instructional materials to religious schools as part of a general program of aid to education. Justice Thomas's opinion for the judicial plurality insisted, "If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government." Finally, in *Zelman v. Simmons-Harris* (2003) the Supreme Court by a 5-4 vote sustained an Ohio law that provided financial assistance to parents who sent their children to private schools, the vast majority of which are religious.

## Zelman v. Simmons-Harris, 536 U.S. 639 (2002)

*Doris Simmons-Harris was a parent of a minor child in the Cleveland, Ohio, school district. In 1999 and 2000 the Ohio legislation enacted a comprehensive spending program designed to improve the exceptionally low performance of children in the Cleveland public schools. Elected officials increased the number of community and magnet schools in the Cleveland school district. They provided tutorial aid for students who chose to remain in the public school system. Finally, the state provided tuition grants of up to $2,250 to students who enrolled in either private schools or public schools in districts near Cleveland (although no school outside of Cleveland agreed to take any students). Schools accepting the money had to agree not to discriminate on the basis of religion or "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Fifty-six private schools agreed to accept public school students. Forty-six of those schools were sectarian. Simmons-Harris and other Cleveland residents who opposed the tuition grants filed a lawsuit against Susan Zelman, the superintendent of public instruction in Ohio. They claimed that government could not pay tuition for students to attend religious schools. Both the local federal district court and the Court of Appeals for the Sixth Circuit agreed with this contention. Zelman appealed to the Supreme Court of the United States.*

*The Supreme Court by a 5-4 vote sustained the voucher program. Chief Justice Rehnquist's opinion for the Court asserted that the establishment clause requirement that prgrams be neutral between religion and nonreligion was met because money flowed to religious schools only as a consequence of private choices made by parents. How do each of the opinions interpret neutrality, and how do these interpretations influence voting in* Zelman? *What is more relevant to the constitutional analysis: that religious schools were not singled out as special beneficiaries, or that because of the extensive preexisting network of religious schools in Cleveland religious schools were the primary financial beneficiaries of this government program? The dissenting opinions in* Zelman *worry that public officials may use funding as a way to influence religious indoctrination. Is this a legitimate fear? Consider that many religions teach that their adherents are a "chosen people" or that only adherents will enjoy the afterlife. Could this be said to foster the hatred on the basis of religion prohibited by Ohio law? What restrictions on state funding might you insist upon? Are those restrictions neutral with respect to different religions?*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

. . .

. . . [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. . . . It is precisely for these reasons that we have never found a program of true private choice to offend the Establishment Clause.

We believe that the program challenged here is a program of true private choice . . . and thus constitutional. . . . [T]he Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may

participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools. . . . The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. . . .

. . .

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

. . . Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. . . . It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. . . . To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, . . . but not in inner-city Cleveland, where Ohio has deemed such programs most sorely needed, but where the preponderance of religious schools happens to be greater. . . .

. . .

JUSTICE O'CONNOR, concurring.

. . .

. . . The share of public resources that reach religious schools is not as significant as respondents suggest. . . . Data from the 1999–2000 school year indicate that 82 percent of schools participating in the voucher program were religious and that 96 percent of participating students enrolled in religious schools. . . . These statistics do not take into account all of the reasonable educational choices that may be available to students in Cleveland public schools. When one considers the option to attend community schools, the percentage of students enrolled in religious schools falls to 62.1 percent. If magnet schools are included in the mix, this percentage falls to 16.5 percent. . . .

Even these numbers do not paint a complete picture. The Cleveland program provides voucher applicants from low-income families with up to $2,250 in tuition assistance and provides the remaining applicants with up to $1,875 in tuition assistance. . . . In contrast, the State provides community schools $4,518 per pupil and magnet schools, on average, $7,097 per pupil. . . . Even if one assumes that all voucher students came from low-income families and that each voucher student used up the entire $2,250 voucher, at most $8.2 million of public funds flowed to religious schools under the voucher program in 1999–2000. . . . [T]he amount spent on religious private schools is minor compared to the $114.8 million the State spent on students in the Cleveland magnet schools.

. . .

Against this background, the support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs. While this observation is not intended to justify the Cleveland voucher program under the Establishment Clause, . . . it places in broader

perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases. . . .

. . .

In my view the more significant finding in these cases is that Cleveland parents who use vouchers to send their children to religious private schools do so as a result of true private choice. The Court rejects, correctly, the notion that the high percentage of voucher recipients who enroll in religious private schools necessarily demonstrates that parents do not actually have the option to send their children to nonreligious schools. . . . Likewise, the mere fact that some parents enrolled their children in religious schools associated with a different faith than their own . . . says little about whether these parents had reasonable nonreligious options. Indeed, no voucher student has been known to be turned away from a nonreligious private school participating in the voucher program. . . .

. . .

JUSTICE THOMAS, concurring.

. . .

. . . There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice.

The wisdom of allowing States greater latitude in dealing with matters of religion and education can be easily appreciated in this context. Respondents advocate using the Fourteenth Amendment to handcuff the State's ability to experiment with education. But without education one can hardly exercise the civic, political, and personal freedoms conferred by the Fourteenth Amendment. Faced with a severe educational crisis, the State of Ohio enacted wide-ranging educational reform that allows voluntary participation of private and religious schools in educating poor urban children otherwise condemned to failing public schools. The program does not force any individual to submit to religious indoctrination or education. It simply gives parents a greater choice as to where and in what manner to educate their children. This is a choice that those with greater means have routinely exercised.

. . .

While the romanticized ideal of universal public education resonates with the cognoscenti who oppose vouchers, poor urban families just want the best education for their children, who will certainly need it to function in our high-tech and advanced society. . . . The failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives. If society cannot end racial discrimination, at least it can arm minorities with the education to defend themselves from some of discrimination's effects.

JUSTICE STEVENS, dissenting. . . .

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

. . .

. . . In the city of Cleveland the overwhelming proportion of large appropriations for voucher money must be spent on religious schools if it is to be spent at all, and will be spent in amounts that cover almost all of tuition. The money will thus pay for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension. Public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic.

. . .

. . . If regular, public schools (which can get no voucher payments) "participate" in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority's reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all. "Neutrality" as the majority employs the term is, literally, verbal and nothing more. This, indeed, is the only way the majority can gloss over the very nonneutral feature of the total scheme covering "*all* schools": public tutors may receive from the State no more than $324 per child to support extra tutoring (that is, the State's 90% of a total amount of $360), . . . whereas the tuition voucher schools (which turn out to be mostly religious) can receive up to $2,250. . . .

. . .

If . . . we ask the right question about genuine choice to use the vouchers, the answer shows that something is influencing choices in a way that aims the money in a religious direction: of 56 private schools in the district participating in the voucher program (only 53 of which accepted voucher students in 1999–2000), 46 of them are religious; 96.6% of all voucher recipients go to religious schools, only 3.4% to nonreligious ones. . . .

Even so, the fact that some 2,270 students chose to apply their vouchers to schools of other religions . . . might be consistent with true choice if the students "chose" their religious schools over a wide array of private nonreligious options, or if it could be shown generally that Ohio's program had no effect on educational choices and thus no impermissible effect of advancing religious education. But both possibilities are contrary to fact. First, even if all existing nonreligious private schools in Cleveland were willing to accept large numbers of voucher students, only a few more than the 129 currently enrolled in such schools would be able to attend, as the total enrollment at all nonreligious private schools in Cleveland for kindergarten through eighth grade is only 510 children and there is no indication that these schools have many open seats. Second, the $2,500 cap that the program places on tuition for participating low-income pupils has the effect of curtailing the participation of nonreligious schools: "nonreligious schools with higher tuition (about $4,000) stated that they could afford to accommodate just a few voucher students." By comparison, the average tuition at participating Catholic schools in Cleveland in 1999–2000 was $1,592, almost $1,000 below the cap.

. . .

In paying for practically the full amount of tuition for thousands of qualifying students . . . the scholarships purchase everything that tuition purchases, be it instruction in math or indoctrination in faith. The consequences of "substantial" aid . . . are realized here: the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.

. . .

. . . [I]n the 21st century, the risk [of state aid corrupting religion] is one of "corrosive secularism" to religious schools, . . . and the specific threat is to the primacy of the schools' mission to educate the children of the faithful according to the unaltered precepts of their faith. . . .

. . .

Increased voucher spending is not, however, the sole portent of growing regulation of religious practice in the school, for state mandates to moderate religious teaching may well be the most obvious response to the third concern behind the ban on establishment, its inextricable link with social conflict. . . .

. . . Religious teaching at taxpayer expense simply cannot be cordoned from taxpayer politics, and every major religion currently espouses social positions that provoke intense opposition. Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines "a nationalistic sentiment" in support of Israel with a "deeply religious" element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting the articles of faith of the Southern Baptist Convention. . . .

. . .

JUSTICE BREYER, with whom JUSTICE STEVENS and JUSTICE SOUTER join, dissenting.

. . . I write separately to emphasize the risk that publicly financed voucher programs pose in terms of religiously based social conflict. I do so because I believe that the Establishment Clause concern for protecting the Nation's social fabric from religious conflict poses an overriding obstacle to the implementation of this well-intentioned school voucher program. . . .

. . .

. . . [A]n "equal opportunity" approach [is] not workable. With respect to religious activities in the public schools, how could the Clause require public primary and secondary school teachers, when reading prayers or the Bible, *only* to treat all religions alike? In many places there were too many religions, too diverse a set of religious practices, too many whose spiritual beliefs denied the virtue of formal religious training. This diversity made it difficult, if not impossible, to

devise meaningful forms of "equal treatment" by providing an "equal opportunity" for all to introduce their own religious practices into the public schools.

. . . The upshot is the development of constitutional doctrine that reads the Establishment Clause as avoiding religious strife, *not* by providing every religion with an *equal opportunity* (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of *separation* between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue.

. . .

. . . School voucher programs finance the religious education of the young. And, if widely adopted, they may well provide billions of dollars that will do so. Why will different religions not become concerned about, and seek to influence, the criteria used to channel this money to religious schools? Why will they not want to examine the implementation of the programs that provide this money—to determine, for example, whether implementation has biased a program toward or against particular sects, or whether recipient religious schools are adequately fulfilling a program's criteria? If so, just how is the State to resolve the resulting controversies without provoking legitimate fears of the kinds of religious favoritism that, in so religiously diverse a Nation, threaten social dissension?

Consider the voucher program here at issue. That program insists that the religious school accept students of all religions. Does that criterion treat fairly groups whose religion forbids them to do so? The program also insists that no participating school "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." . . . As one *amicus* argues, "it is difficult to imagine a more divisive activity" than the appointment of state officials as referees to determine whether a particular religious doctrine "teaches hatred or advocates lawlessness." . . .

. . .

I do not believe that the "parental choice" aspect of the voucher program sufficiently offsets the concerns I have mentioned. Parental choice cannot help the taxpayer who does not want to finance the religious education of children. It will not always help the parent who may see little real choice between inadequate nonsectarian public education and adequate education at a school whose religious teachings are contrary to his own. It will not satisfy religious minorities unable to participate because they are too few in number to support the creation of their own private schools. It will not satisfy groups whose religious beliefs preclude them from participating in a government-sponsored program, and who may well feel ignored as government funds primarily support the education of children in the doctrines of the dominant religions. . . .

**Religion in the Public Sphere.** Americans and the Supreme Court had difficulty determining the place of religion, religious monuments in particular, in the public sphere. Two cases decided in 2005 illustrate the fine line between monuments that the judicial majority believed reflect the nation's heritage and monuments that unconstitutionally established religion. *McCreary County v. ACLU of Kentucky* by a 5-4 vote declared unconstitutional several efforts by a local government to display the Ten Commandments in the local courthouse. Justice Souter's majority opinion stated, "The display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content." That same day the justices by a 5-4 vote in *Van Orden v. Perry* decided that Texas could include a monument displaying the Ten Commandments in a collection of other monuments displaying facets of state history. Chief Justice Rehnquist declared, "Texas has treated its Capitol grounds monuments as representing the several strands in the State's political and legal history. The inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government." Eight justices could find no difference between the two cases. Justice Breyer, who could, cast the deciding votes.

Whether the Roberts Court would reach the same conclusions is open to question. In *Salazar v. Buono* (2010) the Supreme Court by a 5-4 vote permitted the United States to transfer federal land to the Veterans of Foreign Wars (VFW) after a court ordered the removal of a large Latin cross memorializing soldiers killed in action. *Buono* was decided after Justice O'Connor left the Court and was replaced by Justice Alito. O'Connor voted against the display of the Ten Commandments in both *McCreary County* and *Van Orden*. Alito joined the majority in *Buono*. His concurrence asserted, "I see no reason to doubt that Congress' consistent goal, in legislating with regard to the Sunrise Rock monument, has been to commemorate our Nation's war dead and

to avoid the disturbing symbolism that would have been created by the destruction of the monument."

**Religion in Schools.** Neither the Supreme Court nor the lower federal courts showed any inclination to revisit previous decisions forbidding public schools from conducting prayer exercises (*Lee v. Weisman* [1993]) or teaching religious alternatives to evolution (*Edwards v. Aguillard* [1987]). *Santa Fe Independent School District v. Doe* (2000) declared unconstitutional a policy that allowed students to determine by election whether prayers would be said before football games. Justice Stevens's majority opinion declared, "An objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." Federal courts rebuffed efforts to have public schools teach "intelligent design," the view that the universe was created by an intelligent entity. A federal district court in *Kitzmiller v. Dover Area School District* (2005) maintained that intelligent design was no different than the creationist theories that the Supreme Court in *Edwards* declared violated the establishment clause when taught in public schools.

## Kitzmiller v. Dover Area School District, 400 F.Supp.2d 707 (M.D.Pa., 2005)

*Tammy Kitzmiller was the parent of two children who attended Dover High School in Dover, Pennsylvania. On October 18, 2004, the Dover Board of Education passed the following resolution: "Students will be made aware of gaps/problems in Darwin's theory and of other theories of evolution including, but not limited to, intelligent design. Note: Origins of Life is not taught." The next month the board ordered ninth-grade science teachers to read the following statements to their students:*

> *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.*

*Kitzmiller and other parents who objected to these statements filed a lawsuit in the local federal district court, claiming that this policy violated the religion clauses of the Constitution of the United States and the Pennsylvania Constitution. They noted that the "reference book" mentioned by the board was created by a nonprofit organization founded by an ordained minister for the purpose of "proclaiming, publishing, preaching, [and] teaching . . . the Christian Gospel."*

*The federal district court in* Kitzmiller *declared that the Dover policy violated the establishment clause of the First Amendment. Judge Jones ruled that efforts to integrate intelligent design into the public school curriculum stood on no better constitutional footing than the prior efforts to integrate creation science into the curriculum that the Supreme Court rejected in* Edwards v. Aguillard *(1987) and* Epperson v. Arkansas *(1968). Is Judge Jones correct that no difference exists between creation science and intelligent design? Consider that at least some persons with Ph.D.s in biology support intelligent design. Should that provide sufficient reasonable grounds for the Dover policy? Read* Dover *in light of* Gonzales v. Carhart *(2007). In that case Justice Kennedy permitted Congress to ban partial-birth abortions, even though an overwhelming majority of doctors claimed that partial-birth abortions were sometimes necessary to preserve maternal health. How do the scientific claims in* Dover *and* Gonzales *differ?*

JUDGE JONES delivered the following opinion.

. . .

The endorsement test recognizes that when government transgresses the limits of neutrality and acts in ways that show religious favoritism or sponsorship, it violates the Establishment Clause. . . .

As the endorsement test developed through application, it is now primarily a lens through which to view "effect," with purpose evidence being relevant to the inquiry derivatively. . . . The test consists of the reviewing court determining what message a challenged governmental policy or enactment conveys to a reasonable, objective observer who knows the policy's language, origins, and legislative history, as well as the history of the community and the broader social and historical context in which the policy arose. . . .

. . .

. . . [W]e conclude that the religious nature of ID (Intelligent Design) would be readily apparent to an objective observer, adult or child.

We initially note that John Haught, a theologian who testified as an expert witness for Plaintiffs and who has written extensively on the subject of evolution and religion, succinctly explained to the Court that the argument for ID is not a new scientific argument, but is rather an old religious argument for the existence of God. He traced this argument back to at least Thomas Aquinas in the 13th century, who framed the argument as a syllogism: Wherever complex design exists, there must have been a designer; nature is complex; therefore nature must have had an intelligent designer. . . .

Although proponents of the IDM [Intelligent Design Movement] occasionally suggest that the designer could be a space alien or a time-traveling cell biologist, no serious alternative to God as the designer has been proposed by members of the IDM, including Defendants' expert witnesses.

. . .

A "hypothetical reasonable observer," adult or child, who is "aware of the history and context of the community and forum" is also presumed to know that ID is a form of creationism. . . . The evidence at trial demonstrates that ID is nothing less than the progeny of creationism.

As Plaintiffs meticulously and effectively presented to the Court, *Pandas* went through many drafts, several of which were completed prior to and some after the Supreme Court's decision in *Edwards*, which held that the Constitution forbids teaching creationism as science. By comparing the pre and post *Edwards* drafts of *Pandas*, three astonishing points emerge: (1) the definition for creation science in early drafts is identical to the definition of ID; (2) cognates of the word creation (creationism and creationist), which appeared approximately 150 times were deliberately and systematically replaced with the phrase ID; and (3) the changes occurred shortly after the Supreme Court held that creation science is religious and cannot be taught in public school science classes in *Edwards*. This word substitution is telling, significant, and reveals that a purposeful change of words was effected without any corresponding change in content, which directly refutes [the publisher's] argument that by merely disregarding the words "creation" and "creationism," [they] expressly rejected creationism in *Pandas*.

. . .

An objective student is also presumed to know that the Dover School Board advocated for the curriculum change and disclaimer in expressly religious terms, that the proposed curriculum change prompted massive community debate over the Board's attempts to inject religious concepts into the science curriculum, and that the Board adopted the ID Policy in furtherance of an expressly religious agenda. . . . Importantly, the historical context that the objective student is presumed to know consists of a factor that weighed heavily in the Supreme Court's decision to strike down the balanced-treatment law in *Edwards*, specifically that "[o]ut of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." . . . Moreover, the objective student is presumed to know that encouraging the teaching of evolution as a theory rather than as a fact is one of the latest strategies to dilute evolution instruction employed by anti-evolutionists with religious motivations. . . .

In summary, the disclaimer singles out the theory of evolution for special treatment, misrepresents its status in the scientific community, causes students to doubt its validity without scientific justification, presents students with a religious alternative masquerading as a scientific theory, directs them to consult a creationist text as though it were a science resource, and instructs students to forego scientific inquiry in the public school classroom and instead to seek out religious instruction elsewhere. . . .

. . .

An objective adult member of the Dover community would also be presumed to know that ID and teaching about supposed gaps and problems in evolutionary theory are creationist religious strategies that evolved from earlier forms of creationism. . . . The objective observer is therefore aware of the social context in which the ID Policy arose and considered in light of this history, the challenged ID Policy constitutes an endorsement of a religious view.

. . .

The 225 letters to the editor and sixty-two editorials from the *York Daily Record* and *York Dispatch* that Plaintiffs offered at trial and which we have admitted for consideration in our analysis of the endorsement test and *Lemon*'s effect prong, show that hundreds of individuals in this small community felt it necessary to

publish their views on the issues presented in this case for the community to see. Moreover, a review of the letters and editorials at issue reveals that in letter after letter and editorial after editorial, community members postulated that ID is an inherently religious concept, that the writers viewed the decision of whether to incorporate it into the high school biology curriculum as one which implicated a religious concept, and therefore that the curriculum change has the effect of placing the government's imprimatur on the Board's preferred religious viewpoint. These exhibits are thus probative of the fact that members of the Dover community perceived the Board as having acted to promote religion, with many citizens lined up as either for the curriculum change, on religious grounds, or against the curriculum change, on the ground that religion should not play a role in public school science class. Accordingly, the letters and editorials are relevant to, and provide evidence of, the Dover community's collective social judgment about the curriculum change because they demonstrate that "[r]egardless of the listener's support for, or objection to," the curriculum change, the community and hence the objective observer who personifies it, cannot help but see that the ID Policy implicates and thus endorses religion.

. . .

. . . [W]hile ID arguments may be true, a proposition on which the Court takes no position, ID is not science. We find that ID fails on three different levels, any one of which is sufficient to preclude a determination that ID is science. They are: (1) ID violates the centuries-old ground rules of science by invoking and permitting supernatural causation; (2) the argument of irreducible complexity, central to ID, employs the same flawed and illogical contrived dualism that doomed creation science in the 1980's; and (3) ID's negative attacks on evolution have been refuted by the scientific community. . . . ID has failed to gain acceptance in the scientific community, it has not generated peer-reviewed publications, nor has it been the subject of testing and research.

. . .

[The National Association of Scientists], the "most prestigious" scientific association in this country, views ID as follows:

> Creationism, intelligent design, and other claims of supernatural intervention in the origin of life or of species are not science because they are not testable by the methods of science. These claims subordinate observed data to statements based on authority, revelation, or religious belief. Documentation offered in support of these claims is typically limited to the special publications of their advocates. These publications do not offer hypotheses subject to change in light of new data, new interpretations, or demonstration of error. This contrasts with science, where any hypothesis or theory always remains subject to the possibility of rejection or modification in the light of new knowledge.

. . .

The evidence presented in this case demonstrates that ID is not supported by any peer-reviewed research, data or publications. Both Drs. Padian and Forrest testified that recent literature reviews of scientific and medical-electronic databases disclosed no studies supporting a biological concept of ID. . . .

. . .

. . . Although Defendants have consistently asserted that the ID Policy was enacted for the secular purposes of improving science education and encouraging students to exercise critical thinking skills, the Board took none of the steps that school officials would take if these stated goals had truly been their objective. The Board consulted no scientific materials. The Board contacted no scientists or scientific organizations. The Board failed to consider the views of the District's science teachers. The Board relied solely on legal advice from two organizations with demonstrably religious, cultural, and legal missions, the Discovery Institute and the TMLC [Thomas More Law Center]. . . .

Accordingly, we find that the secular purposes claimed by the Board amount to a pretext for the Board's real purpose, which was to promote religion in the public school classroom, in violation of the Establishment Clause.

. . .

To be sure, Darwin's theory of evolution is imperfect. However, the fact that a scientific theory cannot yet render an explanation on every point should not be used as a pretext to thrust an untestable alternative hypothesis grounded in religion into the science classroom or to misrepresent well-established scientific propositions. . . .

### Free Exercise

Elected officials and justices dispute whether Congress can legislatively require states to give religious believ-