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Cover Page Footnote

The author wishes to thank his friends and his sister, Lori Hilliard, for their support and encouragement, and editor and friend Mary G. Walsh for her editorial assistance.

THE EVOLUTION AND MISINTERPRETATION OF THE ESTABLISHMENT CLAUSE: IS TEACHING INTELLIGENT DESIGN IN PUBLIC SCHOOLS A GOVERNMENTAL ENDORSEMENT OF RELIGION PROHIBITED BY THE FIRST AMENDMENT?

Mark Hilliard *

Honest differences are often a healthy sign of progress.[1]

I. INTRODUCTION

The debate is everywhere: on public radio programs; on cable and network television; on the front pages of newspapers and in popular magazines. Whether you read, watch, or listen to the news nowadays, you can almost regularly hear a story, report, opinion, or discussion about the politically fused debate over whether it is legal (or *should* be legal) to teach or discuss intelligent design[2] in public schools contemporaneously with the theory of evolution.[3] But despite intelligent design's current media buzzword status as one of the hottest, most controversial political issues of the year, the question at the heart of this seemingly new debate is in fact a much older one—What constitutes religion under the Establishment Clause?[4] Or, perhaps more generally—What role, if any, does God have in the sphere of public institution?

Historically, this inquiry has unquestionably been a part of ample and fervent debate, frequently pulling at the heartstrings of the public at-

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[1] Mohandas Gandhi, http://en.wikiquote.org/wiki/mohandas_gandhi (accessed April 7, 2006)

[2] *Infra* sec. II(B)(2) (explaining and defining the theory of intelligent design).

[3] *Infra* sec. II(B)(1) (explaining and defining the theory of evolution).

[4] The Establishment Clause, discussed *infra* sec. II(A), is found in the First Amendment of the U.S. Constitution, passed into law by Congress on September 25, 1789, (ratified by three-fourths of the states) and put into effect on December 15, 1791. The Establishment Clause, in its entirety, declares the following: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

large since the Establishment Clause's passage into law over two centuries ago. In this respect, not much has changed. Even in 2006, with society's interest in being politically correct at an all time high, the debate over God's role in public society has returned, never having been more prevalent, relevant, or important than it is at present.[5]

While the importance and passion surrounding the aforementioned debate have not changed, a great deal has changed between how the American public viewed or defined religion in 1791, and the way the American people view or define religion now. While the debate over what specifically constitutes a governmental endorsement of religion in public schools has been a large part of Establishment Clause jurisprudence for the better part of a century,[6] only recently has the deliberation re-established itself as an important issue in the realm of public concern. Largely, this re-establishment has occurred as a result of the emergence of the theory of intelligent design. The issue presented in this Comment—whether teaching (or merely mentioning) intelligent design in public schools is a governmental endorsement of religion under the First Amendment—is itself a new facet of a classical, sophisticated debate, graced with well-established arguments and infused with historical importance.

As an important preliminary matter, please note that this Comment will not critique the scientific or spiritual value of any theory, including the theories of evolution, creationism, or intelligent design.[7] Instead, quite generally, this Comment will argue that strictly as a matter of law, teaching, mentioning, or simply making public high school students aware of intelligent design, does *not* violate the Establishment Clause and thus intelligent design *may*[8] legally be taught in public schools.

In support of this assertion, this Comment will examine the intersection between the Establishment Clause and the theory of intelligent design. To aid in this purpose, Section II will provide the necessary

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[5] The issue contained in this Comment has been both the subject of frequent media publicity, as well as a hot topic of debate on college campuses across the U.S. For example, University of Texas at Dallas held an Intelligent Design Symposium in the spring of 2005. Intelligent Design and Evolution Awareness Club at UT Dallas, *Intelligent Design Symposium*, http://www.utdallas.edu/orgs/idea/symposium2005 (accessed Nov. 7, 2006). Thomas More College is sponsoring a new course called *Creation and Evolution* wherein two professors (one a scientist and the other a priest) will discuss science and religion and show how they can mix. Lori Kurtzman, *Course Mixes Religion, Evolution*, Cincinnati Enquirer C4 (Feb. 23, 2006). Yale University sponsored a panel discussion and screening of the documentary *A Flock of Dodos* on February 13, 2006. *Film Explores Evolution vs. Intelligent Design*, 34 Yale Bulletin & Calendar 18 (Feb. 10, 2006), http://www.yale.edu/opa/v34.n18/story12.html.

[6] The debate over religion in school curriculum essentially began in Dayton, Tennessee, with the John Scope's Monkey Trial. *Infra* n. 109.

[7] Furthermore, this Comment will *not* weigh the philosophical or religious values of evolution, intelligent design, or creationism, and will not inquire into which theory is supported by the most evidence. This Comment will *only* discuss the legal implications of teaching or mentioning intelligent design in public schools.

[8] Importantly, please note that the word *may* appears, and not the word *should*. This is because this Comment is not advocating for, or on behalf of, the theory of intelligent design (or any other theory for that matter), and argues only that the theory *may* legally be taught.

background and contain three subsections.[9] The first subsection will review and discuss the language contained in the Establishment Clause;[10] the second subsection will briefly set forth the basic tenets of the theories of evolution and intelligent design;[11] and lastly, the third subsection will present a historical perspective of the debate over the theories of evolution, creationism, and intelligent design, and demonstrate how the debate has changed over the past century.[12]

Section III will contain an analysis of why, as a matter of law, intelligent design may legally be taught, mentioned, and explained in public schools.[13] This section will also contain three subsections. The first subsection considers why intelligent design is *not* a religion and argues that its incorporation into a public school's curriculum does not violate the First Amendment.[14] This subsection will also assess intelligent design under the two tests presently in use: the *Lemon* Test and the Endorsement Test. The second subsection will explain why prohibiting intelligent design from being taught alongside evolution in public schools may actually violate the Establishment Clause.[15] Finally, the third subsection will review the statutory construction of, and legislative intent behind, the First Amendment, and reveal why prohibiting intelligent design in public schools is the result of erroneous statutory interpretation.[16]

Section IV will conclude by scrutinizing the incongruities between what the original drafters legislatively intended in enacting the Establishment Clause, and the seemingly modern trend in Establishment Clause interpretation. This section will close by proposing a solution: intelligent design is best handled by allowing the constituencies of school districts nationwide to individually choose whether to include it in their respective school district's curriculum.[17] And at long last, this section will prove the assertion that intelligent design, as a matter of law, *may* be taught in public schools without violating the First Amendment.

II. BACKGROUND

A. The Establishment Clause of the First Amendment

To understand why teaching intelligent design is legally permissible and does not violate the fragile boundary separating church from state, it is crucial to understand the language around which the controversy is

[9] *Infra* sec. II.
[10] *Infra* sec. II(A).
[11] *Infra* sec. II(B).
[12] *Infra* sec. II(C).
[13] *Infra* sec. III.
[14] *Infra* sec. III(A).
[15] *Infra* sec. III(B).
[16] *Infra* sec. III(C).
[17] *Infra* sec. IV.

centered—the Establishment Clause. Since the Establishment Clause represents such a broad and important source of law in the U.S., Subsection A will be further separated into two divisions. The first division will examine the Establishment Clause from a historical perspective and discuss the criteria used in determining whether a government's conduct encroaches on the boundary set forth in the Clause. The second will discuss Establishment Clause interpretation and review the *Lemon* Test, the Endorsement Test, and the overlap and relationship between the two tests.

1. The Establishment Clause and Violations Thereof: A Historical Perspective

In the First Amendment, Congress makes two guarantees regarding religion: first, it will "make no law respecting an establishment of religion,"[18] and second, it will make no law "prohibiting the free exercise thereof."[19] These two guarantees, taken together, have been jointly characterized as "the most distinctive concept that the American constitutional system has contributed to the body of political ideas."[20] Perhaps the reason why these guarantees were (and continue to be) so dynamic is because at the time they were incorporated into the U.S. Constitution, no other country had so scrupulously delineated the delicate balance between religious power and state power.[21] But if these guarantees are so important, one must inquire—Why do courts continue to misinterpret them so blatantly?

Consider the following: James Madison crafted the Establishment Clause as we now know it. However, as evident from the following, the language Madison originally used was quite different from the language contained in the Clause today. As Madison originally prepared it, the Clause read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall *any national religion be established*, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[22] It is easy to see that as originally penned, the Framers *only* intended the Clause to serve as a limitation on Congress's power to pass legislation declaring a *national* church, *national* religion, or *national* faith. This ceiling on Congress's power was created because many states had already ratified the Constitution on the contingency that amendments would be added by Congress to safeguard the personal liberties (e.g., religious freedoms) of the people.[23] These contingencies took the form of proposals which were submitted by a number of states. In writing his first

[18] U.S. Const. amend. I.
[19] *Id.*
[20] Robert L. Cord, *Separation of Church and State* xiii (Lambeth Press 1982).
[21] *Id.*
[22] 1 Annals of Cong. 451 (1789).(emphasis added).
[23] Cord, *supra* n. 20, at 30.

draft of the amendment guaranteeing religious freedom,[24] Madison took these proposals into account,[25] nearly all of which requested that no national church be established.[26] To prove to the states that America's newly formed central government was strong and trustworthy, Madison stated to his colleagues that "[t]he applications for amendments come from a very respectable number of our constituents, and it is certainly proper for Congress to consider the subject, in order to quiet the anxiety which prevails in the public mind."[27]

Thus, quite simply, Madison's goal in addressing the states' concerns was to "quiet the anxiety" of the states. Put another way, Madison's purpose for drafting the Establishment Clause was to alleviate the states' concerns that Congress might use its legislative power to establish a national religion similar to the one imposed by the English Crown at the time. Needless to say, in drafting what would become one of the most significant pieces of legislation in U.S. history, Congress certainly considered the states' proposals and accordingly ensured only that Congress was without the power to declare an official American religion.

Although Madison did not believe that an amendment was necessary to prevent Congress from establishing a national religion,[28] he was nonetheless a member of the Select Committee established by the House of Representatives on July 21, 1791, to consider his own draft.[29] But because one of the State Ratifying Conventions' prevailing concerns was "to protect freedom of *conscience* in religions matters,"[30] the House of Representatives, acting as Committee of the Whole, modified Madison's

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[24] *Id.*; *supra* n. 22.

[25] See *id.* at 6, wherein Cord describes various proposals offered by the states. Maryland's Ratifying Convention proposed: "That there be *no national religion established by law*; but that all persons be equally entitled to protection in their religious liberty." *Id.* (emphasis in original). Virginia's Ratifying Convention proposed:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that *no particular religious sect or society ought to be favored or established, by law, in preference to others*.

Id. at 7 (emphasis in original). New York's Convention proposed: "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that *no religious sect or society ought to be favored or established by law in preference to others*." *Id.* (emphasis original).

[26] Cord, *supra* n. 20, at 30.

[27] 1 Annals of Cong. at 444.

[28] Madison believed, quite simply, that since power to pass legislation determining a national religion had not been granted to Congress, to legislate in this area would be in excess of Congress's constitutional authority. See Saul K. Padover, *The Complete Madison* 306 (Harper and Bros. Pub. 1953) (wherein Madison states "[t]here is not a shadow of right in the general government to intermeddle with religion").

[29] 1 Annals of Cong. at 690-91.

[30] Cord, *supra* n. 20 at 8 (emphasis added).

original proposal to instead read: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of the conscience."[31]

Naturally, several different versions followed and great deliberation took place among the two houses of the newly installed bicameral legislature. Ultimately, the first version to emerge from the Senate floor (for the House's vote) on September 3, 1791 read: "Congress shall make no law establishing one religious sect or society in preference to others, or to infringe on the rights of conscience.[32] Eventually, by the end of September 9, 1791, Congress arrived at the words we now recognize as the Establishment Clause: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof."[33]

Still, the fact remains that the Framers' (and the states') purpose in drafting the Establishment Clause was to restrict Congress's legislative power to declare a national church or a national religion, *not* to ban harmonious interaction between religion and government, and certainly not to ban, inhibit, or eliminate religion from public institutions of American society. Given the historical evolution of the Clause, surely the Framers never intended that some "high and impregnable wall"[34] be erected as a means of perpetually separating church from state. And thus, based on the above legislative history, it seems clear that the "modern" interpretation of the Establishment Clause subjects the statute to misuse never intended by its original framers.

Today, while the Establishment Clause is still a key part of federal law, state governments are equally bound by the Clause's prohibitions as a result of the First Amendment's application to the states through the Fourteenth Amendment.[35] The effect is simple: since the Amendment applies to both federal and state governments, the scope of the Establishment Clause is far-reaching, encompassing nearly all governmental action.

The rationale for the Establishment Clause, although it is skewed from its intended interpretation, is fairly easy to understand: the First Amendment mandates that a government, through its conduct, may not show favoritism for one religion over another or for religion generally over non-religion.[36] Therefore, the Establishment Clause serves to ensure that the government is not acting with the "ostensible and predominant purpose of

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[31] *Id.*
[32] *Id.*
[33] *Id.* at 9.
[34] *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).
[35] *Cantwell v. Conn.*, 310 U.S. 296, 303 (1940) (holding that the Fourteenth Amendment "embraces the liberties guaranteed by the First Amendment").
[36] *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 746 (M.D. Pa. 2005).

advancing religion."[37] To accomplish this task, the Establishment Clause prohibits governmental conduct which, through its effect, derogates one of the core values of the First Amendment: "official religious neutrality."[38]

Factual analysis concerning whether or not a violation of the Establishment Clause has occurred is principally focused on whether governmental conduct either (1) favors religion over non-religion, or (2) favors any particular group of religious beliefs over another group of religious beliefs.[39] As such, the central factual inquiry which a court must make is whether the government, by its actions and under the totality of the circumstances, has taken sides such that the conduct fails to preserve religious impartiality.[40] In summary, if a court finds that the government's conduct breaches religious neutrality, then the government's conduct violates the First Amendment's Establishment Clause.

2. The Modern Interpretation of the Establishment Clause: Testing to Determine When and What Types of Governmental Conduct Violate the Establishment Clause

While the Establishment Clause (at least based on the foregoing facial analysis) does not seem overly complex, there have nonetheless been a plethora of modern legal questions regarding the Clause's interpretation. Many of these questions delineate whether certain governmental conduct conforms to the Establishment Clause, or conversely, whether certain governmental conduct violates it.[41]

To begin, it is contextually helpful to first determine the range of violations which might occur under the Establishment Clause, i.e., to establish what conduct violates the Establishment Clause and what conduct does not. For example, in *Kitzmiller*, the court stated that the First Amendment broadly prohibits "any governmental action that endorses or has the primary purpose or effect of advancing religion."[42] Consequently, the *Kitzmiller* court held that the specific intelligent design policy[43] adopted by the Dover Area School Board violated the Establishment Clause because it had the effect of endorsing religion.[44] Similarly, in *Edwards v. Aguillard*,[45] the Supreme Court held that when a state restructures science

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[37] *Id.*
[38] *Id.* (quoting *McCreary County v. ACLU*, 125 S. Ct. 2722, 2733 (2005)).
[39] *Id.*
[40] *Id.* at 714.
[41] See e.g. *McCreary County*, 125 S. Ct. at 2733 (holding that two counties' posting the Ten Commandments in their respective courthouses violated the Establishment Clause); *Kitzmiller*, 400 F. Supp. 2d at 707 (holding that teaching intelligent design in public schools violates the Establishment Clause); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that a student-delivered prayer over a public address system before home varsity football games violated the Establishment Clause).
[42] 400 F. Supp. 2d at 727 n. 7.
[43] For the Dover Area School Board's policy, consult *infra* note 122 and accompanying text.
[44] *Kitzmiller*, 400 F. Supp. 2d at 765.
[45] 482 U.S. 578 (1987).

curriculum to conform with a particular religious viewpoint, the state violates the Establishment Clause.[46] Drawing on both cases, it seems apparent that if a public school teacher openly and verbally endorses a particular religious viewpoint or advocates a particular religion during class, this conduct would violate the Establishment Clause because it constitutes the endorsement of a religion, and thus falls within the ambit of "respecting an establishment of religion."[47]

But unfortunately, in reality the factual line is not so clearly drawn. While both *Kitzmiller* and *Edwards* hold that the respective conduct in each case violated the Establishment Clause, there are cases upon cases where governmental conduct seems almost certainly to establish or prohibit religion, yet the court found no violation.[48] Thus, the question inevitably becomes—How far may the envelope be pushed? Or phrased another way—How religious must the governmental conduct be for the Establishment Clause to prohibit it?

This is not an easily answered question; hence, it is apparent that the Establishment Clause is an illusory creature of sorts. On its face, the Clause does not seem overly complex; all it does is prohibit the governmental conduct from "respecting an establishment of religion, or prohibiting the free exercise thereof."[49] But to the contrary, the *legal* analysis necessary to determine whether governmental conduct violates the Establishment Clause is ultimately quite intricate.

So, due to the Clause's unlikely complexity and the evidently ongoing difficulty with demarcating the boundaries of acceptability within the Establishment Clause's purview, courts have naturally derived tests to determine when governmental conduct establishes religion in order to eliminate as much gray area as possible. Two such tests are the *Lemon* Test and the Establishment Test.

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[46] *Kitzmiller*, 400 F. Supp. 2d at 717. *See also Edwards*, 482 U.S. at 578 (holding that the Establishment Clause is violated when legislation alters a scientific curriculum to reflect a religious view that is antagonistic to the theory of evolution).

[47] U.S. Const. amend. I.

[48] *See e.g. Good News Club v. Milford Central Sch.*,,533 U.S. 98 (2001) (holding that it is not a violation of the Establishment Clause to allow religious school groups to use school facilities); *Agostini v. Felton*, 521 U.S. 203 (1997) (approving a program that provided public employees to teach remedial classes at religious and other private schools and overruling both *Aguilar v. Felton*, 473 U.S. 402 (1985), which banned public school teachers from going to parochial schools to provide remedial education to disadvantaged children, and *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985), holding a program which provided classes to religious school students at public expense in classrooms leased from religious schools to be unconstitutional); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (holding that disbursement of funds from student activity fees to religious organizations is not prohibited under the Establishment Clause); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (allowing, as part of a federal program for the disabled, a public school district to provide a sign language interpreter to a deaf student at a Catholic high school); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding a Christmas display including a crèche and finding no violation of the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer conducted by a state-paid chaplain in the Nebraska State Legislature).

[49] U.S. Const. amend. I.

a. The *Lemon* Test[50]

The *Lemon* Test originated in *Lemon v. Kurtzman*[51] which holds that for governmental conduct to comply with the Establishment Clause, the conduct must: (1) have at least one secular purpose;[52] (2) have the principle or primary effect of neither advancing nor inhibiting religion;[53] and (3) not foster an excessive entanglement[54] with religion.[55] If the governmental conduct satisfies all three prongs of the *Lemon* Test, it does not violate the Establishment Clause.[56]

The first prong looks at the conduct's *purpose* and asks whether the government acted with the purpose of either "endors[ing] or disapprov[ing] of religion."[57] With apparent consistency, it is all but stipulated that the *Lemon* Test's first prong is "a fairly low hurdle"[58] where any "legitimate secular purpose supporting a challenged governmental action"[59] will suffice. Thus, the first prong of the *Lemon* test is contravened "only if [the government's conduct] is '*entirely* motivated by a purpose to advance religion.'"[60]

The *Lemon* Test's second prong looks at the governmental conduct's *effect* to ensure that "the principal or primary effect [of the conduct] . . . neither advances nor inhibits religion."[61] The Supreme Court commented that the sole purpose of the *effect* prong is to prohibit the government from:

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[50] It is important to note that the *Lemon* Test has faced a great deal of scrutiny and, from time to time, has even been ignored. In *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1253 (2000) (Scalia, J., dissenting), Justice Scalia mentions his disapproval of the *Lemon* test by stating, in a dissenting opinion, "Like a majority of the Members of this Court, I have previously expressed my disapproval of the *Lemon* test." Scalia stated this *expression* in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-400 (1993). The majority in *Lambs Chapel* determined that a law mandating that a public school not be used for religious purposes during non-school hours violated free speech. *Id.* at 384. Nonetheless, an explanation of the *Lemon* Test is contained in this Comment because in recent cases courts have consistently applied the test when determining whether or not a violation of the Establishment Clause exists. It is uncertain what the future holds for the *Lemon* Test, but for now at least, despite the fact the Supreme Court does not particularly like the test, its application remains quite prevalent and widespread. *See e.g., Kitzmiller*, 400 F. Supp. 2d 707; *Lambeth v. Bd. Of Commrs.*, 407 F.3d 266 (4th Cir. 2005) (both applying the *Lemon* Test as recently as 2005); *see also Hankins v. Lyght*, 438 F.3d 163 (2d Cir. 2006); *Skoros v. City of New York*, 437 F.3d 1 (2d Cir. 2006); *Bats v. Cobb County*, 410 F. Supp. 2d 1324 (N.D. Ga. 2006) (all three applying the *Lemon* Test as recently as early 2006).

[51] 403 U.S. 602, 612 (1971).

[52] Commonly referred to as the *purpose prong* of the *Lemon* Test.

[53] Commonly referred to as the *effect prong* of the *Lemon* Test.

[54] Commonly referred to as the *entanglement prong* of the *Lemon* Test.

[55] *Koenick v. Felton*, 973 F. Supp. 522, 525 (D. Md. 1997).

[56] *Lambeth*, 407 F.3d at 269.

[57] *Edwards*, 482 U.S. at 583.

[58] *Brown v. Gilmore*, 258 F.3d. 265, 276 (4th Cir. 2001) (internal citations omitted).

[59] *Lambeth*, 407 F.3d at 270 (citing *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984)).

[60] *Id.* at 269 (emphasis added).

[61] *Tangipahoa*, 530 U.S. at 1253 (2000) (Scalia J., dissenting).

> plac[ing] its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.[62]

Thus, if the state action has the effect of either advancing or inhibiting religion, the conduct fails the *Lemon* Test's second prong and is consequently prohibited by the First Amendment.[63]

Compliance with the third prong of the *Lemon* Test, concerning governmental entanglement, mandates that a government's conduct may not "foster an excessive entanglement with religion."[64] It is implicit that the separation between church and state need not be absolute, since *some* governmental interaction with religion or religious organizations is inevitable and necessary.[65] Rather, what is prohibited under the *Lemon* Test—and thus by the Establishment Clause—is *excessive* governmental entanglement. To resolve whether the governmental entanglement with religion is excessive, a court must "examine the character and purposes of the institutions that are benefited, the nature of the state-provided aid, and the resulting relationship between the government and the religious authority."[66] If the governmental conduct causes an *excessive* entanglement between it and a religion or religious organization, the conduct violates the Establishment Clause of the First Amendment.[67]

b. The Endorsement Test

The Endorsement Test was initially set forth in Justice O'Connor's concurring opinion in *Lynch*.[68] The Test rests on the foundation that a government's "[e]ndorsement [of a religion] 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."[69] As a matter of function, the Test asks whether the government's conduct has endorsed a

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[62] *Tex. Mthly., Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (reviewing tax exemptions for publishers of religious periodicals and holding that such an exemption has the effect of advancing religion, and thus violating the Establishment Clause).

[63] This interpretation is supported by the *Kitzmiller* court's interpretation of the effect prong. In pertinent part, the Court held that the Dover Area School Board's policy of reading a statement which questioned the theory of evolution by "urging [students] to contemplate alternative religious concepts implies School Board approval of religious principles." 400 F. Supp. 2d at 764.

[64] *Koenick*, 973 F. Supp. at 525.

[65] In *Lemon*, the court opined that "[s]ome relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts." 403 U.S. at 614.

[66] *Id.* at 615.

[67] *Koenick*, 973 F. Supp. at 525.

[68] 465 U.S. 668 at 687-94.

[69] *Id.* at 688.

religion.[70] However, from an application standpoint, to employ the Test a court must determine "what message a challenged governmental policy or enactment conveys to a reasonable, objective observer[71] who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose."[72]

Santa Fe[73] provides an example of the Endorsement Test's application. In *Santa Fe*, the Supreme Court dealt with the issue of school-sponsored prayer at high school football games.[74] More specifically, parents of enrolled children sued the school district over several of the district's practices, one of which involved a student delivering "a prayer over the public address system before each varsity football game for the entire season."[75] In a 6-3 opinion, Justice Stevens, in writing for the majority, explained the Endorsement Test by stating that: "In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive [the prayer] as a state endorsement of prayer in public schools.'"[76]

In accordance with the Test, the court examined the history of the policy of permitting a school prayer before home football games.[77] Among other things, the court considered the school-sanctioned office of "Student Chaplain," the "Prayer at Football Games" regulation, and the school district's intention "to preserve the practice of prayer before football games."[78] In holding that the school prayer violated the Establishment Clause, Justice Stephens further explained that:

> [g]iven these observations, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of

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[70] *Id.*

[71] Naturally, the question arises—Who is the reasonable, objective observer? To be sure, there is no lack of authority on this issue. As the Third Circuit stated in *Modrovich v. Allegheny County*, 385 F.3d 397, 407 (3d Cir. 2004), "the reasonable observer is an informed citizen who is more knowledgeable than the average passerby." This concept, that the reasonable *observer* is more informed than the reasonable *person*, seems to be the prevailing consensus among many other jurisdictions. *See e.g. McCreary*, 125 S. Ct. at 2736-37 (finding that the objective observer is "presumed to be familiar with the history of the government's actions and competent to learn what history has to show"); *Santa Fe*, 530 U.S. at 308 (explaining that the objective observer is one familiar with implementation of governmental action); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1306 (N.D. Ga. 2005) (remarking that the objective observer is "familiar with the origins and context of the government-sponsored message at issue and the history of the community where the message is displayed").

[72] *Kitzmiller*, 400 F. Supp. 2d at 714-15.

[73] 530 U.S. 290.

[74] *Id.* at 294.

[75] *Id.*

[76] *Id.* at 308 (quoting *Wallace v. Jaffree*, 462 U.S. 38, 46 (1985) (O'Connor, J. concurring)).

[77] *Id.* at 309.

[78] *Id.*

> the policy was to preserve a popular "state-sponsored religious practice." [And that,] "[t]he text and history of this policy, moreover, reinforces our objective student's perception that the prayer is, in actuality, encouraged by the school."[79]

Thus, in this Comment, the key inquiry under the Endorsement Test will be whether given the history of intelligent design, a reasonable, objective observer might infer that the specific purpose of teaching intelligent design along with evolution is to engage in a state sponsored religious practice. This Comment answers in the negative.

c. Reconciling the Tests

While applying both the *Lemon* Test and the Endorsement Test might seem overly thorough, or even like a belt-and-suspenders approach to determine whether governmental conduct violates the Establishment Clause, each test is typically treated as separate and distinct from the other.[80] As a result, courts have typically applied both tests in cases regarding potentially religious governmental conduct.[81] However, even though the two tests are applied separately in assessing Establishment Clause liability, there is certainly a relationship between them.[82]

The overlap between the two tests exists in two ways: each test focuses on the conduct's *purpose* and on the conduct's *effect*. It is the third prong (the *entanglement prong*) of the *Lemon* Test which sets it apart from the Endorsement Test. So, because the *Lemon* Test takes more variables into account in determining whether conduct violates the Establishment Clause,[83] courts have typically combined their discussions on the Endorsement Test into the *Lemon* Test. Therefore, the *Lemon* Test will generally carry the day in determining whether a government's conduct violates the Establishment Clause.[84]

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[79] *Id.*

[80] *Kitzmiller*, 400 F. Supp. 2d at 714.

[81] *See e.g. Kitzmiller*, 400 F. Supp. 2d at 714 (using both tests to determine if an announcement stating, among other things, that the theory of evolution is not fact and holding that the announcement violated the Establishment Clause); *Freethought Socy. v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (applying both tests and determining that a plaque bearing the Ten Commandments, which had been placed on a courthouse over eighty years prior to the action, did not violate the Establishment Clause); *Modrovich*, 385 F.3d 397 (applying both tests to determine whether the Ten Commandments listed on a plaque affixed on the courthouse since 1918 constituted a violation of the Establishment Clause and holding the plaque did not because the preservation was historical and not religious).

[82] *Kitzmiller*, 400 F. Supp. 2d at 714.

[83] For example, in addition to scrutinizing the message's purpose and effect, the *Lemon* Test takes into account other variables such as whether the message has a secular purpose and whether the message creates an "excessive entanglement of the government with religion." *Kitzmiller*, 400 F. Supp. 2d at 746 (citing *Lemon*, 403 U.S. at 612-13).

[84] For example, in the Third Circuit, a court may "incorporate factual findings and legal conclusions made under the endorsement analysis by reference here, in accordance. . . . Effect under the Lemon test is cognate to endorsement, and hence courts do not hesitate simply to incorporate its discussion of endorsement into the effect analysis." *Kitzmiller*, 400 F. Supp. 2d at 764 (quotations omitted).

B. The Theories of Evolution and Intelligent Design

As mentioned above, this Comment will not attempt to measure the scientific or spiritual value, quantitative validity, or correctness (or conversely, *lack* of correctness) inherent in evolution or intelligent design.[85] But to be clear, it is paramount that the reader be substantively informed as to the beliefs and axioms associated with both of the aforementioned theories. To begin, both theories attempt to answer the "mystery of mysteries"[86]—"How did [living organisms] acquire life?"[87] To demonstrate and explain each theory properly and without bias, this subsection will be further broken into two divisions: the first will briefly explain the theory of evolution, and the second will briefly explain the theory of intelligent design.

1. The Theory of Evolution

Historically, the theory of evolution was formally proposed by Charles Darwin who, as a naturalist on board the H.M.S. Beagle beginning in 1837,[88] proclaimed that species had been, and currently were, evolving through a process called *natural selection* which "occurs when a population of replicating entities possesses three characteristics: variation, heritability, and the 'struggle to survive.'"[89] However, as Richard Dawkins[90] aptly points out in his essay *Darwin and Darwinism*,[91] the most basic Darwinian hypothesis, that current species may have originated from other species, is not Darwin's entirely. In fact, in cultures as early in recorded history as the ancient Greeks, the theory that species might be (and may have always been) evolving into other species was alive and well.[92] Nonetheless, when Darwin published the literary work for which he is most well known today, *On the Origin of Species by Means of Natural Selection* in 1859 to explain "the uncanny perfection with which living organisms are equipped to survive and multiply"[93] he essentially became the modern founder of the theory known today as evolution.

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[85] *Supra* n. 7.
[86] Charles Darwin, *On the Origins of Species by Means of Natural Selection* 1 (London: John Murray, Albemarle Street 1859).
[87] M.R. Sahni, *Man in Evolution* 4 (Orient Longmans Ltd. 1952).
[88] Darwin, *supra* n. 86 at 1.
[89] Richard E. Michod, *Darwinian Dynamics: Evolutionary Transitions in Fitness and Individuality* 5 (Princeton U. Press 1999).
[90] Noted British biologist and professor of the Public Understanding of Science at Oxford University. In his work, *The Blind Watchmaker*, Dawkins states that "[b]iology is the study of complicated things that give the appearance of having been designed for a purpose." Richard Dawkins, *The Blind Watchmaker* 1 (W.W. Norton & Co. 1986).
[91] Richard Dawkins, *Darwin and Darwinism*, http://www.simonyi.ox.ac.uk/dawkins/WorldOfDawkins-archive/ Dawkins/Work/Articles/1998darwinism.shtml (accessed Apr. 7, 2006).
[92] *Id.*
[93] *Id.*

From a more scientific perspective, the theory of evolution, in its most broad technical purview, stands for the basic proposition that all living things as we now know them evolved from a common origin and that the chemical progression created the various "building blocks of life."[94] Chronologically, the theory of evolution proposes that;

> the facts of science tell us . . . that man, being a mammal, had reptiles as his ancestors . . . His earlier relatives were amphibians . . . And still more remote ancestors were, in unbroken succession: fishes, lancelet-like forms . . . relations of sea-urchins and sea-anemones, coelenterates and, finally, minute single-celled organisms, the protozoa.[95]

From a scientific vantage, the theory of evolution explains the transformations of species into other species since Earth's inception as a result of "modifications in successive generations."[96] Simply put, the forms (i.e., appearances) taken on by living beings have been slightly changing over the past 500 million years. Of those 500 million years, modern man has only been on Earth for about one million years.[97]

2. The Theory of Intelligent Design

Much like the theory of evolution,[98] intelligent design also seeks to answer one of the most basic, yet perplexing questions in the world today—"How did the 'appearance of design in living systems arise?'"[99]

Historically, while both theories of evolution and intelligent design are considered by many to be diametrically opposed concepts, perhaps ironically, intelligent design like evolution, is heavily derived from the ancient Greeks, a civilization commonly regarded as the first to advance the possibility of a "natural designer."[100] Within classical Greek philosophy, both Plato and Aristotle developed works of literature contending that humankind originated from the work of a natural creator.[101] Even long after

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[94] Associate Press, *Kansas School Board Redefines Science*, (Nov. 9, 2005) (available at: http://www.cnn.com/2005/EDUCATION/11/08/evolution.debate.ap/index.html).

[95] Sahni, *supra* n. 87 at 2.

[96] Merriam-Webster Online Dictionary, *Evolution*, http://www.m-w.com/dictionary/evolution (accessed Nov. 7, 2006).

[97] Sahni, *supra* n. 87 at 2-3.

[98] *Supra* sec. II(B)(1).

[99] Br. of Amicus Curiae, The Discovery Institute at 6, *Kitzmiller v. Dover Area Schs.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) [hereinafter Discovery Institute Brief].

[100] Wikipedia, *Intelligent Design*, http://en.wikipedia.org/wiki/Intelligent_design#Origins_of_the_concept (accessed Nov. 14, 2006).

[101] *See e.g.* Plato's *Timaeus*, expressing that "everything that becomes or is created must . . . . be created by some cause, for without a cause nothing can be created. The work of the creator, whenever he looks to the unchangeable and fashions the form and nature of his work after an unchangeable pattern, must necessarily be made fair and perfect; but when he looks to the created only, and uses a created pattern, it is not fair or perfect." Plato, *Timaeus* 3 http://www.activemind.com/Mysterious/Topics/Atlantis/timaeus_page3.html (accessed Nov. 14, 2006). As is evident from the preceding quotation, Plato acknowledges the work of a *creator*. Further, Aristotle, describes the "prime mover" as the natural creator of the cosmos in his work, Metaphysics. While

Plato and Aristotle, Thomas Aquinas carried the torch when he stated his *Five Proofs for the Existence of God*, advocating a natural designer, in perhaps his most celebrated literary work, *Summa Theologica*.[102] Ergo, the modern day theory of intelligent design has evolved largely from the early, but nonetheless crucially important, philosophies contained above.

In the technical sense, according to the Discovery Institute,[103] the process of intelligent design as defined at present, offers 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."[104] Moreover, proponents of intelligent design argue that as an evidentiary matter, the complexities inherent in the various life-forms demonstrate that life "could not have evolved randomly, but rather, must have been produced by an unidentified intelligent cause, or designer."[105]

In summary, the theory of intelligent design does not rebuff the theory of evolution, nor is it antagonistic to it. Intelligent design is not based on Christianity, the Bible or any other religious text.[106] Instead, intelligent design merely "infers only an unspecified designing intelligence" in answering the questions that evolution has not.[107] Therefore, as a matter of fact, intelligent design as a theory, does not displace evolution, but merely supplements it.

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oversimplified for purposes of conciseness, Aristotle identified the "prime mover" as "a perfect being, a being lacking no perfection that remains for it to attain. This perfect being, which is the prime mover of the universe, Aristotle called God." Mortimer Adler, *Aristotle for Everybody: Difficult Thought Made Easy* 187 (Macmillan Publg. Co. 1978).

[102] St. Thomas Aquinas, *Summa Theologica*, (Fathers of the English Dominican Province trans., Benzinger Bros., Inc., 1947).

[103] The Discovery Institute describes itself as follows:

> Founded in 1990, the Institute is a national, non-profit, non-partisan policy and research organization, headquartered in Seattle, WA. It has programs on a variety of issues, including regional transportation development, economics and technology policy, legal reform, and bioethics. The Institute's founder and president is Bruce Chapman, who has a long history in public policy at both the national and regional levels.

Discovery Institute, Center for Science and Culture, *Top Questions*, http://www.discovery.org/csc/topQuestions.php (accessed Nov. 14, 2006). The Institute is also "a public policy think tank addressing transportation, bioethics, legal reform, and science and technology issues. Discovery's Center for Science and Culture ("CSC") supports scientific research developing the theory of intelligent design." Discovery Institute Brief, *supra* n. 99 at 3.

[104] Discovery Institute, Center for Science and Culture, *Questions about Intelligent Design*, http://www.discovery.org/csc/topQuestions.php#questionsAboutIntelligentDesign (accessed Nov. 14, 2006).

[105] Ann Simmons, *Intelligent Design Strikes Out Again; Rural California District to End Class Covering Evolution Alternatives*, Chicago Tribune, C14 (Jan. 18, 2006).

[106] Discovery Institute Brief, *supra* n. 99 at 9.

[107] *Id.*

C. A Historical Perspective of the Debate over the Origins of Humankind, Evolution, Creationism, and Intelligent Design, and the Kitzmiller Maelstrom[108]

1. The Historical Interaction between Evolution, Creationism, Intelligent Design, and the Law

Considering the historical significance and breadth of the First Amendment's Establishment Clause, it is not surprising that over eighty-one years after the *Scopes Monkey Trial*[109] (essentially marking the beginning of the debate over evolution and what constitutes religion in schools) such a wide-scale discussion over the meaning of religion in public schools has resurfaced. While the heart of the issue—what constitutes religion under the Establishment Clause—has not changed, the societal differences between 1791 and today, however readily identifiable, cannot be understated or ignored. After all, only eighty-one years ago, evolution was all but illegalized—it was banned almost universally from being taught to children in public schools.[110]

Not even a full century ago, evolution was today's creationism to the extent that doctrinally, it faced strong legislative opposition.[111] In fact, some legislatures considered the theory of evolution such a societal evil that they passed laws[112] aimed at protecting public school children by prohibiting science teachers from teaching evolution.[113] These laws, quite accurately termed "anti-evolution laws,"[114] made it unlawful, for example, "to teach any theory that denies the story of the divine creation of man as taught in the Bible, and to teach instead . . . that man has descended from a lower order of

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[108] In *Kitzmiller*, U.S. District Judge John E. Jones III, describes the litigation surrounding the case a "maelstrom." 400 F. Supp. 2d at 765.

[109] In 1925, John Thomas Scopes was convicted of teaching the theory of evolution in public schools in violation of the Tennessee Anti-evolution Act, 1925 Tenn. Pub. Acts ch. 27. In 1926, he appealed his conviction in *Scopes v. State*, 289 S.W. 363 (Tenn. 1926), more popularly known as the *Monkey Trial* (a reference that humans evolved from monkeys), where the Supreme Court of Tennessee reversed Scopes's conviction, holding that the Religious Preference Clause in Tennessee's Constitution (prohibiting the State from giving preference to any religion) did not conflict with Tennessee's anti-evolution law because the prohibition of teaching the theory of evolution did not give preference to any religious establishment. *Id.* at 367.

[110] *Epperson v. Ark.*, 393 U.S. 97, 102 n. 8 (1968) (setting forth the following legislative history of anti-evolution or *monkey* laws: Mississippi enacted an anti-evolution law which was subsequently repealed: Miss. Code Ann. §§ 6798, 6799 (1942); Arkansas did the same: Ark. Code. Ann. §§ 80-1627, 80-1628 (1960 Repl. Vol.).) Further, "[t]he Tennessee [anti-evolution] law was repealed in 1967. Oklahoma enacted an anti-evolution law, but it was repealed in 1926. The Florida and Texas Legislatures, in the period between 1921 and 1929, adopted resolutions against teaching the doctrine of evolution. In all, during that period, bills to this effect were introduced in 20 States." *Id.*

[111] *Supra* nn. 109-110.

[112] For example, the Tennessee Anti-evolution Act (properly entitled "An Act prohibiting the teaching of the evolution theory in all the Universities, Normals and all other public schools of Tennessee, which are supported in whole or in part by the public school funds of the State, and to provide penalties for violations thereof") made it illegal to teach anything other than the Biblical account (e.g., the account in the Book of Genesis) of man's origins. *Scopes*, 289 S.W. at 364.

[113] *Id.* at 364.

[114] *Epperson*, 393 U.S. at 101.

animals."[115] Nowadays, as we look back over the past century and consider the scientific advancement achieved in that time, the laws which forbade the teaching of evolution are inarguably antiquated, without merit, and even comedic to some degree. Suffice it to say, America's views on religion in schools continue to evolve. But, nonetheless, the debate continues.

1. The *Kitzmiller* Maelstrom

The most recent installment in the debate over the origins of life, and the meaning of religion in schools, stems from a new legal deliberation over whether intelligent design, as a constitutional matter, may be taught in public schools.[116] This debate effectively began on October 18, 2004, when the Dover Area School Board of Directors, by a 6-3 vote, passed the following resolution: "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, Intelligent Design. Note: Origins of Life is not taught."[117] Once this resolution was in place, the Dover Area School District, by press release, formally notified residents (including students' parents) that teachers would be required to read a statement to their ninth grade biology classes concerning problems with evolution, and encourage students to learn about alternate theories, including intelligent design.[118]

This press release, together with the above resolution and the following statement, prompted plaintiffs[119] to file suit against the defendants[120] in district court.[121] The statement which the defendant School

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[115] *Scopes*, 289 S.W. at 364.

[116] There is no set beginning of this debate, but what might be viewed as the action which set the ball rolling in the debate was when on October 14, 2004, the Dover Area School Board in Dover, Pennsylvania, passed a resolution implicating intelligent design. See *Kitzmiller*, 400 F. Supp. 2d at 708-709.

[117] *Kitzmiller*, 400 F. Supp. 2d at 708.

[118] *Id.*

[119] In *Kitzmiller*, the plaintiffs consisted of the following parties: Tammy Kitzmiller, who is a Dover resident and the parent of two children both in high school; Bryan and Christy Rehm, who are both Dover residents and have four children, none of whom are in high school. *Id.* at 709-10. The *Kitzmiller* Court based the Rehms' standing on the fact that "[t]hey intend for their children to attend Dover High School." *Id.* at 710. Plaintiffs also included Deborah F. Fenimore and Joel A. Leib, both of whom are Dover residents and the parents of a Dover high school senior and a seventh grader; Steven Stough is resident of Dover and a parent of an eighth grader at Dover; and Beth A. Eveland is a resident of York, Pennsylvania, with two children, neither of whom attend Dover High School. *Id.* The *Kitzmiller* Court based her standing on the fact that she "intends for her children to attend Dover High School." *Id.* Cynthia Sneath, also a plaintiff, is a resident of Dover, Pennsylvania, and is the parent of two children, neither of whom attend Dover High School. *Id.* Again, the *Kitzmiller* Court based her standing on the fact that she "intends for her children to attend Dover High School." *Id.* Plaintiffs also included Julie Smith, who is a resident of York, Pennsylvania, and a parent of a Dover High School student; and Aralene and Frederick Callahan, who are Dover residents and the parents of a Dover High School student. *Id.*

[120] In *Kitzmiller*, the defendants included, "the Dover Area School District . . . and Dover Area School District Board of Directors . . . Defendant [School District] is a municipal corporation governed by a board of directors, which is the Board. The [School District] is comprised of Dover Township, Washington Township, and Dover Borough, all of which are located in York County, Pennsylvania.

Board required teachers to read to their ninth grade biology classes stated that:

> 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.[122]

The statement was not well received by some parents.

Shortly after the School Board released the statement, parents who objected to it sued the school district.[123] In their complaint, the plaintiffs asserted that the defendant School Board's policy "facially and as applied violate[d] the *Establishment Clause of the First Amendment to the United States Constitution*."[124] On July 13, 2005, the defendants filed a motion for summary judgment against the plaintiffs on the grounds that there were no material facts upon which the plaintiffs could conclude that the School Board's policy[125] violated the Establishment Clause.[126] The district court denied the defendants' motion for summary judgment, holding that genuine

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There are approximately 3,700 students in the [School District], with approximately 1,000 attending Dover High School." *Id.* at 710-711.

[121] *Id.* at 709.

[122] *Id.* at 708-09.

[123] The plaintiffs originally brought suit on December 14, 2004, less than one month after the statement was made, and less than a month before the statement's requirements were to go into effect. *Id.* at 709.

[124] *Kitzmiller*, 2005 U.S. Dist. LEXIS 33915 at *3 (M.D. Pa. Sept. 13, 2005) (emphasis original).

[125] Recall that in essence, the policy critically evaluated the theory of evolution, mentioned intelligent design at the beginning of the class, and pointed students to a book in the library. *Kitzmiller*, 400 F. Supp. 2d at 707.

[126] *Kitzmiller*, 2005 U.S. Dist. LEXIS 33915 at *6-7 (emphasis original). In fact, as defendant's Brief in Support of their Motion for Summary Judgment points out, "[t]he curriculum change at issue advances many secular educational purposes, and, given the undisputed fact that only the Darwinian theory of evolution will actually be taught in the ninth-grade biology class pursuant to Pennsylvania's academic standards, [the school board]'s selection and purpose of *Biology* as its primary science text, and [the school board]'s unequivocal statement and disclaimer that intelligent design, creationism, or religion will not be taught in this class, its principle or primary effect neither advances nor inhibits religion." *Id.* at *7.

issues of material fact existed with respect to whether or not the policy's "principal or primary effect advance[d] or inhibit[ed] religion."[127] Eventually, in December 2005, in a sixty page opinion holding for the plaintiffs, U.S. District Judge John E. Jones III held that the statement violated the Establishment Clause because it violated both the *Lemon*[128] and Endorsement Tests,[129] respectively.[130] Judge Jones concluded that "it is unconstitutional to teach [intelligent design] as an alternative to evolution in a public school science classroom."[131]

II. ANALYSIS

As stated previously[132] this Comment will argue that as a matter of law, public schools *may* teach and discuss the theory of intelligent design in conjunction with the theory of evolution without violating the First Amendment. To best analyze why this assertion is correct, this section will be broken down into two subsections. Subsection A[133] will argue that teaching intelligent design in public schools does not respect an establishment of religion and satisfies both (1) the *Lemon* Test and (2) the Endorsement Test. Necessarily, Subsection A will be separated into three divisions: the first division will argue that intelligent design is *not* a religion; the second division will argue that teaching intelligent design satisfies, and does not violate any prong of the *Lemon* Test; and the third division will argue that intelligent design passes the Endorsement Test.

Subsection B[134] will assert that under *Lemon*, *refusing* to teach or mention intelligent design in public schools amounts to governmental conduct which endorses, respects, and even advocates a religion: atheism. And third, the Analysis section will conclude with the argument that prohibiting intelligent design from being taught in public schools is the result of a historically erroneous statutory interpretation of the First Amendment's Establishment Clause.[135]

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[127] *Id.* at *9.
[128] *Supra* sec. II(A)(2).
[129] *Supra* sec. II(A)(2).
[130] *Kitzmiller*, 400 F. Supp. 2d at 765.
[131] *Id.*
[132] *Supra* sec. I.
[133] *Infra* sec. III(A).
[134] *Infra* sec. III(B).
[135] *Infra* sec. III(C).

A. Discussing Intelligent Design in Public Schools (1) Does Not "[R]espect[] an [E]stablishment of [R]eligion,"[136] (2) Does Not Violate Either the Lemon Test or the Endorsement Test and Thus, Does Not Violate the First Amendment's Establishment Clause.

1. Intelligent Design is Simply Not Religion within the Meaning of the First Amendment.

Teaching, mentioning, or making students aware of the theory of intelligent design does not respect an establishment of religion and therefore, is not prohibited by the Establishment Clause. Intelligent design is not religion, nor is it creationism disguised. In support of these assertions, please consider the following supposition: the theory of intelligent design does not sustain a belief in, or postulate, the existence of God, a Trinity, or a supernatural creator; nor does it hold dogmatic beliefs on spirituality, death, forgiveness, war, faith, marriage, ethics, sex, morality, or any other traditionally ideological viewpoint associated with a religion or religious creed. Schools or groups advocating or teaching the theory of intelligent design are not the recipients of beneficial tax treatment[137] the way religious organizations are. Nor is any school or group supporting intelligent design granted status as a religious institution for any other purpose related to intelligent design. Importantly, intelligent design does not hold, as the Book of Genesis does, that the Earth, the cosmos, the galaxy, or any part thereof, was created spontaneously, over the course of seven days, or even in the order proposed by the Book of Genesis or in any other religious text. Rather, intelligent design simply seeks to answer the evidentiary questions regarding the complexity of life and the origins of design apparent in all living systems. Still, in light of all of these facts, courts have applied two prevailing tests to determine when, if at all, governmental conduct violates the Establishment Clause.

2. Under the *Lemon* Test, Teaching Intelligent Design in Public Schools Does Not Violate the Establishment Clause.

The first test, the *Lemon* Test, evaluates the (1) purpose, (2) effect, and (3) level of governmental entanglement resulting from the governmental conduct.[138] It is clear that, perhaps contrary to recent caselaw, under the *Lemon* Test, teaching intelligent design in public schools does not violate the Establishment Clause.

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[136] U.S. Const. amend. I.

[137] For example, pursuant to 26 U.S.C. § 501 (2000), entitled, "Exemption from tax on corporations, certain trusts, etc.," "[a]n organization described in subsection (c) or (d) . . . shall be exempt from taxation . . . ." Under subsection (c)(3) the statute describes, in pertinent part, the following organizations as tax-exempt: "Corporations, and any *community chest, fund, or foundation, organized and operated exclusively for religious*, charitable, scientific, testing for public safety, literary, or educational purposes . . ." (emphasis added).

[138] *Supra* n. 50.

To begin, recall that the *Lemon* Test's first prong[139] is a low hurdle dealing with purpose and is typically not dispositive. If the conduct in question (here, a public school's decision to incorporate intelligent design into a high school biology class discussion) has at least one, singular secular, non-religious purpose, it will satisfy the *Lemon* Test's purpose prong. Also recall that under the *Lemon* Test, governmental conduct may have an ancillary religious purpose as long as the action affirmatively has at least at least *one* secular purpose.

Incorporating intelligent design into a high school classroom discussion regarding the origins of humankind serves a number of legitimate, secular purposes. First, making students aware of the theory of intelligent design or the problems with the theory of evolution offers an educational benefit to students in any school district: the empowerment to make one's own informed decision. More specifically, teaching competing theories of a complex scientific issue (namely, the beginning of life generally, in *conjunction* with evolution), serves as a springboard for critical analysis, and intellectual, academic, and scholarly debate. After all, the *Kitzmiller* Court was quite correct when it factually found that "[t]o be sure, Darwin's theory of evolution is imperfect."[140]

So, perhaps the most important secular purpose of teaching intelligent design is to further scientific debate among young scholars with respect to making Darwin's theory more perfect. President George W. Bush, when asked about his opinion on intelligent design in public schools, was correct when he stated "I think that part of education is to expose people to different schools of thought."[141] Additionally, teaching intelligent design to public school children puts them in a better academic position (from the standpoint of preparation) to compete with private school children on the collegiate level. This is because in a private high school, children's educational experiences likely exposed them to the theory of intelligent design, or at least its most basic premises.

A second important secular purpose achieved by teaching intelligent design in addition to evolution is that it fosters an air of acceptability which saves students from either being ostracized for their religious beliefs, or worse, being forced to abandon what perhaps many of them were taught by their parents, churches, mosques, temples, or synagogues as children.[142] The

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[139] See *Edwards*, 482 U.S. at 5838 (regarding the conduct's purpose).

[140] *Kitzmiller*, 400 F. Supp. 2d at 765.

[141] Claudia Wallis, *The Evolution Wars; When Bush Joined the Fray Last Week, The Question Grew Hotter: Is "Intelligent Design" a Real Science? And Should it Be Taught in Schools?* Time Mag., 26 (Aug. 15, 2005).

[142] As stated in Time Magazine, "[i]n a Harris poll conducted in June [2005], 55% of 1,000 adults surveyed said children should be taught creationism and intelligent design along with evolution in public schools. The same poll found that 54% did not believe humans had developed from an earlier species—up from 45% with that view in 1994—although other polls have not detected this rise." *Id.* at 28.

benefits of introducing intelligent design in accordance with this secular purpose are twofold: by teaching intelligent design to students who have learned evolution from their parents, those students are able to question or challenge their beliefs with competing theories, in the spirit of open-mindedness; contemporaneously, students whose parents taught them a different account than evolution (e.g., the Biblical account) may, after learning about the theory of intelligent design, retreat to their own views or choose evolution. Either way, teaching intelligent design in public schools allows students to choose what to believe in, without being forced to entirely admonish their religious beliefs (or a large part thereof) during a time as vulnerable and uncertain as grade school or high school.

Teaching intelligent design alongside evolution encourages students to form their own opinions on a very complex, multi-faceted matter, or conversely, to maintain beliefs instilled in them by their parents. This secular benefit fosters a comfort and understanding among students, which allows them to reconcile their personal beliefs on the origins of life with those of evolution.[143]

Certainly encouraging freedom of academic debate, or idea-friendly environments are meritorious secular benefits of incorporating intelligent design into public schools. Therefore, based on the foregoing, it is readily evident that there is at least *one* secular purpose for incorporating intelligent design into a public school's classroom discussion on the merits of evolution.

Under the *Lemon* Test's second prong,[144] the effect of the state action may neither advance nor inhibit religion.[145] Therefore, a school board's decision allowing intelligent design to be taught in public schools does not effectively advancing or inhibiting religion.

While intelligent design is not religion, courts have held that to allow intelligent design to be taught in schools is to engage in conduct which has the *effect* of advancing religion. To the contrary, the "principal or primary effect" of teaching intelligent design in public schools is actually, as Justice Scalia stated, "to advance freedom of thought,"[146] the free flow of ideas, and to debate the theory of evolution's imperfections. The effect of including intelligent design in public schools is *not* to indoctrinate children

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[143] See *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 345-46 (5th Cir. 1999) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), which noted that in the context of a civil rights action, fundamental values essential to a democratic society include "tolerance of divergent political and religious views" and "consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students"). As a result, the *Freiler* Court acknowledged that "local school boards need not turn a blind eye to the concerns of students and parents troubled by the teaching of evolution in public classrooms" and held that a secular purpose similar to the one stated above was sufficient to satisfy the first prong of the *Lemon* Test. *Id.*

[144] *Tangipahoa*, 530 U.S. 1253 (200) (Scalia J., dissenting).

[145] *Id.*. at 1253.

[146] *Id.*

with religious ideology, for such a conclusion lacks any merit with respect to intelligent design's most basic precepts or beliefs. Rather, the primary *effect* of teaching intelligent design is to encourage the exchange of ideas in the name of science and in furtherance of scientific education. Thus, since the effect of teaching intelligent design in public schools is not religiously motivated, teaching intelligent design meets the second prong of the *Lemon* Test.

Under the third prong of the *Lemon* Test, the government's conduct may not create an excessive entanglement with religion. While *some* entanglement is permitted, the entanglement must not be "excessive."[147] In no way does a school board's allowing intelligent design into classroom discussions on the origins of life cause a governmental entanglement with religion, excessive or otherwise.

First, no religious institution or organization choosing to teach intelligent design receives any governmental benefits whatsoever solely on account of that decision. To the contrary, the nature of the aid provided by the government amounts to no more or less than would have been ordinarily spent. In other words, teaching intelligent design does not cost the government or tax payers extra money. Second, there is no relationship fostered between the government and any religious organization since there is no religious organization involved. Thus, a school board's decision to include intelligent design in the public school curriculum does not foster any type of governmental entanglement whatsoever.

In conclusion of this review of the *Lemon* Test, teaching intelligent design in public schools does not violate the First Amendment. This is because a governmental (e.g., school board) decision to include intelligent design in high school curriculum (1) has at least *one* secular purpose, (2) does *not* have the primary effect of advancing religion or prohibiting it, and (3) does *not* create excessive governmental entanglement. In conclusion, under the *Lemon* Test, intelligent design may legally be taught in public schools because it does not violate the First Amendment.

3. Because Intelligent Design's Inclusion in Public School Curriculum Does Not Amount to an *Endorsement of Religion*, Intelligent Design Does Not Violate the First Amendment under the Endorsement Test

As mentioned previously, the inquiry under the Endorsement Test is whether a "reasonable observer"[148] with knowledge of intelligent design's history, would perceive merely allowing intelligent design (in its current state) into classroom discussion to be an endorsement of religion. In order

[147] *Koenick*, 973 F. Supp. at 525.
[148] *Supra* n. 71.

to answer this question, we must look not only to intelligent design's history, but to its present state.

In *Kitzmiller*, the court sets forth in detail the history surrounding the theory of intelligent design, and demonstrates how, at least historically, the theory has roots close to Christianity. Regardless, intelligent design has come a long way in scientific advancement, as evidenced by the current state of the theory. Recall that intelligent design seeks to answer the question—"How did the appearance of design in living systems arise?"[149] Interestingly, "biology," as defined in the online edition of the Oxford English Dictionary, simply means "the study of human life and character."[150] Therefore, intelligent design is, by definition, a biological study focused on the order and progression of life systems, and the character of those systems. As such, it is a form of science, not religion, and the reasonable objective observer could hardly classify it as the latter.

It is imperative to recognize that despite its history, intelligent design no longer aligns itself with Christian ideals, values, or beliefs, or on the creeds of any other religion; right or wrong, intelligent design does not credit God or any deity. Thus, in reality, it is certainly possible to be a pagan, agnostic, or atheist and surmise "an unspecified designing intelligence."[151] Despite that some of the people who believe in intelligent design may personally hold Christian beliefs, the theory of intelligent design itself says nothing about the identity of the intelligent cause responsible for the complexity of life. As a result, there can only be one conclusion: intelligent design is not religious at all.

As is quite evident from the foregoing, it seems wholly unreasonable to conclude that offering another theory which (1) competes on the merits with evolution, (2) does not proffer a belief in *God* and (3) simply attempts to explain what evolution has proven unable to explain, somehow constitutes an endorsement of religion. A reasonable, objective observer with unbiased knowledge of both the history and the current state of intelligent design could not conclude that teaching it in public schools (alongside evolution no less) would constitute a state endorsement of religion.

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[149] Discovery Institute Brief, *supra* n. 99.
[150] Oxford Online Dictionary, *Biology*, http://dictionary.oed.com/cgi/entry/50022345 (accessed Apr. 7, 2006).
[151] Discovery Institute Brief, *supra* n. 99 at 9.

C. Even If Intelligent Design Could be Classified as Postulating the Existence of God (and it Cannot), Prohibiting it from Public Schools Amounts to an Endorsement of Atheism, a Religion,[152] and Thus Violates the Establishment Clause.

Pursuant to the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[153] Using this amendment and the various tests set out above, this Comment has attempted to demonstrate why a school board's decision to allow intelligent design in public schools does not have the effect of endorsing religion. But what if we were to scrutinize the effect of *prohibiting* intelligent design from schools? What result then?

Quite obviously, this Comment argues vigorously that intelligent design does not proffer an existence in God and that the theory is not religion within the meaning of the Establishment Clause. But, even if intelligent design *is* deemed to be religion within the meaning of the First Amendment, governmental conduct prohibiting it might well constitute a violation of the Establishment Clause under both the *Lemon* and the Endorsement Tests. Please consider the following five-step proof: (1) prohibiting religion because it postulates the existence of God, in *effect*, prohibits or denies God; (2) a governmental decision to prohibit God is, in *effect*, a governmental endorsement of the non-existence of God; (3) atheism is "religion" within the meaning of the Establishment Clause, and atheists[154] ("a" meaning "without" + "theist" meaning "one who believes in deity")[155] are people who believe in the non-existence of God; (4) therefore, governmental conduct prohibiting intelligent design because it postulates the existence of God, by its *effect*, "respects an establishment of religion:" atheism; (5) as such, governmental conduct prohibiting intelligent design violates the First Amendment because it respects an establishment of religion: atheism.

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[152] See *Kaufman v. McCaughtry*, 419 F.3d 678, 681 (7th Cir. 2005) (stating that "when a person sincerely holds beliefs dealing with issues of 'ultimate concern' that for her occupy a 'place parallel to that filled by . . . God in traditionally religious persons,' those beliefs represent her religion," and holding that atheism, for these purposes, is a religion). Additionally, the Equal Protection Clause of the Constitution (U.S. Const. amend. XIV, § 1), protects the rights of all individuals equally so that, in effect, all people are entitled to protection of their religions. Even in other statutes like Title VII, the term "religion" broadly encompasses "all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j) (2000).

[153] U.S. Const. amend. I.

[154] According to the Oxford English Online Dictionary "atheists" are defined as people "who den[y] or disbeliev[e] the existence of a God." Oxford English Online Dictionary, *Atheist*, http://dictionary.oed.com/cgi/entry/50014052 (accessed Apr. 7, 2006).

[155] The prefix "a" comes from the Greek for "without." John R. Anderson, Jr., *Prefix/Suffix Meanings*, http://www.gpc.edu/~janderso/historic/psmeanin.htm (updated Mar. 11, 1998). The word "theist" means simply "One who holds the doctrine of theism," Oxford Online Dictionary, *Theist*, http://dictionary.oed.com/cgi/ entry/50250522 (accessed Apr. 7, 2006), and "theism" means simply a "Belief in deity." Oxford Online Dictionary, *Theism*, http://dictionary.oed.com/cgi/entry/50250520 (accessed Apr. 7, 2006). Therefore, literally, an "atheist" is one whose belief is without deity, or God.

As is evident from the above proof, governmental conduct which denies the existence of God, by its very nature, *endorses* atheism. Therefore, under both the *Lemon* Test and the Endorsement Test, since prohibiting intelligent design has the *effect* of respecting an establishment of religion (atheism), then essentially, prohibiting intelligent design violates the First Amendment.

Certainly, it may be argued that giving the language contained in the Establishment Clause its plain meaning causes an *absurd* or inconsistent effect, and that as a result, we should look to the purpose or intent of the Establishment Clause. This Comment will. But proponents of prohibiting intelligent design should be forewarned that they will likely find little comfort, if any, when they discover that the framers' intent *and* purpose in drafting the Establishment Clause were merely to prohibit a governmentally imposed national religion[156] and *not* to remove God from the nation's public conscience, including America's schools and public institutions.

D. Pursuant to the Establishment Clause's Legislative History, Prohibiting Intelligent Design on the Grounds That it is "Religious," Violates the Plain Meaning, Intent, and Purpose Approaches of Statutory Interpretation.

In stating the court's objective with respect to statutory interpretation, Lord Blackburn's guidance proves quite useful. In 1877, he stated the following:

> But it is to be borne in mind that the office of the Judges is not to legislate, but to declare the expressed intention of the Legislature, even if that intention appears to the Court injudicious; and I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear.[157]

Based on Lord Wensleydale's "golden rule," the first method we must employ in deriving the meaning of the First Amendment's Establishment Clause is to give the language its plain meaning.

In the Establishment Clause, two words bear particular significance: "respecting" and "establishment". In plain English, "respecting" means "to

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[156] See *infra* III(C).

[157] *River Wear Commrs. v. Adamson*, 2 App. Cas. 743, 764-65 (House of Lords 1877) (emphasis omitted).

regard, consider, or take into account"[158] whereas "establishment" in plain English means "[a]n arranged order or system."[159] With these definitions in mind, we can transplant the words into the Establishment Clause so that it reads, Congress shall make no law regarding, considering, or taking into account an arranged order or system of religion. Then, as noted by Cord, we know that historically, "[s]ince a national religious establishment did not exist at the time of the Amendment, it became unconstitutional to provide one after ratification [of the Establishment Clause.]"[160] The result is simple: all the Establishment Clause forbade was Congress's declaring a national religion. Nothing more, nothing less.

In accordance with the *golden rule* therefore, when given its plain meaning, the natural language of the Establishment Clause does not produce an "inconsistency, or an absurdity or inconvenience."[161] Thus, the plain meaning rule need not be abandoned. It is evident from the plain meaning of the text that the Establishment Clause was intended to prohibit Congress from authorizing or passing a law regarding an order of arranged, designated religion.

So what does this mean for intelligent design? If it is stipulated that the Establishment Clause is intended to prohibit the establishment of a *national religion*, then we must also take it as true that religious symbols, or even religion itself, may legally and peaceably coexist with public institutions so long as the coexistence does not establish a *national religion*. The effect of such a straightforward interpretation would be, in a word, monumental. Were we to give the words in the Establishment Clause their plain and ordinary meaning, we would no longer be confronted with daily stories about the Ten Commandments in courthouses, about the word "God" in the Pledge of Allegiance or on American currency, or about prayer in public schools. And, if we give the language in the First Amendment its plain meaning, we would see that intelligent design (although not religious at all) certainly does not violate the Establishment Clause because it does not establish national religion. As a result and in accordance with the *golden rule* stated above, intelligent design *may* be taught in any public school choosing to have it incorporated into the curriculum.

While giving the First Amendment's Establishment Clause its plain meaning does not seem to create an absurdity, even if it did, the same outcome would result under both the intent approach and purpose approach to statutory interpretation. A classic application of a court's hunt for the

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[158] Oxford Online Dictionary, *Respect* http://dictionary.oed.com/cgi/entry/50204211 (accessed Apr. 7, 2006).
[159] Thefreedictionary.com, *Establishment*, http://www.thefreedictionary.com/Establishment (accessed Apr. 7, 2006).
[160] Cord, *supra* n. 20, at 9.
[161] *Supra* n. 159.

legislature's specific intent occurred in *United Steelworkers v. Weber*, wherein a white steelworker brought a claim against his employer under Title VII[162] for reverse discrimination[163] While ultimately Justice Brennan delivered the majority opinion that Title VII was not intended to cover such a claim (he held that Title VII only covered minority discrimination, and not reverse discrimination), Justice Rehnquist, in his dissent, searched Title VII's legislative history for the legislature's specific intent in passing Title VII into law.[164] In doing so, Rehnquist established proof that when Congress drafted Title VII, it specifically intended the anti-discrimination law to prohibit *any* kind of hiring or firing based on race whatsoever, and not merely discrimination aimed at minorities.[165]

This legislative history regarding the Establishment Clause's inception yields evidence that the First Congress actually intended to prohibit the establishment of a national church. Thus, if in fact the legislature's specific intent was to prohibit a legislatively-declared state religion, it must reasonably follow that since intelligent design in no way establishes a state religion, the framers would have permitted it.

Even under the purpose approach,[166] which regards the statute's goal in yielding a proper interpretation, it is also apparent from the evidence contained above[167] that the framers' *purpose* in drafting the Establishment Clause was to quell concerns of the ratifying states, regarding the establishment of an official national faith. If the purpose of the Establishment Clause was originally to ensure that Congress was without the authority to legislatively delegate a national religion, then today's courts should still be bound by this purpose and the Establishment Clause's application should be synonymous with its authors' objectives. Therefore, since the First Congress's goal was to prohibit a national religion (and not to prohibit mere religious interaction with public institution), it becomes extraordinarily obvious that intelligent design, which is clearly not a religion, would not have been one of the dangers against which the Establishment Clause sought to protect. Thus, it should not, and legally cannot, be prohibited today.

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[162] 42 U.S.C. § 2000a et seq. (2000).
[163] 443 U.S. 193 (1979).
[164] *United Steelworkers*, 443 U.S. at 219.
[165] See *id.* at 251 (quoting Senator Moss on the day Title VII was passed: "The bill does not accord to *any* citizen advantage or preference") (emphasis added).
[166] The purpose approach to statutory interpretation asks "What was the statute's goal?" rather than "What did the drafters specifically intend?" The latter question is more on target with the intent approach to statutory interpretation discussed *infra*.
[167] See *supra* sec. II(A)(1).

III. CONCLUSION

A. A New Age for an Old Law: What Would Madison and the First Congress Have Decided About Intelligent Design?

A new age comprised of new ideologies, different societal interests, globalization, varying philosophies, and splintered dogmas, is taking place at this very moment. Still, it is remarkable how much society's perception of religion has changed, in totality, in only the past century. It is interesting to think that not that long ago, the government sought to *ban* the theory of evolution from being taught in public schools. But today, in modern times, evolution is seemingly the *only* theory the government claims it can legally support to explain the origins of life to high school students.

From a legal perspective, it is undoubtedly an easier argument to make that "creationism" in its strictest sense, is religion and thus violates the Establishment Clause. But even this argument requires adopting a perverse and polluted interpretation of the First Amendment completely unintended by those who drafted it. Still, even after embracing the skewed interpretation, the much more difficult question to answer is whether the theory of intelligent design is a religious doctrine to the extent that its mere presence during a high school science class violates the First Amendment. To be clear, no matter your perception on whether intelligent design is real science or pseudoscience, its popularity is growing, and it is becoming a fact of life. If it is banned from a high school class, may it then be banned from being discussed at a public university? Without question, such a result would amount to no more than ludicrous censorship of ideas, and close-minded suppression of meritorious deliberation; neither of which finds support among the Constitution's original framers. But the question remains—Where do you draw the line between censorship and governmental neutrality?

Whether you regard intelligent design's inclusion in public schools as a religious endorsement or not, there is good cause to include it in a public high school's curriculum. Among other things; it serves to benefit students scholastically, it benefits science with healthy dissent, and it encourages everyone involved including the students, teachers, and administrators to keep an open mind. Until evolution is a perfect science and no longer merely a *theory*, an open mind might be just American society.

Undeniably, our society is moving away from a time when we could embrace one another's beliefs without being categorically offended by them. The twenty-first century's most recent jurisprudence (and for that matter, *legis*prudence) has been nothing short of dominated with holdings mandating that in public schools, God is forbidden. Perhaps it is easier to justify why Christian, Jewish, Buddhist, or Muslim prayer is not permitted

in schools, but when courts decide to shift America's conscience from the very principles upon which this country was founded, soon enough we will find ourselves without a foundation at all.

The shift does not stop there. The latest trend in public schools requires that any curriculum advocating that "science teachers lead students in a discussion to 'critically analyze' the theory of evolution"[168] be dropped from lesson plans altogether. For example, Ohio's State Board of Education, as of February 15, 2006, voted 11-4 to "eliminate portions of its curriculum guidelines for 10th-grade biology and an accompanying lesson plan that called for the critical analysis of evolution."[169] The reason for the Board's vote? Protection from legal action,[170] presumably similar to the December 2005 lawsuit brought against the Dover, Pennsylvania School Board in *Kitzmiller*.[171] When school boards, either local or statewide in jurisdiction, take actions as drastic as the ones listed above (e.g., banning something as simple and non-controversial as the critical analysis of evolution), it begs the question—Does the law really illegalize a mere critical analysis of Darwin's theory? Stated another way, what sorts of lessons on the origins of life *are* considered legally permissible in public schools?[172] Perhaps it is not the school boards that need reformed, but rather the courts. How far must the interpretation of the Establishment Clause be skewed and distorted before it finally snaps and the concept of *God* is banned in America?

Perhaps Chief Justice Burger put it best when he observed that:

> [i]n the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of [the Supreme] Court.[173]

This statement should serve as a reminder that despite our society's greatest attempts at instituting a utopia of political correctness, that like it or not, the

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[168] Scott Elliot, *Board Vote Backs Evolution; Curriculum Standard to 'Critically Analyze' Theory is Shot Down*, Dayton Daily News A1 (Feb. 15, 2006).

[169] Catherine Candisky, *State Drops Analysis of Evolution; Reversal Represents a Setback to Backers of Intelligent Design in Science Classes*, Columbus Dispatch A1 (Feb. 15, 2006).

[170] *Id.* (quoting Case Western Reserve Biology teacher and leading critic of Ohio's curriculum guidelines, Patricia Princehouse, as saying that "[t]he (Ohio) board has protected itself from legal action").

[171] 400 F. Supp. 2d at 746.

[172] For example, proponents of the Ohio Board of Education's earlier curriculum standards (allowing critical analysis of Darwin's theory of evolution) like the Discovery Institute's Casey Luskin, assert that "This isn't over. You can't change the fact that there is skepticism about evolution." Candisky, *supra* n. 169, at A4.

[173] *Marsh*, 463 U.S. at 786 (wrestling with the issue of whether paying a chaplain to deliver a daily prayer before the opening of the Nebraska state legislature violates the Establishment Clause and deciding it does not).

United States was founded on a religiously oriented value system. And while nearly all of present society's notions on religion are wholly incongruous to the religious views reminiscent of the bygone era when the original framers ratified the Establishment Clause, suffice it to say, James Madison, drafter of the First Amendment and reverend, just might be rolling in his grave.

B. Suggestions for Proper Integration of Intelligent Design Into Public Schools

As an ancillary matter, it seems only fitting to suggest a diplomatic resolution to the problem of what to do with intelligent design. It seems that allowing each school board to determine its own curriculum would best effectuate both the framers' intent as well as the wishes of a particular school district's constituency. Seemingly, the best method of employing this suggestion is to put resolutions on the ballot that ask people to either vote for intelligent design to be added to their child's school curriculum, or to vote against the addition. By granting autonomy to interested people within a certain school district, *they* become empowered to take the otherwise gray area, and either shade it white or black. After all, *they* are almost certainly in a better position to decide what is right for their children's education than any court in the land, no matter how supreme it purports to be.

The result is simple: if a majority of the constituency in a given school district chooses to incorporate intelligent design into the curriculum, they may have it that way. Conversely, if a majority does not wish to have intelligent design included in the curriculum then it will not be included. This allows for flexibility, so that a school district's curriculum reflects the personal political views inherent in the people whose children attend that school district. This suggestion seems to effectively broker a fair outcome for people on both sides of the issue and reconciles what are undoubtedly honest differences. If it is true what Gandhi once said, that "[h]onest differences are often a healthy sign of progress"[174] then *reconciling* honest differences must be the embodiment of a healthy society.

[174] *Supra* n. 1.