The Dover Question: will Kitzmiller v Dover affect the status of Intelligent Design Theory *in the same way as McLean v. Arkansas* affected Creation Science?

Darlene N. Snyder, Springfield College in Illinois/Benedictine University Faculty
University of Illinois at Springfield

Abstract

The judgment that took place in the United States Court for the Middle District of Pennsylvania identified as *Kitzmiller v. Dover Area School District* [1], may signify the legal future of Intelligent Design Theory. While the precedent set in *Kitzmiller* is only applicable to the Middle District of Pennsylvania, history demonstrates that the research, testimony, definitions, and subsequent decisions realized in U.S. District courts, have been cited to facilitate resolutions in U.S. Supreme Court cases.

The *McLean v. Arkansas Bd. of Ed.* [2] findings for Creation Science is a specific example of a U.S. District Court case impacting a Supreme Court Decision, *Edwards v. Aguillard*.[3] Consequently, the *Kitzmiller* judgment may contribute substantially to a Supreme Court decision concerning Intelligent Design Theory as a scientific concept. This paper explores the soundness of Judge Jones' decision and investigates parallels between the *McLean* and *Kitzmiller* rulings. From this analysis predictions are made anticipating an unfavorable legal decision awaiting Intelligent Design Theory at the Supreme Court level.

Introduction

In Dover Pennsylvania, the local school board mandated the reading of the following statement which includes both a disclaimer marginalizing the biological theories of evolution and the recommendation of a school library book *Of Pandas and People*. These were presented as referenced alternatives to the existing scientific theories of evolution to all tenth grade biology classes. The *Kitzmiller* court testimonies and depositions provided the following information:

> On November 19, 2004, the Defendant Dover Area School District announced by press release that, commencing in January 2005, teachers would be required to read the following statement to students in the ninth grade biology class at Dover High School:
> 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. [4]

[1] 400 F. Supp. 2d 707 (M.D. Pa. 2005).
[2] 529 F. Supp. 1255 (E.D Ark. 1982).
[3] 482 U.S. 578, 582-83 n. 3 (1987).
[4] *Id*. at 39-43.

The initial reaction was immediate and came from the school's biology teachers. They refused to read the statement to their classes; consequently, members of the school board visited each biology class and personally recited the disclaimer. Tammy Kitzmiller and other parents filed suit in the U.S. District Court for the Middle District of Pennsylvania.[5]

When loosely disguised religious dogma is proposed to be a new scientific theory to be presented in public science classes it is traditionally met with intense opposition from the scientific community and consistently challenged in the courts. Additionally, there is a continuum linking court decisions that allow for reasonable conclusions about the fate of Intelligent Design Theory if it is ever heard by the U.S. Supreme Court. It can be argued that the influence of the *Kitzmiller* outcome will be will be infavorable to Intelligent Design Theory in any potential Supreme Court hearing that challenges the constitutionality of Intelligent Design Theory.

Prior to the legal challenge in Dover Pennsylvania, religious fundamentalist were attempting to incorporate the pseudoscientific concept of Intelligent Design Theory into public school science classes at the local level hoping to circumvent Constitutional restrictions. With the lawsuit in Pennsylvania the constitutional and scientific status of Intelligent Design Theory was put on trial. The U.S. District Court case in Dover and the U.S. District Court case of *McLean v. Arkansas* have striking similarities. *McLean v. Arkansas* entailed a comparable pseudoscientific concept known as Creation Science.[6] The underlying concept for both cases is one of religious dogma camouflaged in scientific sounding language in order to be incorporated into public science classes.

Establishment Clause Assessments

In his judgment of *Kitzmiller* Judge Jones used the existing First Amendment tests previously established by the Supreme Court.[7] These principles have been repeatedly used by the courts in decisions relating to infringements issues of the Establishment Clause of the First Amendment.[8] Despite the fact that Establishment Clause tests have been criticized by members

[5] *Id.*
[6] 529 F. Supp. 1255 1258-1254 (E.D. Ark 1982).
[7] See Lemon v. Kurtzman, 403 U.S. 602 (1971); Lynch v. Donnelly 465 U.S. 668 (1984) and Abbington School Dist v. Schemp 374 U.S. 203 (1963).
[8] U.S. Const. amend. I.

of the Supreme Court, they have been used successfully to determine the outcome several court decisions concerning Establishment Clause issues.[9]

It is imperative to understand both the logic and paradigm that Judge Jones used to determine the fate of Intelligent Design Theory as a scientific concept in public biology classes. Additionally, it is important to understand the prevailing criteria used by the Supreme Court to resolve earlier Establishment Clause breaches.

The Supreme Court has articulated three distinct tests which have been effectively used to resolve past Establishment Clause questions. Judge Jones engaged two of these; the *Lemon* test and the Establishment test. The third test, the coercion test, which was outlined by Justice Anthony Kennedy in his dissenting opinion in *Allegheny v. ACLU.*[10] However, the coercion test was not appropriate for the Dover proceedings and therefore not used by the court for adjudication.

Historically the *Lemon* test stems, in part, from the U.S. Supreme Court case of *Abbington v. Schemp*.[11] In this decision Justice Clark initially expressed what would later become the first two prongs of the *Lemon* test. Consequently, the *Lemon* test as articulated by Justice Burger in 1971 was gleaned from reviewing previous Supreme Court cases involving Establishment Clause violations. To emphasize this point in *Lemon* v. *Kurtzman* Justice Burger wrote that: "Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years."[12]

The *Lemon* test in its current form as adopted from the U.S. Supreme Court case of *Lemon v. Kurtzman* is a three part assessment which states that: 1) there must be a secular legislative purpose for the law, 2) the primary effect of a law can neither advance nor inhibit religion, and, 3) the primary effect of the law does not result in excessive government entanglement with religion.[13]

[9] See Edwards v. Aguillard 482 U.S. 578, (1987); Kitzmiller v. Dover Area Sch. Bd . 400 F. Supp. 2d 707 (M.D. Pa. 2005) and Selman v. Cobb County Sch. Dist., 2006 WL 1428822 (Ga. App. May 26, 2006).
[10] 492 U.S. 573 (1989).
[11] 374 U.S. 203 (1963).
[12] 403 U.S. 602 (1971).
[13] *Id*. (citing Kurtzman 403 U.S.602).

The Endorsement test was initially expressed by Justice Sandra Day O'Connor in *Lynch v. Donnelly*.[14] The Endorsement test deals with the perceptions of a reasonable observer and asserts that a law is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of any religion.[15] Judge Jones applied two of the three existing standards of case law to determine the constitutionality of the Dover school board disclaimer.

The Kitzmiller Decision

Justice Jones begins his judgment by executing a comprehensive search of relevant Supreme Court cases as well as applicable litigation from the Third Circuit Court of Appeals, which he states at the beginning of his opinion in *Kitzmiller*.[16] Jones uses multiple citations from historical case law to support his ruling.[17] The Memorandum Opinion for *Kitzmiller* ran a total length of 169 pages, forty-one of these pages are devoted to defining the reasonable observer and what this identified observer would perceive that the board's policy statement was actually conveying to students.[18] Judge Jones concluded that the reasonable observer will understand that the Dover disclaimer, as read by school board members, to be a decidedly religious concept. The legitimacy of this deduction is unambiguously established through forty-one pages of testimony, research and historical case law.[19] Intelligent Design Theory unmistakably and conclusively failed the Endorsement test.

In addressing the first prong of the Lemon test it is significant to note that public statements were made by members of the school board which referenced specific religious concepts adhered to by certain religious groups, i.e. Christianity. These statements were made during a school board meeting.[20] One such statement was made by Mr. Bonsell with reference to the boards' new Intelligent Design policy was that "2,000 years ago someone died on a cross. Can't someone take a stand for him?"[21] These religious comments were made in an attempt to rationalize the school boards' new Intelligent Design disclaimer policy. This is one of many

[14] 465 U.S. 688 (1984).
[15] *Id*.
[16] 400 F. Supp.2d 707 (M.D. Pa. 2005).
[17] *Id*. at 10.
[18] *Id*. at 9- 32.
[19] *Id*. at 10-11.
[20] *Id*. at 105.
[21] *Id*. at 105.

examples signifying that the board's new policy was religiously motivated and; subsequently, lacking secular purpose.[22] As previously acknowledged, the first prong of the *Lemon* test asserts that a law must have a secular purpose to avoid being in violation of the Establishment Clause. Consequently, the school boards' Intelligent Design policy was in violation of first prong of the *Lemon* test. Once again Intelligent Design Theory unmistakably and conclusively failed the first prong of the *Lemon* test.

The second prong of the *Lemon* test maintains that the government's action must not have the primary effect of either advancing or inhibiting religion. It has been demonstrated that the Dover's school boards' policy would indeed be perceived as religion by a reasonable observer. Public statements made by members of the school board along with the recommended reference book, *Of Pandas and People,* demonstrate the lack of a secular purpose. Accordingly, it becomes evident that the result of the Intelligent Design policy would be to advance a religious agenda; specifically Christianity.[23] For that reason, the Intelligent Design policy also unmistakably and conclusively fails the second prong of the Lemon Test. Given that the Dover school board's new Intelligent Design policy failed the first and second prongs of the *Lemon* test as well as the Endorsement test Judge Jones rightfully concluded that:

> The proper application of both the endorsement and *Lemon* tests to the facts of this case makes it abundantly clear that the Board's ID Policy violates the Establishment Clause. In making this determination, we have addressed the seminal question of whether ID is science. We have concluded that it is not, and moreover that ID cannot uncouple itself from its creationist, and thus religious, antecedents. [24]

Analogous Jurisdictions

Parallels between *McLean* in 1981 and *Kitzmiller* in 2005 are as obvious as they are abundant. On close examination, it could be argued that *McLean* and *Kitzmiller* addressed the same First Amendment dilemma. Both dealt with essentially the same concept differing only in nomenclature. The religious concepts were disguised as science for presentation in public school science classes in order to circumvent First Amendment religious restrictions. In *McLean* the term was Creation Science and for *Kitzmiller* it was Intelligent Design Theory.

[22] *Id*. at 130.
[23] *Id*. (citing Kurtzman 403 U.S. 602.).
[24] *Id*. at 136.

McLean [25] was heard in a U.S. District Court. This meant that the case did not set a national precedent and was not applicable to schools that were outside the Eastern District of Arkansas. Creationists chose not to appeal the Court's decision; however, the outcome has had considerable influence on subsequent rulings including the U. S. Supreme Court case *Edwards v. Aguillard* [26] which addressed the same issue. Comparable to this state of affairs was the trial that took place in Dover, Pennsylvania twenty-four years later i.e. *Kitzmiller v. Dover*. The *Kitzmiller* case was also tried in a District court and not legally binding for schools outside the Middle District of Pennsylvania.[27] The board members who were religious proponents of Intelligent Design Theory and responsible for the implementation of the new policy, were voted out of office; therefore, the decision, as in the *McLean* ruling, was never appealed to a higher court. Nevertheless the impact of the *Kitzmiller* decision may very well be substantial for future court proceedings.

Clarifying Science and Religion

Kitzmiller addressed the constitutionality of a disclaimer read to students in biology class which marginalized the biological theories of evolution and suggested that students seek out a book on Intelligent Design Theory in the library. *McLean* dealt with the balanced treatment approach for the introduction of a religious concept, Creation Science, into Arkansas public schools. Arkansas Act 590 [28] mandated that Creation Science be given the same amount of class time equivalent to the class time spent on the biological theories of evolution. The overall problem of recognizing religion masquerading as science for use in public schools remains the same. One of the most important outcomes of *McLean* is Judge Overton's explicit definition for science. This description for science and the scientific method was obtained from the scientific community. The scientific community provided testimony leading to Overton's clear and exact definition for science which was stated as:

1. It is guided by natural law.
2. It has to be explanatory by reference to natural law.
3. It is testable against the empirical world.
4. Its conclusions are tentative, i.e. are not necessarily the final word; and it is falsifiable.

[25] 529 F. Supp. 1255 1258-1264 (E.D. Ark 1982).
[26] *Id*. (citing Edwards 482 U.S. 587).
[27] *Id*.(citing Kitzmiller 400 F. Supp. 2d 707 at 105).
[28] 1981 Ark. Acts 590, § 4(a).

5. It is guided by natural law.[29]

With this working definition of science the court found that "creation science" failed to meet these essential characteristics.[30]

Comparatively, Judge Jones arrives at the same conclusion for Intelligent Design Theory as Overton did for creation science.[31] Judge Jones uses an almost identical definition for science as did Judge Overton; additionally, the court relied once again on the scientific community for an accurate working definition of science. The National Academy of Sciences is the premier institute for defining what constitutes a valid scientific hypothesis and the court aptly noted that:

> NAS is in agreement that science is limited to empirical, observable and ultimately testable data: Science is a particular way of knowing about the world. In science, explanations are restricted to those that can be inferred from the confirmable data – the results obtained through observations and experiments that can be substantiated by other scientists. Anything that can be observed or measured is amenable to scientific investigation. Explanations that cannot be based upon empirical evidence are not part of science."[32]

Further stating:

> As the National Academy of Sciences (hereinafter "NAS") was recognized by experts for both parties as the "most prestigious" scientific association in this country, we will accordingly cite to its opinion where appropriate.[33]

Conclusion

McLean and *Kitzmiller* both make definitive legal statements about the constitutionally of newly proposed scientific theories; Overton in *McLean v.* ruled on creation science and Jones in *Kitzmiller* ruled on Intelligent Design Theory. Both litigations provide the same fundamental definitions for science and the scientific method. Moreover, both Justices Jones and Overton set virtually the same parameters for religious concepts. This allowed both courts to differentiate between religious dogma and true scientific hypotheses. Both courts ruled that the loosely

[29] McLean v. Arkansas Board of Education 529 F. Supp. 1255 (E.D. Ark. 1982).
[30] *Id.*
[31] Tammy Kitzmiller, et al. v. Dover Srea Schppl District, et al. 400 F. supp.2d 707 (M.D. Pa. 2005).
[32] *Id.* at 66.
[33] *Id.* at 65.

disguised religious beliefs masquerading as science were unconstitutional in accordance with the Establishment Clause of the First Amendment.[34]

Although *McLean* was heard in a U.S. District court, Judge Overton laid the ground work for the U.S. Supreme Court case *Edwards v. Aguillard* which took place five years later. In *Edwards* the U. S. Supreme Court ruled that Creation Science was not science, but in fact was a religious concept suffused with scientific sounding terminology.[35] Creation Science as a religious dogma was in violation of the Establishment Clause of the First Amendment and therefore declared unconstitutional. Although *McLean* was decided five years earlier, is cited multiple times in the U.S. Supreme Court decision of *Edwards.* [36] Consequently, the U.S. District Court of Arkansas provided the underpinnings for the *Edwards* decision.

The *Kitzmiller* case presented information, reminiscent of *McLean*; therefore, I believe that *Kitzmillerr* will contribute extensively to the foundation of any future U.S. Supreme Court decisions involving the constitutionally of Intelligent Design Theory. I would argue that it is reasonable to assert that a U.S. Supreme Court considering the validity of Intelligent Design as a scientific theory would engage the testimony, research, and definitions made available by the U.S. District Court of Middle Pennsylvania.

Regardless of the political makeup of the U.S. Supreme Court it would be unconscionable that any sitting U.S. Supreme Court justice would adjudicate in favor of a pseudoscientific theory which demands that the discipline of science incorporate the concept of astrology into its conceptual framework.[37] Judge Jones is considered a political conservative;[38] nevertheless, he ruled uncompromisingly and vigorously against Intelligent Design Theory as a legitimate scientific hypothesis.[39]

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[34] U.S. Const. amend. I.
[35] Edwards v. Aguillard, 482 U.S. 578 (1987).
[36] *Id.*
[37] Kitzmiller et al. v. Dover Area Sch. Bd. Et al. 400 F. Supp. 2d 707(M.D. Pa. 2005) at 38.
[38] http://www.time.com/time/magazine/article/0,9171,1187265,00.html (accessed 11 September 2007).
[39] Kitzmiller et al. v. Dover Area Sch. Bd. Et al. 400 F. Supp. 2d 707(M.D. Pa. 2005).