

Kitzmiller v. Dover Area School District: Teaching Intelligent Design in Public Schools

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Matthew Brady falters on the stand under the shrewd questioning of Henry Drummond, and fundamentalism is dealt a swift blow in *Inherit the Wind*, a dramatic interpretation of the Scopes Monkey Trial.¹ The lasting impression of the play, read in high schools across the country and memorialized in film, demonstrates the deep impression that the controversy over teaching evolution in public schools has left on American culture. Often over-simplified as merely a battle between fundamentalism and atheism,² the debate over teaching Darwin's theory of evolution has raged both in and out of the courtroom. The Supreme Court has struck down statutes that require the teaching of creationism, the belief that "matter, the various forms of life, and the world were created by God out of nothing and usually in the way described in Genesis,"³ as an endorsement of religion contravening the Establishment Clause of the First Amendment.⁴ But as public opinion about evolution remains mixed, those dedicated to ensuring the place of religion in public life and in classrooms continue to press the boundary between church and state. From anti-evolution laws,⁵ to "creation science,"⁶ to balanced treatment statutes,⁷ proponents of creationism remain one step ahead of the law, leaving the courts in their reactive role to act as sentinels for the First Amendment. Although the purpose of the Establishment Clause is to "[erect] a wall between church and state" that is "high and impregnable,"⁸ the courts can do little to stem the tide of litigation generated by those in our society, including highly influential

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¹ See *Scopes v. State*, 289 S.W. 363 (1927); JEROME LAWRENCE & ROBERT E. LEE, *INHERIT THE WIND* (New York: Bantam, 1982) (1955).

² Surveys have shown that scientists as a group are less likely than the average American to believe in God, but by no means are scientists all atheists. Jim Holt, *Madness About a Method*, N.Y. TIMES, Dec. 11, 2005, § 6 (Magazine), at 25; see also Jerry Adler, *Evolution of a Scientist*, NEWSWEEK, Nov. 28, 2005, at 50 (noting that biologist Francis Collins, the director of the Human Genome Project, is also an evangelical Christian); Neela Banerjee & Anne Berryman, *At Churches Nationwide, Good Words for Evolution*, N.Y. TIMES, Feb. 13, 2006, at 16 (discussing the efforts of ministers to discount the belief that science and religious faith are incompatible).

³ MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 272 (10th ed. 1993).

⁴ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987).

⁵ See *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁶ See *McLean v. Ark. Bd. of Educ.*, 529 F. Supp. 2d 1255, 1259 (E.D. Ark. 1982).

⁷ See *Edwards*, 482 U.S. at 581.

⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

religious and political leaders, who are determined to capitalize on society's divide over the role of religion in public life and evolution in the classroom. In this context, as the controversy surrounding the district court case examined below illustrates, a court can exert little influence preventing judicial waste for such Establishment Clause violations, no matter how decisive and assiduous its ruling may be.

The most recent litigation regarding evolution in public schools surrounds the teaching of intelligent design ("ID"), the newly proffered alternative to creationism. ID "holds that certain features of the universe and of living things are best explained by an intelligent cause, not an undirected process such as natural selection," but purposefully avoids identifying the intelligent cause.⁹ ID describes itself as a "scientific theory"¹⁰ that deserves equal time with evolution. The school board in Dover, Pennsylvania ("the Board"), decided last October to move toward granting ID such attention. The Board devised a statement to be read to Dover High School students in ninth grade biology about gaps in evolution theory with specific reference to ID as an "explanation of the origin of life that differs from Darwin's view."¹¹ The statement came after months of community debate,¹² clear statements by board members in favor of teaching creationism,¹³ and Board contact with organizations with theistic motivations for teaching ID.¹⁴ Parents with

⁹ *Top Questions and Answers About Intelligent Design Theory*, DISCOVERY INST. NEWS, Sept. 8, 2005, <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=2348>.

¹⁰ *Id.*

¹¹ *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 727 (M.D. Pa. 2005). The statement followed a Board resolution, passed 6-3 on October 18, 2004, stating, "[s]tudents will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design." *Id.* at 708. The statement, announced by press release on November 19, 2004, read in full:

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.

Id. at 708-09.

¹² *Id.* at 732.

¹³ *Id.* at 750-54.

¹⁴ The Board first contacted the Discovery Institute, which developed the ID movement

children both currently attending and intending to enroll in Dover High School filed suit in district court claiming that the Board's ID policy constituted an establishment of religion in violation of the First Amendment.¹⁵

Last December, Judge John E. Jones of the Middle District of Pennsylvania ruled that the Board's policy on ID violated the Establishment Clause.¹⁶ The court concluded that both the endorsement test and the *Lemon* test should apply in interpreting the Establishment Clause.¹⁷ The endorsement test is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement [of religion]."¹⁸ The court held that an objective observer would know that the Board's ID policy stemmed from religious beliefs rooted in creationism, given the history of Christian fundamentalism's fight over evolution teaching and the development of the ID movement.¹⁹ The court went on to conclude that an objective student would view the policy statement as an official endorsement of religion due to its attack on evolution.²⁰ The policy statement singled out evolution and presented ID, which the court saw as "a mere relabeling of creationism, and not a scientific theory,"²¹ as the only alternative explanation for the origins of life.²²

The court next applied the *Lemon* test, which examines purpose, effect, and degree of entanglement between religion and government.²³ The court meticulously catalogued the Board's activities leading up to the ID statement, including Board members' public statements about injecting religion into the curriculum,²⁴ clashes with teachers over biology textbooks,²⁵

"to replace materialistic explanations with the theistic understanding that nature and human beings were created by God." *Id.* at 720 (quoting DISCOVERY INST., THE "WEDGE DOCUMENT": "SO WHAT?" 12-16 (2006), <http://www.discovery.org/scripts/viewDB/filesDB-download.php?id=349>). The Board later corresponded with the Thomas More Law Center, which describes itself as "a not-for profit public interest law firm dedicated to the defense and promotion of the religious freedom of Christians, time-honored family values, and the sanctity of human life." *Kitzmiller*, 400 F. Supp. 2d at 753-54; Thomas More Law Ctr., *About Us*, <http://www.thomasmore.org/about.html> (last visited Apr. 16, 2006).

¹⁵ *Kitzmiller*, 400 F. Supp. 2d at 709-10.

¹⁶ *Id.* at 709.

¹⁷ See *infra* note 23 for a description of the *Lemon* test. The Supreme Court has characterized the endorsement test as a "gloss" on the *Lemon* test's purpose and effect prongs. *Kitzmiller*, 400 F. Supp. 2d at 714 (citing *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

¹⁸ *Kitzmiller*, 400 F. Supp. 2d at 712-13 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

¹⁹ *Id.* at 716.

²⁰ *Id.* at 731.

²¹ *Id.* at 726.

²² *Id.* at 724.

²³ The *Lemon* test says "a government-sponsored message violates the Establishment Clause of the First Amendment if: (1) it does not have a secular purpose; (2) its principal or primary effect advances or inhibits religion; or (3) it creates an excessive entanglement of the government with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

²⁴ *Kitzmiller*, 400 F. Supp. 2d at 748, 750-51 (M.D. Pa. 2005).

²⁵ *Id.* at 749-50, 754-55.

and contact with two pro-ID organizations, the Discovery Institute²⁶ and the Thomas More Law Center.²⁷ After this exhaustive review, the court held that the true purpose of the Board's ID policy was to advance religion²⁸ and that its stated purpose of "improving science education and encouraging students to exercise critical thinking skills" was a sham.²⁹ Although the effects inquiry was superfluous, the court incorporated its findings from the endorsement analysis to conclude that the ID policy had the effect of injecting religious views into the biology class.³⁰ In light of these findings, the court also held that the ID policy violated the Pennsylvania constitution, which reflects the same concerns as the Establishment Clause of the U.S. Constitution.³¹

In so ruling, the court offered three reasons for its conclusion that ID is not science.³² First, ID requires a supernatural agent in violation of the "ground rules of science" that require a theory to be testable.³³ Second, ID's argument of "irreducible complexity" employs a false dichotomy that so long as evolution fails to explain a particular phenomenon, ID is confirmed.³⁴ Third, the vast majority of scientists accept evolution, whereas ID distorts the theory of evolution and lacks any peer-reviewed publications to back its assertions.³⁵ The court aggressively disputed the scientific rigor of the defendants' expert witnesses, including Professor Michael Behe, the leading intellectual of the ID movement,³⁶ and the creationist book mentioned in the ID statement, *Of Pandas and People*.³⁷ The court devoted a section of its opinion to this conclusion for two stated purposes. Finding that ID is theological rather than scientific in nature was necessary to the overall holding that the Board's policy violated the Establishment Clause; additionally, the court was motivated by "the hope that [concluding ID is not a science here] may prevent the obvious waste of judicial and other resources" in subsequent trials involving the same question.³⁸

Although the opinion was excellently written and reasoned, its broad conclusions will not have a great impact on the public debate about teaching evolution and thus will fail to fulfill its hope of preventing judicial waste. Given the vast divide in American society over the role of religion in public

²⁶ *Id.* at 750.

²⁷ *Id.* at 753–54.

²⁸ *Id.* at 747.

²⁹ *Id.* at 762–63 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987) for language about the sham proponent of the purpose inquiry).

³⁰ *Id.* at 764.

³¹ *Id.* at 764–65.

³² *Id.* at 735.

³³ *Id.* at 736 (discussing the defense experts' personal mission to broaden what qualifies as scientific).

³⁴ *Id.* at 738.

³⁵ *Id.* at 743–45.

³⁶ *Id.* at 739.

³⁷ *Id.* at 743.

³⁸ *Id.* at 735.

life, the influence of high profile individuals who favor creationist teaching, and the limited precedential value of a district court's opinion, lawsuits will continue to serve as the primary check on new and improved methods of including creationism in the classroom. ID is representative of a huge cultural divide in America that a court, despite ambitious goals, cannot mend prophylactically.³⁹ In fact, the opinion's decisiveness in finding that ID was not science, based on the overwhelming evidence of the Board's religious motivations, may encourage critics of evolution simply to repack-age their next attack to avoid any mention of religion and thereby escape negative Establishment Clause analysis.⁴⁰

Recent polls show that around eighty percent of Americans believe God created the earth,⁴¹ while acceptance of evolution hovers around fifty percent.⁴² This split in opinion was reflected in the media coverage of the *Kitzmiller* case, when they called it the "latest culture clash between science and religion."⁴³ Responding to this opportunity, the *Kitzmiller* defendants' tactic was to demand that schools "teach the controversy." Despite the fact that the vast majority of scientists unflinchingly believe in evolution and describe it as bedrock for all science,⁴⁴ the "teach the controversy" approach endorsed by the Discovery Institute recommends that students be exposed to "scientific evidence for and against neo-Darwinism" as a means of increasing overall scientific knowledge.⁴⁵

³⁹ This is not to say that the *Kitzmiller* decision will have no effect on the questioning of evolution in public schools, but rather that the controversy over evolution will continue to generate lawsuits. The influence of the *Kitzmiller* holding on the Ohio school board in particular is discussed later in this article. See *infra* notes 66–68 and accompanying text.

⁴⁰ Although religion would be superficially removed from this future formulation, the underlying purpose for challenging evolution would remain religiously motivated and have harmful affects on scientific learning. See *infra* note 45.

⁴¹ See William Lee Adams, *Other Schools of Thought*, NEWSWEEK, Nov. 28, 2005, at 57.

⁴² See Glenn Collins, *An Evolutionist's Evolution*, N.Y. TIMES, Nov. 7, 2005, at B1 (citing a poll that fifty-one percent of Americans reject evolution); Nicholas D. Kristof, *The Hubris of the Humanities*, N.Y. TIMES, Dec. 6, 2005, at A27 (using a forty percent figure). The gap between the numbers for belief in God and belief in evolution demonstrate that the two beliefs are distinguishable rather than mutually exclusive. See *supra* note 2.

⁴³ Kenneth L. Woodward, *Evolution as Zero-Sum Game*, N.Y. TIMES, Oct. 1, 2005, at A15.

⁴⁴ Adler, *supra* note 2 ("[B]iologists overwhelmingly dismiss [ID] as nonsense."); Laurie Goodstein, *Intelligent Design Might Be Meeting Its Maker*, N.Y. TIMES, Dec. 4, 2005, § 4, at 1 (stating that ID proponents are "academic pariahs" on college campuses).

⁴⁵ *Setting the Record Straight about Discovery Institute's Role in the Dover School District Case*, DISCOVERY INST. NEWS, Nov. 10, 2005, <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=3003>. This desire to "teach the controversy" holds despite warnings that fostering doubt about evolution will harm the very students that creationist and ID proponents claim to want to expose to critical thinking. Given evolution's firm foothold in modern science, introducing the idea of controversy over its tenets and offering ID as a viable scientific alternative could be viewed as putting those students and, ultimately, the United States at a competitive disadvantage. See Kristof, *supra* note 42; Margaret Talbot, *Letter From Pennsylvania: Darwin In the Dock—Intelligent Design Has its Day in Court*, NEW YORKER, Dec. 5, 2005, at 66, 77 (quoting a paleontologist as saying the "teach the controversy" approach "makes people stupid"); Editorial, *Intelligent Design Derailed*, N.Y. TIMES, Dec. 22, 2005, at A32.

Leaving aside the fundamental conflict between the Discovery Institute's insistence that ID is a science and the *Kitzmiller* court's firm opinion to the contrary, the most revealing exercise for determining applicability of the Establishment Clause tests is to inquire why ID proponents want alternatives to evolution to be taught in the public classroom. The Board members who voted for the ID statement and the defense expert witnesses were without exception religiously motivated.⁴⁶ The Thomas More Law Center, which provided legal counsel for the defendants in *Kitzmiller*, framed the case as part of a culture war, in which it is necessary to defend the religious freedom of Christians.⁴⁷ The influence of Christianity on evolution teaching is also clear in other areas of the country.⁴⁸

Although the Board's defense was easy to dismiss as a sham in the *Kitzmiller* case based on the evidence, challenges to evolution may not always cross that line, especially since the purpose inquiry of the *Lemon* test has not always favored similarly situated plaintiffs. In a case in Cobb County, Georgia, a district court found that a sticker commenting on evolution affixed to the front of science textbooks⁴⁹ had at least two secular purposes satisfying the *Lemon* test's first prong.⁵⁰ The court held that the sticker fostered "critical thinking" and "reduce[d] offense to students and parents whose beliefs may conflict with the teaching of evolution."⁵¹ Although the court went on to hold that the stickers failed the *Lemon* test's

⁴⁶ Local newspapers had reported one board member as saying, "This country wasn't founded on Muslim beliefs or evolution. This country was founded on Christianity, and our students should be taught as such." Talbot, *supra* note 45, at 70. Another board member solicited donations from his church congregation to purchase the textbook *Of Pandas and People*, a pro-ID account of the origin of life that was shown at trial to have replaced "creation" with "intelligent design" in its latest edition. *Id.* at 71; see also *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 721 (M.D. Pa. 2005). Michael Behe, a Lehigh University biologist and the leading scientist of the ID movement, and other advocates "will freely admit that, for them, the designer of life on earth is the God of Christianity." Talbot, *supra* note 45, at 68.

⁴⁷ See Laurie Goodstein, *In Intelligent Design Case, a Cause in Search of a Lawsuit*, N.Y. TIMES, Nov. 4, 2005, at A16. See also Thomas More Law Center, *About Us*, <http://www.thomasmore.org/about.html> (last visited Apr. 16, 2006).

⁴⁸ In Kansas, new science standards redefine science to include supernatural explanations; the standards in Minnesota, New Mexico, and Pennsylvania require "critical analysis" of evolution. Jodi Wilgoren, *Kansas Board Approves Challenges to Evolution*, N.Y. TIMES, Nov. 9, 2005, at 14. See also EDWARD J. LARSON, TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION 203 (3d ed. 2003) (quoting a news broadcast describing the "ridicule" that Kansas's new standard promoted from non-Fundamentalists). A school district in Georgia attached stickers to the front of biology books that read much like the Board's statement in *Kitzmiller*. See *infra* notes 49–52 and accompanying text.

⁴⁹ The stickers said, "Evolution is a theory, not a fact This material should be approached with an open mind, studied carefully, and critically considered." *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1292 (N.D. Ga. 2005).

⁵⁰ *Id.* at 1300.

⁵¹ *Id.*

effects prong,⁵² that case indicates some room within Establishment Clause jurisprudence for a school board to facilitate questioning of evolution.

The Discovery Institute appears poised to exploit this opening, maintaining that it did not support the Board's actions in Dover and instead wants "to improve science education by teaching students more fully about the theory of evolution."⁵³ In claiming that its desire is to increase the breadth of science being taught in schools, the Discovery Institute presents itself not as a religious organization but rather as an institution that supports religious liberty and the "legitimate role of faith-based institutions in a pluralistic society."⁵⁴ This framing likely resonates with numerous Americans who do not read the First Amendment to mandate the complete removal of religion from public education.⁵⁵ For decades, religiously motivated individuals have responded to court rulings by developing new strategies of injecting religion into the classroom.⁵⁶ Even before the court's opinion was announced, commentators predicted that "[i]f intelligent design is defeated in the *Kitzmiller* case, its backers will undoubtedly find subtler ways of promoting it."⁵⁷

Several high-profile individuals who believe that religion belongs in public life have increased the tension surrounding the evolution dispute. Pope Benedict XVI, his predecessor Pope John Paul II, and the Dalai Lama find "offensive" what is termed "neo-Darwinism," the belief that the "engine of evolution is random mutation."⁵⁸ The Vatican, however, has indicated that ID is unscientific and should not be taught as an alternative to evolu-

⁵² *Id.* at 1306.

⁵³ Discovery Inst., Questions and Answers about Discovery Institute, <http://www.discovery.org/csc/topQuestions.php> (last visited Apr. 16, 2006) [hereinafter Discovery Inst., Questions and Answers]. The Discovery Institute has circulated an anti-evolution petition since 2001; despite its claim that the signatures of scientists and engineers are proof that doubt about evolution exists within the scientific community, most signers are evangelical Christians motivated by religious beliefs. Kenneth Chang, *Few Biologists but Many Evangelicals Sign Anti-Evolution Petition*, N.Y. TIMES, Feb. 21, 2006, at F2.

⁵⁴ Discovery Inst., Questions and Answers, *supra* note 53.

⁵⁵ Indeed, at least one member of the Board did not believe that the Constitution mandates separation of church and state in this way. Laurie Goodstein, *Judge Rejects Teaching Intelligent Design*, N.Y. TIMES, Dec. 21, 2005, at A34. See Phillip E. Johnson, Essay, *Is God Unconstitutional?*, 66 U. COLO. L. REV. 461 (1995) (discussing how Establishment Clause cases about creationism could be construed as viewpoint discrimination).

⁵⁶ See EDWARD J. LARSON, *TRIAL AND ERROR: THE AMERICAN CONTROVERSY OVER CREATION AND EVOLUTION* 95–98 (2003). For a summary of evolution teaching, see RANDY MOORE, *EVOLUTION IN THE COURTROOM: A REFERENCE GUIDE* (2002). See also Lisa D. Kirkpatrick, Note, *Forgetting the Lessons of History: The Evolution of Creationism and Current Trends To Restrict the Teaching of Evolution in Public Schools*, 49 DRAKE L. REV. 125 (2000).

⁵⁷ Talbot, *supra* note 45, at 77.

⁵⁸ George Johnson, *For the Anti-Evolutionists, Hope in High Places*, N.Y. TIMES, Oct. 2, 2005 (Week in Review), at 3. A distinction should be made between rejecting randomness as driving evolution and rejecting evolution outright. The Vatican has indicated acceptance of common ancestry in evolutionary theory because it does not foreclose God's guidance. Ian Fisher & Cornelia Dean, *In "Design" vs. Darwinism, Darwin Wins Point in Rome*, N.Y. TIMES, Jan. 19, 2006, at A12.

tion.⁵⁹ Closer to home, televangelist Pat Robertson criticized Dover as rejecting God after the town ousted the Board that put the ID policy in place. Robertson warned on his television show, *The 700 Club*, that Dover should not “be surprised if disaster struck.”⁶⁰ Indeed, Robertson’s ability to influence the debate demonstrates how “conservative Christian religious organizations have the necessary structures in place” to continue challenging evolution even if creationism is kept out of the classroom.⁶¹

The religious right enjoys support from Republican politicians and organizations as well. On the national level, Senator Rick Santorum (R-Pa.) has expressed support for ID.⁶² On the state level, a National Center for Science Education survey found “explicitly antievolution platforms or public statements” made by seven states’ Republican parties.⁶³ Local and state efforts have been focusing on the Discovery Institute’s approach of “teach the controversy” and attempting to expose gaps in evolutionary theory.⁶⁴ In Dover itself, the Board members that adopted the ID policy were all Republican, and their removal was only possible because voters crossed party lines.⁶⁵ Clearly, political and social capital is available to fuel the continuing challenge to teaching evolution in schools.

Another factor restricting the reach of the *Kitzmiller* decision is its limited precedential value; as a district court case, the *Kitzmiller* decision is binding only on the actual parties to the suit. Its outcome can, however, serve as a warning that litigation may not be worth the time and money—a warning that the state of Ohio heeded less than two months later.⁶⁶ After becoming the first school board to mandate “critical analysis” of evolution in 2002, the Ohio Board of Education deleted that language from its curriculum “partly out of fear of a lawsuit in the wake of” the *Kitzmiller*

⁵⁹ Fisher & Dean, *supra* note 58.

⁶⁰ *National Briefing Mid-Atlantic: Pennsylvania: Town Is Warned of God’s Wrath*, N.Y. TIMES, Nov. 11, 2005, at A16.

⁶¹ LARSON, *supra* note 56, at 189. See CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE 182 (2005) (listing Christian Right organizations Focus on the Family, Eagle Forum, the Concerned Women for America, Coral Ridge Ministries, the American Family Association, and the Alliance Defense Fund as embracing or sympathetic to ID).

⁶² Santorum has called ID a “legitimate scientific theory” and tried to work language from the ID movement into an amendment for the No Child Left Behind Act. MOONEY, *supra* note 61, at 182–83 (quoting a Santorum op-ed in the *Washington Times*). Following the *Kitzmiller* ruling, Santorum cut ties with the Thomas More Law Center, claiming that he approved of the “teach the controversy” approach but was “troubled” by the Board members’ religious motivations. *Senator to Cut Ties Over Evolution Suit*, N.Y. TIMES, Dec. 23, 2005, at A24.

⁶³ MOONEY, *supra* note 61, at 183.

⁶⁴ See *id.*

⁶⁵ Laurie Goodstein, *A Decisive Election in a Town Roiled Over Intelligent Design*, N.Y. TIMES, Nov. 10, 2005, at A24.

⁶⁶ Jodi Rudoren, *Ohio Expected to Rein in Class Linked to Intelligent Design*, N.Y. TIMES, Feb. 14, 2006, at A12 (describing a reversal in Ohio as “signaling a sea change across the country against intelligent design”). The article also describes events in California, Indiana, and Wisconsin in reaction to the *Kitzmiller* ruling. *Id.* See also Laurie Goodstein, *Schools Nationwide Study Impact of Evolution Ruling*, N.Y. TIMES, Dec. 22, 2005, at A20.

ruling.⁶⁷ But if the history of creationism lawsuits is any indication, there will be continued attempts to inject religion into the classroom.⁶⁸ Evolution supporters have acknowledged the durability of the creationism movement; as the leader of the Ohio challenge noted, “critical analysis is intelligent design relabeled, just as intelligent design was creationism relabeled.”⁶⁹

Demonstrating its resilience, the ID movement’s reaction to events in both Dover and Ohio was swift: the Discovery Institute immediately attacked both the *Kitzmiller* ruling⁷⁰ and the Ohio board’s decision.⁷¹ Calling Judge Jones an “activist judge” who has “delusions of grandeur,” the Institute assured ID proponents that the decision would not have a lasting effect, both because of its limited precedential value and because the decision was unlikely to be appealed following the Board composition change.⁷² The harsh reaction to Judge Jones is noteworthy because he is a lifelong Republican who was appointed to the federal bench by President George W. Bush in 2002, having garnered support from both Pennsylvania senators.⁷³ With regards to Ohio, the Discovery Institute called deletion of the critical analysis language an “outrageous slap in the face” to Ohioans who “want students to hear the scientific evidence for and against Darwin’s theory”⁷⁴ and evidence of “the extremism of the other side.”⁷⁵ The Thomas More Law Center reacted similarly, releasing a statement one day after the *Kitzmiller* ruling.⁷⁶ Perhaps more telling than the reaction of these advocacy groups, Ohioans in support of “critical analysis” remained staunch believers in the approach and felt that it could have survived a constitutional challenge.⁷⁷ Thus, the threat to teaching evolu-

⁶⁷ Jodi Rudoren, *Ohio Board Undoes Stand on Evolution*, N.Y. TIMES, Feb. 15, 2006, at A14. Although the Ohio model lesson plan does not mention ID, its opponents characterized critical analysis as ID in disguise. *Id.*

⁶⁸ See *supra* note 56.

⁶⁹ Rudoren, *supra* note 66 (quoting Patricia Princehouse, a biologist who led the challenge to the lesson plan).

⁷⁰ *Dover Intelligent Design Decision Criticized as a Futile Attempt to Censor Science Education*, DISCOVERY INST. NEWS, Dec. 20, 2005, <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=3107> [hereinafter DISCOVERY INST. NEWS, *Dover*].

⁷¹ *Darwinists Bully Ohio School Board into Censoring Teaching of Evolution*, DISCOVERY INST. NEWS, Feb. 14, 2006, <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=3257> [hereinafter DISCOVERY INST. NEWS, *Darwinists*].

⁷² DISCOVERY INST. NEWS, *Dover*, *supra* note 70 (quoting John G. West, Assoc. Dir. of the Ctr. for Sci. & Culture, Discovery Inst.).

⁷³ Laurie Goodstein, *Evolution Trial in Hands of Willing Judge*, N.Y. TIMES, Dec. 18, 2005, at N41.

⁷⁴ DISCOVERY INST. NEWS, *Darwinists*, *supra* note 71 (quoting John G. West).

⁷⁵ Rudoren, *supra* note 66 (quoting John G. West).

⁷⁶ Press Release, Thomas More Law Ctr., *Court Issues Troubling Decision in Dover Intelligent Design Case* (Dec. 21, 2005), http://www.thomasmore.org/show_news.html?NewsID=393.

⁷⁷ David Zanotti, president of a conservative group in Ohio and one such supporter of the curriculum, stated, “If I had the money, I’d pay for the lawsuit. They should sue or shut up.” Rudoren, *supra* note 66.

tion in public schools remains alive in Ohio. As one school board member characterized the vote after the meeting, it was “just another round in the culture war, not a knockout.”⁷⁸

Evolution cannot win against mobilized religious advocates unless it enters the fray in popular culture, as it has already begun to do in some respects.⁷⁹ Indeed, the Discovery Institute believes that opponents to evolution have the upper hand in “the court of public opinion.”⁸⁰ The inevitability of this culture war and the effectiveness of scientific engagement of religiously minded people were demonstrated by a split in the Dover community. The Christians who resided in Dover were divided between the plaintiffs and defendants,⁸¹ enabling the *Kitzmiller* lawsuit challenging the Board’s policy to go forward. With its high-profile media coverage, the *Kitzmiller* litigation itself can be construed as an effort to sway public opinion regarding this issue, and the plaintiffs’ attempt to discredit the ID movement has had some impact, as in Ohio. But although Ohio is an encouraging sign for evolution proponents, the fight over teaching evolution is far from over.⁸² Proponents of evolution can only wait for the next onslaught of creationism, which is likely to be fastidiously stripped of any religious affiliation. How a court will react to this when that time comes remains to be seen.

⁷⁸ *Id.*

⁷⁹ One such effort by evolution proponents is the use of websites for games and songs poking fun at ID. Cornelia Dean, *Commentary; Helping Out Darwin’s Cause With a Little Pointed Humor*, N.Y. TIMES, Dec. 27, 2005, at F3. After the Kansas school board changed standards to include ID in the school curriculum, it received a letter asking for equal time to be given to the belief that the universe was created by a Flying Spaghetti Monster. *Id.* Another effort to engage the public is organized gatherings in cafes, bars, and churches to discuss science in an effort to make it “accessible.” Mindy Sink, *Science Comes to the Masses (You Want Fries With That?)*, N.Y. TIMES, Feb. 21, 2006, at F3.

⁸⁰ Rudoren, *supra* note 66 (quoting John G. West with regards to the Ohio school board decision).

⁸¹ Goodstein, *supra* note 65. See also Talbot, *supra* note 45, at 74 (noting that the difference between plaintiffs and defendants did not break down along secular-religious lines).

⁸² In Nevada, for example, a constitutional amendment requiring teachers to tell students that evolution is questioned, seen by critics as a ploy to teach ID, was filed after the *Kitzmiller* ruling. *Evolution Initiative*, LAS VEGAS REV.-J., Mar. 1, 2006, at 8B. Kansas changed its school standards in November, when the *Kitzmiller* case was pending. See *supra* note 48.