REBUTTAL TO IRONS*

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We wrote a serious critique of the *Kitzmiller* ruling. Rather than deal with the substance of our arguments, Peter Irons responds primarily with red herrings, personal attacks, and erroneous statements.[1] With merely 1,000 words to rebut, we highlight merely some of the problems.[2]

1. Irons tries to refute intelligent design (ID) by smear and innuendo rather than substantive argument. Pro ID scholars have published more than a decade of scholarship in reputable academic books and journals about the empirical evidence supporting design.[3] Instead of engaging this scholarship, Irons wildly misrepresents a few blog posts and an old fundraising proposal,[4] and uses guilt-by-association to insinuate (falsely) that Discovery

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* Editors' Note: The present Article is the third in a series of three discussing *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2004). In the first article, the present authors criticize the *Kitzmiller* decision. *Intelligent Design Will Survive* Kitzmiller v. Dover, 68 Mont. L. Rev. 7 (2007). Peter Irons provides a critical response to the first article in *Disaster in Dover: The Trials (and Tribulations) of Intelligent Design*, 68 Mont. L. Rev. 59 (2007). The entire series is preceded by *Editors' Note: Intelligent Design Articles*, 68 Mont. L. Rev. 1 (2007), which includes a chronology of important events.

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1. Peter Irons, *Disaster in Dover: The Trials (and Tribulations) of Intelligent Design*, 68 Mont. L. Rev. 59 (2007).

2. Readers may contact the authors at cluskin@discovery.org for additional documentation of errors and misrepresentations in Irons's article.

3. For an annotated bibliography of scholarship by ID scientists and other scholars, see Discovery Inst., *Center for Science and Culture*, *Peer-Reviewed & Peer-Edited Scientific Publications Supporting the Theory of Intelligent Design*, http://www.discovery.org/scripts/viewDB/index.php?command=view&id=2640 (accessed Mar. 1, 2007).

4. Irons, *supra* n. 1, at 60, 65–67. For a full response regarding the "Wedge Document," see Discovery Inst., *The "Wedge Document": So What?* http://www.discovery.org/scripts/viewDB/index.php?command=view&id=2101 (accessed Mar. 1, 2007). In addition, compare Irons's description of West's blog posts with John G. West, Discovery Institute, *Dover in Review: A Review of Judge Jones' Decision in the Dover Intelligent Design Trial*, http://www.discovery.org/scripts/viewDB/index.php?command=view&id=3135 (Jan. 6, 2006).

Institute (DI) is run by "biblical creationist[s]" and supports "Biblical Reconstructionis[m]" and theocracy.[5] Irons devotes pages to caricaturing the backgrounds, beliefs, and political affiliations of ID proponents, rather obviously trying to present ID as part of a nefarious conspiracy of the "Religious Right."[6] This is an example of what historian Richard Hofstadter called "The Paranoid Style in American Politics."[7] Irons tries to avoid debating the real issues by poisoning the well.

2. Irons misrepresents our critique of Judge Jones. Given his article, it is surprising that Irons accuses us of making *ad hominem* attacks against Judge Jones.[8] *Ad hominem* arguments attack a person rather than that person's position.[9] Our article assesses Judge Jones's analysis in light of his judicial responsibilities, but Irons's rebuttal starts with the alleged motives and personal failings of the authors. Irons's claim that we resort to *ad hominem* attacks is the height of irony.

3. Irons misapplies the* Lemon *test. In a rare attempt to rebut our legal arguments, Irons claims Judge Jones properly determined whether ID is science because otherwise the Dover school board's "religious motivations would have been irrelevant."[10] This is wrong: the Supreme Court requires the proffered secular purpose "be sincere and not a sham"[11] and "[i]f the law was enacted for the purpose of endorsing religion, no consideration of [*Lemon*'s] second or third criteria is necessary."[12] Had Judge Jones found

5. Irons, *supra* n. 1, at 68. *But see* Discovery Inst., *The Truth about Discovery Institute and "Theocracy"*, http://www.discovery.org/scripts/viewDB/index.php?command=view&id=2733 (accessed Mar. 1, 2007); Corrections, Austin Am.-Statesman A2 (July 19, 2003) ("[The *Austin American-Statesman*] story may have inaccurately suggested a shared philosophy between the Discovery Institute . . . and the Chalcedon Foundation[,] . . . [which] supports Christian theocracy. . . . However, Ahmanson and the Discovery Institute oppose the idea of Christian theocracy."). With regard to Irons's characterization of Howard Ahmanson, see Roberta Green Ahmanson, Ltr. to the Ed., *Supporting Democracy*, Austin Am.-Statesman A10 (July 23, 2003).

6. Irons, *supra* n. 1, at 61–62, 65–71, 77–79, 81–82.

7. Richard Hofstadter, *The Paranoid Style in American Politics*, Harper's Mag. 77, 77 (Nov. 1964).

8. Irons, *supra* n. 1, at 60 ("West fired a barrage of *ad hominem* volleys at Judge Jones . . . .").

9. Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 Am. U. L. Rev. 53, 74–75 (1992).

10. Irons, *supra* n. 1, at 65.

11. *Edwards v. Aguillard*, 482 U.S. 578, 586–87 (1987).

12. *Id.* at 585 (citations and quotations omitted) (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). It should be noted that the authors, like many other commentators, believe

that ID *is* science, Dover's policy would still be unconstitutional if adopted for predominately religious reasons. But Judge Jones found Dover's proffered secular purpose was a sham,[13] negating any need to address whether ID is science. As we noted, even anti-ID legal scholar Jay Wexler agrees Judge Jones was mistaken to rule on ID's scientific status.[14]

4. Rewriting the history of DI's involvement with Dover. DI opposed Dover's policy at every stage of the process, and Irons's contrary suggestions are false.[15] The DI's position in Dover was consistent with its publicly stated science education policy,[16] and with its recommendations in Ohio in 2002[17] and 2004,[18] and in Wisconsin in 2004,[19] where DI also opposed mandates of ID. Irons's only source for rewriting history is a statement of a Dover board member whom Judge Jones said "testified inconsistently, or lied outright under oath" and is therefore "not credible."[20]

5. Irons defends Judge Jones's double standard on motives. According to Irons, Judge Jones rightly scrutinized the religious beliefs of ID theorists while ignoring those of Darwinists,

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that the Supreme Court's current application of the purpose prong in the *Lemon* test is seriously flawed.

13. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 762 (M.D. Pa. 2005).

14. Jay D. Wexler, Kitzmiller *and the "Is It Science?" Question*, 5 First Amend. L. Rev. 90, 93 (2006) (footnotes omitted).

15. Irons, *supra* n.1, at 72–75; Discovery Inst., *Setting the Record Straight about Discovery Institute's Role in the Dover School District Case*, http://www.discovery.org/scripts/viewDB/index.php?command=view&id=3003 (Nov. 10, 2005); Seth Cooper, Discovery Inst., *Center for Science and Culture*, *Evolution News & Views*, "Statement by Seth L. Cooper Concerning Discovery Institute and the Decision in *Kitzmiller v. Dover Area School Board* [sic] Intelligent Design Case," http://www.evolutionnews.org/2005/12/statement_by_seth_l_cooper_con.html (Dec. 21, 2005).

16. Discovery Inst., *Center for Science and Culture*, *Top Questions*, http://www.discovery.org/csc/topQuestions.php (accessed Oct. 30, 2006) [hereinafter Discovery Inst., *Top Questions*].

17. Richard N. Ostling, *Darwin vs. Design in Ohio*, Wis. St. J. (Madison) A3 (Mar. 17, 2002) (available at http://www.madison.com/archives) ("Stephen Meyer of Seattle's Discovery Institute, the leading ID think tank, told the board that rather than making ID part of the curriculum it should merely encourage teachers to cover the disagreements about Darwinism.").

18. Discovery Inst., *Ohio Votes 13–5 to Approve Lesson Plan Critical of Evolution*, http://www.discovery.org/scripts/viewDB/index.php?command=view&id=1898 (Mar. 9, 2004).

19. Discovery Inst., *Wisconsin School Board Adopts Improved Policy Endorsing Fully Teaching Evolution, Not Creationism*, http://www.discovery.org/scripts/viewDB/index.php?command=view&id=2323 (Dec. 7, 2004).

20. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 752 (M.D. Pa. 2005).

asserting that atheism naturally "follow[s]" from evolution, whereas religion motivates ID.[21] This is empirically false,[22] and stands the First Amendment on its head: can Irons seriously claim that the First Amendment *requires* discriminatory treatment toward scientists because of their religious beliefs?[23] By arguing that Richard Dawkins's atheism "followed"[24] from evolution, Irons concedes that metaphysical implications of a scientific theory cannot render it unscientific.

6. Irons repeatedly misrepresents and misstates facts. Irons's factual errors are too numerous to catalog, but we highlight some of the most egregious: Irons incorrectly conflates ID proponents with "biblical creationists."[25] He wrongly implies that ID must reject common ancestry.[26] He accuses Michael Behe of failing to repair a purported "defect" in irreducible complexity, without revealing that Behe has responded to this objection.[27] He claims the John Templeton Foundation (JTF) asked ID proponents for research proposals which "never came in," but JTF's vice president denies that such a request was ever made, calling the

21. Irons, *supra* n. 1, at 81–82.

22. Not only have many scientists embraced ID for scientific rather than religious reasons (e.g., Michael Behe, whose Roman Catholic beliefs permitted acceptance of Darwinian evolution), but some advocates for evolution (e.g. Francis Crick) have admitted that they were motivated by their desire to disprove the claims of religion. Roger Highfield, *Do Our Genes Reveal the Hand of God?* http://www.telegraph.co.uk/education/main.jhtml?xml=/education/2003/05/19/tesAecfgod19.xml (Mar. 20, 2003) (quoting Francis Crick).

23. *See* Francis J. Beckwith, *The Court of Disbelief: The Constitution's Article VI Religious Test Prohibition and the Judiciary's Religious Motive Analysis*, 33 Hastings Const. L.Q. 337, 337–38 (2006).

24. Irons, *supra* n. 1, at 81.

25. Irons, *supra* n. 1, at 69. *Contra* Discovery Inst., *Top Questions*, *supra* n. 16. *See also* Stephen C. Meyer, *Intelligent Design Is Not Creationism*, London Daily Telegraph 24 (Feb. 9, 2006); John G. West, *Intelligent Design and Creationism Just Aren't the Same*, http://www.discovery.org/scripts/viewDB/index.php?command=view&id=1329 (Dec. 1, 2002).

26. Irons, *supra* n. 1, at 80–81. *Contra* Discovery Inst., *Top Questions*, *supra* n. 16; Michael J. Behe, *Darwin's Black Box: The Biochemical Challenge to Evolution* 5 (Free Press 1996) ("I find the idea of common descent (that all organisms share a common ancestor) fairly convincing, and have no particular reason to doubt it."); William A. Dembski, *No Free Lunch: Why Specified Complexity Cannot Be Purchased without Intelligence* 314–15 (Rowman & Littlefield 2002) ("[I]ntelligent design is also fully compatible with largescale evolution over the course of natural history, all the way up to what biologists refer to as 'common descent' . . . .").

27. Irons, *supra* n. 1, at 83–84. *Contra* Michael J. Behe, *Whether ID Is Science: Michael Behe's Response to* Kitzmiller v. Dover, in David K. DeWolf, John G. West, Casey Luskin & Jonathan Witt, *Traipsing into Evolution: Intelligent Design and the* Kitzmiller v. Dover *Decision* 79, 82–83 (Discovery Inst. Press 2006).

episode a "media narrative manufacture."[28] Irons alleges we "hijacked" Stephen Jay Gould,[29] but Gould plainly agreed with Niles Eldridge that "the higher up the Linnaean hierarchy you look, the fewer transitional forms there seem to be."[30] Irons insinuates that "not one" of DI's fellows in the Center for Science and Culture has expertise in paleontology,[31] ignoring the various ID proponents who have studied (or published) in mainstream paleontology circles, including on hominid evolution.[32] He claims "no 'intelligent' force can be observed or measured by any scientific process,"[33] yet we explained that scientists study intelligence by observing humans and seek to detect intelligent action in SETI ("search for extraterrestrial intelligence") programs. Irons uses poor sources for many of his claims, which may be why he is so inaccurate.[34]

Irons repeatedly falsely insinuates that we misrepresent quotations through omissions, but he misrepresents through creative quoting himself. For example, Irons claims William Dembski takes the position that "I am a Christian, therefore I reject evolution," but ignores Dembski's actual position: "Intelligent design . . . has no prior religious commitments and interprets the data of science on generally accepted scientific principles."[35] It is Irons who has attempted to "swift-boat" the character of ID proponents through selective citations.

Rather than refuting our substantive arguments, Irons attempts to divert attention away from the *Kitzmiller* ruling and its

28. Irons, *supra* n. 1, at 69. *Contra* Joseph C. Campana, *ResearchIntelligentDesign.org*, *Media Misreports Intelligent Design Research and the John Templeton Foundation*, http://www.researchintelligentdesign.org/wiki/Media_Misreports_Intelligent_Design_Research_and_the_John_Templeton_Foundation (Feb. 27, 2007).

29. Irons, *supra* n. 1, at 79.

30. Niles Eldredge, *The Monkey Business: A Scientist Looks at Creationism* 65–66 (Wash. Square Press 1982); Stephen Jay Gould, *This View of Life: The Return of Hopeful Monsters*, 86 Nat. History 22, 22–24 (June–July 1977). *See also* Niles Eldredge, *Macroevolutionary Dynamics: Species, Niches, and Adaptive Peaks* 22 (McGraw-Hill Publg. Co. 1989). Regarding Gould's claims about the transitional status of *Australopithecus afarensis*, see Casey Luskin, *Human Origins and Intelligent Design*, http://www.iscid.org/papers/Luskin_HumanOrigins_071505.pdf (Aug. 2004).

31. Irons, *supra* n. 1, at 80.

32. *E.g.* Sigrid Hartwig-Scherer & Robert D. Martin, *Was "Lucy" More Human Than Her "Child"? Observations on Early Hominid Postcranial Skeletons*, 21 J. Hum. Evolution 439 (1991).

33. Irons, *supra* n. 1, at 78.

34. *Supra* n. 2.

35. William A. Dembski, *The Design Revolution: Answering the Toughest Questions about Intelligent Design* 41 (InterVarsity Press 2004).

weaknesses. We trust that fair-minded readers will see through such tactics. If this is the best defenders of *Kitzmiller* can muster, the shelf-life of the ruling may be short indeed.