

TEXTBOOKS DISCLAIMED OR EVOLUTION DENIED:
A CONSTITUTIONAL ANALYSIS OF TEXTBOOK DISCLAIMER
POLICIES AND ACADEMIC FREEDOM ACTS

ABSTRACT

For decades, the United States has been involved in a public and sometimes acrimonious debate between those desiring the public schools to teach so-called “traditional values” and those who want the school curriculum to have a more secular focus. One of the most heated of these debates centers around the teaching of the Theory of Evolution by Natural Selection. Proponents of teaching evolution tend to couch the debate in scientific terms: the science classroom should be reserved for teaching currently accepted scientific models of how the world around us works. Those opposed to teaching evolution have attempted many tactics to keep evolution out of the classroom. However, with Supreme Court decisions sharply curtailing the efforts of those opposed to evolution, the anti-evolutionist strategies have morphed into attempts to at least keep creationist thought in the classroom.

This Note discusses two of these more recent tactics: textbook disclaimer policies and Academic Freedom Acts. By analyzing the two major cases dealing with the constitutionality of textbook disclaimers, this Note identifies a path by which a textbook disclaimer policy might be acceptable under First Amendment jurisprudence, but it also reaches the conclusion that a policy that stays on this path would likely not be acceptable to anti-evolutionists. Then, this Note proposes that a method of constitutional analysis typically applied in Equal Protection cases be applied in cases of this nature, and by applying this method, shows that Academic Freedom Acts are likely unconstitutional.

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I. INTRODUCTION

Summer, 1925. In a sweltering courtroom (and later on the courthouse steps and lawn) in Dayton, Tennessee, John Scopes, a high school biology teacher, was on trial for the crime of teaching evolution.¹ The State of Tennessee, through the enactment of the Butler Act of 1925,² had banned the teaching of evolution in public schools. The Butler Act provided for a fine of no less than \$100 and no more than \$500 for any such offense. The American Civil Liberties Union (ACLU) selected Tennessee’s law, and Dayton in particular, as ideal to test the constitutionality of such acts and to force states to teach evolution in their schools. In a trial featuring two of the most prominent trial lawyers of the day, Clarence Darrow and William Jennings Bryan, one of the most heated exchanges occurred when Bryan agreed to take the stand as a witness. The prosecution objected to a particular line of questioning by Darrow, asking what the purpose of his interrogation was. Darrow retorted that his purpose was “preventing bigots and ignoramuses from controlling the education of the United States.”³

At trial, Scopes was convicted and ordered to pay a fine of \$100. He then appealed to the Supreme Court of Tennessee, and his fine was overturned on purely procedural grounds.⁴ However, the court held that his conviction did not, *inter alia*, violate either the Due Process Clause of the Fourteenth Amendment to the United States Constitution⁵ or the guarantee

1. Throughout this Note, the term “evolution” will be used in its colloquial meaning, to mean the scientific theory that living things share common ancestors and evolve by natural selection.

2. Tenn. Acts 1925, ch. 27, enacted as TENN. CODE ANN. § 49-1922, repealed by H.R. 237-48, 85th Gen. Assemb., Reg. Sess. (1967).

3. JEFFREY P. MORAN, THE SCOPES TRIAL: A BRIEF HISTORY WITH DOCUMENTS 156 (2002).

4. *Scopes v. State*, 289 S.W. 363, 367 (Tenn. 1927) (holding that Scopes’s fine violated TENN. CONST. art. VI, § 14, as only a jury could impose a fine of greater than \$50; while the question of guilt or innocence was properly submitted to the jury, the judge simply imposed the minimum fine of \$100 without submitting it to the jury).

5. *Id.* at 364.

of the Tennessee Constitution⁶ “that no preference shall ever be given, by law, to any religious establishment or mode of worship.”⁷

As a result of this defeat in the courtroom, evolution went virtually untaught in the American classroom from the 1930s to the 1960s. Even where teaching of evolution was allowed, textbooks of the time would not include the information so that they could be sold in anti-evolution jurisdictions.⁸ However, the Cold War and the perception that the United States was losing the “space race” with the Soviet Union gave rise to a change in popular attitudes toward science education. This change in popular attitude came to a head in new court battles over the constitutionality of bans on teaching evolution in school.⁹ Effectively vindicating Scopes and the ACLU’s position, the Supreme Court in the 1968 case *Epperson v. Arkansas* struck down an Arkansas statute¹⁰ that made it a crime to teach evolution in schools supported in whole or part by public funds.¹¹ The Court’s opinion focused on the Establishment Clause of the First Amendment to the United States Constitution, holding that the Arkansas statute was “contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.”¹²

Since the 1980s, the nature of the struggle has changed. Rather than fighting for curricular inclusion, the ACLU and other so-called “evolutionists” are fighting against encroachment in the classroom by those wanting to teach the origins of life from a religious perspective. Almost two decades post-*Epperson*, the Court applied the test articulated in *Lemon v. Kurtzman*¹³ to strike down a Louisiana statute¹⁴ as violative of the Establishment Clause.¹⁵ The statute in question required equal time for evolution and “creation science”: while no school was required to teach either, if one was taught, the school had to teach the other.¹⁶ Notably, the

6. *Id.*

7. TENN. CONST. art. I, § 3.

8. EUGENIE C. SCOTT, *EVOLUTION VS. CREATIONISM: AN INTRODUCTION* 97 (2004) (“By 1930, only five years after the Scopes trial, an estimated 70 percent of American classrooms omitted evolution . . . , and the amount diminished even further thereafter.”) *referenced by* LESLIE C. GRIFFIN, *LAW AND RELIGION: CASES AND MATERIALS* 571 (2007).

9. SCOTT, *supra* note 8, at 98.

10. ARK. CODE ANN. §§ 80-1627 to -1628 (1960).

11. *Epperson v. Arkansas*, 393 U.S. 97, 103 (1968).

12. *Id.* at 109.

13. 403 U.S. 602, 612–13 (1971) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’”) (citations omitted).

14. LA. REV. STAT. ANN. §§ 17:286.1–.7 (1982).

15. *Edwards v. Aguillard*, 482 U.S. 578, 597 (1987).

16. The Louisiana statute was representative of legislation proposed in twenty-seven states, though it was only passed in Arkansas and Louisiana. A similar Tennessee statute requiring the teaching of *biblical* creationism (i.e., the story of creation as literally laid out in the Book of Genesis)

Aguillard Court did not forbid teaching of alternative theories to evolution outright. Instead, the court emphatically stated, “We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught.”¹⁷

After losing the battle over equal-time statutes in *Aguillard*, opponents of teaching evolution in schools have begun using “disclaimer policies” that attempt an end-run around the standards announced by the Court. Proponents of disclaimer policies have two goals: first, the disclaimer raises doubts that evolution is an accepted scientific theory; second, the disclaimer presents Intelligent Design Theory (IDT) as a scientifically valid alternative explanation for the origins of life. Disclaimers are typically read to a science class before discussion of evolution or are written on stickers affixed to textbooks containing discussion of evolution.¹⁸

This Note first discusses the two leading cases dealing with disclaimer policies, *Freiler v. Tangipahoa Parish Board of Education*¹⁹ and *Kitzmiller v. Dover Area School District*,²⁰ focusing on how each court concluded that the challenged disclaimer policy was unconstitutional.²¹ After laying this initial framework, this Note will address whether and how a disclaimer might survive challenges based on the Establishment Clause. Finally, this Note finishes with an analysis on a new tactic employed to teach “alternative” science in classrooms—Academic Freedom Acts—and concludes that they are likely unconstitutional under an analytical framework new to First Amendment analysis.

II. STATE OF THE LAW

To find the challenged policies unconstitutional, the *Freiler* and *Kitzmiller* courts relied on both the *Lemon* test and the endorsement “refinement” to the *Lemon* test proposed by Justice O’Connor.²² In addition

whenever evolution was also taught was struck down on Establishment Clause grounds in *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975). See GRIFFIN, *supra* note 8, at 572.

17. *Aguillard*, 482 U.S. at 593.

18. See Asma T. Uddin, *Evolution Toward Neutrality: Evolution Disclaimers, Establishment Jurisprudence Confusions, and a Proposal of Untainted Fruits of a Poisonous Tree*, 8 RUTGERS J.L. & RELIGION 12 (2007).

19. 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).

20. 400 F. Supp. 2d 707 (M.D. Pa. 2005).

21. A third case, *Selman v. Cobb County School District*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005) was vacated on appeal to the Eleventh Circuit, 449 F.3d 1320 (11th Cir. 2006). On remand, the parties settled out of court. As such, this case forms no part of the analysis presented, though on occasion other cases will cite to its reasoning and such citations are preserved.

22. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O’Connor, J., concurring) (“What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion.”); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 593–94 (1989) (“The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . .”).

to using these two tests, the *Freiler* court also found that application of the coercion test articulated by Justice Kennedy in *Lee v. Weisman*²³ was inappropriate in the context of disclaimer policies.²⁴ Both courts relied heavily on a textual analysis of the disclaimers to be read before class discussion of evolution, each of which is presented in its entirety below:

The Dover Disclaimer

The Pennsylvania Academic Standards require students to learn about Darwin's theory of evolution and eventually 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 origin 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.²⁵

The Tangipahoa Disclaimer

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept.

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged

23. 505 U.S. 577, 587 (1992) ("It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'") (citations omitted).

24. *Freiler*, 185 F.3d at 344.

25. Neela Banerjee, *An Alternative to Evolution Splits a Pennsylvania Town*, N.Y. TIMES, Jan. 16, 2005, at N18 (paragraph structure altered).

to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.²⁶

A. *The Endorsement Test*

While the *Freiler* court treated the endorsement test as equivalent to the advancement or inhibition prong of the *Lemon* test,²⁷ the *Kitzmiller* court treated the endorsement and *Lemon* tests as entirely separate.²⁸ In both cases, however, the court found that the challenged policy would fail the endorsement test.

In *Freiler*, the Fifth Circuit held that reading the challenged disclaimer to students posed a significant danger of “students and parents perceiving that the School Board endorses religion, specifically those creeds that teach the Biblical version of creation.”²⁹ Contrasting the challenged policy with the practice of church groups meeting after school upheld in *Lamb’s Chapel v. Center Moriches Union Free School District*,³⁰ the Fifth Circuit stated that there was a distinguishable difference between a church group meeting in a school facility, after hours, conducted by non-school employees and a reading of a statement by school personnel.³¹

Appropriately for a court that recognized the endorsement test as separate from the *Lemon* test, the district court in *Kitzmiller* was more detailed in its endorsement test analysis. The district court noted that to fail under the endorsement test, a reasonable observer familiar with the history of the policy in question must perceive the government action as endorsing religion.³² The district court also used Third Circuit precedent to determine that a reasonable person would be able to “glean . . . relevant facts” from the context of the government action.³³ Finally, the district court identified two relevant audiences to determine the characteristics of the reasonable person: the reasonable Dover School District ninth grade student and the reasonable adult observer in the Dover area.³⁴

The district court articulated three ways in which the Dover disclaimer would appear to endorse religion to a reasonable ninth grader. First, the plain language of the disclaimer would appear to be an endorsement of

26. *Freiler*, 185 F.3d at 341.

27. *Id.* at 348.

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

29. *Freiler*, 185 F.3d at 348.

30. 508 U.S. 384 (1993).

31. *Freiler*, 185 F.3d at 348.

32. *Kitzmiller*, 400 F. Supp. 2d at 714–15 (citing *McCreary Cnty., Ky. v. ACLU*, 545 U.S. 844, 866 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000)).

33. *Id.* at 715 (quoting *Modrovich v. Allegheny Cnty., Pa.*, 385 F.3d 397, 407 (3d Cir. 2004)).

34. *Id.* at 715–16.

religion to a reasonable ninth grader.³⁵ Second, a reasonable ninth grader would perceive the manner in which the district presented the disclaimer as an endorsement of religion.³⁶ Third, the historical context of the disclaimer policy would lead the reasonable ninth grader to believe that the school district endorsed religion.³⁷

In holding that the Dover disclaimer endorsed religion to a reasonable ninth grader, the district court cited *Freiler*, noting that an official disclaimer that disavows the material to be taught and urging a student to seek out alternative religious theories implies an endorsement of religion.³⁸ However, rather than simply discussing the disclaimer as a whole, the district court analyzed the Dover disclaimer paragraph by paragraph in an attempt to ascertain the message conveyed. The district court found that, because the Dover School District did not single out any other portion of the curriculum required by the Pennsylvania academic standards, a reasonable ninth grader would determine that the school district disapproved of evolution.³⁹ The district court also found that the language labeling evolution as “just a theory” singled out evolution from the remainder of the science curriculum and plays on the “popular [mis]understanding of the term [‘theory, ’]”⁴⁰ so that a reasonable ninth grader would understand that this concept, in particular, was disfavored by the school district.⁴¹ Further, the Dover disclaimer directed students toward a specific textbook espousing a religious⁴² viewpoint: *Of Pandas and People*. The district court found that a reasonable ninth grader would interpret this as an endorsement of IDT as a recognized or legitimate scientific alternative to evolution.⁴³ Finally, the district court found that while the Dover disclaimer urged students to discuss evolution and competing concepts with their parents, it only presented one competing concept: IDT. The district court held that this direction for children to discuss evolution and alternative concepts with their parents served the same purpose as similar language in the Tangipahoa disclaimer: telling children they didn’t need to believe the presented material and that religious views held by the child’s parents were superior or more correct

35. *Id.* at 724.

36. *Id.* at 726–28.

37. *Id.* at 728.

38. *Id.* at 726.

39. *Id.* at 724.

40. *Id.* at 725 (quoting *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1310 (N.D. Ga. 2005)).

41. *Id.*

42. *Id.* at 726 (“The overwhelming evidence at trial established that ID[T] is a religious view, a mere re-labeling of creationism, and not a scientific theory.”).

43. *Id.* at 725.

than the views presented in class.⁴⁴ Based on these factors, the district court found that the plain language of the Dover disclaimer would appear to endorse religion to a reasonable ninth grade student in the Dover School District.⁴⁵

The *Kitzmiller* court also found that the presentation of the disclaimer would appear to endorse religion to a reasonable ninth grader. The Dover School District guidelines required that the district employee (either a teacher or administrator) inform the students that ““there will be no other discussion of the issue and your teachers will not answer questions on the issue.””⁴⁶ The district court found that this gave an added *cachet* to the IDT—implying that IDT was a “secret science” so sensitive that teachers couldn’t even *discuss* it with students for fear of reprisal.⁴⁷ The Dover School District also required that students who did not wish to hear the disclaimer (or, more accurately, whose parents did not want their children to hear the disclaimer) “opt-out” by procuring their parents’ permission to be excluded from the reading.⁴⁸ The district court found that the “opt-out” process had the effect of both enhancing the appeal of IDT and inculcating the belief that those not hearing the disclaimers were ““outsiders, not full members of the political community.””⁴⁹ Further, mirroring the reasoning of *Freiler*, the *Kitzmiller* court found that school administrators making a special appearance in the classroom to deliver the disclaimer would tend to give the disclaimer inordinate weight and appear to be an official endorsement of religion.⁵⁰

The district court also found that the history of the disclaimer policy would lead a reasonable ninth grader to interpret the disclaimer as an endorsement of religion.⁵¹ Drawing parallels to *Santa Fe*, the district court found that if a student enrolled in the Santa Fe School District would be able to determine that the purpose of a student invocation before a football game was to promote prayer due to the history surrounding the policy, then a student in the Dover School District would be able to discern that the purpose of the disclaimer policy was to promote religion from the history surrounding the policy.⁵² A reasonable ninth grader, the district court found, would know that evolution is a scientific theory subject to a great deal of criticism from religious organizations, she would know that the

44. *Id.* at 726.

45. *Id.*

46. *Id.* at 727.

47. *Id.*

48. *Id.* at 727–28.

49. *Id.* at 728 (quoting *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000)).

50. *Id.*

51. *Id.* at 728.

52. *Id.*

debate about the disclaimer policy in Dover was framed in religious terms, and she would know that disclaimers were the “‘latest strateg[y] to dilute evolution instruction employed by anti-evolutionists with religious motivations.’”⁵³

The district court also found that a reasonable Dover citizen would construe the disclaimer policy as an endorsement of religion. First, a reasonable person would know that IDT and disclaimer policies are “‘creationist religious strategies.’”⁵⁴ Second, a reasonable person would know that the debate in the community over the disclaimer policy was framed in explicitly religious terms. The district court determined that the inquiry into what a reasonable Dover citizen would perceive was relevant due to the school district having made the decision to implement the policy publicly and its subsequent public defense of the policy.⁵⁵ Further, a mailing (discussed below) was sent to every household in the Dover area, bringing even those who did not attend school board meetings into the debate.⁵⁶

Drawing parallels to *Selman*, the district court discussed the cultural context of the words used in the disclaimer policy. The construction “‘evolution is a theory . . . not a fact’” was found in *Selman* to be a strategy employed by those with religious motivations to discredit evolution.⁵⁷ The district court found that a reasonable observer would be aware of this cultural meaning.⁵⁸ Next, the district court found (as discussed above) that the disclaimer policy singled *only* evolution out “‘as a ‘theory’ with ‘gaps,’ [and] ‘problems.’”⁵⁹ Noting that a reasonable citizen of Dover would know that evolution was a scientific theory that had “‘historically . . . been opposed by certain religious sects,’”⁶⁰ the district court held that a reasonable member of the Dover community would recognize that evolution was being singled out for religious reasons.⁶¹

The district court then examined the nature of the community debate surrounding the disclaimer policy. A study of letters to the editor and opinion pieces appearing in the *York Daily Record* and *York Dispatch* (two regional newspapers that covered the Dover area) showed that the overwhelming majority of Dover residents who discussed the issue did so

53. *Id.* at 731 (quoting *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1308 (N.D. Ga. 2005)).

54. *Id.*

55. *Id.* at 730.

56. *Id.* at 730–31.

57. *Selman*, 390 F. Supp. 2d at 1312.

58. *Kitzmiller*, 400 F. Supp. 2d at 732.

59. *Id.*

60. *Id.* at 728 (quoting *Edwards v. Aquillard*, 482 U.S. 578, 593 (1987)).

61. *Id.* at 732.

in religious terms.⁶² The district court noted that the *Epperson* Court also analyzed letters to the editor as one factor in determining the religious purpose of a statute. The debates in the school board meetings centering on the disclaimer policy were likewise sectarian, with several board members “advocat[ing] for the ID Policy in expressly religious terms.”⁶³ Finally, a newsletter was sent to all Dover area residents that framed the policy debate as religious in nature, stating that the policy’s challengers saw the policy as an imposition of religious belief, that defenders of evolution “engage in trickery and doublespeak,” and noting that many question IDT as religious in nature.⁶⁴

Based on these observations and findings, the district court held that both a reasonable ninth grader in the Dover School District and a reasonable citizen of the Dover community would perceive the disclaimer policy as an endorsement of religion.⁶⁵

B. The Lemon Test

Under the first prong of *Lemon* analysis, a government action must have a legitimate secular purpose.⁶⁶ The *Kitzmiller* defendants asserted legitimate secular purposes in improving science education and teaching of critical thinking skills by presenting opposing viewpoints.⁶⁷ The *Freiler* defendants asserted legitimate secular purposes in encouraging informed freedom of belief, disclaiming an “orthodoxy of belief” that might be inferred from exclusive education in evolution, and reducing any offense to the sensibilities of students or parents opposed to the teaching of evolution.⁶⁸ Although courts generally give some deference to pedagogical concerns of schools,⁶⁹ both courts gave short shrift to at least some of the asserted secular purposes. The *Kitzmiller* court held that the stated secular purpose of improving science education was a “sham” because the school board took none of the steps school boards normally take in pursuing the improvement of science education or teaching of critical thinking—no

62. *Id.* at 733 (discussing that of 139 letters published by the *Daily Record* in the relevant time period, eighty-six framed the debate in religious terms; of eighty-six letters published by the *Dispatch*, sixty framed the debate in religious terms; of forty-three editorials published by the *Daily Record*, twenty-eight framed the debate in religious terms; and of nineteen editorials published by the *Dispatch*, seventeen framed the debate in religious terms).

63. *Id.* at 730.

64. *Id.*

65. *Id.* at 734.

66. *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1298 (N.D. Ga. 2005).

67. *Kitzmiller*, 400 F. Supp. 2d at 762.

68. *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 344 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000).

69. *Id.*

scientists or scientific organizations were consulted, nor was any scientific literature reviewed or presented to the school board.⁷⁰ Instead, the school board consulted only two organizations, both of whose mission was to discredit evolution and attempt to promote teaching IDT in school.⁷¹ Likewise, the *Freiler* court held that the secular purpose of improving science education alleged by the Tangipahoa Board of Education was also a sham, as the policy actually had the opposite effect: scientific inquiry was curtailed, not expanded.⁷² However, the *Freiler* court did find that the board was not asserting sham purposes in disavowing orthodoxy of belief and reducing offense to those opposed to evolution.⁷³ Further, both purposes were not only “real” purposes but legitimate secular purposes, and the court specifically noted that local school boards do not have to turn a blind eye to the concerns of students and parents.⁷⁴

Under *Lemon*’s second prong, the challenged government action must not have the purpose or effect of advancing religion.⁷⁵ The *Freiler* court’s analysis under *Lemon*’s second prong is discussed above. The *Kitzmiller* court, in addition to the effects-driven test applied under the endorsement test, applied a purpose-driven test to the Dover School Board’s actions under the second prong of *Lemon*.⁷⁶ The district court noted that the proper inquiry under the second prong “involves consideration of the ID Policy’s language, ‘enlightened by its context and contemporaneous legislative history[,]’ including . . . the broader context of historical and ongoing religiously driven attempts to advance creationism while denigrating evolution.”⁷⁷ To determine the historical context of the board’s decisions, the district court looked at the timeline of the decision to implement the disclaimer policy.

The district court found that Alan Bonsell, the president of the Dover School Board, identified his purpose in joining the school board on numerous occasions as reintroducing creationism and prayer to classrooms.⁷⁸ Further, Bonsell confronted several teachers during the run-up to the introduction of the disclaimer policy, bracing them about teaching evolution as “fact” not “theory,” which lead several teachers to stop

70. *Kitzmiller*, 400 F. Supp. 2d at 763.

71. *Id.*

72. *Freiler*, 185 F.3d at 344 (citing *Edwards v. Aguillard*, 482 U.S. 578, 589 (1987)).

73. *Id.* at 345.

74. *Id.* at 345–46 (citing *Zorach v. Clauson*, 343 U.S. 306 (1952) (schools may accommodate religious practices without running afoul of the Establishment Clause)).

75. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

76. *Kitzmiller*, 400 F. Supp. 2d at 746–63.

77. *Id.* at 746 (quoting *Selman v. Cobb Cnty. Sch. Dist.*, 390 F. Supp. 2d 1286, 1300 (N.D. Ga. 2005)).

78. *Id.* at 749.

teaching evolution altogether or severely curtail classroom discussion.⁷⁹ The district court also noted that board member William Buckingham engaged in discussions with the Discovery Institute, a pro-creationism religion-based group, on how to legally teach IDT in classrooms.⁸⁰

After these discussions took place, the board delayed the purchase of new biology textbooks “because of the book’s treatment of evolution and the fact that it did not cover any alternatives to the theory of evolution.”⁸¹ At two meetings in June 2004, several school board members spoke openly in favor of teaching creationism and disparaged the teaching of evolution on explicitly religious grounds.⁸²

Then, at a curriculum meeting in June 2004, several documents were provided during a discussion of the science curriculum acknowledging a link between IDT and creationism, and thus religion.⁸³ In July 2004, Buckingham contacted the Thomas More Law Center, another pro-creationism religion-based group, for legal advice on teaching IDT. In that conversation, Buckingham learned of the *Of Pandas and People* textbook.⁸⁴ After Buckingham’s conversations with the Thomas More Law Center, pro-IDT School Board members first attempted to block the purchase of the standard biology textbook containing references to evolution in favor of *Of Pandas and People*.⁸⁵ They then agreed to a “compromise” position where the regular textbook would be purchased, but *Of Pandas and People* would also be purchased as a “comparison” textbook.⁸⁶

During this negotiation, legal counsel for the school board cautioned them that due to the great deal of religiously-framed discussion around IDT and the disclaimer policy in general, it was likely that a court would find a religious purpose in any enactment of an IDT-friendly policy.⁸⁷ Nonetheless, the board proceeded with its plan to adopt *Of Pandas and People* as a “reference text,” arranged for the donation of several copies from local churches, and adopted a curriculum change that included the disclaimer policy.⁸⁸ Based on this sequence of events, the district court found that the school board’s purpose was “to promote religion in the public school classroom, in violation of the Establishment Clause.”⁸⁹

79. *Id.*

80. *Id.* at 750.

81. *Id.*

82. *Id.* at 750–51.

83. *Id.* at 753.

84. *Id.* at 754.

85. *Id.*

86. *Id.* at 755.

87. *Id.* at 754–55.

88. *Id.* at 755–62.

89. *Id.* at 763.

Neither the *Kitzmiller* court nor the *Freiler* court chose to address *Lemon*'s third prong of excessive entanglement, apparently ending their analyses with the determination that the purposes and effects prong was not met.

III. MOVING FORWARD: DOES A DISCLAIMER EVER PASS CONSTITUTIONAL MUSTER?

Building a disclaimer policy that does not run afoul of the Establishment Clause may not be possible. Even though the *Freiler* court identified two legitimate secular purposes that could be served by a disclaimer policy, both the *Freiler* and *Kitzmiller* courts noted that the historical context of IDT in general, and disclaimers in particular, are problematic. If a reasonable person would automatically assume that a disclaimer was designed to favor IDT and disfavor evolution, then it seems unlikely that any disclaimer would pass either the endorsement test or the purposes or effects prong of *Lemon*. Asma T. Uddin calls this the "poisonous tree" problem: can untainted fruit in the form of a constitutionally sound disclaimer policy be grown from the poisonous tree of the historical significance of disclaimers?⁹⁰ Some commentators, however, feel that the contextual analysis is flawed in itself: "Individual legislators are not—nor, as a practical matter, could they be—constitutionally required to divorce themselves from their religious beliefs when acting in their capacity as lawmakers."⁹¹ Virelli seems to argue that the sham endorsement and purpose and effects analyses of the *Kitzmiller* and *Freiler* courts are so over-inclusive that a legislator who acts from any religious motivation at all, or even enacts a law that *might* have a religious motivation from the view of a reasonable person, runs a grave risk of that law being invalid.⁹²

Both views seem to miss a basic point of the analysis under *Kitzmiller* and *Freiler*. The *Kitzmiller* court did note that a reasonable person would determine that a disclaimer was an endorsement of religion *in part* because of the history of the evolution/creationism debate. However, had that been dispositive to the endorsement test, it seems unlikely that the district court would have spent approximately twenty pages of what amounts, under Uddin and Virelli's view, to *obiter dictum* describing other reasons why the particular disclaimer in that case constituted an endorsement of religion. The recognition of the history of IDT and disclaimer policies by the

90. Uddin, *supra* note 18.

91. Louis J. Virelli III, *Making Lemonade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423, 438 (2006).

92. *Id.* at 438–39.

reasonable person was only one factor in the *Kitzmiller* court's analysis. Likewise, the *Freiler* court did not simply state that reasonable people know the history of disclaimer policies. Rather, *Freiler's* endorsement analysis focused on the wording of the disclaimer itself and the fact that the disclaimer created a false dichotomy between IDT and evolution. Therefore, it seems that the history of disclaimers might not be as important as Virelli appears to believe in the endorsement analysis. Possibly as a result of his overemphasis on the historical analysis of disclaimers, Virelli argues that a new standard based on Fourteenth Amendment equal protection analysis should be adopted.⁹³ However, once the historical analysis of *Kitzmiller* is understood in its proper context, not only does a new standard appear unnecessary, but a crack of light appears where a carefully tailored disclaimer policy might sneak under the barred door of the Establishment Clause.

Uddin identifies ways in which a disclaimer policy might lose the "taint" of its religious roots. Primary among these are that it be a "fundamentally modified version of its original version, that is, its primary effect is no longer unconstitutionally discriminatory" and that the policy "serves one or more secular purposes."⁹⁴ Further, analogizing to *Board of Education of Kiryas Joel Village School District v. Grumet*,⁹⁵ Uddin argues that a disclaimer policy that is sufficiently general might well divorce itself from the history of disclaimer policies and pass both the endorsement test and the second prong of *Lemon*.⁹⁶ In *Grumet*, a school districting plan was struck down due to being too specific to a particular faith.⁹⁷ The New York Legislature passed two more laws authorizing creation of school districts, and both times, the New York courts struck the law down as violative of the Establishment Clause.⁹⁸ Finally, a more generalized plan applicable to several areas instead of just the one religious community has been upheld.⁹⁹ Uddin further analogizes to *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*.¹⁰⁰ In *McCreary*, the Supreme Court held that a display of the Ten Commandments was sufficiently similar to previous displays not to be fully divorced from the endorsement of religion, even though there was a stated secular purpose.¹⁰¹ The key, Uddin explains, is

93. *Id.* at 445.

94. Uddin, *supra* note 18.

95. 512 U.S. 687 (1994).

96. Uddin, *supra* note 18.

97. *Grumet*, 512 U.S. at 709–10.

98. *See Grumet v. Cuomo*, 681 N.E.2d 340 (N.Y. 1997); *Grumet v. Pataki*, 720 N.E.2d 66 (N.Y. 1999), *cert. denied*, 528 U.S. 946 (1999); *see also* WOLTERS KLUWER, LAW AND RELIGION: CASES IN CONTEXT 225–26 (Leslie C. Griffin ed., 2010).

99. Uddin, *supra* note 18.

100. 545 U.S. 844 (2005).

101. *Id.* at 868.

that the displays were not sufficiently different from previous displays to become secularized.¹⁰²

From the above discussion, it appears that for a disclaimer policy to harmonize with the Establishment Clause, it should follow five basic guidelines:

A. The debate leading up to the policy should be couched in non-religious terms.

This guideline may end up being the most difficult hurdle for supporters of disclaimer policies to clear. As evolution is a religiously-charged subject, it seems inevitable that at least some members of the public will invoke religious doctrine in support of a disclaimer. On the other hand, it may actually be unnecessary. Simply debating a measure in religious terms may be evidence in support of an endorsement of religion, or it may be evidence of a non-secular purpose in the policy, but it is not clear at all that the simple mention of religion in a public policy debate confers a government *imprimatur* on religion if the policy is enacted. As Virelli aptly points out, this would lead to absurd results.¹⁰³ Such a view would seem to violate at least the spirit of the Constitution: “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”¹⁰⁴ If any enactment by a legislator who professed a religious motivation were held to a *per se* rule of invalidity, a *de facto* religious test would be the result: the Article VI guarantee presupposes that both the religious and non-religious are qualified to hold office. Further, American history is rife with examples of enactments that were argued in religious terms and were not subject to Establishment Clause attack: blue laws, anti-gambling statutes, “dry” counties, and even anti-abortion statutes have been argued in such terms.¹⁰⁵ Still, to give a proposed disclaimer the best chance of surviving constitutional attack, it is incumbent on supporters to at least shy away from religious arguments as much as possible, particularly when stating their legislative purpose for the record.

So how can supporters avoid couching the debate in religious terms? As already discussed, some religious debate on the subject doesn’t automatically render a disclaimer policy invalid, but there may be some threshold beyond which the policy becomes inextricably linked with religion. While controlling the public aspect of the debate may be

102. Uddin, *supra* note 18.

103. Virelli, *supra* note 91, at 438–39.

104. U.S. CONST., art. VI, cl. 3.

105. See *McGowan v. Maryland*, 366 U.S. 420 (1961); IDAHO CODE ANN. § 18-3802 (2007); KY. REV. STAT. ANN. § 242.230 (West 2005); S.C. CODE ANN. § 44-41-20 (1976).

impossible, supporters acting in an official capacity should avoid statements regarding the validity or invalidity of a theory that are couched in religious terms. In other words, statements like “We have to teach an alternative to (a given scientific theory) to keep us from godless atheism” or “This theory contradicts the Seven Aphorisms of SUMMUM” are likely to garner more judicial scrutiny than “It’s important that the views of the religious community are respected.” Further, communication between officials and the public should not frame any debate in religious terms. Most importantly, any communication that paints those who disagree with a disclaimer policy as religious outsiders to the political community should be avoided. The Dover School Board failed in both of these regards, and its actions came back to haunt them at trial.

*B. The disclaimer should be written as broadly as possible.*¹⁰⁶

Something that both the *Freiler* and *Kitzmiller* courts found troubling was that evolution was the sole scientific theory singled out by the disclaimer policies.¹⁰⁷ It stands to reason that a general disclaimer that does not single out evolution as uniquely problematic, but rather encourages students to skeptically question everything presented in science class and seek materials outside of those presented, is less likely to be perceived by a reasonable person as endorsing religion. Indeed, such a policy is more likely to be seen as an attempt to “encourage informed freedom of belief,” the very secular purpose the *Freiler* court determined was a sham.¹⁰⁸ Further, the policy should not offer only one competing perspective. The *Kitzmiller* court found that a reasonable ninth grader would view the Dover School District’s offer of *Of Pandas and People* as its sole alternative to evolution as an endorsement of IDT.¹⁰⁹ To avoid this “contrived dualism,” the general disclaimer should again be left as broad as possible and should avoid mentioning specific competing religion-based theories. If any mention of alternative theories is made, these mentions should be kept to science-based theories only. This leads to problems with defining which theories are, in actual fact, based on science. While definitions including

106. Disclaimers in this context are limited to science textbooks and instruction. For a discussion on religious objection to instruction in other subjects, see *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058, 1060–61 (6th Cir. 1987).

107. See, e.g., *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 724 (M.D. Pa. 2005); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 345 (5th Cir. 1999), cert. denied, 530 U.S. 1251 (2000).

108. *Freiler*, 185 F.3d at 344.

109. *Kitzmiller*, 400 F. Supp. 2d at 726.

testability, falsification, and repeatability are helpful in this inquiry, it is probably safest to leave mention of alternate theories out.¹¹⁰

Other solutions exist to the contrived dualism problem, but none solves the problem in an elegant manner. One such solution would be to teach several viewpoints: if evolution is taught and IDT is taught, other views (particularly religion-based views) could be taught. Of course, as the Church of the Flying Spaghetti Monster demonstrates, this would quickly embroil school boards in debates over what constitutes a “legitimate” religion-based theory.¹¹¹ It is difficult to see how such a determination would not run afoul of *Lemon*’s third prong, not to mention the rule in *United States v. Ballard*.¹¹² Another proposed solution is to explain why evolution does not necessarily conflict with a belief in divine creation. This proposal has two major defects. First, this probably violates the third prong of *Lemon* by entangling the state in matters of religious faith. Second, this would likely fail the endorsement/purpose and effects standard as well: if a teacher presenting IDT as an alternative to evolution constitutes an endorsement, how much more of an endorsement of a religious view would it be for a teacher to explain a fine point of doctrine?

C. The secular purpose of the policy should be stated as clearly as possible and not be subject to attack as a sham.

As discussed *supra* Part II.B, a secular purpose does not need to avoid any relationship to religion. The *Freiler* court said as much when noting

110. Unfortunately, this leads back to the problem of the state offering an official orthodoxy of science. However, it is important to note that the science taught in high school courses is generally of an introductory nature and includes, by necessity of both time limits and limited educational foundation, approximations and analogies that do not accurately describe the true “cutting edge” of scientific knowledge. See generally TERRY PRATCHETT, IAN STEWART & JACK COHEN, *THE SCIENCE OF DISCWORLD* (1999). A disclaimer indicating that scientific theories are open to challenge as new evidence comes to light and that students should maintain an open mind toward new theories is inconsistent with perception of a state-sanctioned orthodoxy.

111. The Church of the Flying Spaghetti Monster was a *reductio ad absurdum* argument proposed by Bobby Henderson in *Open Letter to Kansas School Board*, CHURCH OF THE FLYING SPAGHETTI MONSTER, <http://www.venganza.org/about/open-letter/> (last visited Feb. 18, 2012). In the “Open Letter,” Henderson applauds the decision by the Kansas State Board of Education to permit the teaching of IDT and requests that they include the creation stories of the Church of the Flying Spaghetti Monster. This fictional church purports to teach, among other silliness, that pirates were peaceful explorers that were demonized by Christian missionaries and that the decline of piracy is responsible for global warming. Particularly relevant to the evolution/creationism debate, the Church of the Flying Spaghetti Monster “orthodoxy” is that the Flying Spaghetti monster created life as single-celled organisms that over millions of years evolved into its current forms. The similarity between the views of the so-called Pastafarians and those of strict evolutionists is not lost on this author, with the sole exception of the intervention of a divine entity. See generally Bobby Henderson, *About*, CHURCH OF THE FLYING SPAGHETTI MONSTER, <http://www.venganza.org/about> (last visited Feb. 18, 2012).

112. 322 U.S. 78, 86 (1944) (explaining that it is not the place of the government to determine the truth, falsehood, or sincerity of a person’s religious beliefs).

that protection of the sensibilities of the religious members of the community was a legitimate secular purpose.¹¹³ However, when articulating the secular purpose, the enacting body should take particular care that the purpose will not be perceived as a sham. The *Kitzmiller* court identified one method of avoiding the problem: the district court found it notable that, although the stated secular purpose of Dover's disclaimer policy was to improve science education and critical thinking, no scientists or science associations were consulted.¹¹⁴ It appears that a wise step on the part of school boards would be to take testimony on any proposed disclaimer from the scientific community.

This approach raises some questions. Namely, it is unlikely that a scientist—at least one unaffiliated with any creation science organization—would testify to the desirability of including IDT in the curriculum or to gaps in evolution. However, the purpose of the testimony isn't to establish the desirability of teaching IDT or attacking evolution specifically: the purpose of the testimony is to establish a secular purpose in a *general* disclaimer. Finding a scientist to testify to the desirability of questioning orthodoxy should be an easy task.

D. The policy should either be handed out at the beginning of the course or be read at the beginning of the course.

As noted *supra* Part II.A, both the *Kitzmiller* and *Freiler* courts found that the “singling out” of evolution was problematic.¹¹⁵ A formally neutral disclaimer that is read or handed out before class discussion of evolution would still have this singling-out effect, indicating that the school district thought evolution theory alone was questionable or had gaps. As the *Kitzmiller* court noted, a reasonable ninth grader would know that an attack directed at only evolution would likely have a religious motivation.¹¹⁶ Of course, this would likely not be dispositive towards an endorsement of religion. However, keeping the disclaimer temporally separated from the material on evolution decreases the likelihood of a court finding that evolution has been singled out. Disclaimer policies requiring a sticker placed on a biology textbook would satisfy this requirement simply by placing a neutral disclaimer on a flyleaf or the cover of the text in question.

113. *Freiler*, 185 F.3d at 345.

114. *Kitzmiller*, 400 F. Supp. 2d at 763.

115. *See, e.g., id.* at 724; *Freiler*, 185 F.3d at 345.

116. *Kitzmiller*, 400 F. Supp. 2d at 726.

E. The policy should be “opt-in” rather than “opt-out.”

As discussed by the *Kitzmiller* court, an “opt-out” provision in the Dover disclaimer policy gave added *gravitas* to the perceived endorsement of religion.¹¹⁷ Students, or their parents, who did not wish to hear the disclaimer were required to submit written requests signed by the students’ parents. However, an opt-in plan would not seem to implicate the same concerns: parents who were concerned about their children *not* being presented with “alternate viewpoints” to evolution could affirmatively request that the school district provide their children with disclaimers. This has the added benefit of more narrowly tailoring the proposed government action to fit one of the secular purposes approved by the *Freiler* court: the interest in protecting the sensibilities of religious families who believe that evolution is of questionable scientific merit.¹¹⁸ A possible way this could work would be to have a designated day where all students in the district meet to have the policy read by an administrator. While this may seem like an endorsement of religion, it is more reminiscent of the release-time program found to not violate the Establishment Clause in *Zorach*—students voluntarily are released from class to hear a message specifically approved by their parents.¹¹⁹

Arguably, the opt-in solution simply reverses the political outsider questions: it may make those wanting disclaimers feel like *they* are outside the community, the strange ones. However, the Establishment Clause does not give people the right to be free of feeling strange or outside the political mainstream. These concerns are only implicated when a state *establishment of religion* has the effect of marginalizing a particular group. While education in secular topics might be discomfiting to the religious, it does not seem feasible that a strict fundamentalist Christian could allege a state establishment of religion when a third grade teacher explains the heliocentric model of the solar system.¹²⁰ Further, curing an Establishment Clause violation does not establish hostility to religion.¹²¹ Since the question in this instance is no longer one of establishment, it becomes one

117. *Id.* at 727–28.

118. *Freiler*, 185 F.3d at 345.

119. *Zorach v. Claiborn*, 343 U.S. 306, 312 (1952).

120. *Cf.* 1 *Chronicles* 16:30 (“[T]he world also shall be stable, that it be not moved.”); *Psalms* 93:1 (“[T]he world also is [e]stablished, that it cannot be moved.”); *Psalms* 96:10 (“[T]he world also shall be established that it shall not be moved”); *Psalms* 104:5 (“Who laid the foundations of the earth, that it should not be removed for ever.”); *Isaiah* 45:18 (“God himself that formed the earth and made it; he hath established it”).

121. *McGinley v. Houston*, 361 F.3d 1328, 1332 (11th Cir. 2004) (“If the appellants were correct [that removing an Establishment Clause violation established a religion of non-theism] an Establishment Clause violation could never be cured because every time a violation is . . . cured by the removal of the statute or practice that cure itself would violate the Establishment Clause”).

of free exercise: the state is simply accommodating the free exercise rights of those who have a religious reason for wanting to hear or read a disclaimer.

F. A Proposed Disclaimer

A disclaimer conforming to the guidelines above is presented below. See the Conclusion for reasons this disclaimer may not be acceptable to disclaimer advocates.

DISCLAIMER

The purpose of science education is to inculcate the ability to think critically. Critical thinking includes the ability to test hypotheses against available evidence. As we discover more of the physical universe, and evidence is found which contradicts explanations which were previously sufficient, those explanations must either be adjusted to fit the available evidence or the explanation must be discarded altogether and a new explanation devised.

A scientist should never ignore evidence because it does not fit her preconceived notions, or because it cannot be explained by her current understanding of the universe.

It should be understood by the student that the theories presented in this textbook are, in the judgment of the scientific community at large, the best explanations for observed phenomena. This does not mean that new data disproving any of the theories presented could not come to light, nor does it mean that all scientists agree with every theory presented.

As with any subject, a student's understanding may be increased by outside-of-class discussion with friends, members of the community, or family members. We encourage this discussion as part of the educational process.

IV. THE STRENGTHS AND WEAKNESSES APPROACH

After the *Kitzmiller* and *Freiler* decisions, evolution opponents have tried a new strategy. This new strategy is embodied in so-called "Academic Freedom Acts," which allow teachers to introduce criticism of evolution to classroom discussion.¹²² As of this writing, Louisiana and Texas are the

122. See MODEL ACADEMIC FREEDOM STATUTE ON EVOLUTION (Discovery Inst., Proposed Bill 2007), available at <http://www.academicfreedompetition.com/freedom.php>.

only states to enact such legislation, though other bills have been introduced in various state legislatures. The Louisiana statute is styled the “Louisiana Science Education Act” (LSEA) and is presented in relevant part below:

B. (1) The State Board of Elementary and Secondary Education, upon request of a city, parish, or other local public school board, shall allow and assist teachers, principals, and other school administrators to create and foster an environment within public elementary and secondary schools that promotes critical thinking skills, logical analysis, and open and objective discussion of scientific theories being studied including, but not limited to, evolution, the origins of life, global warming, and human cloning.

(2) Such assistance shall include support and guidance for teachers regarding effective ways to help students understand, analyze, critique, and objectively review scientific theories being studied, including those enumerated in Paragraph (1) of this Subsection.

C. A teacher shall teach the material presented in the standard textbook supplied by the school system and thereafter may use supplemental textbooks and other instructional materials to help students understand, analyze, critique, and review scientific theories in an objective manner, as permitted by the city, parish, or other local public school board unless otherwise prohibited by the State Board of Elementary and Secondary Education.

D. This Section shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion.¹²³

The Texas statute directing how biology is to be taught in schools is reproduced in relevant part below:

(7) Science concepts. The student knows evolutionary theory is a scientific explanation for the unity and diversity of life. The student is expected to:

(A) analyze and evaluate how evidence of common ancestry among groups is provided by the fossil record, biogeography,

123. LA. REV. STAT. ANN. § 17:285.1 (2008).

and homologies, including anatomical, molecular, and developmental;

(B) analyze and evaluate scientific explanations concerning any data of sudden appearance, stasis, and sequential nature of groups in the fossil record;

(C) analyze and evaluate how natural selection produces change in populations, not individuals;

(D) analyze and evaluate how the elements of natural selection, including inherited variation, the potential of a population to produce more offspring than can survive, and a finite supply of environmental resources, result in differential reproductive success;

(E) analyze and evaluate the relationship of natural selection to adaptation and to the development of diversity in and among species;

(F) analyze and evaluate the effects of other evolutionary mechanisms, including genetic drift, gene flow, mutation, and recombination; and

(G) analyze and evaluate scientific explanations concerning the complexity of the cell.¹²⁴

Examining these statutes under the proposed guidelines suggests that, at least facially, they do not constitute an establishment of religion. The statutes themselves seem somewhat innocuous: nothing could be more in line with scientific inquiry than allowing critical debate. Further, there isn't quite the same singling out of evolution seen in disclaimer policies. Far from singling evolution out, the Louisiana statute in particular specifically mentions two other scientific concepts¹²⁵ and makes it clear that critical discussion of any concept presented is authorized. The stated secular purpose is one even Richard Dawkins would likely approve: promotion of critical thinking skills, logical analysis, and open and objective discussion

124. 19 TEX. ADMIN. CODE § 112.34 (2009).

125. It strains credulity to assume coincidence when of the three concepts named, two are repugnant to religious conservatives and the other is only "controversial" in the political sense. However, strictly political opposition to science education is outside the scope of this Note, and this arguably keeps evolution from being singled out.

of scientific theories. If the criticism is secular in nature, no opt-in should be necessary.¹²⁶

Despite their innocuous posture, though, these bills can be viewed as Trojan horses, whose benign appearances belie their underlying intent: presenting opportunities to both discredit evolution and introduce religiously-based “alternative” theories into the classroom. As Professor Virelli points out, both statutes “make clear to educators that they have the opportunity to introduce criticisms or alternative explanations of human origins.”¹²⁷ While no explicit requirement that those criticisms or alternate explanations be religious in nature appears in the bill, as explained below, it is hard to understand how else these instructions were meant to be understood when taken in context.

However facially neutral LSEA may be, there is some evidence that the true purpose behind the bill was advancement of religion. Senator Ben Nevers, the sponsor of the bill, has admitted that he was asked to sponsor the bill by the Louisiana Family Forum.¹²⁸ Nevers acknowledges that one of the Louisiana Family Forum’s goals is the teaching of creationism alongside evolution.¹²⁹ This, in and of itself, is not enough to make out an Establishment Clause claim. As discussed *supra*, those who hold religious beliefs are allowed to participate in public policy debates without their preferred legislation being held to a per se rule of invalidity.

Similarly, debate around the Texas statute has been religiously-framed. Eugenie Scott, Executive Director of the National Center for Science Education, points out that the Texas standards give teachers an opportunity to “bash evolution”¹³⁰ and to tell students to “just read Genesis.”¹³¹ Scott refers to this as “creationism by the back door.”¹³² Further, one of the main proponents of the changes to the Texas Administrative Code, Dr. Don McLeroy, is a staunch creationist who “believes that God created the earth less than 10,000 years ago.”¹³³ Dr. McLeroy explicitly stated that one of his goals was to insert language in textbooks indicating that “individual cells

126. This raises the question of whether such a statute is actually necessary. There does not appear to be widespread foreclosure of the discussion of *secular* criticism of scientific theories or concepts.

127. Louis J. Virelli III, *Judging Darwin: Understanding the New Distributive Model of Evolution Instruction*, 13 U. PA. J. CONST. L. 81, 102 (2010).

128. Sylvia Schon, *Bill Allows Teaching of Creationism as Science*, HAMMOND STAR, Apr. 6, 2008, at A1.

129. *Id.* The title of the article suggests that, at the very least, one observer believes that the purpose of the statute is to allow teaching creationism in schools.

130. See *Darwin's in the Details*, ON THE MEDIA (Apr. 3, 2009), <http://www.onthemedial.org/2009/apr/03/darwins-in-the-details/> (interview by Bob Garfield with Eugenie Scott).

131. *Id.*

132. *Id.*

133. Stephanie Simon, *Texas School Board Set to Vote on Challenge to Evolution*, WALL ST. J., Mar. 23, 2009, at A5.

are far too complex to have evolved by chance mutation and natural selection,”¹³⁴ an argument that seems all too similar to those in *Of Pandas and People*. It seems disingenuous to argue that a claim that cellular biology is too complex to have evolved by chance mutation and natural selection is not an argument for Intelligent Design in some shape or form, but this seems to be precisely what proponents of the Texas statute like Dr. McLeroy argue. However, accepting the contention that one is not a necessary corollary of the other, it seems apparent that some religious motivation may be at work here. Dr. McLeroy has led other charges to amend Texas teaching standards (as one would expect from a member of the Texas Board of Education). A constant in many of his campaigns is religion, specifically Christianity, and the notion that the United States is a “Christian nation.”¹³⁵ It defies imagination that Dr. McLeroy’s other attempts to modify Texas curricula would be religiously-based, but that one would not have at least a suspicion of religious motivation in the one area where he is silent on religion (other than being a proponent of a view held by explicitly religious organizations such as the Discovery Institute). Again, the fact that Dr. McLeroy or other proponents of so-called “Academic Freedom Acts” have religious motivations doesn’t even make out a prima facie case of establishment. However, the purpose of a facially-neutral enactment to advance religion is certainly relevant in discussion of whether the Establishment Clause has been violated.

Ultimately, the constitutionality of this statute may depend on its application. A similar analysis to *Yick Wo v. Hopkins*¹³⁶ may be warranted. In *Yick Wo*, the City of San Francisco enacted a statute requiring all owners of laundries in wooden buildings to obtain a permit. Although the statute was facially neutral, it was enforced unequally against laundry-owners of Chinese descent.¹³⁷ The Supreme Court held the statute to violate the Equal Protection Clause of the Fourteenth Amendment because its application inhibited the interests of a racial group without what would now be called a compelling government interest.¹³⁸

Although *Yick Wo* involved an Equal Protection Clause analysis, the nature of the second prong of *Lemon* and the endorsement “effects” test lend themselves particularly well to unequal enforcement analysis. If the unequal way a facially neutral statute is enforced tends to advance or inhibit religion, or if the way in which a facially neutral statute is enforced has the effect of endorsing a particular religious view, this would seem to

134. *Id.*

135. See generally Russell Shorto, *How Christian Were the Founders?*, N.Y. TIMES MAG., Feb. 14, 2010, at MM32.

136. 118 U.S. 356 (1886).

137. *Id.* at 373.

138. *Id.* at 374.

constitute an establishment of religion in the same way a non-neutral statute would. If it turns out that the overwhelming majority of application of this statute is to allow discussion of IDT¹³⁹ or attacks on religion, then the same analysis applied to the Dover policy seems appropriate: reasonable students know that attacks on evolution tend to be religiously motivated, and a reasonable student would perceive a singling out of evolution for criticism as official disapproval of evolution. Further, depending on the types of critical discussion of evolution engendered by the statute, the same code word analysis used by the *Kitzmiller* court might apply.¹⁴⁰

V. CONCLUSION

The five guidelines presented above presuppose that a group proposing a disclaimer policy would agree to such a neutered and watered-down disclaimer: one in which evolution was not specifically attacked, not presented contemporaneously with evolution, and not featuring an opt-out but an opt-in. This may be an unwarranted assumption. However, this goes to the very heart of the Establishment Clause problem with disclaimer policies and forces those supporting disclaimers to face hard questions. Is it their purpose to discredit evolution in favor of a religious theory, or is it simply to promote good science? If the goal is promotion of good science, a neutral disclaimer is something that almost all can support. Is the desired effect of a disclaimer to communicate to students that Darwin's teachings undermine their religious beliefs, or is it to foster a healthy skepticism towards received knowledge? Is it the goal of disclaimer supporters to ensure that children of secular parents are exposed to religious criticism of evolution, or are disclaimers intended simply to reinforce official tolerance of competing views? If the former answers are chosen, it is likely that those supporting disclaimers will abandon the effort: there does not seem to be any way to tailor a disclaimer program so that it both presents religion-based "alternatives" to evolution while passing constitutional muster.

139. It seems discussion of IDT is precluded by the findings of the *Kitzmiller* court. If IDT is religion, there is little doubt that teaching it as a criticism of evolution would be an Establishment Clause violation. See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 735–47 (M.D. Pa. 2005).

140. It should be pointed out that, as noted *supra* Part III, Virelli also argues for an equal protection-type analysis of Establishment Clause claims. However, his argument is based around disparate impact analysis of the sort used in *Washington v. Davis*, 426 U.S. 229 (1976). This seems an inappropriately high burden for a plaintiff to carry, as under a *Davis* analysis, a plaintiff has to not only show disparate impact but also that there was a discriminatory motive behind the enactment. *Id.* at 239. Further, it almost seems to be tail-chasing: to show religious motivation, one would have to show religiously-biased motivation. Under a *Yick Wo* analysis, to make out a prima facie case all that is needed is a showing of disparate enforcement without a showing of motive. 118 U.S. at 374.

However, if the latter answers are chosen, the guidelines above can help craft a disclaimer policy that might survive constitutional attack.

The Establishment Clause, in part, was a recognition on the part of the Framers that religion was a subject on which men violently disagreed and that official support of religion could lead to discord.¹⁴¹ A generalized disclaimer, by taking religion out of the mix, might have the added benefit of bringing more reasoned and levelheaded debate to the subject. As the United States becomes more and more factionalized, it can hardly be argued that depoliticizing religion would be a bad thing.

The new approach of Academic Freedom Acts may be a death knell for disclaimer-type legislation, though. It seems that the groups opposing the teaching of evolution in the classroom have moved on to the tactic of Academic Freedom Acts. However, as my proposed analysis shows, Academic Freedom Acts may not pass constitutional muster, particularly if the freedom to question is only used as a freedom to question evolution to the benefit of IDT. In the long run, for those truly concerned with improving the quality of science education rather than injecting religion in the classroom, it seems that a truly religion-neutral disclaimer might still be the right approach.

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141. See *United States v. Ballard*, 322 U.S. 78, 87 (1944).

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