Regardless of the result of this ongoing debate, the Kitzmiller opinion offers guidance in a conflict which all too often prizes passion over reason. Future courts may choose to follow a different path, but they will have difficulty resisting the thorough and rational reasoning Kitzmiller displays.