

# SEEING GOVERNMENT PURPOSE THROUGH THE OBJECTIVE OBSERVER’S EYES: THE EVOLUTION- INTELLIGENT DESIGN DEBATES

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Debates about teaching intelligent design in public school science classes are inflaming communities across the nation. These controversies present thorny Establishment Clause questions at a time when that doctrine is less clear than ever. The ambiguity is not due to a lack of case law: Just last year, the Supreme Court issued two seemingly contradictory Establishment Clause decisions, driven by what then-Chief Justice Rehnquist characterized as “Januslike” interests. *McCreary County v. ACLU*, with its focus on government purpose, is more applicable to curricular disputes such as intelligent design than *Van Orden v. Perry*, with its examination of passive, apparently uncontroversial expression. This Article thus examines *McCreary County* within the intelligent design context, focusing on *McCreary County*’s decision to import the “objective observer” from the effects-endorsement analysis into the government purpose inquiry. Such analysis makes clear the ways in which a strict reading of *McCreary County* leads to undesirable results, and the reasons why the Court should retain *McCreary County*’s focus on government purpose, but reject the expanded role of the objective observer.

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I. INTRODUCTION

On October 18, 2004, the 3,700-student school district in Dover, Pennsylvania became the first in the nation to require that its students be taught about the concept of intelligent design when learning the theory of evolution.<sup>1</sup> The Dover school district thus presented in public school science classrooms the idea that an intelligent agent must be responsible for the origin and variety of the species because evolution alone could not have produced such complexity. The Dover school district's instruction in intelligent design was cursory, requiring only that the

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1. Although Dover was the first school district in the country to require such instruction, other school districts have adopted policies implicitly or explicitly permitting intelligent design instruction. Most recently, in August 2005, the Rio Rancho, New Mexico school board specifically voted to permit high school science classes to discuss alternatives to the theory of evolution. See Martha Raffaele, *New Mexico Schools Could Enter Battle over "Intelligent Design,"* WASH. POST., Oct. 9, 2005, at A7. Additionally, the school board in Grantsburg, Wisconsin approved teaching "all theories of origin" in June 2004 and modified its policy to teach "various scientific models/theories of origin" in October 2004. John Angus Campbell & Stephen C. Meyer, *How Should Schools Handle Evolution?*, USA TODAY, Aug. 15, 2005, at A13. Cecil County, Maryland also has adopted a policy encouraging, but not requiring, the teaching of intelligent design. See Bruce Alberts, President, National Academy of Sciences, *The Evolution Controversy in Our Schools*, Letter to Academy Members (Mar. 4, 2005), available at [http://www.nasonline.org/site/PageServer?pagename=NEWS\\_letter\\_president\\_03042005\\_BA\\_evolution](http://www.nasonline.org/site/PageServer?pagename=NEWS_letter_president_03042005_BA_evolution).

Additionally, a note on an issue that is not all semantics: Intelligent design advocates posit the concept of intelligent design as a "theory." Used colloquially, "theory" indicates an untested explanation for a past or future occurrence, similar to a scientific hypothesis. In its technical, scientific sense, however, "theory" indicates a well tested, verifiable, and substantially proven scientific explanation closely akin to the common understanding of "fact." Scientific facts, by contrast, are mere observations or results, usually from experimentation, with little value until understood in the context of a theory. See, e.g., Transcript of Trial Proceedings, Day 1 PM, at 91-92, *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (No. 4:04-CV-02688) (M.D. Pa. 2005) (all trial transcripts are available at <http://www.aclupa.org/legal/legaldocket/intelligentdesigncase/dovertrialtranscripts.htm>); NILES ELDREDGE, *THE TRIUMPH OF EVOLUTION AND THE FAILURE OF CREATIONISM* 21-24 (2001). Accordingly, this Article refers to evolution as a theory and creationism and intelligent design as concepts.

following statement (modified slightly in June 2005) be read to biology students studying evolution:<sup>2</sup>

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.<sup>3</sup>

In January 2005, when Dover science teachers refused to read the statement, the school district's assistant superintendent did so instead.<sup>4</sup> Even before the statement was read in Dover classrooms, however, parents already had challenged its constitutionality in federal court.<sup>5</sup> The trial in this case was the first in the nation to address the evolution-intelligent design dispute directly.<sup>6</sup> Just six weeks after the twenty-one-day trial concluded, the district court ruled soundly for the plaintiffs.<sup>7</sup> While the trial was in full swing, the ideological battle also played out in the Dover school board election, in which the eight incumbents standing for reelection (all supporters of the

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2. The policy, as modified, mentions "other resources" about intelligent design, including PERCIVAL DAVIS & DEAN H. KENYON, *OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS* (2d ed. 1993), available in the school library. Transcript of Trial Proceedings, *supra* note 1, Day 1 AM, at 16-18.

3. Dover Area Board of Directors, Board Press Release for Biology Curriculum (Nov. 19, 2004), [http://www.ncseweb.org/kitzmiller/DASD\\_Policy.htm](http://www.ncseweb.org/kitzmiller/DASD_Policy.htm); see also Jerry Coyne, *The Faith that Dare Not Speak Its Name*, 233 NEW REPUBLIC 21 (Aug. 22 & 29, 2005).

4. See Lauri Lebo, *Experts Won't Back Dover*, YORK DAILY REC., June 19, 2005, at C1.

5. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 709 (M.D. Pa. 2005).

6. See Laurie Goodstein, *Evolution Lawsuit Opens with Broadside Against Intelligent Design*, N.Y. TIMES, Sept. 27, 2005, at A21.

7. *Kitzmiller*, 400 F. Supp. 2d at 766.

intelligent design policy) were voted out of office on November 8, 2005.<sup>8</sup>

The district court's strong decision in the Dover case may dampen the enthusiasm of some intelligent design proponents, but it certainly will not halt the movement.<sup>9</sup> The controversy in Dover is representative of a rapidly growing number of proposals surfacing across the country requiring that students in public schools study the concept of intelligent design in science class, or at least that teachers present a critical view of evolution (the first premise of intelligent design). In 2005 alone, forty-seven local school boards and fourteen state legislatures considered such proposals; between 2000 and 2005, sixteen state boards of education did so also.<sup>10</sup> Last November, the Kansas Board of Education modified its state science standards, requiring schools to teach the "flaws" of the theory of evolution and effectively inviting schools to teach the concept of intelligent design.<sup>11</sup> Legislatures in Kansas, Minnesota, New Mexico,

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8. See Laurie Goodstein, *Evolution Board Slate Outpolls Rivals*, N.Y. TIMES, Nov. 9, 2005, at A4. The campaign mirrored the community's turmoil: One incumbent sent out a letter on behalf of himself and other incumbents criticizing the *Kitzmiller* plaintiffs and describing the ACLU as an organization that defends terrorists as well as the right of the North American Man/Boy Love Association "to put out information on how adults can lure young children into having sex with them." Teresa McMinn, *Bonsell, Walczak React to Letter*, YORK DAILY REC., Oct. 28, 2005, at A6; see also Teresa McMinn, *Facts, or Smear?*, YORK DAILY REC., Oct. 27, 2005, at A1.

9. See Laurie Goodstein, *Schools Nationwide Study Impact of Evolution Ruling*, N.Y. TIMES, Dec. 22, 2005, at A20.

10. See Nat'l Ctr. for Sci. Educ., *Events of the Past Year: December 8, 2004 to Present*, <http://www.natcensci.org/pressroom.asp?year=2005> (last visited Jan. 17, 2006) (documenting legislative activity in 2005); see also Claudia Wallis, *The Evolution Wars*, TIME, Aug. 15, 2005, at 28-29. Eugenie Scott, Executive Director of the National Center for Science Education, noted that as of January 2005, the middle of the 2004-2005 legislative session in many states, legislators in thirteen states had introduced eighteen bills regarding the teaching of evolution, which is double the usual number of the past few years. See Debora Mackenzie, *A Battle for Science's Soul*, NEWSIDENTIST, July 9, 2005, at 8. Some of the proposed legislation could have extreme consequences: In Florida, a bill was defeated that would have given public school students a cause of action against a teacher who demonstrated a "bias" towards evolution in the classroom. *Id.* at 9.

11. See Kenneth Chang, *Evolution and Its Discontents*, N.Y. TIMES, Nov. 15, 2005, at D3; Dennis Overbye, *Philosophers Notwithstanding, Kansas School Board Redefines Science*, N.Y. TIMES, Nov. 15, 2005, at D3. After a parallel set of hearings in 2002, the Ohio Board of Education voted to allow the teaching of intelligent design. In Kansas, the proposed standards' treatment of evolution was so controversial that just days before their scheduled adoption, the National Academy of Sciences and the National Science Teachers Association refused to permit the use of their

and Ohio already have passed state statutes permitting, but not requiring, science instruction about intelligent design.<sup>12</sup> Similar legislation is pending in Georgia, Michigan, Oklahoma, Pennsylvania, South Carolina, and Texas, and also may be introduced in Utah and Indiana.<sup>13</sup> These existing and proposed policies and statutes follow on the heels of federal-level support for teaching the concept of intelligent design. Conference committee language accompanying the federal No Child Left Behind Act of 2001 (NCLB) encouraged a critical teaching of evolution, and even President George W. Bush weighed in on this issue in August 2005, expressing support for teaching intelligent design alongside the theory of evolution.<sup>14</sup>

Whether presented in court or merely as legal advice to a state or local school board, legal arguments supporting intelligent design already have assumed a common form: (1) The

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copyrighted materials in the proposed standards. See Jodi Wilgoren, *Kansas Fight on Evolution Escalates*, N.Y. TIMES, Oct. 28, 2005, at A11.

12. See Peter Slevin, *Battle on Teaching Evolution Sharpens*, WASH. POST, Mar. 14, 2005, at A1; see also Ker Than, *Anti-Evolution Attacks on the Rise*, LIVE SCI., Sept. 27, 2005, [http://www.livescience.com/othernews/050927\\_ID\\_cases.html](http://www.livescience.com/othernews/050927_ID_cases.html).

13. See Than, *supra* note 12 (documenting pending legislation). Some of the legislation that calls for a critical teaching of evolution is modeled specifically after Senator Rick Santorum's failed amendment to the No Child Left Behind Act, including a bill the South Carolina legislature will take up in January 2006. See Susan Spath, Nat'l Ctr. for Sci. Educ., *Antievolution Legislation in South Carolina Again* (June 17, 2005), [http://www.ncseweb.org/resources/news/2005/SC/357\\_antievolution\\_legislation\\_in\\_s\\_6\\_17\\_2005.asp](http://www.ncseweb.org/resources/news/2005/SC/357_antievolution_legislation_in_s_6_17_2005.asp); see also Alberts, *supra* note 1; James Dao, *Sleepy Election is Jolted by Revolution*, N.Y. TIMES, May 17, 2005, at A12; Richard Fellingner, *State Studies Intelligent Design*, YORK DAILY REC., June 21, 2005, at C1.

Although most intelligent design proponents argue vehemently that teaching intelligent design does not constitute teaching religion, not all legislators draw a clear line between science and religion. For example, Utah state representative Chris Buttars wants to require the teaching of "divine design," requiring students to learn that the world was created by "a superior power." Matt Canham, *Evolution Battle to Flare Up in Utah: Backers of "Divine Design" Theory Want Equal Time in Schools*, SALT LAKE TRIB., June 6, 2005, [http://www.sltrib.com/utah/ci\\_2777333](http://www.sltrib.com/utah/ci_2777333). Buttars originally planned to introduce a bill to this effect when the Utah legislature returns in January 2006 but has since indicated he instead will introduce it in the 2007 session if science teachers who teach evolution are not "dealt with" by the state board of education. See Mark Canham, Nat'l Ctr. for Sci. Educ., *"Divine Design" Legislation in Utah on Hold* (July 21, 2005), [http://www.ncseweb.org/resources/news/2005/UC374\\_divine\\_design\\_legislation\\_in\\_7\\_21\\_2005.asp](http://www.ncseweb.org/resources/news/2005/UC374_divine_design_legislation_in_7_21_2005.asp); Mary Beth Schneider & Robert King, *GOP Lawmakers Want Schools to Teach "Intelligent Design"*, INDIANAPOLIS STAR, Nov. 3, 2005, at 1A (noting support from Indiana legislators and from the electorate for teaching intelligent design).

14. See Peter Baker & Peter Slevin, *Bush Remarks on "Intelligent Design" Theory Fuel Debate*, WASH. POST, Aug. 3, 2005, at A1; Elizabeth Bumiller, *Bush Remarks Roil Debate over Teaching of Evolution*, N.Y. TIMES, Aug. 3, 2005, at A14.

concept of intelligent design is science and should be taught in the spirit of teaching both sides of a controversy; (2) the theory of evolution is hostile to religion, thus intelligent design should be taught to preserve government neutrality towards religion; (3) a teacher's ability to teach the concept of intelligent design is a matter of academic freedom.<sup>15</sup> Because the intelligent agent or agents to whom all credit is given remain unidentified, intelligent design proponents reject the suggestion that the concept is merely the newest iteration of biblically based creationism.<sup>16</sup> On the other side, opponents of intelligent design argue that because the concept of intelligent design is religious and not scientific, and because the theory of evolution is scientific and not religious, teaching intelligent design is motivated by an impermissible purpose to advance religion in public schools and generates an effect of advancing religion; such motive and result both violate the Establishment Clause.<sup>17</sup> Accordingly, because intelligent design advocates' purpose is nearly always less overtly religious than that of traditional creationists, discerning the government purpose that motivates an intelligent design policy is a crucial yet challenging aspect of intelligent design litigation. In fact, this analysis will be even more difficult after the Supreme Court's recent decision in *McCreary County v. ACLU*.<sup>18</sup>

In June 2005, the Court issued decisions in two cases involving the public posting of the Ten Commandments on government property. In *Van Orden v. Perry*, the Court upheld as constitutional a six-foot-tall granite monument of the Ten Commandments erected on the Texas state capitol grounds nearly forty years ago, focusing on the passivity of the monument's message, the historical, secular meaning of the Ten Commandments, and the longstanding, uncontroversial nature of the display at issue.<sup>19</sup> In *McCreary County v. ACLU*, the Court rejected two Kentucky counties' recent, repeated attempts to post the Ten Commandments inside their respective county courthouses, initially by posting the document alone and then

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15. See, e.g., John H. Calvert, IDNet, Teaching Origins Science in Public Schools: Memorandum & Opinion (2001), <http://www.intelligentdesignnetwork.org/legalopinion.htm>.

16. See *infra* Part IV.A.1.

17. See *id.*; see also, e.g., Michelle Starr, *Some Call Design a Step Toward Balance*, YORK DAILY REC., Oct. 19, 2005, at A1.

18. 125 S. Ct. 2722 (2005).

19. 125 S. Ct. 2854 (2005).

as part of larger displays.<sup>20</sup> *McCreary County* utilized the initial, and rarely determinative, aspect of the three-prong Establishment Clause test the Court set forth in 1971 in *Lemon v. Kurtzman*: “First, the [government action] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . [third, it] must not foster ‘an excessive government entanglement with religion.’”<sup>21</sup>

While *McCreary County* thus reconfirmed the primacy of the *Lemon* test’s government purpose analysis, *Van Orden* entirely disregarded the *Lemon* test. Whether read individually or taken together, these two cases amplify the confusion that attends Establishment Clause doctrine, an area of law prominent scholars have described as chaotic and largely incoherent, and that a district court characterized, in the wake of *McCreary County* and *Van Orden*, as beset by “utterly standardless” distinctions.<sup>22</sup>

This chaos is due in part to the “objective observer” or “reasonable observer” test, a legal fiction created and championed by Justice O’Connor.<sup>23</sup> This objective, reasonable observer has served the courts in Establishment Clause cases as an arbiter of a statute or policy’s effect, or as a measurer of degree of endorsement.<sup>24</sup> Originally, the objective observer was cast as a well informed hypothetical member of the community, and thus provided a rough response to the implied question arising from the *Lemon* test: “Effect upon, or endorsement as perceived by, whom?” The objective observer matured over time, but always operated within the context of the effects-endorsement analysis. Then, *McCreary County* imported the objective ob-

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20. *McCreary County v. ACLU*, 145 F. Supp. 2d 845, 847 (E.D. Ky. 2001); *McCreary County v. ACLU*, 96 F. Supp. 2d 679, 686–88 (E.D. Ky. 2000).

21. 403 U.S. 602, 612–13 (1971).

22. See, e.g., *Newdow v. Congress*, 383 F. Supp. 2d 1229, 1244 n.22 (E.D. Cal. 2005); see also Michael W. McConnell, *State Action and the Supreme Court’s Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 686 n.31 (2001) (collecting scholarly comments from Thomas Berg, Jesse Choper, John Garvey, Leonard Levy, Marci Hamilton, John Mansfield, and Antonin Scalia regarding the “incoherence and inconsistency” of the Establishment Clause cases). This doctrine has become such a quagmire that another district court, attempting to reconcile and apply *McCreary County* and *Van Orden*, suggested that the “context driven inquiry” applied by Justice Breyer as the swing vote in *Van Orden* effectively evaluates the reasonable observer’s perspective of whether government action created an endorsement of religion. *Twombly v. City of Fargo*, 388 F. Supp. 2d 983, 990 (D.N.D. 2005).

23. See *infra* Part III.B.1.

24. See *id.*



server's perspective into the government purpose analysis, an area previously reserved to the courts and characterized by an evaluation of a government actor's *actual* purpose.<sup>25</sup> In *McCreary County*, the Court delineated the new boundaries of the government purpose inquiry: "[T]he eyes that look to purpose belong to an 'objective observer' . . ." and if a religious motive is hidden "so well that the 'objective observer' . . . cannot see it, then without something more . . . it suffices to wait and see whether such government action turns out to have . . . the illegitimate effect of advancing religion."<sup>26</sup> Given the constantly changing nature of Establishment Clause doctrine, it is unclear whether this newly expanded role of the reasonable observer is a definitive change or merely a temporary shift. Either way, the emerging set of evolution-intelligent design controversies illustrates some difficulties courts will encounter should they choose to interpret and apply *McCreary County* strictly.

Bearing in mind that a reasonable observer brings an increasingly extensive knowledge of issues of law to any analysis, the second Part of this Article explores the ideas at the root of these controversies—evolution, creationism, and intelligent design—and reviews the public perceptions that underlie the evolution-intelligent design debate. The third Part analyzes the line of cases giving rise to the reasonable observer as an analytical tool employed by a majority of the Court, and charts the reasonable observer's changes over time. These cases set the stage for a discussion of *McCreary County*, which both refocuses Establishment Clause doctrine on government purpose and alters the purpose analysis by invoking the distanced perspective of the reasonable observer.

The fourth and final Part considers the potential impact of *McCreary County* on intelligent design disputes and ultimately argues for a limited application of *McCreary County*. Strictly read, *McCreary County* changes the fundamental constitutional harm in an Establishment Clause case from actual government purpose to perceived government purpose, resulting in a slightly different formulation of this factor that is both overinclusive and underinclusive. *McCreary County* also vests the reasonable observer with increasingly vast knowledge of issues of law (in some cases an education law specialist's command of

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25. See *infra* Part III.C.

26. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2734–35 (2005).

NCLB), yet insufficient knowledge of issues of fact. Lastly, it requires a uniformly *de novo* standard of review for federal appellate courts' inquiries into government purpose without sufficient justification for expanding the scope of review. Given the value of an actual purpose inquiry and undesirable consequences resulting from the shift to a perceived purpose inquiry, the Court should retrace some of its steps, as it has done in this area before, and refocus on government purpose without the aid of the reasonable observer.

The evolution-intelligent design debates raise several noteworthy legal issues. This Article is intentionally limited to a focus on the government purpose analysis; set aside for the moment are the questions of effect and endorsement, as well as coercion and the related importance of *Lee v. Weisman*.<sup>27</sup>

## II. AN EVOLUTION-INTELLIGENT DESIGN PRIMER

The evolution-intelligent design debates are marred by a misunderstanding of the ideas involved, science's frequent hostility towards religion, and Western religions' resistance to conceiving of nature itself as divine.<sup>28</sup> As discussed later in this Article, after *McCreary County*, courts should evaluate government purpose in an intelligent design case from the perspective of the reasonable observer who presumably is not omniscient and certainly is not typical, but who will be vested with extensive knowledge. In the Dover case, for example, the court-created reasonable observer had an even more extensive understanding of intelligent design than is presented here.<sup>29</sup> Because the reasonable observer will be presumed to have a proper understanding of the ideas underlying any present controversy, this Part revisits the theory of evolution and the concepts of creationism and intelligent design, complex ideas too often characterized in sound-bite definitions. Then, because the reasonable observer is deemed to be operating in a social con-

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27. 505 U.S. 577 (1992).

28. See KENNETH R. MILLER, FINDING DARWIN'S GOD: A SCIENTIST'S SEARCH FOR COMMON GROUND BETWEEN GOD AND EVOLUTION 19, 57 (1999).

29. See generally *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714–35 (M.D. Pa. 2005) (conducting an endorsement test and employing the reasonable observer); *id.* at 735–46 (discussing whether intelligent design is science and concluding that the reasonable observer would reach the same conclusion as the court).

text, the Part assesses the current climate of public opinion regarding evolution, creationism, and intelligent design.

A. *Revisiting the Ideas at Issue*

1. *Evolution*

Credit for the theory of evolution is in large part properly attributed to Charles Darwin's 1859 work *On the Origin of Species* and his 1871 tome *Descent of Man and Selection in Relation to Sex*.<sup>30</sup> Darwin's *Origin of Species* was revolutionary because it argued that species of flora and fauna do not permanently exist in their present forms. Rather, they vary over time as individual members develop inheritable adaptations to their natural environments that make them more likely to survive than members of the same species that have not changed or have changed in less advantageous ways. Mutations upon mutations lead to diversification within, and eventually among, species.<sup>31</sup>

The next major intellectual leap in this area, the Neo-Darwinian Synthesis, took shape in the 1940s and proposed that species' adaptations result in better suited individuals having more offspring that survive at a higher rate, and that variations within a species are inherited specifically through individual organisms' genetic code.<sup>32</sup> Scientists continue to find significant support for the theory of evolution and the Neo-Darwinian Synthesis in the fossil record, which confirms that extinct organisms are found in older layers of rock, that living organisms have become more complex over time, and that dif-

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30. Darwin was the first scientist to explore this idea in such depth, but he was not the first to consider the concept of species' change over time. See MILLER, *supra* note 28, at 32–36 (summarizing the earlier scientific work of William Smith, Georges Cuvier, and Etienne Geoffroy Saint-Hilaire).

31. See George Levine, *Introduction to CHARLES DARWIN, THE ORIGIN OF SPECIES BY MEANS OF NATURAL SELECTION* xvii, xxiv, xxvi (George Stade, ed., Barnes & Noble 2004) (1859) [hereinafter DARWIN, ORIGIN]; see also ERNST MAYR, *WHAT EVOLUTION IS* 75, 116 (2001). Humans were not included in this concept of evolution through natural selection until *Descent of Man*. Hamilton Cravens, *Introduction to CHARLES DARWIN, DESCENT OF MAN AND SELECTION IN RELATION TO SEX* ix, xi (Barnes & Noble 2004) (1871).

32. See generally MAYR, *supra* note 31. The Neo-Darwinian Synthesis considered Darwin's work in concert with that of geneticist Gregory Mendel and naturalist Alfred Russell Wallace. It resulted mostly from the work of John Burdon Sanderson Haldane, Ronald Fischer, Theodosius Doebzhansky, and Julian Huxley. See *id.*

ferent species today can be traced back through mutations to common ancestors.<sup>33</sup>

Evidence supporting the theory of evolution always has been questioned, in part because such critical questioning is the backbone of science, and, in this case, also because of the theory's perceived social, moral, and religious ramifications. From the start, Darwin's theory was the target of criticism because it ran counter to a literal interpretation of the Genesis creation story, in which God individually created plant and animal species. That criticism grew in force when the theory of evolution gained support from advances in genetics. From the perspective of religious adherents to creationism and intelligent design, the danger presented by the theory of evolution is that if humans were not specially created by God and in the image of God, then there is no reason to expect humans to behave differently from amoral animals.<sup>34</sup> Or, in the words of a letter read by Representative Tom DeLay on the floor of the U.S. House of Representatives, tragedies such as the 1999 school shooting in Columbine, Colorado happen in part because "[o]ur school systems teach the children that they are nothing but glorified apes who have evolutionized out of some primordial soup of mud . . . ."<sup>35</sup> As its name suggests, Darwin's *Origin of Species* limited itself to a discussion of inter- and intra-species diversification, sidestepping the issue of living things' ultimate origins.<sup>36</sup> Though the theory of evolution is hardly the only scientific concept with potential consequences for religious

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33. See *id.* at 13, 22. Evidence of responsive mutation is not limited to fossils; scientists today document such mutation in viruses and bacteria that develop drug resistance. See TIM M. BERRA, *EVOLUTION AND THE MYTH OF CREATIONISM* 53 (1990).

34. See ELDREDGE, *supra* note 1, at 10; KENT GREENAWALT, *DOES GOD BELONG IN PUBLIC SCHOOLS?* 92 (2005). As stated by John Buell, president and academic editor of the Foundation for Thought and Ethics, in a 1995 fundraising letter,

The current deplorable condition of our schools results in large part from denying the dignity of man created in God's image. Even junior high students recognize that if there is no creator, as textbooks teach, then there is no law giver to whom they must answer, and therefore no need of a moral lifestyle, much less a respect for the life of their fellow man.

The message of the foundation is that this is simply unacceptable.

Transcript of Trial Proceedings, *supra* note 1, Day 6 AM, at 101.

35. Chet Raymo, *Darwin's Dangerous De-evolution*, *BOSTON GLOBE*, Sept. 6, 1999, at C2; Coyne, *supra* note 3, at 33.

36. Levine, *supra* note 31, at xviii.

faith,<sup>37</sup> it has been a constant target of religiously driven criticism for the past 150 years.

Since Darwin's time, many scientists and theologians have argued that evolution and religion are compatible, despite frequent antagonism between the two perspectives. Some scientists, such as Brown University biology professor Kenneth Miller, have published books reconciling the theory of evolution with religious belief.<sup>38</sup> Alan Leshner, chief executive of the American Association for the Advancement of Science, has commented that "the theory of evolution does not, in fact, conflict with the religious views of most Jewish, Christian, Muslim, Buddhist, or Hindu followers."<sup>39</sup> The official statements of religious leaders reinforce Leshner's assertion, including Pope John Paul II's 1996 *Message on Evolution to the Pontifical Academy of Sciences*, which echoed Pope Pius II's 1950 theistically qualified statement that there is "no opposition between evolution and the doctrine of the faith about man and his vocation . . ."<sup>40</sup>

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37. As noted by a federal district court, there are religious implications to "the theories of gravity, relativity, and Galilean heliocentrism . . ." *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1292 (N.D. Ga. 2005).

38. See, e.g., MILLER, *supra* note 28; see also David Barton, *A Death-Struggle Between Two Civilizations*, 13 REGENT U. L. REV. 297, 310 n.63 (2000); George Johnson, *For the Anti-Evolutionists, Hope in High Places*, N.Y. TIMES, Oct. 2, 2005, at A3; Claudia Wallis, *The Evolution Wars*, TIME, Aug. 15, 2005, at 34.

39. Cornelia Dean, *Opting Out in the Debate on Evolution*, N.Y. TIMES, June 21, 2005, at F1.

40. Pope John Paul II, *Message on Evolution to the Pontifical Academy of Sciences* (Oct. 23, 1996), <http://www.catholic.net/RCC/Periodicals/Inside/01-97/creat2.html>; see also Lawrence M. Krauss, *School Boards Want to "Teach the Controversy": What Controversy?*, N.Y. TIMES, May 17, 2005, at F3; Cornelia Dean, *Evolution Takes a Back Seat in U.S. Classes*, N.Y. TIMES, Feb. 1, 2005, at F1.

The current Pope, Benedict XVI, has made similar statements, although the Archbishop of Vienna questioned public interpretation of the Catholic Church's endorsement, provoking a minor controversy in July 2005. On July 7, 2005, Cardinal Christopher Schönborn, Archbishop of Vienna, expressed in a *New York Times* editorial that "[e]volution in the sense of common ancestry might be true, but evolution in the neo-Darwinian sense—an unguided, unplanned process of random variation and natural selection—is not." Christopher Schönborn, *Finding Design in Nature*, N.Y. TIMES, July 7, 2005, at A23. Scientists and others called for Pope Benedict XVI to clarify the Church's position and reaffirm the earlier statements of John Paul II and Pius II. See Lawrence M. Krauss, Francisco Ayala, & Kenneth Miller, *Letter to Pope Benedict XVI* (July 12, 2005), <http://genesis1.phys.cwru.edu/~krauss/papaletttxt.htm>; see also Cornelia Dean, *Scientists Ask Pope for Clarification on Evolution Stance*, N.Y. TIMES, July 13, 2005, at A18; Cornelia Dean & Laurie Goodstein, *Leading Cardinal Redefines Church's View on Evolution*, N.Y. TIMES, July 9, 2005, at A1. On November 3, 2005, Monsignor Gianfranco Basti, the director of the Catholic Church's Science, Theology and Ontological Quest project, and Cardinal Paul Poupard, the director of the Pontifical Council for Culture,

The Presbyterian Church (USA) and the Lutheran World Federation have issued official statements accepting the theory of evolution, as has the American Jewish Congress.<sup>41</sup> Similarly, the Unitarian Universalist Association and the United Methodist Church oppose the teaching of creationism in public schools.<sup>42</sup> Moreover, a “Creator” merited several mentions in Darwin’s *Origin of Species*, including the book’s very last sentence:

There is grandeur in this view of life, with its several powers having been originally breathed by the Creator into a few forms or into one; and that, whilst this planet has gone cycling on according to the fixed law of gravity, from so simple a beginning endless forms most beautiful and most wonderful have been, and are being, evolved.<sup>43</sup>

The scientific and cultural import of this theory hardly can be overstated.<sup>44</sup> Today, the scientific community is nearly unanimous in its acceptance of the theory of evolution and its view of the importance of this theory.<sup>45</sup> Nevertheless, despite this widespread acceptance, only twenty-seven states’ public school science standards received a passing grade for their treatment of evolution in a December 2005 report from the

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reiterated the Church’s support of science, and evolutionary theory in particular. See Nicole Winfield, *Vatican: Faithful Should Listen to Science*, USA TODAY.COM, Nov. 3, 2005, [http://www.usatoday.com/tech/science/ethics/2005-11-03-vatican-science\\_x.htm](http://www.usatoday.com/tech/science/ethics/2005-11-03-vatican-science_x.htm).

41. National Center for Science Education, *Statements from Religious Organizations* (Dec. 19, 2002), [http://www.ncseweb.org/resources/articles/7445\\_statements\\_from\\_religious\\_org\\_12\\_19\\_2002.asp](http://www.ncseweb.org/resources/articles/7445_statements_from_religious_org_12_19_2002.asp).

42. *Id.*

43. DARWIN, *ORIGIN*, *supra* note 31, at 384.

44. Harvard biology professor emeritus Ernst Mayr has called evolution “the most important concept in biology.” MAYR, *supra* note 31, at xiii. A federal district court recently recognized evolution as “the dominant scientific theory regarding the origin of the diversity of life . . . accepted by the majority of the scientific community.” *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1284, 1289 (N.D. Ga. 2005).

45. See, e.g., Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 804 nn.234–35 (2003) (collecting statements from prominent scientists regarding the overwhelming support for the basic tenets of the theory of evolution, and reflecting an understanding of its role as a central concept of modern scientific knowledge); Michael Powell, *Pa. Case Is Newest Round In Evolution Debate*, WASH. POST, Sept. 27, 2005, at A3.

nonprofit Fordham Foundation; in 2000, thirty-one states had received a passing grade for their evolution-related standards.<sup>46</sup>

## 2. *Creationism*

In constitutional law, “creationism” has become a term of art to describe the beliefs of so-called young-earth creationists, who date the age of the earth from the chronology suggested in the Bible and conclude the earth is only 5,000 to 10,000 years old.<sup>47</sup> Young-earth creationists reject evidence that the earth is approximately 4.5 billion years old by arguing that the Noachian flood led to the appearance of a fossil record because the organisms that could escape to higher ground or otherwise survive the inundation did so and those left behind gradually became buried in sediment.<sup>48</sup> Other young-earth creationists argue that this flood altered chemical and biological processes to the point that contemporary scientific methods of dating fossils and various artifacts are entirely inaccurate.<sup>49</sup> Young-earth creationists often concede the *apparent* age of the earth, fossils, and even surrounding cosmos, while maintaining that the real age of these things is much less, and they were merely created to look older.<sup>50</sup>

As their name suggests, old-earth creationists concede the earth to be billions of years old. They maintain that God individually created “kinds” of plants and animals sequentially over great spans of time, and that God works through biological processes to create diversity within species.<sup>51</sup> Both groups rely on the Genesis account to support their claim that God created all species separately from one another, particularly

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46. PAUL R. GROSS, *THE STATE OF SCIENCE STANDARDS 2005* at 7, 25 (2005), available at [http://www.edexcellence.net/doc/Science%20Standards.Final%20\(12-6\).pdf](http://www.edexcellence.net/doc/Science%20Standards.Final%20(12-6).pdf).

47. See Francis J. Beckwith, *Science and Religion Twenty Years After McLean v. Arkansas: Evolution, Public Education, and the New Challenge of Intelligent Design*, 26 HARV. J.L. & PUB. POL’Y 455, 460–61 (2003); see also MICHAEL J. BEHE, *DARWIN’S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION* 5 (1996).

48. See generally JOHN C. WHITCOMB, JR. & HENRY M. MORRIS, *THE GENESIS FLOOD: THE BIBLICAL RECORD AND ITS SCIENTIFIC IMPLICATIONS* (1961). This work is summarized in MILLER, *supra* note 28, at 61.

49. See generally GEORGE MCCREADY PRICE, *THE NEW GEOLOGY* (2d ed. 1923); WHITCOMB & MORRIS, *supra* note 48.

50. MILLER, *supra* note 28, at 79–80.

51. Eugenie C. Scott, *Science, Religion, and Evolution*, in *EVOLUTION: INVESTIGATING THE EVIDENCE* 361, 372 (1999), available at [http://www.ncseweb.org/resources/articles/528\\_science\\_religion\\_and\\_evoluti\\_6\\_19\\_2001.asp](http://www.ncseweb.org/resources/articles/528_science_religion_and_evoluti_6_19_2001.asp).

focusing on the distinct creation of humans. Thus, all creationists reject the idea of common descent, the theory that existing plants and animals evolved from simpler organisms. Teaching either form of creationism, or “creation science,” in a public school science class has consistently been found to violate the Establishment Clause.<sup>52</sup>

### 3. *Intelligent Design*

Although creationists’ arguments generally are based on a literal or barely interpretive reading of Genesis and are thus fairly well defined, there is less clarity and even greater variation among the arguments presented by intelligent design proponents.<sup>53</sup> This complicates the evolution-intelligent design debates further and ultimately makes a government purpose inquiry more difficult and fact-specific. Unlike creationists, many of intelligent design’s scientific advocates do not dispute that the Earth is billions of years old or that humans and apes have a common ancestor.<sup>54</sup> In fact, some intelligent design advocates accept the legitimacy of the fossil record as well as corresponding theories in geology and physics.<sup>55</sup> The concept of intelligent design, however, is significantly different from approaches taken by evolutionary theists.

One of two scientific legs on which the concept of intelligent design stands is the idea of “irreducible complexity.” Lehigh University biochemistry professor Michael Behe advances this argument,<sup>56</sup> which in a significant sense rekindles the argument presented in 1802 by William Paley in *Natural Theology*. Paley argued that even in their most basic forms, various organisms (or organs) are so complex that they could not have resulted from evolution alone and exist only because they are the direct products of an intelligent designer, a Creator.<sup>57</sup>

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52. *E.g.* *Edwards v. Aguillard*, 482 U.S. 578 (1987).

53. *See, e.g.*, Michael Powell, Washington Post Staff Writer, Online Discussion: The Evolution Debate, (Oct. 5, 2005), [http://www.washingtonpost.com/wpdyn/content/discussion/2005/10/04/DI200510040217\\_pf.html](http://www.washingtonpost.com/wpdyn/content/discussion/2005/10/04/DI200510040217_pf.html); *see also* Laurie Goodstein, *Witness Defends Broad Definition of Science*, N.Y. TIMES, Oct. 19, 2005, at A15; Mike Argento, *Intelligent Design’s Plea for Help*, YORK DAILY REC., Oct. 25, 2005, at A8.

54. *See* Transcript of Trial Proceedings, *supra* note 1, Day 10 PM, at 118.

55. *See* MILLER, *supra* note 28, at 93, 164; *see also* WILLIAM A. DEMBSKI, INTELLIGENT DESIGN 122–52 (1999).

56. *See generally* BEHE, *supra* note 47.

57. *See* WILLIAM PALEY, NATURAL THEOLOGY 44–45 (Boston, Gould & Lincoln 1857). In *Origin of Species*, Darwin responded to Paley’s claim that the vertebrate eye must have been created in present form because it cannot function without all



In Behe's book *Darwin's Black Box*, one of the foundational works of the intelligent design movement, Behe contends that Darwin's response is no longer adequate because of scientific advances that have occurred since Darwin's death.<sup>58</sup> Thus, the theory of evolution deserves to be revisited. Behe argues that advances in biochemistry during the 1950s enabled scientists to study organisms at the molecular level, leading to an understanding that the cell is an irreducibly complex organism that requires all of its components to function and therefore cannot be created piecemeal through a process of evolution.<sup>59</sup> Because natural selection can favor only working systems, a cell cannot be produced through natural selection if it lacks any of its necessary components, which are not working systems in their own right. Accordingly, the cell's components could not exist independently, let alone be preserved and refined through natural selection on their own.<sup>60</sup> Behe argues not only that an intelligent designer created the first irreducibly complex organism, a bacterium cell, but also that this cell was packed with genes that would not become active for billions of years and had the genetic ability to lead to all subsequent life forms.<sup>61</sup> What evolution advocates perceive to be the random process of evolution, intelligent design proponents contend was actually genetically predestined. Significantly, Behe rejects the idea that

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of its various parts. MILLER, *supra* note 28, at 135 (quoting CHARLES DARWIN, *THE ORIGIN OF SPECIES* 187 (Coth ed., Oxford Univ. Press 1956) (1872)). What Paley assumed was irreducibly complex, Darwin said was in fact not, because earlier versions of that eye would have had evolutionary value if they resulted in any new or better sensory ability, and thus that eye could have been protected and honed through natural selection, evolving from a less complex version of itself. BEHE, *supra* note 47, at 211–16.

Harvard professor and evolutionary biologist Stephen Jay Gould, and American Museum of Natural History curator and evolutionary paleontologist Niles Eldridge, have proposed a more recent alternate evolutionary answer to the question Paley poses. They argue that, rather than occurring slowly over time as Darwin suggested, evolution occurs in bursts when an organism develops a new characteristic through random mutation that is significantly beneficial; then the new characteristic changes quickly, resulting in rapid diversification. This is the theory of punctuated equilibrium. MAYR, *supra* note 31, at 193, 270.

58. BEHE, *supra* note 47, at 10.

59. *Id.*

60. Behe explains that a tangible example of an irreducibly complex system is a mousetrap, which needs all of its components to function (the hammer, spring, catch, holding bar, and platform), and whose components do not have other functional value by themselves. *Id.* at 4–5, 39.

61. In other words, the genetic code for all of the rest of the organisms that have ever and will ever exist was packed into the first bacterium. MILLER, *supra* note 28, at 162 (quoting BEHE, *supra* note 47, at 227–28).

the mechanism of natural selection, with its focus on chance and adaptation, determined the development of species, yet he does not propose a specific, step-by-step mechanism in its place.<sup>62</sup>

The concept of intelligent design may appeal to evolutionary theists, particularly because some of the scientists affiliated with the intelligent design movement accept parts of the theory of evolution. These two approaches, however, sit on either side of the only true dividing line in the evolution-creationism continuum as described by National Center for Science Education director Eugenie Scott.<sup>63</sup> That is, the theory of evolution relies on natural processes to influence change among and within species, although evolution's adherents disagree about the degree to which a divine being was or is involved in determining the laws of nature that dictate those natural processes.<sup>64</sup> Importantly, evolution's adherents agree that the process of evolution is a separate issue from the existence and form of a divine being.<sup>65</sup> In contrast, intelligent design advocates contend that the issues are inseparable: The irreducible complexity of organs or organisms only can be explained by the existence and involvement of an intelligent designer (whom they do not specifically identify). Furthermore, because these issues cannot be disentangled, evolution's silence about divinity is viewed as hostility towards religion.<sup>66</sup>

To the frustration of the scientific community, the irreducible complexity argument posed by Behe and echoed by some of his fellow advocates—that the diversity of species and existence of humans must be attributed to an omniscient, omnipotent designer because of the flaws in the theory of evolution—is a hy-

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62. See Laurie Goodstein, *Witness Defends Broad Definition of Science*, N.Y. TIMES, Oct. 19, 2005, at A15; Transcript of Trial Proceedings, *supra* note 1, Day 11 PM, at 84–87.

63. See Eugenie C. Scott, Nat'l Center for Science Educ., *The Creation/Evolution Continuum* (Dec. 7, 2000), [http://www.ncseweb.org/resources/articles/9213\\_the\\_creationevolution\\_continu\\_12\\_7\\_2000.asp](http://www.ncseweb.org/resources/articles/9213_the_creationevolution_continu_12_7_2000.asp). Brown University biology professor Kenneth Miller and Georgetown University theology professor emeritus John Haught have testified that they understand the concept of intelligent design to be, in Miller's words, "a classic form of creationism known as special creationism." Transcript of Trial Proceedings, *supra* note 1, Day 1 PM, at 43–45; see also *id.*, Day 5 PM, at 10. Behe rejects this characterization. *Id.*, Day 10 AM, at 87.

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

65. See *id.*

66. Lest the reader wonder, the Author considers herself an evolutionary theist.

pothesis that cannot be tested, unlike the theory of evolution which has been tested continually for the past 150 years.<sup>67</sup> There is little debate about the unpopularity of intelligent design in the scientific community: The number of scientists who advance intelligent design is small,<sup>68</sup> the overwhelming majority of scientists reject the concept of intelligent design,<sup>69</sup> and the science supporting intelligent design continues to be almost entirely absent from peer-reviewed journals.<sup>70</sup> While intelligent design proponents view their exclusion from scientific journals as reflecting a bias against their ideas, many scientists suggest

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67. Professor Steve Fuller from the University of Warwick, England testified that intelligent design is a concept "too young" to have generated sufficient methods of being tested. Fuller was an expert witness for the school district. Transcript of Trial Proceedings, *supra* note 1, Day 15 AM, at 86; see also Lauri Lebo & Michelle Starr, *Witness: Intelligent Design Needs Boost*, YORK DAILY REC., Oct. 25, 2005, at A1; MILLER, *supra* note 28, at 126. In 2002, the American Association for the Advancement of Science (AAAS) concluded that intelligent design should not be taught in schools because the intelligent design movement had "not proposed a scientific means of testing its claims." Media Matters for America, Religious Conservatives Tout "Intelligent Design" as a "Secular," "Scientific" Alternative to Evolution (Dec. 21, 2004), [www.mediamatters.org/items/200412210002](http://www.mediamatters.org/items/200412210002). Given the lack of a significant intervening publication record, it seems likely the AAAS would reach the same conclusion today.

Behe, however, argues that it is evolution that is not easily falsifiable, and that intelligent design is, by comparison, significantly more testable. Transcript of Trial Proceedings, *supra* note 1, Day 10 AM, at 86.

68. For a listing of scholars involved in the intelligent design movement, a chronicle of the half-dozen books published in this area, and a summary of academic and public debate generated by the intelligent design movement, see Francis J. Beckwith, *Science and Religion*, *supra* note 47, at 470-77 & nn.50-112; Francis J. Beckwith, *Public Education, Religious Establishment, and the Challenge of Intelligent Design*, 17 NOTRE DAME J.L. ETHICS & PUB. POL'Y 461, 462-65 & nn.4-23 (2003). See also Jeffrey F. Addicott, *Storm Clouds on the Horizon of Darwinism: Teaching the Anthropic Principle and Intelligent Design in the Public Schools*, 63 OHIO ST. L.J. 1507, 1595 (2002); Wexler, *supra* note 45, at 804 & n.233.

69. See Wexler, *supra* note 45, at 236.

70. Behe notes that he published a peer-reviewed intelligent design article in 2004 in *Protein Science*. See Michael J. Behe & David W. Snoke, *Simulating Evolution by Gene Duplication of Protein Features that Requires Multiple Amino Acid Residues*, 13 PROTEIN SCI. 2651 (2004); see also Laurie Goodstein, *Expert Witness Sees Evidence in Nature for Intelligent Design*, N.Y. TIMES, Oct. 18, 2005, at A14. But see Coyne, *supra* note 3, at 31 (writing after the publication of Behe's article and noting the absence of intelligent design articles from scientific peer-reviewed journals); Wexler, *supra* note 45, at 807 n.237 (collecting sources supporting this conclusion). Steven C. Meyer's paper *The Origin of Biological Information and the Higher Taxonomic Categories* is the only intelligent design argument published in a peer-reviewed scientific journal, but the journal later issued a statement that the article did not receive proper peer review and failed to satisfy the journal's scientific standards. See Coyne, *supra* note 3, at 31.

that to the extent intelligent design papers are even submitted, they are rejected because they are bad science.<sup>71</sup>

As noted, Behe's irreducible complexity argument is one of the two primary scientific bases supporting the intelligent design movement. The other argument, an odds-based approach, has been developed by Southern Baptist Theological Seminary professor and mathematician William Dembski. This approach begins by searching for a "sufficiently complex" pattern of events or system in nature and then seeks to rule out scientific necessity or chance as the cause of the complexity: in other words, establishing the odds of the likelihood of the system coming into existence randomly as prohibitively low.<sup>72</sup> This approach, too, makes the scientific aspects of the concept inseparable from the existence of an intelligent designer.

Aside from Behe, Dembski, and a few others,<sup>73</sup> most of intelligent design's visible proponents are not scientists or even academics. Missouri attorney John Calvert is the co-founder of the Intelligent Design Network, an organization dedicated to advocating intelligent design instruction in schools.<sup>74</sup> Calvert has given legal advice to school districts and state boards of education in more than ten states over the past six years; many of his opinion letters about state science standards and science curricula are readily available on the Internet.<sup>75</sup>

Although Calvert frequently cites to Behe's and Dembski's work, other advocates of intelligent design present a view of intelligent design more overtly tied to religion. In an interview in December 2004, Albert Mohler, president of the Southern Baptist Theological Seminary, stated:

I believe in creation, in a full biblical doctrine of creation. I'm a Christian theologian . . . . But the theory of intelligent design comes down to this. In the entire complexity of the universe as we know it, from something as complex as the

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71. Wexler, *supra* note 45, at 805–07.

72. See Calvert, *supra* note 15, at 10–14.

73. Most of the research supporting intelligent design is connected with the Seattle-based nonprofit think tank the Discovery Institute. The organization's web site is <http://www.discovery.org>.

74. The organization's web site is <http://www.intelligentdesignnetwork.org>.

75. Calvert has advised school boards or state boards of education in Kansas (in 1999 and in 2005), Missouri, Ohio, West Virginia, North Carolina, Georgia, New Mexico, Nebraska, Iowa, and Minnesota. Letter from John H. Calvert to Darby, Montana School Board (Feb. 19, 2004), at 1–2, *available at* <http://www.intelligentdesignnetwork.org/DarbyBoardOpinion.pdf>.

human eye to the glory of the sky and all the cosmos, all the planets and their proportion, there is more information necessary there than the theory of evolution can explain.<sup>76</sup>

Similarly, University of California law professor Phillip Johnson has explained his role as the primary legal architect of the intelligent design movement: "I wanted to redefine what is at issue in the creation-evolution controversy so that Christians, and other believers in God, could find common ground in the most fundamental issue—the reality of God as our true creator."<sup>77</sup> Johnson has commented elsewhere that "[w]ith the success of intelligent design . . . we're going to understand that, regardless of the details, the Christians have been right all along—at least on some major elements of the story, like divine creation."<sup>78</sup> Terry Fox, pastor of a Wichita, Kansas Southern Baptist Church attended by 6,000 people each week, characterizes intelligent design as a temporary compromise for creationists: "The strategy this time is not to go for the whole enchilada. We're trying to be a little more subtle."<sup>79</sup> Even Dembski, one of the movement's two key scientists, has characterized intelligent design as "the Logos of John's Gospel restated in the idiom of information theory."<sup>80</sup> And, when the early intelligent design primer *Of Pandas and People* was in its initial stages of development, it was replete with references to "creationism" that were ultimately replaced by "intelligent design" before the book's publication.<sup>81</sup>

In keeping with their denial that intelligent design is creationism in disguise, intelligent design advocates consistently frame the debate as a contest between two scientific theories:

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76. Media Matters for America, *supra* note 67.

77. PHILLIP E. JOHNSON, *DEFEATING DARWINISM BY OPENING MINDS* 92 (1997).

78. Mark Hartwig, *The Meaning of Intelligent Design*, BOUNDLESS WEBZINE, July 18, 2001, <http://www.boundless.org/2000/features/a0000455.html>. See also Phillip E. Johnson, *Starting a Conversation About Evolution*, Access Research Network, (Aug. 31, 1996), <http://www.arn.org/docs/johnson/ratzsch.htm>.

79. Peter Slevin, *Battle on Teaching Evolution Sharpens*, WASH. POST, Mar. 14, 2005, at A1.

80. Barbara Forrest, *Intelligent Design?*, 111 NAT. HIST. 73, 80 (Apr. 2002). See also William A. Dembski, *Introduction: Mere Creation*, in *MERE CREATION* 13, 28–29 (1998).

81. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 721–22 (M.D. Pa. 2005); see also *Transcript of Trial Proceedings*, *supra* note 1, Day 6 AM, at 108, 117–26.

evolution and intelligent design.<sup>82</sup> Despite critics' characterization of this dualism as, for example, "not unlike recommending that mustard plasters and bleeding be taken as seriously as antibiotics and heart-bypass surgery,"<sup>83</sup> this approach of positing intelligent design as the single alternative to evolution appears to have had some success. After Ohio adopted new state science standards in 2002 that called for a critical teaching of evolution, a member of the Ohio Board of Education reported receiving calls from school districts saying they were "allowing students to openly debate intelligent design" and that students were researching intelligent design.<sup>84</sup> Similarly, a federal district court wrote in January 2005 that "[b]y denigrating evolution, the School Board appears to be endorsing the well-known prevailing alternative theory, creationism or variations thereof, even though the [statement] does not specifically reference any alternative theories."<sup>85</sup>

The idea that an intelligent designer influenced the creation of human beings necessarily raises the question of the identity of the designer or designers. It is in this respect that intelligent design seems to its critics most like creationism in sheep's clothing, particularly because many of intelligent design's strongest proponents are fundamentalist Christians. Much to the chagrin of many intelligent design proponents, Behe, Calvert, and others take great pains to explain that the intelligent designer who created the first cell is not necessarily the Judeo-Christian God or any other God, but in fact could be, as the dis-

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82. In 2001, Calvert referred to intelligent design as "one of the only two possible answers," claiming that "[e]vidence contradicting the Darwinian theory is, by default, evidence that supports the Design Hypothesis . . . because design detection requires the elimination of chance and necessity as the explanatory cause." Calvert, *supra* note 15, at 12, 27. In 2004, Calvert correspondingly advised a school board that "any discussion of evolution necessarily involves a usually unstated premise about intelligent design. The core claim of modern evolutionary theory is that life is not designed." Calvert, *supra* note 75, at 2. See also Evan Ratliff, *The Crusade Against Evolution*, WIRED, Oct. 2004, available at <http://www.wired.com/wired/archive/12.10/evolution.html>. But cf. Beckwith, *supra* note 47, at 489. The plaintiffs in the Dover, Pennsylvania case refer to this as a "contrived dualism" reminiscent of the "evolution science"- "creation science" pairing set forth in *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982). Brief in Support of Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 29, *Kitzmiller*, No. 4:04-CV-02688 (M.D. Pa. Nov. 23, 2005).

83. Chester E. Finn, Jr., *Foreword* to GROSS, *supra* note 46, at 9.

84. Terry Phillips, State Issues Producer, Focus on the Family—Citizen Link, Ohio Paves Way in Evolution Debate, (Dec. 13, 2002), <http://www.sciohio.org/sbe1015.htm>.

85. *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1309 (N.D. Ga. 2005).

strict court in the Dover, Pennsylvania trial skeptically noted, “a space alien or a time-traveling cell biologist.”<sup>86</sup> This concession is necessary given proponents’ claim that intelligent design is not advancing religious beliefs. Despite this admission, evolution’s supporters—both people of faith and not—vigorously criticize intelligent design as a religion-driven concept.<sup>87</sup> The district court in the Dover trial reached essentially the same conclusion in December 2005:

After this searching and careful review of [intelligent design] as espoused by its proponents, as elaborated upon in submissions to the Court, and as scrutinized over a six week trial, we find that [intelligent design] is not science and cannot be adjudged a valid, accepted scientific theory as it has failed to publish in peer-reviewed journals, engage in research and testing, and gain acceptance in the scientific community. [Intelligent design], as noted, is grounded in theology, not science.<sup>88</sup>

#### B. *The Cultural Context, at Home and Abroad*

The evolution-intelligent design battles evoke strongly personal reactions from participants and observers alike because the central question often perceived to be at issue is the origin of the human species. Although Americans are split between a belief in evolution or in creationism, citizens of other Western, industrialized countries do not present the same division, nor do they have the adamant exclusion of creationism from school curricula required by the First Amendment’s Establishment Clause.<sup>89</sup>

For at least the past quarter-century, Americans have been fairly evenly divided between belief in the theory of evolution and in the concept of creationism. A September 2005 Gallup Poll confirmed that the division has remained roughly constant: Thirty-one percent of Americans believe humans evolved

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86. See *Kitzmiller*, 400 F. Supp. 2d at 718; see also Calvert, *supra* note 15, at 6 n.9.

87. The words differ, but the sentiment is consistent: Intelligent design is an “invent[ion]” of creationism, Mackenzie, *supra* note 10, at 8, “creationism in a lab coat,” Ratliff, *supra* note 82, at 158, “the most highly evolved form of creationism to date,” *id.* at 202 or “a thinly veiled effort to dress up creationism as science . . .,” Media Matters for America, *supra* note 67.

88. *Kitzmiller*, 400 F. Supp. 2d at 745.

89. For a discussion of how classification as an Establishment Clause issue ratchets up a controversy, see generally Stuart Buck, *The Nineteenth-Century Understanding of the Establishment Clause*, 6 TEX. REV. L. & POL. 399, 427–28 (2002).

from other life forms with divine assistance, twelve percent believe humans evolved from other life forms without divine assistance, and fifty-three percent of Americans believe humans were created directly — “as is” — by a divine being at some point within the past 10,000 years.<sup>90</sup> Thus, in 2005 the split between evolution and creationism was fifty-three to forty-three in favor of creationism, a shift from 2004, when the split was fifty-one to forty-five in favor of evolution, and 2001, when the split was forty-seven to forty-five, again in favor of evolution.<sup>91</sup> As the margin of error is three percent and these responses generally are consistent with Gallup Poll results tracked since 1982,<sup>92</sup> it is fair to conclude that Americans’ beliefs about evolution and creationism have remained more or less stable across varying

90. CNN/USA Today/Gallup Poll, Sept. 8–11, 2005, available at <http://www.pollingreport.com/science.htm>.

91. National Center for Science Education, Public View of Creationism and Evolution Unchanged, Says Gallup (Nov. 19, 2004), [http://www.ncseweb.org/resources/news/2004/US/724\\_public\\_view\\_of\\_creationism\\_and\\_11\\_19\\_2004.asp](http://www.ncseweb.org/resources/news/2004/US/724_public_view_of_creationism_and_11_19_2004.asp); Deborah Jordan Brooks, Gallup News Service, Poll Release: Substantial Numbers of Americans Continue to Doubt Evolution as Explanation of Origin for Humans (Mar. 5, 2001), <http://www.unl.edu/rhames/courses/current/creation/evol-poll.htm>. The participants were asked, “Which of the following statements comes closest to your views on the origin and development of human beings: 1) Human beings have developed over millions of years from less advanced forms of life, but God guided this process, 2) Human beings have developed over millions of years from less advanced forms of life, but God had *no part* in this process, 3) God created human beings pretty much in their present form at one time within the last 10,000 years or so?” Options one through three were rotated to eliminate rank bias.

A 2001 National Science Foundation survey is one of the few to claim that a majority (fifty-three percent of Americans) accepts the theory of evolution. Cornelia Dean, *Evolution Takes a Back Seat in U.S. Classes*, N.Y. TIMES, Feb. 1, 2005, at F1, F6. About eighty percent of people in industrialized nations accept the theory of evolution, as do approximately seventy-five percent of people in heavily-Catholic Poland and ninety-six percent of people in Japan. *Id.*

92. Brooks, *supra* note 91; CNN/USA Today/Gallup Poll, *supra* note 90. Responses to the Gallup Poll from 1982 through 2001 are as follows:

	<b>Humans developed, with God guiding</b>	<b>Humans developed, but God had no part in process</b>	<b>God created humans in present form</b>	<b>Other (volunteered)/no opinion</b>
<b>Sept. 2005</b>	31%	12%	53%	4%
<b>Nov. 2004</b>	38	13	45	4
<b>Feb. 2001</b>	37	12	45	6
<b>Aug. 1999</b>	40	9	47	4
<b>Nov. 1997</b>	39	10	44	7
<b>June 1993</b>	35	11	47	7
<b>1982</b>	38	9	44	9



Presidential administrations, economic conditions, and phases of domestic and foreign policy. Additionally, because nearly half of the adult population in the 2005 and 2004 surveys was too young to have been represented in the 1982 survey, the general consistency of the data also suggests that the input from schools and places of worship has been, on average, no more or less convincing to young and middle-aged Americans over the past twenty-five years than it was to their parents' generations. With Americans evenly divided between evolution and creationism,<sup>93</sup> it is not surprising that science teachers often shy away from teaching the theory of evolution, even absent any official state or local restrictions.<sup>94</sup>

Creationism and intelligent design advocates are more entrenched and effective domestically than abroad.<sup>95</sup> In England, where some state schools regularly use instructional time for religious education and observance, the national curriculum

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93. The Gallup data may slightly overestimate evolution's support, according to other polls. A November 2004 CBS News poll found that only forty percent of Americans self-identify as evolutionists, a combination of twenty-seven percent stating evolution has been divinely guided and thirteen percent stating evolution was unguided. See POLL: CREATIONISM TRUMPS EVOLUTION, CBSNews.com, Nov. 22, 2004, <http://www.cbsnews.com/stories/2004/11/22/opinion/polls/main657083.shtml>. The July 2005 Harris Poll also reached similar conclusions, finding only thirty-eight percent of Americans think humans evolved from earlier species, although forty-nine percent of Americans agree generally that plants and animals evolved from earlier species. See HARRIS INTERACTIVE, NEARLY TWO-THIRDS OF U.S. ADULTS BELIEVE HUMAN BEINGS WERE CREATED BY GOD (2005), [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=581](http://www.harrisinteractive.com/harris_poll/index.asp?PID=581).

94. A February 2005 *Education Week* article summarized these recent studies:

A survey of teachers in Oklahoma, conducted in 1999, found that about 25 percent of public school life-science teachers placed at least moderate emphasis on creationism, or the biblical belief that God created the universe, in their classes. Forty-eight percent believed strong scientific evidence exists for creationism, the study found . . . [I]n Minnesota, a survey of first-year biology students at the University of Minnesota-Twin Cities reported that only 38 percent said their high school biology courses had emphasized evolution. Twenty percent of those students said their courses had emphasized creationism, according to that 2004 study. Similar polls dating back to the 1980s, from states such as Illinois, Pennsylvania, and South Dakota, closely mirror these results.

Sean Cavanagh, *Teachers Torn over Religion*, *Evolution*, EDUC. WEEK, Feb. 2, 2005, at 1, 18.

95. See Nicholas Wade, *Long-Ago Rivals Are Dual Impresarios of Darwin's Oeuvre*, N.Y. TIMES, Oct. 25, 2005, at F2. Whether this gap will remain so wide is unclear. One indication of intelligent design's momentum is Eastern Europe's first conference on the topic, which was held in October 2005 and drew more than 700 attendees. Ondrej Hejma, "Intelligent Design" Supporters Gather, LANCASTER-ONLINE.COM, Oct. 24, 2005, [http://ap.lancasteronline.com/6/czech\\_intelligent\\_design](http://ap.lancasteronline.com/6/czech_intelligent_design).

calls for a robust teaching of evolution.<sup>96</sup> Select English schools teach creationism in addition to evolution, though this practice appears tied to the requests of private benefactors.<sup>97</sup> The national curricula of Ireland, Northern Ireland, France, and Canada similarly focus on evolution and leave little room for creationism or intelligent design, even in publicly funded, religiously affiliated schools.<sup>98</sup> The Catholic Church in France strongly supports teaching evolution, emphasizing the distinction that “[e]volution is a scientific theory; creation is a meaning . . . .”<sup>99</sup> Similarly, Serbian Orthodox bishops spoke out in opposition after the state briefly banned the teaching of evolution in September 2004.<sup>100</sup> Australia is the outlier in the Western industrialized world, permitting its public schools to teach evolution, creationism, or both.<sup>101</sup> Two non-Western countries that do not teach evolution are Turkey, which instructs students in creationism in elementary and secondary public schools and where an intelligent design movement is beginning to take root, and Pakistan, where evolution is no longer taught in universities.<sup>102</sup> This, then, is the background for a debate that is starting to see the inside of federal courtrooms, and likely will do so with increasing frequency.

### III. THE ESTABLISHMENT QUAGMIRE

Often in tension and sometimes serving as a direct check upon one another, the First Amendment’s two religion clauses read, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>103</sup> In 1947, the Court held in *Everson v. Board of Education* that the Establishment Clause applied to the States through the Fourteenth Amendment.<sup>104</sup> Since that time, the Court’s religion cases have

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96. It is the exception rather than the rule for even a religiously affiliated school in England to teach creationism in a class other than religion. See Michelle Galley, *Evolution Theory Prevails in Most Western Curricula*, EDUC. WEEK, Jan. 28, 2004, at 8.

97. MacKenzie, *supra* note 10, at 9. For example, the school financed by Peter Vardey, Christian fundamentalist and millionaire car dealer, includes instruction in creationism. *Id.*

98. Galley, *supra* note 96, at 8.

99. *Id.* at 8.

100. Mackenzie, *supra* note 10, at 9.

101. Galley, *supra* note 96, at 8.

102. Mackenzie, *supra* note 10.

103. U.S. CONST. amend. I.

104. 330 U.S. 1 (1947).

come to constitute some of its most complex and unpredictable jurisprudence. As the Court euphemistically noted in *McCreary County v. ACLU*, “Establishment Clause doctrine lacks . . . categorical absolutes.”<sup>105</sup>

Over the past twenty years, because of the endorsement test Justice O’Connor introduced in *Lynch v. Donnelly*,<sup>106</sup> evaluating the perspective of the “objective observer” or “reasonable observer” gradually has become part of the analysis of a government action’s effect. Although Justice O’Connor linked the purpose and effect prongs of the three-prong *Lemon v. Kurtzman*<sup>107</sup> test under the larger question of endorsement, neither her earlier concurrences nor opinions by other members of the Court suggest that the government’s purpose should itself be evaluated only from the perspective of a reasonable observer. Thus, *McCreary County* is notable because it reinforces the primacy of a government purpose analysis, while also declaring the objective observer to be the sole arbiter of government purpose. An analytical distinction between the purpose and effect prongs as conceived in Justice O’Connor’s endorsement test may have been delicate—indeed, it remains unclear whether the endorsement test is a replacement for the *Lemon* test or merely a new iteration of the effects prong—but until *McCreary County*, the Court at least persisted in drawing a clear technical distinction between the purpose and effect analyses when it employed them. As *McCreary County* is the Court’s most recent pronouncement about government purpose, it will be relevant in pending and forthcoming Establishment Clause cases when the speech at issue is not purely passive, such as the teaching of the concept of intelligent design in public schools.

#### A. *The Life of Lemon*

In 1971, the Court set forth its well known three-part Establishment Clause test in *Lemon v. Kurtzman*.<sup>108</sup> Even today, it is with reference to this gatekeeping test that nearly all Establishment Clause analyses by lower courts begin.<sup>109</sup> *Lemon* held

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105. 125 S. Ct. 2722, 2733 n.10 (2005).

106. 465 U.S. 668 (1984).

107. 403 U.S. 602, 612–13 (1971).

108. *Id.*

109. Again, the predominance of the *Lemon* purpose and effect analysis likely has more to do with lower courts’ understandable confusion about the proper standard (and thus they rely upon the last coherent moments of Establishment Clause jurisprudence) than with the presence of a definitive test. *See, e.g., Peck v.*

that to survive an Establishment Clause challenge, the government action in question must (1) have a secular legislative purpose; (2) result in a primary effect that is neutral towards religion, neither favoring nor inhibiting it; and (3) not create an excessive entanglement between government and religion.<sup>110</sup> The Court and commentators alike acknowledge that while *Lemon* no longer has the full support of a majority of the Court, *Lemon's* ideological successor has yet to be anointed.<sup>111</sup> Although frustrating to those who mine these cases in search of guiding precedent, the Court's almost haphazard use of or entire disregard for the *Lemon* considerations is now standard.

As the Court noted in *McCreary County*, the government purpose prong of *Lemon* has rarely been invoked to invalidate a government statute or policy. More often than not, the Court has accepted the government's stated secular purpose as constitutionally sufficient.<sup>112</sup> Some scholars even have speculated that the Court might abandon the secular purpose test altogether.<sup>113</sup> Such speculation was not unwarranted before *McCreary County*, particularly because only five of the Supreme Court's Establishment Clause cases have held a statute or policy to be constitutionally infirm because of an impermissible government purpose.

In *Epperson v. Arkansas* in 1968, the first case in which the Court found a statute to be unconstitutional because of its impermissible purpose, the Court struck down a statute prohibit-

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Baldwinsville Cent. Sch. Dist., No. 04-4950-CV, 2005 WL 2649472, at \*14 (2d Cir. Oct. 18, 2005); *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003), *aff'g* *Glassroth v. Moore*, 229 F. Supp. 2d 1290 (M.D. Ala. 2002); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 405-06 (2d Cir. 2001). In some cases, such as *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005), the parties concede that the *Lemon* test is controlling. *Kitzmiller*, Memorandum and Order (M.D. Pa. Sept. 13, 2005) (denying Defendant Dover Area School District's motion for summary judgment).

The Seventh Circuit has interpreted *McCreary County* as "reaffirming" the *Lemon* test. *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005). Although *McCreary County* does not replace the *Lemon* test, to say that it reaffirms that test overstates the holding of *McCreary County* and the consistency of Establishment Clause doctrine.

110. 403 U.S. at 612-13.

111. See, e.g., Addicott, *supra* note 68, at 1518; Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 328; Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 499-503 (2002).

112. See Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 97-98 (2002).

113. See *id.* at 98.

ing the teaching of evolution.<sup>114</sup> Twelve years later, in *Stone v. Graham*, the Court rejected a school district's efforts to post a copy of the Ten Commandments in public school classrooms, despite the project's being privately financed and the Ten Commandments' bearing a small disclaimer about the secular value of the text.<sup>115</sup> In 1985, the Court in *Wallace v. Jaffree* declared unconstitutional a state statute "authorizing a one-minute period of silence in all public schools for meditation or voluntary prayer," which replaced a state statute permitting a mere moment of silence with the use of that time unspecified.<sup>116</sup> Then, in *Edwards v. Aguillard*, decided in 1987, the Court rejected a mandatory "balanced treatment" approach to teaching evolution and "creation science."<sup>117</sup> Eighteen years passed before the Court again struck down government action because of an illegitimate purpose in its 2005 decision in *McCreary County*.

Particularly since *Lemon*, Establishment Clause doctrine has become increasingly fractured, assuming unpredictable and ever-changing forms.

B. *The Objective, Reasonable Observer: At First an Evaluator of Effect and Endorsement*

The objective, or reasonable, observer first appeared in an Establishment Clause case in Justice O'Connor's concurrence in *Lynch v. Donnelly* in 1984<sup>118</sup> and gradually became a part of the Court's Establishment Clause doctrine as a means for evaluating the constitutionality of a government action's effect. The Court first adopted the general idea of considering whether government action created an apparent endorsement of religion, and later specifically adopted the reasonable observer analysis.

1. *Emerging in Justice O'Connor's Concurrences*

In *Lynch*, the Court held 6-3 that a city did not violate the Establishment Clause when it included a crèche in its annual outdoor Christmas display, which also featured reindeer, images

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114. 393 U.S. 97 (1968).

115. 449 U.S. 39 (1980) (per curiam).

116. 472 U.S. 38 (1985).

117. 482 U.S. 578 (1987). The statute stipulated that if evolution was taught, "Creation-Science" must be taught as well. There was no statutory or other requirement, however, to teach either concept.

118. 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

of Santa Claus, and strings of small colored lights.<sup>119</sup> The Court concluded that the crèche was constitutionally permissible as part of a public holiday celebration, despite its religious nature. In her concurrence, Justice O'Connor introduced a "clarification" to *Lemon* that since has become known as the endorsement test.<sup>120</sup> Specifically, Justice O'Connor proposed that a court consider both "the intention of the speaker"—the subjective government purpose—and "the 'objective' meaning of the statement in the community"—its effect.<sup>121</sup> If the government's actual purpose was improper, the statute or policy could offend the Constitution notwithstanding its effect; likewise, an effect of appearing to endorse religion could invalidate a statute or policy regardless of a constitutionally proper intent.

In this formulation, a court would view the purpose of the government as speaker from its own judicial perspective and shift its focus to the perspective of the reasonable observer when evaluating the perceived effect. As Professor Timothy Zick describes the initial endorsement test, "there [were] two symbolic meanings in play—the meaning to a potential insider . . .," the government's subjective purpose, "and the meaning to a potential outsider . . .," the perceived effect of the statement in the community.<sup>122</sup> While the objective observer eventually would become the heart of the endorsement test, at this point the concept remained shadowy and ill defined.<sup>123</sup>

One year later, a slightly more articulated objective observer appeared in Justice O'Connor's concurrence in *Wallace v. Jaffree*. The Court's decision was again 6-3,<sup>124</sup> this time concluding that an Alabama statute permitting a moment of silence or voluntary prayer in public schools violated the Establishment Clause because of an impermissible government purpose.<sup>125</sup> The Court's analysis of government purpose was demanding, reviewing the two predecessors to the statute at issue (one per-

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119. *Id.* at 671–72.

120. Although Justice O'Connor consistently situated her endorsement test as the newer version of the *Lemon* test, scholars split on whether the test is merely an interpretation of *Lemon* or an alternative to it altogether. See, e.g., Greenawalt, *Quo Vadis*, *supra* note 111, at 360.

121. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

122. Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261, 2370 (2004).

123. See *Lynch*, 465 U.S. at 690–94 (O'Connor, J., concurring).

124. Five justices formed the majority opinion and Justice O'Connor concurred in the judgment.

125. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

mitting a moment of silence and the other authorizing teacher-led prayer) and concluding that the religious purpose that motivated the first two statutes also motivated the third.<sup>126</sup>

Justice O'Connor's concurring analysis of government purpose in *Wallace* expressed caution and deference to the government's stated purpose, finding an impermissible religious motivation only because "it is beyond purview that endorsement of religion or a religious belief 'was and is the law's reason for existence.'"<sup>127</sup> Then turning to the separate question of the statute's effect, Justice O'Connor contended that the relevant question was "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement" of religious activity.<sup>128</sup> From her perspective, the Alabama statute failed the endorsement test, too, because the religious purpose was transparent and would be clear to an objective observer.<sup>129</sup> In this concurrence, the effects portion of Justice O'Connor's endorsement test began its slow collapse into the government purpose portion of the same test. Because the objective observer in *Wallace* is aware of the same facts regarding legislative intent as is the Court (and will become even more so over time), the objective observer and the Court must reach the same conclusion about government purpose.<sup>130</sup> If not, it is either because the Court lacks objectivity in its analysis,<sup>131</sup> or because it has failed to endow an objective observer—a construct of its own creation—with sufficient knowledge so that it would reach the same conclusion as the Court. Neither option is likely.

## 2. *The Early Stages of Adoption*

In 1989, the Court split 5-4 in an opinion suggestive of the *McCreary County-Van Orden* pairing, reaching seemingly inconsistent decisions arising from a set of similar circumstances. In *County of Allegheny v. ACLU*, the Court held that a county's display of a crèche inside the courthouse constituted an im-

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126. *Id.* at 56–60.

127. *Id.* at 75, (O'Connor, J., concurring) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 108 (1968)).

128. *Id.* at 76.

129. *Id.* at 78.

130. Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266, 293–94 (1987).

131. *Id.*

permissible establishment of religion, while the county and city's outdoor display of a menorah next to a Christmas tree did not.<sup>132</sup> From the perspective of some scholars and Justices, this shift in the Court's theoretical framework marked the point where Establishment Clause doctrine went from bad to worse.<sup>133</sup> In *County of Allegheny*, the plurality first set forth the *Lemon* test and commented that its recent focus had been on the first two prongs of *Lemon*: government purpose and effect, or endorsement.<sup>134</sup> Then, the Court favorably cited part of Justice O'Connor's endorsement test as proposed in *Lynch, Wallace*, and other cases, and neatly shoehorned its precedent into the effects-endorsement concept. In the Court's words, "[w]hether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same."<sup>135</sup>

Not all members of the majority joined Justice Blackmun's entire opinion, but a majority did adopt the concept of evaluating the effect of a government action by considering (apparently from a judicial perspective) whether the government action created an apparent endorsement of religion. The portion of Justice Blackmun's opinion applying the perspective of the reasonable observer did not garner a majority, though as Justice Stevens noted a few years later, five Justices subscribed to the concept of a reasonable person evaluating whether the policy created an endorsement of religion, if not *the* reasonable person.<sup>136</sup> In particular, Justice Brennan set forth contradictory factual conclusions, both of which could be reached by reasonable people, and rejected the idea that the reasonable person could only reach one conclusion: namely, the conclusion set forth by the plurality.<sup>137</sup>

The reasonable observer gained additional definition in Justice O'Connor's concurrence in *County of Allegheny*, which ex-

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132. 492 U.S. 573, 621 (1989).

133. See, e.g., *id.* at 669 (Kennedy, J., concurring in part and dissenting in part) (the "test is flawed in its fundamentals and unworkable in practice"); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1293 (2d ed. 1988); Smith, *supra* note 132, at 293-94; Mark Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 711-12 (1986).

134. 492 U.S. at 592-93.

135. *Id.* at 593.

136. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 799 n.4 (1995) (Stevens, J., dissenting) (citing *County of Allegheny*, 492 U.S. at 620 (Blackmun, J., writing for the plurality); *id.* at 635-36 (O'Connor, J., concurring); and *id.* at 642-43 (Brennan, J., concurring)).

137. *County of Allegheny*, 492 U.S. at 642-43 (Brennan, J., concurring).



panded the reasonable observer's base of knowledge further still. In particular, Justice O'Connor explained that both the "history and ubiquity" of a publicly displayed religious symbol matter to a reasonable observer, because these factors compose part of the context a reasonable observer would consider when determining whether there is a perceived endorsement.<sup>138</sup> In this manner, *County of Allegheny* set the stage for the Court's extensive examination of historical context via the reasonable observer in *Santa Fe*<sup>139</sup> and in *McCreary County*. Justice O'Connor's concurrence in *County of Allegheny* focused almost exclusively on whether the displays had the impermissible effect of creating an apparent endorsement of religion; the government's apparent purpose was one part of this consideration, but Justice O'Connor took the stated purpose at face value and did not probe it further.

In 1995, the Court juggled the First Amendment's two religion clauses and held 7-2 in *Capitol Square Review & Advisory Board v. Pinette* that Establishment Clause concerns did not permit the municipal board to deny the Ku Klux Klan's request to temporarily display a cross in the ten-acre plaza surrounding the Ohio state capitol building.<sup>140</sup> While explicitly stating it was not applying *the* endorsement test, the Court held that because the cross was private speech not attributable to the government, there could be no perceived government endorsement of a religious message.<sup>141</sup> Because the Board had permitted rallies and other unattended displays in the same area by various community groups, including religious groups, the Court determined that government neutrality towards religion mandated granting the Ku Klux Klan's request.<sup>142</sup> A majority endorsed the reasoning just described, but the portion of Justice Scalia's opinion rejecting the endorsement test was joined by only three other Justices.

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138. *Id.* at 631 (O'Connor, J., concurring) ("The question under the endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices, in light of the fact that they serve a secular purpose rather than a sectarian one and have largely lost their religious significance over time.").

139. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

140. 515 U.S. 753. Although the holding was 7-2, only four Justices, including its author, signed on to the entire opinion. *See id.* at 757.

141. *Id.* at 763-64, 770.

142. *Id.* at 757-58, 760-61.

Justice O'Connor concurred in part in *Capitol Square*, writing separately to defend the endorsement test and acknowledge the distinct analyses of government purpose and effect.<sup>143</sup> Notably, Justice O'Connor's concurrence gained the support of Justices Souter and Breyer for the objective (now "reasonable, informed") observer who evaluates whether the government action has the effect of appearing to endorse religion.<sup>144</sup> Although Justice O'Connor and Justice Stevens both employed the analytical framework of the reasonable observer, they reached different conclusions about the ultimate question of whether a reasonable observer would perceive the Klan's cross as an endorsement of religion. Justice O'Connor acknowledged that the reasonable observer "is presumed to possess a certain level of information that all citizens might not share."<sup>145</sup> Justice Stevens responded that because this reasonable observer was presumed to know the Court's holding in *Capitol Square* before it was issued, Justice O'Connor's reasonable person would need to be a "well-schooled jurist, a being finer than the tort-law model."<sup>146</sup> Justice O'Connor admitted her reasonable observer has extensive knowledge of the history and context of the state action, but denied vesting the reasonable observer with sophisticated knowledge of First Amendment law.<sup>147</sup> Justice O'Connor also criticized Justice Stevens's misapplication of the reasonable observer as a mere "casual passerby."<sup>148</sup>

### 3. *The Objective, Reasonable Observer Accepted*

In 2000, a majority of the Court agreed that when it considers whether government action has created an endorsement of religion it will evaluate that question from the perspective of the reasonable observer. In *Santa Fe Independent School District v. Doe*,<sup>149</sup> the Court held 6-3 that a school board policy permitting student-led, student-initiated prayer, delivered over the public address system at a high school football game, constituted an impermissible establishment of religion. Focusing on whether the prayer would result in an actual or perceived endorsement

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143. *Id.* at 773-74 (O'Connor, J., concurring).

144. *Id.* at 773.

145. *Id.* at 780.

146. *Id.* at 800 n.5 (Stevens, J., dissenting).

147. *Id.* at 778-81 (O'Connor, J., concurring).

148. *Id.* at 778-79.

149. 530 U.S. 290 (2000).

of religion (in other words, paying particular attention to the effect), the Court examined the perspective of an objective Santa Fe High School student regarding not only the “text and history” of the relevant school board policy, but also the delivery of a pre-game prayer.<sup>150</sup> In this context, the Court approvingly quoted Justice O’Connor’s endorsement test as set forth in her *Wallace* concurrence, explicitly accepting the reasonable observer as the appropriate arbiter of any perceived endorsement.<sup>151</sup>

It is unclear from the Court’s opinion whether the apparent endorsement alone was sufficient to invalidate the pre-game prayer or whether the Court’s consideration of perceived endorsement may have been merely the first part of its evaluation in the coercion analysis imported from *Lee v. Weisman*.<sup>152</sup> Even if the endorsement inquiry was merely another way of characterizing the speech as not private speech but instead speech of the school that had the impermissible effect of coercing religious observance, *Santa Fe* adds to this body of law an adoption of the reasonable observer as the judge of the speech’s effect. In its brief (and separate) government purpose analysis, the Court examined the text of the policy as well as the relevant history, concluding “it is reasonable to infer” that the policy was motivated by an impermissible purpose of advancing religion.<sup>153</sup> This inference did not yet belong to the reasonable observer; it was still the purview of the Court.

#### 4. Applying the “Standard”

Examining an alleged effect of endorsement from the reasonable observer’s perspective seemed routine by 2002 when the Court decided *Zelman v. Simmons-Harris*, which upheld 5-4 Ohio’s private school voucher and tutoring funding program against an Establishment Clause challenge.<sup>154</sup> After a brief review of the program’s historical context, the Court held that the state program was motivated by a secular purpose of providing better educational opportunities the poorest students in the

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150. *Id.* at 307–08.

151. *Id.* at 308.

152. 505 U.S. 577 (1992). See Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District*, 90 KY. L.J. 1, 28 n.163 (2002); see also *Santa Fe*, 530 U.S. at 301–13.

153. *Santa Fe*, 530 U.S. at 309.

154. 536 U.S. 639 (2002).

“demonstrably failing” 75,000-student Cleveland City School District.<sup>155</sup> The Court then turned to the heart of the decision, an effect analysis that remained technically independent from the government purpose analysis. In reaching its ultimate conclusion that the program was not marred by an unconstitutional effect, the Court first characterized and contextualized its precedent, stating, “[W]e have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.”<sup>156</sup>

Foreshadowing *McCreary County*, *Zelman*’s conclusion about effect continued to blur the Court’s perspective and the reasonable observer’s perspective of government intent.<sup>157</sup> In the Court’s words, “[a]ny objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.”<sup>158</sup> *Zelman* makes clear that, to the extent that the perceived government purpose is part of the policy’s effect, the objective observer must echo the Court’s conclusion.

Although the Court in *Santa Fe* had situated the reasonable observer as a high school student exposed to the pre-game prayer, in *Zelman* the Court returned to a more general view of reasonable observer as an adult community member. This return occurred despite the fact that the program’s vouchers were used almost exclusively to pay tuition for children to attend parochial schools. Unlike the students in *Santa Fe*, who were attending a high school football game open to their parents and other community members, the students in *Zelman* had a much greater opportunity than their parents or other community members to perceive endorsement: They were the ones attending the parochial schools and were the direct recipi-

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155. *Id.* at 644, 649.

156. *Id.* at 654–55. Although the case the Court cited for this proposition, *Mueller v. Allen*, 463 U.S. 388 (1983), stands for this idea generally, *Mueller* was decided in 1983, when Justice O’Connor was still the endorsement test’s only proponent.

157. Although Professor Steven D. Smith noted this analytical collapse in his 1987 article, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, *supra* note 130, at 331, the Court’s opinions did not explicitly demonstrate the collapse in full until *McCreary County*.

158. *Zelman*, 536 U.S. at 655.

ents of religious instruction. In part, this return to the “objective observer as adult community member” model is necessary for the Court to reach the conclusion it does because an objective student in *Zelman* would likely perceive a greater degree of endorsement than did the Court and its reasonable observer. Furthermore, the return is consistent with the objective observer as characterized in Justice O’Connor’s concurrence in *Wallace* and later opinions. As part of its admittedly practical “belt and suspenders” approach, the district court in the Dover, Pennsylvania case evaluated the intelligent design policy from the perspective of both the reasonable high school student and the reasonable adult community member.<sup>159</sup>

The last hint of Establishment Clause principles before *McCreary County* and *Van Orden* was in the Court’s 2004 decision in *Elk Grove Unified School District v. Newdow*, in which atheist father Michael Newdow challenged the school board policy and corresponding state statute requiring daily recitation of the Pledge of Allegiance in his daughter’s school because the Pledge includes the words “under God.”<sup>160</sup> Despite being decided on its merits at the district and appellate levels, the Supreme Court decided the case on procedural grounds, concluding that as a non-custodial parent, Newdow lacked standing to bring suit on his daughter’s behalf. Nonetheless, Justice O’Connor took the opportunity to champion the endorsement test once again in her concurrence. Justice O’Connor focused on the effects aspect of the endorsement test, framing the question as “whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders.”<sup>161</sup> Again, the reasonable observer is not the five-year-old girl whose claimed injury was necessary to the lawsuit nor any other reasonable schoolchild, but rather an adult community member who embodies “a community ideal of social judgment, as well as rational judgment . . . .”<sup>162</sup> As in *Zelman*, the reasonable observer’s conclusion follows from what Justice O’Connor would have the Court conclude:

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159. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714, 723, 729 (M.D. Pa. 2005).

160. 542 U.S. 1 (2004).

161. *Id.* at 43 (O’Connor, J., concurring).

162. *Id.* at 35.

[T]he relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase “under God,” constitutes an instance of worship . . . . A reasonable observer would note that petitioner school district’s policy of Pledge recitation appears under the heading of “Patriotic Observances,” and the California law which it implements refers to “appropriate patriotic exercises.”<sup>163</sup>

Thus, from *Lynch* through *Elk Grove*, the perspective of the reasonable observer was increasingly employed to evaluate whether a perceived endorsement of religion resulted from a statute or policy. As Professor Kent Greenawalt noted ten years ago, “[t]he overall trend in [Justice O’Connor’s] opinions has been to pack more awareness of relevant factors into the reasonable person.”<sup>164</sup> That trend has continued, and today’s reasonable observer is a veritable *Jeopardy!* champion. Even through *Santa Fe* and *Elk Grove*, however, the reasonable observer was absent from the Court’s government purpose analysis, which remained technically distinct from its effects analysis. Then came *McCreary County*.

C. *McCreary County v. ACLU: An Objective, Reasonable Observer’s Perspective on Governmental Purpose*

Because Establishment Clause doctrine is so splintered, the Court’s next moves regarding the reasonable observer are quite uncertain. A strict reading of *McCreary County*, such as is advanced in this Article, can lead to undesirable results, which are explored in the final Part of this Article. While it is impossible to predict the length of time between *McCreary County* and the Court’s next purpose-driven Establishment Clause case, it is likely that at least a few years will pass before *McCreary County* is formally affirmed in whole or in part, distinguished into irrelevance,<sup>165</sup> or discarded outright. During that time, dis-

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163. *Id.* at 40–41.

164. Greenawalt, *supra* note 111, at 372.

165. Some lower courts already are reading the *McCreary County-Van Orden* distinction as focusing on the interior or exterior nature of the display without much regard for *McCreary County*’s emphasis on government purpose. See, e.g., *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 775–78 (8th Cir. 2005) (en banc); *Card v. City of Everett*, 386 F. Supp. 2d 1171, 1172–73 (W.D. Wash. 2005); *Russelberg v. Gibson County*, No. 3:03-CV-149-RLY-WGH, 2005 WL 2175527, at \*2 (S.D. Ind. Sept. 7, 2005). Others, such as the district court in the Dover, Pennsylvania case, employ both the endorsement test and *Lemon*’s purpose and

strict courts and courts of appeal will be bound by *McCreary County* and all of its unfortunate side effects.

In *McCreary County*, the Court again invoked the reasonable observer as the arbiter of endorsement but did not apply a traditional effect analysis. Instead, *McCreary County* is a decision driven by a government purpose analysis.<sup>166</sup> Citing *Santa Fe* frequently, the Court demonstrated the degree to which it has conflated the purpose and effect prongs of the *Lemon* test, thereby depriving courts of the authority to evaluate government purpose without involving the legal fiction of the reasonable observer.

Focusing on the government purpose analysis allowed the Court to delve into the entire recent history preceding the government action at issue. In *Wallace* and *Edwards*, the Court made clear that the counties' earlier actions were crucial in evaluating the constitutionality of their later actions. The tumult began when two neighboring Kentucky counties posted functionally identical displays in the hallways of their individual courthouses. Each display was composed of a large, abridged copy of the Ten Commandments, including a biblical citation. The texts were unaccompanied by an explanation of a secular purpose. After a lawsuit was filed but before the district court acted on the plaintiffs' request that the displays be removed pending the outcome of the case, both counties' elected governing boards approved resolutions to expand the exhibits. The second set of identical exhibits retained the copy of the Ten Commandments from the original displays and added eight other social and political documents with religious references, all in smaller frames, as well as explanations of why each document is part of Kentucky's "precedent legal code."<sup>167</sup>

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effect inquiries, treating the analysis as though the reasonable observer's analytical work is separate from the purpose analysis. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714 (M.D. Pa. 2005).

166. See *McCreary County v. ACLU*, 125 S.Ct. 2722, 2728 (2005); see also *O'Connor v. Washburn Univ.*, 416 F.3d 1216, 1224–25 (10th Cir. 2005).

Plaintiffs in the Dover, Pennsylvania case asserted that even in *McCreary County*, "purpose evidence [is] relevant to the [endorsement] inquiry derivatively—just as it always was to *Lemon's* effect analysis . . ." Brief in Support of Plaintiffs' Proposed Findings of Fact and Conclusions of Law at 13, *Kitzmiller*, No. 4:04-CV-02688 (M.D. Pa. Nov. 23, 2005). This interpretation misconstrues *McCreary County*, which does not adopt Justice O'Connor's endorsement test wholesale, but rather explicitly frames its analysis as a government purpose inquiry under *Lemon*.

167. *McCreary County*, 125 S. Ct. at 2727. In the Court's words:

The district court temporarily enjoined the first and second displays in both counties, determining that none was motivated by a secular governmental purpose and that a reasonable observer would conclude that all the displays have the effect of appearing to endorse religion.<sup>168</sup> A short while later—and without appealing the preliminary injunction—the two counties hung on their courthouse walls a third set of identical displays, entitled “The Foundations of American Law and Government.” These displays consisted of a longer version of the Ten Commandments, seven other documents (some of which were previously included in the second set of displays), a picture of Lady Justice, and statements explaining the significance of each document.<sup>169</sup> The district court held that the third displays, too, were impermissibly motivated by a government purpose of endorsing religion.<sup>170</sup> The counties appealed this holding to the Sixth Circuit Court of Appeals and, ultimately, to the Supreme Court. The Sixth Circuit affirmed the district court’s decision and further stated that it considered the counties’ unrelenting defense of the displays in the present litigation to support the conclusion that they were motivated by a religious purpose.<sup>171</sup>

First setting forth the applicable law, the Supreme Court emphasized the importance of *Lemon’s* government purpose inquiry, noting that although the Court rarely strikes down a statute or policy as unconstitutional because of an illegitimate government purpose, the government purpose consideration

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The documents were the “endowed by their Creator” passage from the Declaration of Independence; the Preamble to the Constitution of Kentucky; the national motto, “In God We Trust”; a page from the Congressional Record of February 2, 1983, proclaiming the Year of the Bible and including a statement of the Ten Commandments; a proclamation by President Abraham Lincoln designating April 30, 1863, a National Day of Prayer and Humiliation; an excerpt from President Lincoln’s “Reply to Loyal Colored People of Baltimore upon Presentation of a Bible,” reading that “[t]he Bible is the best gift God has ever given to man”; a proclamation by President Reagan marking 1983 the Year of the Bible; and the Mayflower Compact.

*Id.* at 2729–30.

168. *ACLU v. McCreary County*, 96 F. Supp. 2d 679, 686–88 (E.D. Ky. 2000).

169. *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 846–47 (E.D. Ky. 2001). The seven other documents were copies of the Magna Carta, the Mayflower Compact, the Declaration of Independence, the United States Constitution’s Bill of Rights, the national motto, the lyrics to the *Star Spangled Banner*, and the preamble to the Kentucky Constitution. *Id.*

170. *Id.* at 849–50.

171. *ACLU v. McCreary County*, 354 F.3d 438, 449 (6th Cir. 2003).



has not diminished in importance.<sup>172</sup> Describing the common theme of Establishment Clause doctrine as promoting “neutrality between religion and religion, and between religion and nonreligion,” the Court explained that “[b]y showing a purpose to favor religion, the government ‘sends the . . . message to . . . nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members . . . .’”<sup>173</sup> Thus, an apparent illegitimate purpose behind a government action can be enough to invalidate it.<sup>174</sup>

With this background, the Court declared, “The eyes that look to [government] purpose belong to an ‘objective observer,’ one who takes account of the traditional external signs that show up in the ‘text, legislative history, and implementation of the statute,’ or comparable official act.”<sup>175</sup> This objective, reasonable observer, as in cases before, considers the public record and bases his decision on “openly available data supported by a commonsense conclusion . . . .”<sup>176</sup> Rather than being an “absentminded” individual limited to evaluating the present circumstance, the reasonable observer is “presumed to be familiar with the history of the government’s actions and competent to learn what history has to show.”<sup>177</sup> Before *McCreary County*, the Court had often described this fictional reasonable observer, while also declaring that the reasonable observer was the proper judge of a statute or policy’s effect.<sup>178</sup> The Court’s earlier cases, though, had not ceded to the reasonable observer the central role in interpreting government purpose. Thus, although *McCreary County* did little to modify the characteristics of the reasonable observer, it swiftly and subtly altered the reasonable observer’s fundamental function.<sup>179</sup>

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172. *McCreary County*, 125 S. Ct. at 2732–33.

173. *Id.* at 2733 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000)).

174. *Id.* at 2733–34.

175. *Id.* at 2734 (quoting *Santa Fe*, 530 U.S. at 308).

176. *Id.* at 2735.

177. *Id.* at 2737 (quoting *Santa Fe*, 530 U.S. at 308 and *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985)).

178. See *supra* Part II.B.

179. But see *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1224–25 (10th Cir. 2005) (applying *McCreary County* and conducting an analysis of the government actor’s actual purpose rather than the apparent purpose as perceived by the objective observer).

Addressing the crux of the government purpose inquiry, the Court noted that although it generally defers to a stated government purpose, a secular government purpose must be primary and not merely a sham.<sup>180</sup> However, *McCreary County* held that the perceived purpose is what ultimately matters. The Court rejected “a judicial psychoanalysis of a drafter’s heart of hearts” and declared that “[a] secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.”<sup>181</sup> In other words, there are limits to the government purpose inquiry, and they are the limits of the reasonable observer’s perceptions.<sup>182</sup> Unlike the earlier applications of *Lemon* and iterations of the endorsement test in which there were two meanings at issue (the government’s subjective purpose and the objective or reasonable observer’s perception), the only meaning at issue after *McCreary County* is the perceived government intent.

After setting forth the applicable legal framework, the Court quickly reviewed and rejected the first displays—the solitary postings of the Ten Commandments—by noting the absence of any secular explanation: “The reasonable observer could only think that the Counties meant to emphasize and celebrate the Commandments’ religious message.” The Court characterized the second set of displays as “an indisputable, and undisputed, showing of an impermissible purpose . . . [that] the reasonable observer could not forget . . .”<sup>183</sup> The Court dismissed the explanatory statements contained in the third set of displays as “only . . . a litigating position” and noted the absence of any further action by either county’s elected governing board.<sup>184</sup> Then, referring to the cumulative effect of the counties’ three sets of displays, the Court concluded, “If the [reasonable] observer had not thrown up his [or her] hands, he [or she] would probably suspect that the Counties were simply reaching for any way to keep a religious document on the walls of courthouses constitutionally required to embody religious neutral-

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180. *McCreary County*, 125 S. Ct. at 2735–36.

181. *Id.* at 2734, 2735.

182. *Id.* at 2726.

183. *Id.* at 2738–39.

184. *Id.* at 2740.

ity.”<sup>185</sup> The temporal boundaries of the final display’s context are unclear, though the Court noted that a governmental body’s earlier actions do not “forever taint any effort on their part to deal with the subject matter.”<sup>186</sup> Given that the displays in question were all erected within one year, some even after the lawsuit was filed, the Court properly left this question open.

Although the majority opinion focused on the reasonable observer’s perspective on government purpose, Justice O’Connor’s brief concurrence appeared to conflate further the government purpose and effect inquiries. She wrote without additional explanation, “The purpose behind the counties’ display is relevant because it conveys an unmistakable message of endorsement to the reasonable observer.”<sup>187</sup> This statement also could reflect a focus on effect; a subjective government purpose inquiry may still remain a separate analysis. Had the Court taken this approach, it would have by implication preserved its role as arbiter of the government purpose inquiry while considering the issue one of effect and endorsement, properly under the purview of the reasonable observer.

Joined in full or in part by three other Justices, Justice Scalia dissented. He argued that the original intent—and thus the controlling interpretation—of the Establishment Clause was to prevent government from coercing participation in religion, not to prevent religion from being a part of public life.<sup>188</sup> Justice Scalia criticized the majority’s focus on the apparent purpose of the government action rather than on the actual purpose: It was, he said, an ill advised departure from what he views as the wrongly decided *Lemon* test and its progeny. Under the Court’s new formulation, he argued, “the legitimacy of a government action with a wholly secular effect would turn on the *misperception* of an imaginary observer that the government officials behind the action had the intent to advance religion.”<sup>189</sup> Justice Scalia further criticized the majority opinion for “shifting the focus of *Lemon*’s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly

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185. *Id.* at 2741.

186. *Id.*

187. *Id.* at 2747 (O’Connor, J., concurring).

188. *Id.* at 2753–55 (Scalia, J., dissenting). Chief Justice Rehnquist and Justice Thomas joined Justice Scalia’s dissent in full, and Justice Kennedy joined in part.

189. *Id.* at 2757.

religious purpose . . . ,” which can only be satisfied by “a rigorous review of the full record.”<sup>190</sup>

Finally, Justice Scalia applied the majority’s test to conclude that there was no impermissible purpose apparent from the counties’ first, second, or third displays. As part of this analysis, Justice Scalia echoed Justice Stevens’s opinion in *Capitol Square*, criticizing the majority’s presumptions about the knowledge imputed to the reasonable observer.<sup>191</sup> This point of disagreement emphasizes that the Court’s reasonable observer is reasonable in a normative sense, as opposed to an empirical sense: Reasonableness is “what ought to be” rather than what is “typical.”<sup>192</sup> As Professor Alafair Burke commented, “absent statistical evidence establishing the empirical reality, all decisionmakers—whether Supreme Court justices, law professors, or jurors—are tempted to substitute their own judgment of reasonableness both for the majority’s and for what is normatively ‘right.’”<sup>193</sup>

To summarize at the risk of oversimplifying:

#### Status of the Reasonable or Objective Observer

Case	Effect or Endorsement	Government Purpose
Lynch v. Donnelly, 465 U.S. 668 (1984)	Justice O’Connor concurs, introducing the endorsement test, focusing on the “objective meaning of the statement in the community.”	In the endorsement test, the reasonable observer does not evaluate actual government purpose.
Wallace v. Jaffree, 472 U.S. 38 (1985)	Justice O’Connor concurs, focusing on “whether the objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement” of religion.	Justice O’Connor agrees with the Court that an impermissible actual government purpose motivated the government action.
County of Allegheny v. ACLU, 492 U.S.	A majority of the Court asks whether the government action creates an apparent	In her concurrence, Justice O’Connor advances the endorsement test and considers

190. *Id.* at 2758.

191. In particular, Justice Scalia contended that the reasonable observer likely would not have known about the counties’ resolutions authorizing the first two displays, so the counties’ failure to rescind those resolutions would make no difference to the reasonable observer. *Id.* at 2758–59.

192. See Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043, 1052 (2005).

193. *Id.*

573 (1989)	endorsement of religion, but does not yet employ the reasonable or objective observer.	the apparent government purpose (not actual purpose) as one aspect of that test.
Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995)	A majority of the court accepts <i>a</i> , if not <i>the</i> , reasonable observer. Justices Souter and Breyer join Justice O'Connor's concurrence promoting the reasonable observer. Justice Stevens applies the reasonable observer but reaches a different result.	Justice O'Connor's concurrence acknowledges actual purpose and effect as distinct inquiries.
Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000)	The Court evaluates whether the reasonable observer (here, an objective high school student at that school) would perceive an endorsement of religion.	The Court separately considers whether the policy was motivated by an impermissible purpose of advancing religion.
Zelman v. Simmons-Harris, 536 U.S. 639 (2002)	The Court accepts the reasonable observer in the form of an adult community member.	The Court briefly evaluates whether the government was motivated by a secular purpose.
Elk Grove Unified School District v. Newdow, 542 U.S. 961 (2004)	Justice O'Connor's concurrence summarizes the reasonable observer as "fully cognizant of the history, ubiquity, and context of the practice in question."	Justice O'Connor's concurrence does not delve into purpose.
McCreary County v. ACLU, 125 S. Ct. 2722 (2005)	The Court imports the objective, reasonable observer from the effects-endorsement analysis into the government purpose inquiry. For the first time, it asks whether an objective observer would perceive that the government had an impermissible motive rather than focusing from its own perspective on whether the government had an actual impermissible motive. The Court frames its inquiry as a government purpose analysis, not an effects-endorsement analysis.	

Thus, the Court now has adopted the perspective of the reasonable observer to evaluate not only whether a statute or policy has the effect of creating an apparent endorsement of religion, but also whether that statute or policy was motivated by an impermissible government purpose.

*D. Establishment Clause Considerations in Public School Curricular Debates*

The Court has made clear that Establishment Clause doctrine is not beholden to the *Lemon* test, and it has at times disre-

garded that test in its entirety.<sup>194</sup> Before turning to an exploration of the impact of *Lemon*-like *McCreary County* on the evolution-intelligent design debates, it is necessary to examine why a court is likely to apply *McCreary County* in these situations and also why *Van Orden* is likely to have little impact.<sup>195</sup>

First, when the Court last considered a case involving religion in the curriculum—in its 1987 decision in *Edwards v. Aguillard*—it explored the government purpose in depth, ultimately concluding the stated secular purpose was a “sham” intended to conceal the religious purpose motivating the policy.<sup>196</sup> *Edwards* is one of only five Supreme Court cases in which an impermissible government purpose invalidated the state statute at issue.<sup>197</sup> *Edwards* did not rely on a reasonable observer, and even if the Court had performed an effects analysis, it probably would not have employed an endorsement analysis because a majority of the Court did not accept that approach at the time.<sup>198</sup> Thus, although *McCreary County* is the latest in the line of cases to invoke the concept of endorsement, it differs significantly from its predecessors because it blurs the line between purpose and effect. As already discussed, *McCreary County* reshapes the government purpose analysis in light of a reasonable observer’s perceptions.<sup>199</sup> With its intense focus on

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194. See, e.g., *Van Orden v. Perry*, 125 S. Ct. 2854 (2005) (plurality opinion).

195. Although the district court in the Dover, Pennsylvania case considered *McCreary County*, it viewed that case as employing the reasonable observer only as part of an endorsement analysis—not as the driving force in the government purpose analysis. The same court did not consider *Van Orden*. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 712 (M.D. Pa. 2005) (setting up the analytical framework for the opinion); *id.* at 716–35 (employing the endorsement test with the aid of the reasonable observer); *id.* at 746–65 (employing the government purpose analysis without the aid of the reasonable observer).

As noted earlier, intelligent design cases will likely be controlled by the legal issues of government purpose, effect, endorsement, and coercion. This Article is limited to an exacting analysis of government purpose and effect. See *supra* Part III.D.

196. 482 U.S. 578 (1987). The Court did not reach the merits in *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 961 (2004), which involved the daily recitation of the Pledge of Allegiance in public schools. The opinions of several justices indicate that *Elk Grove* would have been decided on much the same basis as *Van Orden*, because the secular cultural significance of the text “under God” has eclipsed its religious nature and thus a searching inquiry into government purpose is unnecessary.

197. See *supra* Part III.A.

198. See *supra* Parts III.B.2–3.

199. See *supra* notes 172–93 and accompanying text.

discerning government purpose, *McCreary County* is *Edwards'* logical successor.

Second, the Court's opinions over time emphasize the sensitivity with which lower courts should evaluate Establishment Clause questions affecting public elementary and secondary school students. Chief Justice Rehnquist's plurality opinion in *Van Orden* takes care to distinguish itself from the line of Establishment Clause cases arising out of educational settings. *Van Orden* reiterates the instruction in *Edwards* that the Court has been and should continue to be "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools" because "particular concerns . . . arise in [that] context."<sup>200</sup> Thus, courts are likely as a general matter to apply a more, rather than less, demanding test to situations involving public schoolchildren.<sup>201</sup> Even though *McCreary County* reins in a government purpose analysis somewhat by limiting the review to the perspective of the reasonable observer, the *McCreary County* standard is still more exacting than a test that asks only whether the state actor has coerced individual religious belief or practice,<sup>202</sup> or whether the religious nature of a statement has dissipated sufficiently over time to permit its display given the independent secular value of the statement.<sup>203</sup>

Third, a school curriculum is by its nature coercive, another factor making an in-depth analysis of government purpose appropriate in that context.<sup>204</sup> Although students are not forced to believe what they are taught in school, courts have long acknowledged that the explicit purposes of public education include developing good citizens and perpetuating a common culture and set of beliefs.<sup>205</sup> In contrast, *Van Orden* is the latest in a line of cases to hold that a noncoercive acknowledgement of this country's Judeo-Christian heritage does not violate the

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200. *Van Orden v. Perry*, 125 S. Ct. 2854, 2863–64 (2005) (plurality) (quoting *Edwards*, 482 U.S. at 584–85).

201. See MARCI A. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 137 (2005).

202. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

203. See, e.g., *Van Orden*, 125 S. Ct. at 2870 (Breyer, J., concurring in the judgment).

204. See *Lee*, 505 U.S. at 593.

205. See, e.g., *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 631 (1943); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

Establishment Clause. Much like the language “In God We Trust” on our nation’s currency or the sculpture of Moses with other law-givers in the Supreme Court courtroom, the Ten Commandments monument at issue in *Van Orden* is “passive.”<sup>206</sup> As Justice Thomas elaborated in his concurrence, “In no sense does Texas compel petitioner Van Orden to do anything. . . . He need not stop to read [the monument] or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life.”<sup>207</sup>

A school curriculum requires active engagement, and is significantly different from the passive message at issue in *Van Orden*. Although students who are taught concepts such as intelligent design are not required to accept the instructional material as true, requiring belief is not the only manner in which a school can run afoul of the Establishment Clause. Even if intelligent design is merely part of a statement read in a classroom, as it was in Dover, Pennsylvania, students must listen to their school officials declare intelligent design to be a valid, and perhaps preferable, scientific concept. In other words, students must absorb a particular message about which idea they ought to accept as true.<sup>208</sup> Depending on the extent to which intelligent design is included in the curriculum, students could be required to read assigned materials, develop an understanding of the ideas presented, or demonstrate that understanding on a class test, if not on a statewide standards-based test that could take the form of a graduation requirement. The extent of instruction is not determinative of an Establishment Clause violation, however. As the plaintiffs’ attorney stated during the trial of the Dover intelligent design policy, “there is no such thing as a little constitutional violation.”<sup>209</sup>

Fourth and finally, the Court’s cases also note that the perceived endorsement of religion is weaker if the religious activity is not school-sponsored and does not occur during school

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206. *Van Orden*, 125 S. Ct. at 2861 (plurality opinion).

207. *Id.* at 2865 (Thomas, J., concurring).

208. As Professor Marci Hamilton has noted, schools’ actions have been held to violate the Establishment Clause when “the school send[s] a rather clear message to the students about what they should believe.” HAMILTON, *supra* note 201, at 137.

209. Transcript of Trial Proceeding, *supra* note 1, Day 1 AM, at 13 (plaintiffs’ opening statement).



hours,<sup>210</sup> does not take place on school property,<sup>211</sup> or does not result from a direct government-to-religiously-affiliated-school subsidy.<sup>212</sup> When the policy at issue involves an action occurring during the school day or at an official school event, the Court has invalidated the policy with greater frequency.<sup>213</sup> Given *McCreary County's* merging of government purpose and effect inquiries, these considerations (earlier only found in the effect analysis) are now relevant to a government purpose analysis as well. *Edwards*, the case involving statutorily prescribed "balanced treatment" of evolution and creationism in the classroom, contained one of the Court's most invasive analyses of government purpose, perhaps second only to *McCreary County*.<sup>214</sup> Even when considering *McCreary County*, the Court's focus on government purpose seems to have had the most significant impact in cases involving public schools.<sup>215</sup>

For these reasons, the Court's precedent suggests that lower courts are likely to consider *McCreary County* in their evaluation of government purpose in intelligent design disputes.

#### IV. DON'T THROW THE BABY OUT WITH THE MCCREARY COUNTY BATHWATER

Many aspects of the current evolution debates sound familiar, but judicial resolution of evolution-intelligent design controversies has become even more complicated because of *McCreary County's* altered focus in the realm of government purpose. The government purpose inquiry has long been criticized by judges and scholars, but *McCreary County* declares de-

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210. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (permitting a non-school-sponsored religious organization to use school facilities after school hours on the same terms as nonreligious organizations).

211. *See generally* *Agostini v. Felton*, 521 U.S. 203 (1997), *overruling* *Aguilar v. Felton*, 473 U.S. 402 (1985).

212. *See* *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (permitting a state-sponsored program to provide qualifying parents with vouchers for private school tuition and tutoring because of the private action necessary to use the public funds in religious schools).

213. *See* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that a school district was not permitted to arrange for student-led religious prayer at school-sponsored football games); *Lee v. Weisman*, 505 U.S. 577 (1992) (holding that a school district could not recruit a clergy person to deliver a nondenominational prayer at middle school graduation because of the coercive nature of the prayer).

214. *See* *Edwards v. Aguillard*, 482 U.S. 578 (1987).

215. *See* Koppelman, *supra* note 112, at 153–54.

finitively that this inquiry is worth maintaining: “After declining the invitation to abandon concern with purpose wholesale, we also have to avoid the [government’s] alternative tack of trivializing the enquiry into it” by assuming the legitimacy of a stated government purpose.<sup>216</sup>

This Part contends that, because *McCreary County* will impact the government purpose analysis negatively if courts interpret and apply the case as this Article argues they are bound to do, the government purpose analysis should be preserved in its pre-*McCreary County* form: as a search for actual purpose without the involvement of the reasonable observer.<sup>217</sup> First and most obviously, when the government purpose inquiry moves from a search for actual purpose to speculation about apparent purpose, the result is both over- and under-inclusive. Second, the reasonable observer evaluating government purpose will be required to have an unreasonably vast command of issues of law, yet is confined by a more limited command of facts than those to which a court is privy. Third, because the formal nature of the Court’s government purpose inquiry has moved from finding facts to reaching legal conclusions, the appellate standard of review will become uniformly *de novo*, even though the inquiry into government purpose is an essentially factual determination. The context of the intelligent design debates illuminates this discussion.

#### A. *Changing the Constitutional Harm*

As the Court noted in *McCreary County*, the term “establishment” is not self-defining,<sup>218</sup> and so it falls to the courts to discern the meaning of the clause and then to distinguish action or intent that runs afoul of the Constitution from that which does not. Because *McCreary County* shifts the harm from a focus on the government’s actual purpose to its perceived purpose,<sup>219</sup> some behavior that would have offended the Constitution before no longer does so, and vice versa. The change may be

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216. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2735 (2005). For a thorough defense of the secular purpose requirement, see *id.*

217. The eventual analytical result I advocate is roughly the same as the approach recently adopted by the district court in the Dover, Pennsylvania trial. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 746, 747 n.20, 763 (M.D. Pa. 2005). As explained in this Part, however, *McCreary County* does not support the district court’s specific approach.

218. See *McCreary County*, 125 S. Ct. at 2742.

219. See *supra* Part III.C.

small and at the margins, but it is nonetheless a change in what constitutes a constitutional harm.

1. *What Apparent Intent Misses: Hidden Motives*

Although any motive-based inquiry to some extent encourages burying improper purposes just deep enough that they will not be discovered,<sup>220</sup> *McCreary County* creates even more hiding places for impermissible motives because of its newly required *definitional* deference to apparent government purpose. The indeterminate depth of the reasonable observer's inquiry (a problem in itself) also creates other problems: The reasonable observer's assumptions about intelligent design influence the scope of the inquiry, and, by relying on traditional publicly available information (not all of which is necessarily reliable, including newspaper articles), the reasonable observer is shielded from important non-public information regarding actual purpose.

*McCreary County* makes clear that the reasonable observer's impression of the apparent government purpose will depend in part on how well an impermissible motive is hidden or, rather, how diligently the reasonable observer—as manipulated by a court—searches for it:

If someone in the government hides religious motive so well that the "objective observer, acquainted with the text, legislative history, and implementation of the statute," . . . cannot see it, then without something more the government does not make a divisive announcement that in itself amounts to taking religious sides. A secret motive stirs up no strife and does nothing to make outsiders of nonadherents, and it suffices to wait and see whether such government action turns out to have (as it may even be likely to have) the illegitimate effect of advancing religion.<sup>221</sup>

The Court implies that this level of inquiry is no different than before, but the focus of the analysis, and of the harm, has shifted.<sup>222</sup> The Court is so unconcerned with rooting out an actual impermissible purpose that it blithely suggests that if an impermissible government purpose escapes notice, then an effects-endorsement analysis will probably function as a sufficient safety net. Evaluating only perceived purpose will

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220. See Smith, *supra* note 130, at 284.

221. *McCreary County*, 125 S. Ct. at 2735 (citations omitted).

222. See *supra* notes 180–87 and accompanying text.

absolve government actors if their attempts to act unconstitutionally are concealed just carefully enough and do not achieve the desired effect. This could happen anyway with an actual purpose analysis, but there is a significant difference between unconstitutional behavior escaping censure because of a systemic error and the same behavior being permitted in the first instance.

As explained earlier, intelligent design is presented as a scientific theory, and its adherents speak reverently of its secular nature; some even state that the intelligent designer to whom all credit is given could be an alien life form.<sup>223</sup> Intelligent design proponents present themselves as promoting their ideas for the secular purposes of fostering critical thinking, religious neutrality, and academic freedom.<sup>224</sup> Although some intelligent design proponents admit an overtly religious motivation for their ideas, most do not.<sup>225</sup> Thus, if a religious motive is present in an intelligent-design-friendly policy or statute, as intelligent design's critics routinely presume,<sup>226</sup> that motive is likely to be at least partially hidden. Accordingly, if the reasonable observer evaluating an intelligent design policy considers a stated secular primary government purpose and cursorily evaluates the context and legislative history of a questioned action, the government purpose inquiry easily could end there, with a determination that an intelligent design policy does not violate the Establishment Clause. If the reasonable observer is aware either of Christian fundamentalists' and creationists' "typical opinion" of evolution<sup>227</sup> or of the religious motivation of many involved in the intelligent design movement, though, the reasonable observer *might* probe the government's apparent purpose further, given that the only limits on an objective, reasonable observer are those set by the guiding court. However, the reasonable observer does not have to do so, and the level of invasiveness in its inquiry is unpredictable. This demonstrates the primary malignancy in *McCreary County*: The decision creates a reasonable observer whose form and function

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223. See Calvert, *supra* note 15, at 4, 8 n.9; Ratliff, *supra* note 82.

224. See *supra* Part II.A.3.

225. See *supra* notes 75–88 and accompanying text.

226. See, e.g., Mackenzie, *supra* note 10; Ratliff, *supra* note 82; Media Matters for America, *supra* note 67.

227. A reasonable observer in the Northern District of Georgia recently was so aware. See *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286, 1308 (N.D. Ga. 2005).

are unprecedentedly malleable, and thus dangerously uncertain.

Whether the reasonable observer is a more or less aggressive investigator of apparent purpose, an ultimate search for actual purpose should not be the focus of a court's analysis after *McCreary County*, as the constitutional harm now follows the public appearance of impropriety.<sup>228</sup> The recent trial involving the Dover, Pennsylvania school district's intelligent design policy illustrates various difficulties resulting from the reasonable observer's consideration of formal proffered purpose, as well as government actors' public statements. At trial, the school district argued that it adopted the policy because it intended to "promote[] critical thinking" by enhancing students' understanding of the theory of evolution.<sup>229</sup> The plaintiffs, however, presented evidence that the most infamous board member made statements at school board meetings referring to a science textbook being "laced with Darwinism," declaring "[n]owhere in the Constitution does it call for a separation of church and state," and posing the rhetorical question, "Two thousand years ago, someone died on a cross; [c]an't someone take a stand for him?"<sup>230</sup> Based in part on these comments as well as various school board members' reported references to "creationism" during board meetings in the months preceding the adoption of the intelligent design policy, the plaintiffs argued that school board members adopted the policy for the purpose of infusing religion into the Dover schools.<sup>231</sup>

Publicly declared and reported statements such as these constitute the traditional type—and arguably the full extent—of information about motive to which a reasonable observer presumably would be privy.<sup>232</sup> Yet as the Dover trial made clear, when the accuracy of newspaper accounts is called into question, the reasonable observer's role is complicated further.

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228. See *supra* notes 174–77, 181–82 and accompanying text.

229. Transcript of Trial Proceeding, *supra* note 1, Day 1 AM, at 21–24; Martha Raffaele, *Board Member Testifies in Evolution Case*, *GUARDIAN*, Nov. 1, 2005, available at <http://www.guardian.co.uk/us/latest/story/0,1282,-5383711,00.html>.

230. Coyne, *supra* note 3, at 21.

231. See, e.g., Complaint at 18, *Kitzmiller*, 400 F. Supp. 2d 707 (No. 4:04-CV-002688); Opposition to Defendants' Motion for Summary Judgment at 25–26, *Kitzmiller*, 400 F. Supp. 2d 707 (No. 4:04-CV-002688); see also Lauri Lebo, *Depositions Refer to Creationism*, *YORK DAILY REC.*, Aug. 10, 2005, at C1.

232. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 714–15 (M.D. Pa. 2005). See also *supra* notes 130, 141, 147–49, 158–62, 177, 227 and accompanying text.

School board members testified that two newspaper articles incorrectly reported board members to have used the word “creationism” when discussing science instruction during a June 2004 board meeting, just four months before the board adopted the intelligent design policy.<sup>233</sup> Because the school district’s audio recording of the meeting in question disappeared before discovery began, the reporters who wrote the articles were subpoenaed; they testified in depositions and in court that their articles accurately reflected board members’ use of the word “creationism.”<sup>234</sup> Ultimately, the district court found that the articles accurately reflected what transpired at the board meeting.<sup>235</sup> Under *McCreary County*, because the court found the articles accurate, that finding would likely comport with a reasonable observer’s presumption. If the court had found the board members’ denials correct, though, then a reasonable observer also would have been presumed to doubt the accuracy of the newspaper accounts without any apparent reason to do so, as no board member requested a retraction of either article.

In the Dover trial, less controversy existed about the validity of other public statements, and depending on the number of board members and administrators who publicly expressed the following types of sentiments, the evidence might or might not be sufficient to create an apparent impermissible government purpose. One school board member’s June 2004 letter to the editor regarding the intelligent design controversy stated, “You can teach creationism without it being Christianity. It’s just a higher power.”<sup>236</sup> Another school board member stated in a television interview around the same time that he supported balancing the teaching of evolution with something “such as creationism.”<sup>237</sup> Nonetheless, the Dover trial also demonstrates that the reasonable observer would not have a full picture of government purpose without a more searching factual inquiry

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233. Transcript of Trial Proceeding, *supra* note 1, Day 16 PM, at 5; *id.*, Day 16 PM, at 12; see also Lauri Lebo, *Judge Grills Dover Official*, YORK DAILY REC., Nov. 1, 2005, at A1; Lauri Lebo, *Nilsen Shrugged Off Principal*, YORK DAILY REC., Oct. 22, 2005, at A1.

234. Transcript of Trial Proceedings, *supra* note 1, Day 2 PM, at 79–81; *id.*, Day 17, at 24–29.

235. *Kitzmiller*, 400 F. Supp. 2d at 751–55.

236. Heather Geesey, Letter to the Editor, *Textbook Quest Explained*, YORK DAILY REC., June 27, 2004, at B6.

237. *Dover Biology TV Clip* (Fox43 television broadcast June 2004), available at <http://www.ydr.com/mmedia/multi/528>.

into board members' and administrators' non-public statements. First, the intelligent design policy was not adopted until October 2004, but the Dover superintendent's notes from January 2002 and March 2003 reflect a school board member's repeated discussion of "creationism" at school board retreats.<sup>238</sup> Second, approximately a year and a half before the intelligent design policy was adopted, the school district's assistant superintendent told the chairperson of the Dover high school science department that a school board member "wanted half the evolution unit devoted to 'creationism.'"<sup>239</sup> Third, the assistant superintendent drafted changes to the biology curriculum using the word "creationism," a term eventually replaced by "intelligent design" before the board adopted the policy (though a board member referred to the policy as referencing "creationism" after the policy was adopted).<sup>240</sup> Fourth, the school board policy referred students to the early intelligent design reference book *Of Pandas and People*, a book with strong roots in creationism.<sup>241</sup> Fifth, the school district surreptitiously received two classroom sets of this book (sixty copies in all) because one school board member raised money to purchase the copies by soliciting cash donations at his church, and then wrote a personal check for the collected amount so that the father of another board member could purchase and donate the books.<sup>242</sup>

These five examples (and others considered by the district court)<sup>243</sup> certainly seem to be important clues about government intent, yet they are clues from which the reasonable observer should be shielded because of the non-public nature of the statements. The Dover plaintiffs likely could have won their case based on publicly available information alone, with-

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238. Transcript of Trial Proceedings, *supra* note 1, Day 13 PM, at 6-7; Lebo, *Nilsen Shrugged off Principal*, *supra* note 233.

239. Lebo, *supra* note 231; *see also* Transcript of Trial Proceedings, *supra* note 1, Day 1 AM, at 7.

240. Transcript of Trial Proceedings, *supra* note 1, Day 1 AM, at 7-8.

241. *Id.*, Day 6 AM, at 118-26.

242. Both board members denied these actions in their January 2005 depositions but admitted their involvement with the book donation while testifying at trial in October 2005. Attempting to reconcile this inconsistency, the board member who solicited contributions tried to parse the language of his solicitation and later claimed to have a poor memory because of his addiction to the painkiller OxyContin. Michelle Starr, *Buckingham Contradicts Self on Money for Books*, YORK DAILY REC., Oct. 28, 2005, at A1.

243. *See* *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 748-50, 752-61 (M.D. Pa. 2005).

out need for a more demanding purpose inquiry. But, based on the situation in Dover, it is not difficult to imagine a similar situation in which some or all school board members and district administrators are more savvy, and secret away religious purpose more effectively behind closed doors.

Thus, when moving backwards from a searching analysis of actual purpose to a less demanding inquiry into apparent purpose, courts must shield the reasonable observer from important information about motive to preserve the integrity of the reasonable observer's analysis. Government officials should not be able to enact laws or policies that violate their oaths of office in which they swear to uphold the Constitution of the United States merely because their covert intent to act unconstitutionally was not followed by the desired effect. This, however, is what *McCreary County* may permit.

## 2. Increasing Problems with "Neutrality"

Relying on the reasonable observer's perspective creates the challenge of trying to fashion a "neutral" or "objective" frame of reference for the reasonable observer.<sup>244</sup> Additional problems arise when the reasonable observer, no longer merely opining about a statute or policy's effect, must speculate about government intent from some ill-defined position of "neutrality," a seemingly specific perspective that is not easily agreed upon in an intelligent design dispute.

The Court's reasonable observers, previously arbiters of effect and endorsement, traditionally have not been representative of minority religious groups which may take more serious offense at public expressions of Judeo-Christian religious traditions.<sup>245</sup> Presumably, then, the Establishment Clause's reasonable observer has viewed the world through some sort of Judeo-Christian lens when evaluating a statute or policy's effect,<sup>246</sup> and will continue to do so when evaluating apparent government purpose. However, it is unclear how a reasonable observer should view the intelligent design debate. With the country fairly evenly divided about such contentious issues as

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244. See *supra* notes 139–40, 150, 163 and accompanying text.

245. See Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992); Anjali Sakaria, Note, *Worshipping Substantive Equality over Formal Neutrality: Applying the Endorsement Test to Sect-Specific Legislative Accommodations*, 37 HARV. C.R.-C.L. L. REV. 483, 493 (2002).

246. See Sakaria, *supra* note 245, at 493.



whether the existence of life and the diversity of species are attributable primarily to natural forces or to specific divine intervention, but not split along the lines of traditional majority and minority religious groups, it is difficult to imagine a “neutral” perspective from which the reasonable observer might operate.<sup>247</sup>

Perhaps a reasonable observer is required to have no opinion about the validity of the theory of evolution or the concept of intelligent design. Under this characterization, a truly neutral reasonable observer should lack knowledge of religion and thus not subscribe to any particular sectarian or secular perspective. Yet, the reasonable observer reflects the community and, as such, is not a *tabula rasa*.<sup>248</sup> Moreover, a “reasonable observer as blank slate” approach would strain the reasonable observer’s legitimacy, as the reasonable observer would be rejected by nearly all scientists for a failure to discard the concept of intelligent design and by intelligent design advocates for a failure to reject evolution. Furthermore, such a person either would be so apathetic as not to care enough to form an opinion about one of the questions most fundamental to human existence, or would lack the judgment to evaluate the scientific research. Neither option fits with the Court’s model of a nearly omniscient reasonable observer. The reasonable observer is not constrained by typicality, but arguably is reined in by courts’ need for analytical legitimacy.

Presuming that some bias is inevitable in an intelligent design case, whether directly on the part of the reasonable observer or indirectly through the court, perhaps the goal should be to have a reasonable observer who is fair, able to recognize personal bias, and more aware of ascribing a motive to government actors based on those assumptions. Again, the problem of the reasonable observer’s neutrality is even more difficult in the context of government purpose than in the effects-endorsement analysis because when viewing an effect, it is easier to distance oneself from personal bias. When making a judgment about covert intent, disentangling personal bias is much more difficult because of the necessity of ascribing some state of mind to the actor rather than dispassionately observing effects.

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247. See *supra* notes 91–94 and accompanying text.

248. See *supra* Parts III.B.3–4.

### 3. *Apparent Intent's Potential for Overreaching*

Finally, these difficulties demonstrate that a focus on perceived government purpose may crucify government actors for apparently acting with an unconstitutional purpose in the absence of an actual intent. Justice Scalia expressed this concern in his *McCreary County* dissent.<sup>249</sup> Striking down a statute or policy based on unconstitutional motive impugns “not only the legislators’ motives but also their honesty.”<sup>250</sup> When based on mere apparent purpose, this action could undermine a branch of government without sufficient justification. A court’s ability to determine that a statute or policy violates a state or federal constitution is a core aspect of our system of government in which the three branches exert their checks and balances upon one another. For a court to strike down an intelligent design policy or statute as motivated by an impermissible government purpose, that court should base its decision on an exacting analysis necessarily, and uniformly, deeper than the reasonable observer’s mere perceptions.

In the intelligent design context, the nearly omniscient reasonable observer could be so skeptical of intelligent design’s recent and present links to religion<sup>251</sup> that the reasonable observer would be unable to imagine any primary secular purpose for teaching intelligent design as valid science. Given the increasingly mutable nature of the reasonable observer, this is certainly possible and would lead to the conclusion that a school board had an obvious, apparent purpose of advancing religion by promoting the instruction of intelligent design. Indeed, the district court in the Dover, Pennsylvania case determined that “an objective observer would know that [intelligent design] and teaching about ‘gaps’ and ‘problems’ in evolutionary theory are creationist, religious strategies that evolved from earlier forms of creationism.”<sup>252</sup>

Yet it is possible that the government actors’ actual purpose could be at odds with this apparent purpose: that school board members could be, in good faith, swayed not by religion, but

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249. *McCreary County v. ACLU*, 125 S. Ct. 2722, 2757 (2005) (Scalia, J., dissenting).

250. Smith, *supra* note 130, at 286.

251. For a chronology of the intelligent design movement, and exploration of its creationist roots in particular, see the *Kitzmiller* trial testimony of Dr. Barbara Forrest. Transcript of Trial Proceedings, *supra* note 1, Day 6 AM, at 117–26.

252. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 716 (M.D. Pa. 2005).

by technical, seemingly complex discussions of bacterial flagella and blood clotting systems such as those introduced by intelligent design proponent Michael Behe.<sup>253</sup> Similarly, as apparently happened in Dover, one or more board members could defer to other board members' judgments that intelligent design is a credible scientific theory and teaching it promotes critical thinking, voting for an intelligent design policy without conducting any independent research on intelligent design whatsoever.<sup>254</sup>

None of this is intended to imply that a court cannot control the reasonable observer inquiry, or that it will employ such an analysis in a haphazard manner without regard for reaching a defensible conclusion. Rather, the reasonable observer analysis *requires* a review one step removed from the perspective of the court.<sup>255</sup> The intelligent design debates are so politically heated and religiously charged that each player questions the credibility and motive of all other players.<sup>256</sup> Thus, courts' decisions serve not only the traditional function of resolving legal debates, but also the social function of giving legitimacy to the prevailing party in a manner that does not weaken the court's own authority. In the intelligent design context, this will be exceptionally difficult because, if *McCreary County* is strictly applied, a purportedly neutral reasonable observer will draw conclusions about governmental intent based on necessarily incomplete factual information and a nearly omniscient perspective on issues of law. These challenges weaken the court's ability to render a credible decision and highlight the difficulties that occur when the inquiry into government purpose is effectively curtailed. Thus, when questioning legislators' motives, an actual purpose analysis is indispensable. For all these reasons, the shift in constitutional harm from actual to apparent government purpose is inherently problematic.

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253. See Transcript of Trial Proceedings, *supra* note 1, Day 11 AM, at 4–30.

254. See *id.*, Day 6 AM, at 117–26.

255. See *supra* notes 135–36, 150–52, 162, 194–96 and accompanying text.

256. See *supra* notes 90–93 and accompanying text. See also Transcript of Trial Proceedings, *supra* note 1, Day 10 AM, at 89–90 (discussing Dr. Kenneth Miller's critique of Dr. Michael Behe's irreducible complexity concept).

B. *What Did the Reasonable Observer Know, and When Did the Reasonable Observer Know It?*

After *McCreary County*, the legal fiction of the reasonable observer takes center stage in the government purpose inquiry. As such, what the reasonable observer is presumed to know becomes even more important in an Establishment Clause case such as an intelligent design dispute. Although the reasonable observer's factual knowledge of context will necessarily be limited, imputing the requisite legal knowledge to the reasonable observer will result in the most bizarrely ultra-knowledgeable reasonable observers to date. One issue in particular brings this into focus: In various ways over the past four years, intelligent design advocates have asserted that the No Child Left Behind Act of 2001 (NCLB) supports, if not requires, the teaching of intelligent design.<sup>257</sup> In 2005, this argument was made extensively during the Kansas Board of Education's consideration of proposed revisions to state science standards and briefly during the Dover trial.<sup>258</sup>

The extent of the reasonable observer's necessary knowledge of issues of law will be enumerated momentarily. Bear in mind that throughout the reasonable observer's existence in Establishment Clause jurisprudence, there is little the reasonable observer has been presumed *not* to know about social practices or legal requirements.

1. *NCLB's Requirements, or Lack Thereof*

Let us assume that a state or local board of education relied on advice such as that given by Intelligent Design Network cofounder and Missouri attorney John Calvert, and mandated teaching of intelligent design with the stated purpose of compliance with NCLB. Parents of affected schoolchildren would bring a lawsuit asserting that the new state standard or local school board policy violates the Establishment Clause, and one of the first questions a trial court would face is whether a reasonable observer would perceive that the government's apparent purpose was to endorse religion or to act with hostility toward religion. To evaluate whether the stated government purpose is a sham, the reasonable observer will need to assess

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257. See Transcript of Trial Proceedings, *supra* note 1, Day 1 AM, at 24–25 (defendant's opening statement); Calvert, *supra* note 75, at 5–7.

258. See Transcript of Trial Proceedings, *supra* note 1, Day 1 AM, at 24–25.

the legitimacy of the government's proffered purpose (in other words, whether NCLB requires what the state actor says it does), and the government's apparent confidence in that purpose (whether the government actor appeared to know that it was relying on bad advice, which is in part dependent on whether a government actor should have known what the law requires).<sup>259</sup> Therefore, the reasonable observer will need knowledge of NCLB that almost certainly exceeds that of nearly all state and local school boards in the country. The reasonable observer will know the following:

In January 2002, President George W. Bush signed into law the No Child Left Behind Act of 2001, 670 pages in its final form. NCLB defines science as a "core academic subject."<sup>260</sup> It requires states to adopt science standards by the 2005–2006 school year, and to begin testing student science achievement by the 2007–2008 school year.<sup>261</sup> Aside from these general requirements, few provisions of NCLB relate to science instruction.<sup>262</sup> Over the past four years, intelligent design advocates

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259. See *supra* notes 173–75 and accompanying text.

260. No Child Left Behind Act of 2001, § 9101(d)(11), Pub. L. No. 107-10, 115 Stat. 1425, 1958 (codified as amended in scattered sections of 20 U.S.C.) [hereinafter NCLB].

261. NCLB § 1111(b)(1)(C) (adoption of standards); § 1111(b)(3)(C)(v)(ii) (science testing must occur once in grades 3–5, grades 6–9, and grades 10–12). Although NCLB contains strict sanctions for schools in which any subgroup of students fails to make adequate yearly progress in reading or math achievement, there are no statutory sanctions for low performance on science tests.

262. This is in direct contrast to NCLB's extensive focus on reading and math instruction. Although the sanctions for low performance on reading and math tests are severe, there are no sanctions for low performance on science tests. The "highly qualified teacher" provisions of NCLB apply to science teachers, although NCLB does not single out science teachers. All teachers hired after January 8, 2002, the effective date of NCLB, must be "highly qualified" at the time of hiring; In other words, certified by the state to teach in a particular area. *Id.* § 1119(a)(1). Further, all teachers of core subjects (including science) must become highly qualified by the 2005–2006 school year. *Id.* § 1119(a)(2).

In other provisions related to science education, NCLB requires that the National Assessment of Educational Progress test students' science achievement. *Id.* § 602. It also permits the troops-to-teachers program to help address the nationwide shortage of science teachers. *Id.* §§ 2301–2307. Finally, it creates programs to encourage science education; e.g., § 1705(c)(4) (developing advanced placement science programs); § 2113(c)(3) (designing alternative certification for science teachers); § 2113(c)(12) (instituting merit-based pay and financial incentives for science teachers); §§ 2201–2203 (creating partnerships between public schools and institutes of higher education to train science teachers and develop science curricula); § 4205(a)(2) (including science instruction in 21st Century Community Learning Centers); §§ 5701–5311 (encouraging science instruction in the Magnet Schools Assistance Program); §§ 5471–5477 (recognizing

have mistakenly claimed that three aspects of NCLB support teaching intelligent design: a sense of the Senate amendment that was not part of the final legislation, the non-binding conference committee report, and NCLB's requirements that supplemental education services and nationally standardized testing be conducted in a "secular, neutral, non-ideological" manner.<sup>263</sup>

## 2. *The Santorum Amendment*

The first point of confusion has its genesis in an amendment Senator Rick Santorum introduced when NCLB was first before the Senate:

It is the sense of the Senate that—(1) good science education should prepare students to distinguish the data or testable theories of science from philosophical or religious claims that are made in the name of science; and (2) where biological evolution is taught, the curriculum should help students to understand why this subject generates so much continuing controversy, and should prepare the students to be informed participants in public discussions regarding the subject.<sup>264</sup>

After brief debate, the amendment passed by a vote of 91-8 and became part of the initial bill adopted by the Senate.<sup>265</sup> The

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science instruction achievement in the Star Schools Program); §§ 5611–5618 (noting participation rates of girls and women in science programs in the Women's Educational Equity Act); § 7121 (Improvement of Education Opportunities for Indian Children); § 7134 (Gifted and Talented Indian Students); § 7205(3)(F) (science programs for gifted and talented native Hawaiian students); § 7304(2)(F) (science programs for native Alaskan students). This footnote contains a comprehensive listing of all science-related provisions contained in NCLB.

263. For a general discussion of NCLB's requirements regarding science and the Santorum Amendment in particular, see Wexler, *supra* note 45, at 835–40.

264. 147 CONG. REC. S6147–48 (daily ed. June 13, 2001) (statement of Sen. Santorum).

265. 147 CONG. REC. S6153 (daily ed. June 13, 2001). The eight Senators voting in opposition may have done so out of concern for federal intrusion into a matter of local control rather than based on an understanding of the religious overtone of the amendment. See Larry Witham, *Senate Bill Tackles Evolution Debate*, WASH. TIMES, June 18, 2001, at A4. The National Center for Science Education speculated, "[I]t seems likely that most of the Senators who voted for the bill were unaware of [its] anti-evolution implications." Glenn Branch, NCSE Office Manager, Nat'l Ctr. For Science Educ., *Farewell to the Santorum Amendment?*, [http://www.ncseweb.org/resources/ncse\\_content/vol22/283\\_farewell\\_to\\_the\\_santorum\\_amend\\_12\\_30\\_1899.asp](http://www.ncseweb.org/resources/ncse_content/vol22/283_farewell_to_the_santorum_amend_12_30_1899.asp) (last visited Jan. 17, 2006). Interestingly, Senator Robert Byrd and Senator Edward Kennedy spoke in favor of a "teach the controversy" approach regarding

Santorum Amendment was not included in the final text of the legislation, however.<sup>266</sup> In the four years since NCLB was signed into law, misleading information about the Santorum Amendment has been circulated repeatedly. In spring 2002, Senator Santorum, Ohio Representatives John Boehner and Steve Chabot, and others made prominent public statements that the Santorum Amendment had become law.<sup>267</sup> Two years later, in the introduction to his 2004 book *Uncommon Dissent: Intellectuals Who Find Darwinism Unconvincing*, Southern Baptist Theological Seminary professor William Dembski reprinted the Santorum Amendment, noting the vote by which it passed the Senate without mentioning that the amendment failed to become law.<sup>268</sup> Most recently, during opening statements in the trial of the Dover, Pennsylvania intelligent design policy in September 2005, the school district's attorney referred to the Santorum Amendment as though it was part of NCLB and thus

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evolution, suggesting their lack of awareness of the amendment's potential effects. 147 CONG. REC. S6150, S6152 (daily ed. June 13, 2001) (statements of Sen. Kennedy and Sen. Byrd).

266. See, e.g., Kenneth R. Miller, Professor of Biology, Brown Univ., The Truth About the "Santorum Amendment" Language on Evolution, <http://www.millerandlevine.com/km/evol/santorum.html> (last visited Jan. 17, 2006); Intelligent Design and Evolution Awareness Center, U.S. Senate Passes Santorum Amendment, Supports Critical Thinking Regarding Evolutionary Theory: \*\*\*Santorum Amendment Update\*\*\*, <http://www.ideacenter.org/contentmgr/showdetails.php/id/1195> (last visited Jan. 17, 2006).

267. For example, in an editorial, Senator Santorum asserted that his amendment was a "provision" of the newly enacted NCLB. Rick Santorum, *Illiberal Education in Ohio Schools*, WASH. TIMES, Mar. 14, 2002, at A14. Approximately one week later, the *Washington Times* quoted Ohio Representatives John Boehner and Steve Chabot stating the same contention. Greg Pierce, *State of Hysteria*, WASH. TIMES, Mar. 20, 2002, at A05. When testifying before the Ohio State Board of Education in the March 6, 2002 hearings regarding proposed revisions to Ohio Science Standards, Steven Meyer of the Discovery Institute also stated that the Santorum Amendment had become law. See Stephen C. Meyer, Discovery News Institute, Teach the Controversy (March 30, 2002), <http://www.discovery.org/scripts/viewDB/index.php?command=view&id=1134>; see also David J. Hoff, *And Congress Said, Let There Be Other Views. Or Did It?*, EDUC. WEEK, June 12, 2002, at 28.

Recently, Senator Santorum stated on NPR that "[a]s far as intelligent design is concerned, I really don't believe it has risen to the level of a scientific theory at this point that we would want to teach it alongside of evolution." Lauri Lebo, *Senator Recasts Science Stance*, YORK DAILY REC., Aug. 5, 2005, at A1.

268. See William Dembski, *Introduction: The Myths of Darwinism*, in UNCOMMON DISSENT: INTELLECTUALS WHO FIND DARWINISM UNCONVINCING xix (William A. Dembski ed. 2004).

binding law.<sup>269</sup> The reasonable observer, of course, would not be misled by any of this, and at this point in time, neither should a local school board, state board of education, or state legislature.

### 3. Conference Committee Report Language

The second point of confusion comes from the nearly 400-page Joint Explanatory Statement of the Committee of Conference (the conference committee report submitted to both houses with the final legislation), which echoed the sentiment of the Santorum Amendment:

The Conferees recognize that a quality science education should prepare students to distinguish the data and testable theories of science from religious or philosophical claims that are made in the name of science. Where topics are taught that may generate controversy (such as biological evolution), the curriculum should help students to understand the full range of scientific views that exist, why such topics may generate controversy, and how scientific discoveries can profoundly affect society.<sup>270</sup>

Normally, conference committee report language would be relevant as part of a statute's legislative history; however, it is unclear how much, if any, weight should be given to the already non-binding<sup>271</sup> "teach the controversy" language of the conference committee report, given both the enormity of this legislation and the absence of any corresponding statutory provision for the report language quoted above.<sup>272</sup> The March 2004 opinion letter to the Darby, Montana school board from attorney John Calvert suggests the conference committee report deserves significant deference:

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269. Transcript of Trial Proceedings, *supra* note 1, Day 1 AM, at 24–25 (defendant's opening statement); *id.*, Day 6 PM, at 83 (cross-examination of Barbara Forrest during which counsel for the school district clarified that the Santorum Amendment is not part of NCLB).

270. H.R. REP. NO. 107-334, at 78 (2001) (Conf. Rep.). This language comes from the Joint Explanatory Statement of the Committee of Conference, which was included in the Conference Committee Report.

271. See Wexler, *supra* note 45, at 766.

272. Thus, the language would not even seem to garner the attention of a court interpreting the statute. See FRANCIS J. BECKWITH, LAW, DARWINISM, & PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN xxi (2003).



The legislative history of No Child Left Behind also makes it clear that Congress considers evolution to be a controversial theory that should be taught objectively. This is evident from the [conference committee report]. . . . Clearly an official policy that censors or downplays scientific criticisms of “biological evolution” and that does not permit discussion of alternative scientific views is contradictory to this advice . . . .<sup>273</sup>

At best, Calvert overstates the binding nature of the conference committee report. At worst, that portion of his legal advice is simply wrong. Regardless, a reasonable observer would know that the language is not binding and would consider that knowledge of the law as part of the background for an evaluation of government purpose.

#### 4. *The “Secular, Neutral, and Nonideological” Directives*

The third point of confusion is, to be fair, a more complicated argument. Calvert and the authors of the March 2005 Kansas Science Standards Committee Minority Report contend that NCLB’s repeated use of the phrase “secular, neutral and nonideological” creates a statutory requirement that evolution be taught critically, if not accompanied by the concept of intelligent design outright.<sup>274</sup> The Minority Report points to two provisions: First, NCLB requires the standardized National Assessment of Education Progress (NAEP) to be “free from racial, cultural, gender, or regional bias, and . . . secular, neutral, and nonideological.”<sup>275</sup> The NAEP is not directly related to local school districts’ curricular choices, however. It is a nationally standardized test administered to sample groups of fourth,

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273. Calvert, *supra* note 75, at 6–7 (citations omitted).

274. *Id.* at 5.

275. NCLB § 412(e)(4), Pub. L. No. 107-10, 115 Stat. 1425, 1906 (codified as amended in scattered sections of 20 U.S.C.) (amending the National Education Statistics Act of 1994). The Department of Education uses NAEP data as a check on states’ reports regarding their own student achievement, but even David Winick, Chairperson of the National Assessment Governing Board, notes that the NAEP and NCLB tests have different purposes and are not interchangeable. U.S. Dep’t of Educ., Science Assessment Meeting Proceedings (June 18–19, 2004), <http://www.ed.gov/rschstat/research/progs/mathscience/science-assessment/proceedings.pdf>. Although NCLB focuses on states’ establishing their own curricular standards and testing students’ achievement towards those state standards, it has been clear from the beginning that states’ performance on NAEP tests does not track with states’ performance on their own standards-based tests. Rand Education, Research Brief: Meeting Literacy Goals Stated by NCLB (2005), <http://www.rand.org/publications/RB/RB9081-1/>.

eighth, and twelfth grade students across the country each year. The NAEP tracks student achievement in eleven subject areas, including science. Resulting data is disaggregated by such factors as sex and racial or ethnic group, but it is not reported by school or district and is only occasionally reported by state.<sup>276</sup> The science test was given in 2000 and again in spring 2005; it is not scheduled to be given again until 2009.<sup>277</sup> Although the NAEP evaluates students' acquisition of scientific knowledge and reasoning, several inferential leaps are required to move from the NCLB requirement, to confidential NAEP questions, to state science standards, to mandatory inclusion of intelligent design in a school district's curriculum.

Second, the Minority Report notes that NCLB requires supplemental service providers, usually organizations providing tutoring to children in failing schools, to provide academic content and instruction that are "secular, neutral and nonideological."<sup>278</sup> This provision has no bearing on states' and school districts' decisions regarding the teaching of evolution. Rather, it opens the door for religiously affiliated organizations and parochial schools to qualify as supplemental service providers so long as they do not engage in religious instruction while delivering the educational services for which they are receiving federal funds. The remaining statutory provisions using the phrase "secular, neutral and nonideological" are triggered when private schools receive NCLB funds and, similarly, have no connection to local school district curricula.<sup>279</sup>

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276. See Nat'l Ctr. for Educ. Statistics, NAEP Overview, <http://nces.ed.gov/nationsreportcard/about/> (last visited Jan. 17, 2006).

277. Results from the 2005 NAEP are expected in Spring 2006. See *id.*

278. NCLB § 1116(e)(5)(D).

279. For example, NCLB requires that private schools receiving subsidies for special education services or other benefits (materials and equipment) guarantee to the state or local education agency that the funds will only be used in a manner that is "secular, neutral and nonideological." § 1120(a)(2). Additionally, NCLB also permits public funds to be used for professional development of private school teachers who teach English language learning students. In that context, states must assure the federal government that local education agencies provide services, materials and equipment to private school non-English speaking students in a manner that is "secular, neutral and nonideological." § 3245(a)(7)(A). Further, NCLB makes funding available for innovative educational programs. States can apply for these funds to redevelop state curricular standards, create new student and school district assessments, encourage charter schools, and initiate other statewide education reforms. School districts can use these funds to develop gifted and talented programs, magnet schools and charter schools, adult literacy initiatives, professional development opportunities, alternative education

5. *What Is a Reasonable Observer to Do?*

All of the foregoing is the legal background a reasonable observer must have to properly evaluate the accuracy of a state or local school board's statement that its purpose in requiring teaching of intelligent design is to comply with the spirit or letter of NCLB. The reasonable observer's job is not done, however, after determining that there is no such statutory or regulatory requirement. The next question in the government purpose analysis is whether, based on a reasonable observer's analysis of public statements and other readily available information,<sup>280</sup> the school board appeared to accept a materially inaccurate characterization of NCLB, or whether it questioned the unsound advice yet acted on it anyway. Several more problems become obvious at this point.

First, a school board's unquestioning reliance on bad legal advice would seem to help immunize it from an Establishment Clause violation from the perspective of a reasonable observer, a result that would encourage school boards to silence their questions about church-state conflict and instead maintain ignorance. Because an apparent purpose analysis is necessarily less complete than an actual purpose inquiry, the reasonable observer could cursorily determine that while the school board's purpose may have been based on a misunderstanding of law, it was not based on an impermissible purpose of advancing religion. This is the sort of situation in which any actual impermissible purpose may not be caught, and the safety net of the effects-endorsement analysis would have sole responsibility for catching an Establishment Clause violation.<sup>281</sup> Of course, the malleable reasonable observer also could reach a very different determination: that the school board disregarded intelligent design's religious connections and the constitutional importance of keeping religious instruction separate from pub-

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services, school-based mental health programs, and other initiatives. Again, private schools are eligible for this funding—if they will use the funding to provide “secular, neutral and nonideological services, materials, and equipment . . .” § 5142(a)(1)(A)(i). Finally, this sentiment is reiterated in Title IX General Provisions, clarifying that with respect to major portions of the act in which private schools may be eligible for NCLB funds, the “educational services or benefits” provided to those schools “must be secular, neutral, and nonideological.” § 9501(a)(2).

280. See *supra* notes 175–77 and accompanying text.

281. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 691–92 (O'Connor, J., concurring) (1984).

lic school curricula. In other words, if the school board receives legal advice that it should be able to recognized as flawed, it could appear unlikely that the school board had truly based its decision on the stated reason, in which case an actual purpose analysis is even more important. Again, we see the reasonable observer's inconsistency and unpredictability in the wake of *McCreary County*.

Second, a school board's decision to rely on legal advice of questionable credibility suggests more clearly that other motives were at play, and that the stated purpose is a sham intended to disguise an impermissible purpose of advancing religion. This situation would likely result in a more invasive apparent purpose inquiry, but it is important to remember that in an intelligent design controversy, religion-based motives are less likely to be blatant and more likely to be discovered only through depositions and written discovery.<sup>282</sup> Some courts have constrained the reasonable observer's perspective to facts that are easily knowable,<sup>283</sup> but, to be fair, courts have also applied this same limit to their own analyses of actual purpose, not necessarily digging into discovery to strike down a statute or policy as motivated by an impermissible government purpose.<sup>284</sup> Nevertheless, after *McCreary County*, the reasonable observer's knowledge of the government actors' expressions of intent is necessarily more limited than a court's.<sup>285</sup> Although a court may choose to rely on public facts such as statements made at school board meetings and to the press, the court is not confined to examining public facts. A reasonable observer *is* confined to that material. In a situation such as an intelligent design debate, damning facts, if they exist, are much less likely to be public, thus requiring a more intensive investigation of government purpose.<sup>286</sup>

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282. See, e.g., Lebo, *supra* note 231 (reporting deposition testimony regarding public and private comments of school board members about intelligent design and creationism). In a state such as Illinois, the plaintiffs could even request the audio recording of a closed-session board meeting, because maintaining audio records has been mandatory since January 2004. 5 ILL. COMP. STAT. 120/2.06 (2005).

283. See *supra* notes 175–78 and accompanying text.

284. See *McCreary County v. ACLU*, 125 S. Ct. 2722, 2736–37 (2005).

285. See *supra* notes 175–78 and accompanying text.

286. See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 748–62 (M.D. Pa. 2005).

For these reasons, importing the reasonable observer into the government purpose analysis affects the analysis of both issues of law and issues of fact in peculiar ways, making the reasonable observer ever more a fiction in the colloquial sense of the word, parting ways with a typical member of the community not by inches but by yards.

C. *The Ever-Important Standard of Review*

After *McCreary County*, the government purpose inquiry, which is particularly critical in an intelligent design case where courts will evaluate the perceived credibility of the government's proffered purpose from the perspective of a reasonable observer, changes from a finding of fact to a question of law. As such, district courts' government purpose analyses now will be reviewed uniformly *de novo*. Before *McCreary County*, the circuits were split on the proper standard of review for findings of fact within a government purpose analysis, so even though this change will bring coherence to a small part of a fractured doctrine (the procedure, not the substance), it is an apparently unforeseen, and, for the reasons explained below, inadequately justified if not detrimental consequence of *McCreary County*.

Like the burden of proof at trial, the standard of review on appeal is so important that, at times, it is effectively outcome-determinative.<sup>287</sup> Generally, a district court's findings of fact are reviewed for clear error: whether "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."<sup>288</sup> Its conclusions of law are reviewed *de novo*: they may be reversed merely if the reviewing court, standing in the place of the trial court, would have reached a different result. This distinction permits trial courts, with their greater proximity to the evidence and witnesses, to make factual findings to which appellate courts defer significantly.<sup>289</sup> By contrast, trial courts' legal conclusions receive greater scrutiny from appellate courts, which have more time to deliberate about what precedent requires as well as greater

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287. See, e.g., Bryan Adamson, *All Facts Are Not Created Equal*, 13 TEMP. POL. & CIV. RTS. L. REV. 629, 629 (2004); Peter Nicolas, *De Novo Review in Deferential Robes?: A Deconstruction of the Standard of Review of Evidentiary Errors in the Federal System*, 54 SYRACUSE L. REV. 531, 531 (2004).

288. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

289. See Nicolas, *supra* note 287, at 533–34.

responsibility to direct the development of the law.<sup>290</sup> Perhaps predictably, Establishment Clause cases present an exception to these general rules.

The circuits are split regarding the proper level of deference appropriate for district courts regarding findings of fact in Establishment Clause cases, but all circuits examine conclusions of law de novo. Specifically, the Third,<sup>291</sup> Sixth,<sup>292</sup> and Tenth<sup>293</sup> Circuits review constitutional facts (facts “fundamental to the existence of a constitutional right,” an erratically applied concept)<sup>294</sup> de novo, while reviewing lower courts’ determinations of subsidiary facts for clear error. The Fourth,<sup>295</sup> Seventh,<sup>296</sup> and Eleventh<sup>297</sup> Circuits review all findings of fact in Establishment Clause cases for clear error. Nearly twenty years before *McCreary County*, Justice O’Connor’s concurrence in *Lynch v. Donnelly* (in which she introduced the reasonable observer and the endorsement test) reviewed a lower court’s government purpose inquiry for clear error.<sup>298</sup> More recently, the Eleventh Circuit made clear that an inquiry into actual government purpose was a factual inquiry under circuit law.<sup>299</sup> This is consistent with circuit courts’ general recognition that the evaluation of government purpose is based on facts, whether the circuit is

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290. See Adamson, *supra* note 287, at 630.

291. See *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004); *Tenafly Eruv Ass’n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 156–57 (3d Cir. 2002).

292. See *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 488 (6th Cir. 2004); *Adland v. Russ*, 307 F.3d 471, 477 (6th Cir. 2002).

293. See *O’Connor v. Washburn Univ.*, 416 F.3d 1216, 1223 (10th Cir. 2005); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 922 (10th Cir. 2002); *Sumnum v. City of Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002).

294. Adamson, *supra* note 287, at 633 (quoting Martin Louis, *Allocating Adjudicative Decision Making Authority Between Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993, 995 n.13 (1986)). The Supreme Court and lower courts do not apply the constitutional facts doctrine with much, if any, uniformity. Accordingly, although the constitutional facts doctrine does control non-jury First Amendment malice cases, it does not control all First Amendment cases. See, e.g., Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1786 (2003); see also Adam Hoffman, Note, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 DUKE L.J. 1427, 1442–43 (2001).

295. See *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 508 (4th Cir. 2001).

296. See *Ind. Civil Liberties Union v. O’Bannon*, 259 F.3d 766, 770 (7th Cir. 2001).

297. See *Glassroth v. Moore*, 335 F.3d 1282, 1291, 1296–97 (11th Cir. 2003); *King v. Richmond County*, 331 F.3d 1271, 1275 (11th Cir. 2003).

298. *Lynch v. Donnelly*, 465 U.S. 668, 688–94 (1984) (O’Connor, J., concurring).

299. *Glassroth*, 335 F.3d at 1296–97.

one that classifies those facts as constitutional or not. Nevertheless, after *McCreary County*, the inquiry into government purpose from the reasonable observer's perspective has become a matter of law, and thus subject to de novo review across the circuits.<sup>300</sup>

While uniformity among circuits about a procedural or substantive matter generally is preferable to a circuit split, the resolution of such a split should occur after thorough consideration of the divergent rules, their origins, and their effects. If the Court in *McCreary County* considered the issue of the changing standard of review, the opinions do not discuss it.

Setting aside the Court's silence, a compelling reason for de novo review of a government purpose inquiry would be for appellate courts to develop and maintain a coherent body of substantive case law, even if limited to intra-circuit consistency.<sup>301</sup> But, given the general incoherence of the Supreme Court's Establishment Clause cases, any sort of substantive doctrinal consistency will almost necessarily be elusive in Establishment Clause cases generally and in intelligent design cases particularly. Consider the results of Establishment Clause cases that have peppered the dockets of courts of appeals across the country for the past decade: The overwhelming number of these cases have been reviewed de novo, either because the reviewing court is evaluating the propriety of granting a motion for summary judgment or motion to dismiss, or because it is evaluating constitutional facts or a conclusion of law.<sup>302</sup> However, these cases as a whole were not bound together by a predictable, or predictive, set of legal rules; at times

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300. The Second Circuit, for example, has specifically held that it reviews a reasonable observer's conclusion de novo. *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 75 (2d Cir. 2001).

301. As the Supreme Court accepts an average of eighty to eighty-five cases per term, the federal courts of appeals in this country establish the vast majority of binding federal precedent.

302. See, e.g., *Lambeth v. Bd. of Comm'rs of Davidson County*, 407 F.3d 266, 268 (4th Cir. 2005) (motion to dismiss); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1212 (10th Cir. 2004) (summary judgment); *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (motion to dismiss, as well as Eleventh Amendment immunity and statute of limitations issues); *Wigg v. Sioux Falls Sch. Dist.*, 382 F.3d 807, 812 (8th Cir. 2004) (summary judgment); *Am. Family Ass'n, Inc. v. City of S.F.*, 277 F.3d 1114, 1120 (9th Cir. 2002) (motion to dismiss); *Knights of Columbus, Counsel No. 94 v. Town of Lexington*, 272 F.3d 25, 30 (1st Cir. 2001) (summary judgment); *Books v. City of Elkhart*, 235 F.3d 292, 298 (7th Cir. 2000) (summary judgment); *Brooks v. City of Oak Ridge*, 222 F.3d 259, 264 (6th Cir. 2000) (summary judgment).

religious displays were permitted, at times rejected. These decisions became consistent only in their lack of consistency, on occasion presenting apparent conflicts within a circuit.<sup>303</sup> Even the recent pair of Supreme Court cases that grew out of this morass only answers questions at the extreme ends of the factual and legal spectra. The resulting unpredictability is not a satisfactory return for the considerable investment of private and judicial resources that the *de novo* review of these cases has required.<sup>304</sup>

Thus, if (or when) a critical mass of intelligent design cases reaches district courts across the country, those courts inevitably will invest their reasonable observers with extensive knowledge of matters of law. Reasonable observers will presumably know a good deal about the theory of evolution, the concept of intelligent design, NCLB's lack of requirements regarding teaching intelligent design, and other similar issues.<sup>305</sup> The factors that will vary significantly from case to case are the public and private statements of the relevant government actors, which are arguably the reasonable observer's greatest non-textual (and, as argued above, sometimes inaccessible) clues to apparent government purpose.

After district courts take their turn, courts of appeals will uniformly exercise the least amount of deference possible to lower courts over essentially factual determinations in a messy area of law guided by unclear precedent. Despite what will certainly be their best efforts, the various courts of appeals will remain predisposed to reaching effectively inconsistent results. Because of likely narrow factual distinctions between intelligent design cases, this effect also could occur within circuits.

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303. *Compare* Books v. Elkhart County, 401 F.3d 857 (7th Cir. 2005) (permitting display of Ten Commandments monument on the lawn of a county administration building), *with* Ind. Civil Liberties Union v. O'Bannon, 259 F.3d 766 (7th Cir. 2001) (not allowing a state to accept a Ten Commandments monument and display it on the grounds of the state house). *See also* ACLU Neb. Found. v. City of Plattsmouth, 358 F.3d 1020 (8th Cir. 2004) (disallowing a Ten Commandments display in a public park); *Freethought Soc'y of Greater Phila. v. Chester County*, 334 F.3d 247 (3d Cir. 2003) (permitting a Ten Commandments plaque to remain posted on the exterior of a county courthouse); *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (not permitting the relocation of a Ten Commandments monument to the state capitol complex); *Sumnum v. City of Ogden*, 297 F.3d 995, 1001 (10th Cir. 2002) (not permitting the city to accept and display a Ten Commandments monument).

304. *See* Nicolas, *supra* note 287, at 533–34; *see also* Adamson, *supra* note 287, at 630.

305. *See supra* Parts IV.B.1–4.



Even if reasonable observers have a consistent presumed universe of knowledge—an occurrence that is theoretically possible but highly unlikely—factually distinguishing these cases from one another should not be difficult. This will create space for cases that draw peculiar distinctions and are in effect at odds with one another.<sup>306</sup> Accordingly, the additional investment of judicial resources at the appellate level through a de novo review of the government purpose inquiry is unlikely to have much, if any, unifying effect on the emerging body of intelligent design case law either among or within the circuits.

Therefore, as the intelligent design context illustrates, the value of an actual governmental purpose inquiry has not dissipated. If anything, this inquiry has become more crucial to maintaining government actors' and courts' legitimacy when courts confront intelligent design policies and statutes. For these reasons, a slight retreat from *McCreary County* is well advised. Despite inevitable invitations to do otherwise, the Court should affirm *McCreary County's* central holding and maintain the importance of the government purpose inquiry. It should, however, limit the role of the reasonable observer to the effects-endorsement analysis.

## V. CONCLUSION

With *McCreary County* and so many other Establishment Clause cases decided 5-4, and Justice O'Connor often serving as a swing vote, this doctrine is one of many at a crossroads following her retirement. Whether the reasonable observer will fade away absent its creator and erstwhile champion remains to be seen, but it seems unlikely, at least, that the reasonable observer's departure is imminent. Either way, the necessary results of *McCreary County* reach too far. The altered notion of the constitutional harm and limited scope of the objective observer's review, the expansion of the objective observer's necessary knowledge of law yet contraction of knowledge of facts in what is at core a factual inquiry, and the mandatory change in the standard of review without sufficient justification—each of these detrimental effects of *McCreary County* will become obvious as courts grapple with issues such as the burgeoning evolution-intelligent design disputes. For these reasons, gov-

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306. The *Van Orden-McCreary County* pairing is just such an example from the highest Court in the land.

ernment purpose should not be perceived by the distanced eyes of the objective, reasonable observer, but rather ascertained for actuality by the blinder-free eyes of courts.