

Evolution Toward Neutrality:
Evolution Disclaimers, Establishment Jurisprudence Confusions, and a Proposal of Untainted
Fruits of a Poisonous Tree

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ABSTRACT

This Article deals with the controversy surrounding the teaching of evolutionary theory in American public schools, with a specific focus on disclaimers read by teachers before they teach evolution. With the rise of religious fundamentalism and the correspondent change in the American socio-legal climate, questions of religion and interpretation of the Religion Clauses of the U.S. Constitution have become increasingly pertinent. In particular, the precise relationship between the Free Exercise and Establishment Clauses is of special importance with religious groups now more vocal in their articulation of their free exercise rights.

The current form of disclaimer either mentions specific religious theories about origins as alternatives to evolution, or denigrates evolutionary theory in more indirect ways. Because such disclaimers are clearly antithetical to the neutrality concerns of the Establishment Clause, they have been held unconstitutional by all courts to date, including the December 2005 *Kitzmiller* case in Dover, Pennsylvania. However, this Article suggests that striking down the disclaimers without providing alternative responses to the legitimate free exercise concerns involved may violate the Free Exercise Clause. As a way of negotiating free exercise and establishment concerns, this Article proposes a generalized disclaimer: one that does not single out evolutionary theory for special treatment, but rather addresses scientific inquiry as a whole. Generalized disclaimers neither discriminate among religion, or between religion and non-religion, or between scientific theories. This Article will then go on to discuss whether such generalized disclaimers can ever be constitutional, despite their origins in the evolution controversy. That is, are they poisoned by their roots, or can they be purged of this poison if they become sufficiently neutral in form? This Article will conclude that the formally neutral generalized disclaimers should be upheld on constitutional grounds.

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INTRODUCTION

The battle between creationism and evolution in American public schools has long captivated the American public. Ever since the evolution controversy in the Scopes Trial of 1927,¹ a few states have struggled to come up with a resolution as state school boards deal with numerous proposals on ways to eliminate or counter the teaching of evolution. These proposals have included such diverse measures as: (1) making creationism the sole basis of the curriculum; (2) giving “equal time” to creationism and evolution; (3) offering intelligent design theory as an alternative to evolution;² and (4) reading or printing disclaimers along with materials on evolution.³ This last measure is among the latest in the long history of the teaching of evolutionary theory in public schools. Evolution disclaimers are either read out loud before the teacher commences the lesson on evolutionary theory, or are printed on stickers that are pasted inside biology textbooks. Regardless of form, the substance of the enacted disclaimers is the same—disclaimers note weaknesses in evolutionary theory⁴ and in some cases mention alternative theories of creation. Although the Fifth Circuit has struck down on establishment grounds a disclaimer mentioning only the Biblical version of creation as an alternative to the evolutionary theory of origins, no court has ever held that facially neutral disclaimers (i.e., disclaimers that have no reference to any religious theory) are problematic on the basis of the

¹ 154 Tenn. 105, 289 S.W. 363 (Tenn. 1927).

² *Kitzmiller v. Dover Area School Dist.*, No. 04cv2688, 2005 U.S. Dist LEXIS 33647 (M.D. Pa. 2005).

³ See Judith A. Villarreal, *God and Darwin in the Classroom: The Creation/Evolution Controversy*, 64 CHI. KENT. L. REV. 335, 345 (1988).

⁴ See F. Arthur Jones, *A Creative Solution?: Assessing the Constitutionality of a New Creation/Evolution Disclaimer*, 49 LOY. L. REV. 519, 532 (2003) (describing the Alabama evolution disclaimer, which discusses the factual weaknesses of evolutionary theory).

Establishment Clause.⁵ This Article will discuss whether such facially neutral disclaimers, despite their origins in the evolution controversy, can ever be constitutionally permissible.

The analytical starting point is acknowledging that establishment analysis is tempered by the free exercise concerns implicated in any given case. This Article will examine the jurisprudence and demonstrate how the Court defines the prongs of the various establishment tests differently according to the type of free exercise issues presented. As a way of organizing the complexity of this approach, this Article proposes dividing cases into categories, with each category including cases that have similar facts and present similar sorts of free exercise-establishment concerns. (This organizational method will be referred to as the “categorical approach.”)

This Article explores the unique free exercise-establishment issues involved in the issue of disclaimers on evolution teaching by proposing a generalized disclaimer: one that does not single out evolutionary theory for special treatment, but rather addresses scientific inquiry as a whole. Generalized disclaimers neither discriminate among religion, or between religion and non-religion, or between scientific theories. Their non-discriminatory content is in conformity with the requirements of the Establishment Clause, and their purpose is to respond to the legitimate free exercise concerns of those parents opposed to the teaching of evolution. This Article suggests that generalized disclaimers be classified in the same category as other government measures that arise from a constitutionally problematic history, but have been subsequently modified from their previously unconstitutional forms. This Article will then go on to define this category, which it will refer to as the “untainted fruits of the poisonous tree”

⁵ See Winston R. Kitchingham, Freiler v. Tangipahoa Parish Board of Education: The Fifth Circuit Leaves William Jennings Bryan on an Establishment Clause Cross, 75 TUL. L. REV. 533, 546 (2000) (because courts have not addressed “the broader question of evolution disclaimers ... it is unclear exactly what elements would comprise an acceptable disclaimer”). In this Article, the phrase will be used to refer to an approach that deals with government measures rooted in a history of establishment violations.

(hereafter “untainted fruits”).⁶ This Article will propose that the constitutional determination within this category is whether the modified version is in fact an “untainted fruit” rather than an inadequately modified (that is, “tainted”) fruit of the poisonous tree.

Part I evaluates proposed and enacted evolution disclaimers and the cases in which those disclaimers have been challenged. Part II provides an overview of the various establishment tests and their role in a relatively confused jurisprudence. Part III evaluates the constitutionality of currently enacted disclaimers. Part IV discusses the free exercise-establishment tension implicated in the case of disclaimers on evolution teaching. Part IV first proposes the generalized disclaimer as a solution to this tension. This Part then goes on to use this hypothetical generalized disclaimer to explore the contours of the jurisprudential analysis of “untainted fruits.”

I. EVOLUTION DISCLAIMERS

A. Proposed and Enacted Disclaimers

Currently, Alabama and Georgia are the only states whose school boards have instituted evolution disclaimers in their public schools. In 1996 when Alabama first began inserting evolution disclaimers in students’ biology textbooks,⁷ the state’s decision stirred much debate.⁸ However, in November 2001 the Alabama Board of Education enacted a new disclaimer which

⁶ The term is taken from the “fruit of the poisonous tree” doctrine in criminal procedure. This doctrine serves as an exclusionary rule, excluding from trial all evidence that derives from a violation of the defendant’s constitutional rights. Mark S. Bransdorfer, Note, Miranda Right-to-Counsel Violations and the Fruit of the Poisonous Tree Doctrine, 62 IND. L.J. 1061 (1987).

⁷ CNN.com Education, Alabama Keeps Evolution Warning on Books (visited Oct. 15, 2004) <<http://archives.cnn.com/2001/fyi/teachers.ednews/11/09/evolution.ap/>> (The “sticker contained questions students should ask about evolution, such as: ‘Why do major groups of plants and animals have no transitional forms in the fossil record?’”).

⁸ *Id.*

faced no dissent⁹ and was strongly supported by the Christian Coalition and the Eagle Forum.¹⁰

It reads in part:

A MESSAGE FROM THE ALABAMA STATE BOARD OF EDUCATION [to be pasted in all biology textbooks]: This textbook discusses evolution, a controversial theory some scientists present as a scientific explanation for the origin of living things, such as plants, animals and humans. No one was present when life first appeared on earth. Therefore, any statement about life's origins should be considered as theory, not fact. The word "evolution" may refer to many types of change. Evolution describes changes that occur within a species. (White moths, for example, may "evolve" into gray moths.) This process is microevolution, which can be observed and described as fact. Evolution may also refer to the change of one living thing to another, such as reptiles into birds. This process, called macroevolution, has never been observed and should be considered a theory. Evolution also refers to the unproven belief that random, undirected forces produced a world of living things.¹¹

It is important to note that this disclaimer, like many others, describes evolution as a theory about the "origin of living things." To describe it as such reflects a fundamental scientific misunderstanding built into the disclaimer specifically and the evolution/creationism battle generally, because evolutionary theory is neither a theory of creation nor a theory about the origins of life. There are in fact two areas of science that are at odds with creationism: cosmology, which for example describes how there came to be certain molecules and not others, and evolution, a theory about life on earth. Specifically, evolution addresses how the differentiations of kinds of things from algae to people arose. In between cosmology and evolution, there is much speculation about the origins of life, although there is no real scientific

⁹ *Id.*

¹⁰ *Id.* ("The decision was actively supported by the Christian Coalition and the Eagle Forum, groups that seek more religious activity in public schools."). The Eagle Forum's mission statement:

We support the Declaration of Independence and its fundamental doctrine that we owe our existence to the Creator who has endowed each of us with inalienable rights. We support the U.S. Constitution as the instrument of securing those God-given rights. We acknowledge the Holy Scriptures as the source of the best code of moral conduct.

Alabama Eagle Forum, Our Mission (visited Oct. 11, 2004) <<http://www.alabamaeagle.org/>>.

¹¹ Alabama State Bd. of Educ., A Message from the Alabama State Board of Education (visited Sept. 19, 2004) <<http://www.eagleforum.org/educate/1995/dec95/textbook.html>>.

theory.¹² However, because evolution is referred to as a theory of origins in both evolution disclaimers and the larger surrounding debate, it will be referred to as such in this paper.

Aside from its scientific problems, this disclaimer which is also included in course guidelines for science teachers¹³ has also not yet been challenged on establishment grounds.¹⁴ Considering that Alabama is predominantly Christian,¹⁵ the disclaimer's language is relatively weak, and the residents may be weary of controversy, it is likely this new disclaimer will remain unchallenged.¹⁶

However, while the current Alabama disclaimer seems relatively safe from challenge, an evolution disclaimer proposed in Oklahoma led to legal disputes.¹⁷ As the Oklahoma State Textbook Committee wanted "textbook publishers to stop presenting evolution as fact and present other options such as creationism—the theory that God or another higher power created the universe,"¹⁸ it proposed adopting a disclaimer identical to the Alabama disclaimer; however, the Oklahoma Attorney General rejected the enactment of the disclaimer as beyond the board's legitimate powers.¹⁹

A proposed disclaimer in Louisiana did not fare much better than the one in Oklahoma although as with Oklahoma's version, the Louisiana disclaimer was virtually identical to the Alabama disclaimer.²⁰ The disclaimer was adopted by Louisiana's Board of Elementary and

¹² Wilkinson Microwave Anisotropy Probe, Big Bang Cosmology (visited Nov. 1, 2005) <http://map.gsfc.nasa.gov/m_uni/uni_101bb1.html>.

¹³ See *supra* note 7.

¹⁴ Jones, *supra* note 4, at 532.

¹⁵ In 1990, 93.30% of Alabama residents were Christian. Adherents.com—Religion by Location, Alabama (visited Oct. 11, 2004) <http://www.adherents.com/adhloc/Wh_6.html>.

¹⁶ See *supra* note 4, at 533.

¹⁷ *Id.*

¹⁸ Diane Plumberg, Disclaimer Sends Message to Publishers, THE DAILY OKLAHOMAN 12A (Nov. 11, 1999) ("A sticker in next year's science textbooks, warning students about evolution, is meant as a message to publishers that at least a few educators in Oklahoma would like to teach something else.").

¹⁹ Barbara Hoberock and Scott Cooper, Vote To Disclaim Negated: State's AG Says Book Committee Lacks Authority, TULSA WORLD (Oklahoma) 1 (Feb. 3, 2000).

²⁰ *Id.*

Secondary Education, but this same school board rejected it in 2002.²¹ Along with recognizing Alabama was the only other state that had adopted such a disclaimer, Louisiana's decision was based on its reluctance to fight a battle "it has entered so many times before and lost."²²

Because the Oklahoma and Louisiana disclaimers failed on political grounds, their failure says little about whether or not they are constitutionally valid.²³ However, the constitutionality of evolution disclaimers remains a relevant issue as is demonstrated by past and current legal challenges.

B. Case Law

1. Freiler, Selman, and Kitzmiller.

Freiler v. Tangipahoa Parish Board of Education²⁴ is the case that brought the issue of evolution disclaimers to the forefront. The Tangipahoa Parish Board of Education in Louisiana sought to disclaim any endorsement of evolution via the following notice:

It is hereby recognized by the . . . 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 . . . 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 to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.²⁵

²¹ Laura Maggi, Evolution Disclaimer is Struck Down; BESE Refuses to Attach Message to Science Books, TIMES-PICAYUNE 4 (Dec. 13, 2002).

²² *Id.*

²³ Jones, *supra* note 4, at 535.

²⁴ Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337 (5th Cir. 1999).

²⁵ *Id.* at 341.

This disclaimer, which teachers were required to read immediately before teaching evolution, was the School Board's response to parental concerns²⁶ that lessons on evolution were troubling for their children as evolutionary theory contradicted what the children had learned at home and in church about the origins of life and matter.²⁷ The disclaimer was intended as a non-intrusive measure to address the needs of a pluralistic student body and protect the rights of children and parents without altering the school curriculum.²⁸

However, the United States Court of Appeals for the Fifth Circuit struck down this disclaimer as unconstitutional.²⁹ According to the court, not only did the disclaimer's reference to the Biblical theory of creation specifically and to the exclusion of any other specific theory of origins protect and maintain Biblical beliefs about creation, but other aspects of the disclaimer were also problematic, not because they protected specific religious content but rather because they protected a religious viewpoint over a non-religious one.³⁰

Freiler illustrates the current context of the evolution controversy. School boards interested in countering the effects of evolution teaching in public schools must adjust their "strategy of including religious viewpoints in public education by exploring the untested contours" of previous decisions.³¹ Any measure that the courts have not yet struck down is still available as a possible means of countering the teaching of evolution. Freiler suggests one way in which the Supreme Court might respond to the constitutional question.

²⁶ See M. Drew DeMott, Freiler v. Tangipahoa Board of Education: Disclaiming "The Gospel of Modern Science", 12 REGENT U. L. REV. 597, 600 (2001).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 185 F.3d at 349.

³⁰ *Id.* at 346.

³¹ Jones, *supra* note 4, at 531.

One of the more recent cases to consider the constitutionality of an evolution disclaimer is Selman v. Cobb County School District.³² In Selman, the Georgia school board required that all new science textbooks bear a sticker reading: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living thing. This material should be approached with an open mind, studied carefully, and critically considered.”³³ The plaintiffs, parents of students, argued this disclaimer violated the Establishment Clause by restricting the teaching of evolution while promoting the teaching of creationism.³⁴ In evaluating the constitutionality of the sticker, a federal district court held it had the effect of endorsing a religious viewpoint.³⁵

The most recent case on the constitutionality of evolution disclaimers is Kitzmiller v. Dover Area School District.³⁶ Although focusing largely on the constitutionality of teaching intelligent design theory in public schools, the dispute over this theory centered on the disclaimer teachers were required to read to biology students:

The Pennsylvania Academic Standards require students to learn about Darwin's Theory of Evolution ... 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.³⁷

As with the disclaimers in Freiler and Selman, the Kitzmiller disclaimer noted the weaknesses of evolution and denigrated its credibility by playing on lay notions of “theory.”

³² Selman v. Cobb County School Dist., No. 102-CV-2325-CC, 2005 U.S. Dist. LEXIS 432 (N.D. Ga. 2005).

³³ *Id.* at *13.

³⁴ *Id.* at *70.

³⁵ *Id.* at *59.

³⁶ No. 04cv2688, 2005 U.S. Dist LEXIS 33647 (M.D. Pa. 2005).

³⁷ *Id.* at *2.

Despite the explanation of “theory” as being “a well-tested explanation that unifies a broad range of observations,”³⁸ the use of the term “gaps” emphasized lack of credibility with respect to evolutionary theory, though no such connotation is attached to the intelligent design theory subsequently mentioned. Further, the juxtaposition of evolution, information about its potential gaps, and the mention of intelligent design theory suggested that intelligent design and evolution were of equal scientific value, with intelligent design perhaps even being more credible as no “gaps” were mentioned in relation to it.³⁹

Moreover, the description of intelligent design as an “explanation of the origins of life” and Of Pandas and People as a “reference book” implicitly emphasized the alleged scientific validity of intelligent design.⁴⁰ However, the court noted that even a cursory examination of Of Pandas and People revealed the religious rather than scientific nature of intelligent design theory.⁴¹ Although it did not make an overtly religious reference as did the Freiler disclaimer, the Kitzmiller disclaimer did make an indirect reference to religion. As such, the court struck down the disclaimer as favoring religion in violation of the Establishment Clause.⁴²

As in Selman, Kitzmiller deals with evolution disclaimers that are not facially biased toward religion. The disclaimers at issue in these cases, especially the one in Selman, are comparable to several other evolution disclaimers, including the one currently used in Alabama and those that came close to being adopted in Louisiana and Oklahoma. Thus the Selman and Kitzmiller holdings regarding the unconstitutionality of disclaimers on evolution teaching will provide guidance for future plaintiffs who want to challenge similar disclaimers in other states.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at *29 (“The description of the designer in Of Pandas and People...is a ‘master intellect,’ strongly suggesting a supernatural deity as opposed to any intelligent actor known to exist in the natural world.”).

⁴² *Id.* at *174.

2. Daniel and Mozert.

In addition to Freiler and Selman which dealt directly with evolution disclaimers, several cases have done so indirectly as part of their constitutional analyses of other state-sponsored religious measures. The first of these, Daniel v. Waters,⁴³ involved a Tennessee statute that required textbooks dealing with the question of origins to carry disclaimers stating that evolution (or any other non-Biblical account of creation) was theory, not fact.⁴⁴ The statute also required such textbooks to give equal treatment to Biblical and scientific theories of creation.⁴⁵ The Sixth Circuit struck down the statute as facially unconstitutional,⁴⁶ with the court focusing on the preferential treatment given to “the Biblical version of creation as opposed to any account of the development of man based on scientific research and reasoning”⁴⁷ and holding that the statute impermissibly required teaching to be tailored to religious dogma.

Mozert v. Hawkins County Board of Education⁴⁸ made a subtle but important point about problematic elements of evolution disclaimers. The case dealt with reading textbooks on various subjects rather than specifically with biology texts.⁴⁹ The parents of some of the school’s students discovered a number of stories in the texts that they considered contradictory to their family’s religious beliefs.⁵⁰ Interestingly, the texts carried an evolution disclaimer stating

⁴³ 515 F.2d 485 (6th Cir. 1975).

⁴⁴ *Id.*

⁴⁵ *Id.* at 487. The statute reads:

Any [biology] textbook . . . used in the public education system which expresses an opinion or relates to a theory or theories shall give in the same textbook and under the same subject commensurate attention to, and an equal amount of emphasis on, the origins and creation of man and his world as the same is recorded in other theories, including, but not limited to, the Genesis account in the Bible.

Id.

⁴⁶ *Id.* at 490. The Court noted the “First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.” *Id.*

⁴⁷ *Id.*

⁴⁸ 827 F.2d 1058 (6th Cir. 1987).

⁴⁹ *Id.* at 1060.

⁵⁰ *Id.* at 1061.

“evolution is a theory, not a proven scientific fact.”⁵¹ The court stated the plaintiffs gave inadequate attention to the effect of this disclaimer,⁵² thereby seemingly suggesting that because the disclaimer responded to the concerns of religious groups, its inclusion in the texts undermined the plaintiffs’ argument that the texts were hostile to religious beliefs.⁵³

II. ESTABLISHMENT VERSUS FREE EXERCISE JURISPRUDENCE

A. Establishment Clause Jurisprudence

The Supreme Court has used various tests to determine whether a government action violates the Establishment Clause, including: the Lemon test,⁵⁴ the endorsement test,⁵⁵ the coercion test,⁵⁶ and the neutrality test.⁵⁷ If the government measure does not meet the particular test used by the court in any given case, it violates the Establishment Clause.⁵⁸

⁵¹ *Id.* at 1062.

⁵² *Id.* In describing the testimony of one of the parent-plaintiffs, the opinion states:

Describing evolution as a teaching that there is no God, she identified 24 passages that she considered to have evolution as a theme. She admitted that the textbooks contained a disclaimer that evolution is a theory, not a proven scientific fact. Nevertheless, she felt that references to evolution were so pervasive and presented in such a factual manner as to render the disclaimer meaningless.

(emphasis added).

⁵³ *Id.*

⁵⁴ Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (stating there are three tests that can be gleaned from Supreme Court establishment jurisprudence: “[F]irst, 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.”).

⁵⁵ County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 593 (1989) (defining “endorsement” as closely linked to promotion and stating that the endorsement test examines whether the government is promoting one religion or religious theory over: (1) another religion or religious theory; or (2) irreligion).

⁵⁶ Lee v. Weisman, 505 U.S. 577 (1992) (the coercion test holds that “at a minimum . . . 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’”).

⁵⁷ Mitchell v. Helms, 530 U.S. 793, 809 (2000) (“If the religious, irreligious, and a religious 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.”).

⁵⁸ See Elizabeth A. Harvey, Freiler v. Tangipahoa Parish Board of Education: Squeeze the Lemon Test out of Establishment Clause Jurisprudence, 10 GEO. MASON L. REV. 299, 305 (2001) (listing the various establishment tests and the elements of each).

The existence of numerous tests has created much confusion in establishment jurisprudence. Courts do not analyze each case under all establishment tests; rather, the common practice is to choose the test on the basis of the specific factual scenario of each case.⁵⁹ Such case-by case determination of which test to use is perhaps inevitable considering the lack of guidance by the Supreme Court on how to conduct the analysis. In recent cases, the Supreme Court has used the Lemon test alone, “used a modified Lemon test, used Lemon in combination with another test, and even declined to mention Lemon in its opinion.”⁶⁰

When additional tests such as the endorsement, coercion, and neutrality tests are added to the mix, establishment jurisprudence becomes almost impossible to navigate.⁶¹ Moreover, acknowledging the “hopeless disarray”⁶² of establishment law requires an understanding that what is usually determinative in the legal analysis is not the greater purpose of the Establishment Clause⁶³ or the ways in which the various tests reflect its principles; rather, what matters is how the tests are applied, with one or more tests preferred over others on the facts of a specific case.⁶⁴

1. The Establishment Tests

⁵⁹ Andrea A. Mittlieder, Freiler v. Tangipahoa Parish Board of Education: Ignoring the Flaws in the Establishment Clause, 46 LOY. L. REV 467, 481 (2000).

⁶⁰ *Id.*

⁶¹ Mellen, 327 F.3d at 370 (“Because the [Supreme] Court has applied a variety of tests (in various combinations) in school prayer cases, federal appellate courts have also followed an inconsistent approach.”).

⁶² Rosenberger v. Rector, 515 U.S. 819, 861 (1995) (Thomas concurring) (“[O]ur Establishment Clause jurisprudence is in hopeless disarray.”).

⁶³ See Robert R. Baugh, Applying the Bill of Rights to the States: A Response to William P. Gray, Jr., 49 ALA. L. REV 551, 582 (1998) (the Establishment Clause is a “co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone.”). The Establishment Clause was enacted as the necessary complement of the Free Exercise Clause, with the latter giving citizens religious freedom and the former restricting state involvement in the propagation of one religion over another, or religion over irreligion.

⁶⁴ See Jeffrey Wahl, Comment, Freiler v. Tangipahoa Parish Board of Education: A Missed Opportunity, 28 OHIO N.U.L. REV. 433, 440-59 (2002) (distinguishing between what the Court should decide and what it most likely will decide—a distinction that admittedly exists in legal analyses of all subjects but is especially important in the establishment context). Although the Establishment Clause was not intended to invoke or permit hostility toward religion, its application according to one or more of the tests may lead to hostility toward religion. *Id.* at 433.

(i) The Lemon Test (1971). The Lemon test has three prongs: (1) “secular legislative purpose”; (2) “primary effect”; and (3) “excessive entanglement.”⁶⁵ The “secular legislative purpose” prong of the Lemon test requires the Court look into the “rationale behind the adoption of the challenged statute.”⁶⁶ If the actual purpose is to endorse or disapprove of religion, the statute is unconstitutional.⁶⁷ However, this prong is violated only if the state-sponsored practice or statute is wholly motivated by an intent⁶⁸ to advance religion.⁶⁹

The “primary effect” prong asks whether regardless of legislative intent, the statute or state-sponsored action “conveys a message of endorsement or disapproval” of religion.⁷⁰ For example, in Larkin v. Grendel's Den, Inc.,⁷¹ the Supreme Court held that a Massachusetts zoning statute that allowed a church to veto the issuance of a liquor license to any establishment located within a 500-foot radius of the church violated the Establishment Clause.⁷² According to the Court, the law had the primary effect of advancing religion because “the churches’ power under the statute [was] standardless” and the “mere appearance of a joint exercise of legislative authority by Church and State provides significant benefit to religion in the minds of some by reason of the power conferred.”⁷³

The third prong of the Lemon test, “excessive entanglement”, asks whether the adoption of the statute in question would lead to excessive government involvement in monitoring the

⁶⁵ Lemon, 403 U.S. at 612-13.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Throughout this essay, “intent” and “purpose” will be used interchangeably.

⁶⁹ See Mittlieder, *supra* note 59, at 472-73 (“[w]hile the state may present an infinite array of avowed purposes, the challenged action will survive this test provided that at least one purported purpose” furthers a permissible state objective).

⁷⁰ Harvey, *supra* note 58, at 305.

⁷¹ 459 U.S. 116 (1982).

⁷² *Id.*

⁷³ *Id.* at 125-26.

activity for possible breaches of constitutional limits.⁷⁴ For example, in Aguilar v. Felton,⁷⁵ the statute at issue provided financial assistance to programs that served the needs of educationally deprived children from low-income families.⁷⁶ As part of its plan, the statute used federal funds to pay the salaries of public employees in parochial schools.⁷⁷ Thus to make sure that federal funds were not being used to promote religious beliefs, the government would have actively to monitor the schools' curricula and the teachers' actions. The Supreme Court held that such constant monitoring would require excessive entanglement of the government with the religious body.⁷⁸

(ii) The Endorsement Test (1984).⁷⁹ Importantly, this last prong was dropped in the subsequent development of a new establishment test: the endorsement test. As it was articulated in County of Allegheny v. American Civil Liberties Union,⁸⁰ the endorsement test is composed of the "primary effect" and "secular legislative purpose" prongs of the Lemon test.⁸¹ The endorsement test precludes the government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred. As the test is essentially a

⁷⁴ Lemon, 403 U.S. at 612-13

⁷⁵ 473 U.S. 402 (1985).

⁷⁶ *Id.* at 404.

⁷⁷ *Id.*

⁷⁸ *Id.* The Supreme Court has never stated that the Lemon test is binding; in fact, although Lemon has never been overruled, in recent times the Court has expressed its disagreement with the test. See Linda P. McKenzie, Note, The Pledge of Allegiance: One Nation Under God?, 46 ARIZ. L. REV. 379, 402 (2004) (stating the Supreme Court is divided on the value of the Lemon test); Sherman v. Community Consolidated School Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992) ("The Court heard Lee v. Weisman in large part to reconsider Lemon, and Lee concluded without renewing Lemon's lease.").

⁷⁹ Theologos Verginis, ACLU v. Capitol Square Review and Advisory Board: Is There Salvation for the Establishment Clause? "With God All Things Are Possible", 34 AKRON L. REV. 741, 766 n.29 (2001) ("The endorsement test originated from Justice O'Connor's concurring opinion in Lynch v. Donnelly (465 U.S. 668 (1984)). Justice O'Connor extrapolated the "purpose and effect" prongs of the Lemon test and redefined them.").

⁸⁰ 492 U.S. 573 (1989).

⁸¹ *Id.* at 593-94.

disjunction of two Lemon prongs, any statute that violates either of those prongs also violates the endorsement test.⁸²

(iii) The Coercion Test (1992). Distinct from the Lemon and endorsement tests is the coercion test, which was first articulated in Lee v. Weisman⁸³ involving a public school system that allowed principals to invite clergy to offer invocations and benediction prayers at graduation ceremonies.⁸⁴ In striking down the practice on establishment grounds, the Supreme Court held that including clerical members exerted coercive pressure on those who objected to the inclusion of religion in public graduation ceremonies.⁸⁵

The Court defined “coercion” as “an attempt to employ the machinery of the state to enforce a religious orthodoxy.”⁸⁶ Coercion can be direct or indirect, with the nature of the environment in which the government program or action is implemented contributing to the coercive impact of the measure.⁸⁷

(iv) The Neutrality Test (2000). The Supreme Court finally developed one other establishment test, the neutrality test. The Court in Mitchell v. Helms⁸⁸ used the term “neutrality” to refer to “generality or evenhandedness of distribution as relevant in judging whether a benefit

⁸² 492 U.S. at 306.

⁸³ 505 U.S. 577 (1992).

⁸⁴ *Id.* at 585.

⁸⁵ *Id.*

⁸⁶ *Id.* at 592.

⁸⁷ In Lee, for example, the Court gave special focus to religious measures in public schools and noted “there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools ... [t]he concern is not limited to the context of schools, but it is most pronounced there.” *Id.* at 594. The special characteristics of a public school setting, where the students are relatively impressionable and the schools are in a unique position of authority, add weight to the coercive power of public schools’ religiously motivated programs. *Id.* These special circumstances are the most important factor in the coercion analysis of evolution disclaimers.

⁸⁸ 530 U.S. 793 (2000).

scheme so characterized should be seen as aiding a sectarian school's religious mission.”⁸⁹ Mitchell mentioned three main criteria by which to “evaluate whether government aid has the effect of advancing religion: does it result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.”⁹⁰

2. The Underlying Concern of All Establishment Tests

Although the four tests approach the establishment question from different perspectives, the concern motivating each is whether a given government act has the purpose and/or effect of favoring or disfavoring religion. Secular legislative purpose and primary effect are two of the prongs of the Lemon test and the only prongs of the endorsement test. By their very labels, the coercion and neutrality tests reveal a concern about effect (coerciveness) and purpose (neutrality). As stated above,⁹¹ in Lee, the Court’s definition of “coercion” focused on the government’s enforcement of a religious orthodoxy. The concern is that such use of government has a coercive effect on those who do not subscribe to the religion in question or to any religion at all. With respect to the neutrality test, the Court focuses on the criteria used in deciding who receives government aid.⁹² The criteria must not discriminate between religion and non-religion, or among religions, with this requirement thus ensuring government aid will be motivated by a neutral purpose.

B. The Free Exercise Clause versus the Establishment Clause

⁸⁹ *Id.* at 883.

⁹⁰ *Id.* at 808. “Excessive entanglement” in this test is defined the same way as in the Lemon test.

⁹¹ See *supra* [Part II.A.1.iii.](#)

⁹² See *supra* [Part II.A.1.iv.](#)

The larger establishment context demonstrates that above all, the Court is concerned with preventing government measures that are motivated by an improper discriminatory purpose. Although framed in terms of “purpose,” the discriminatory rule requires an analysis of effect as well. In fact, the consideration of effect is perhaps what distinguishes the establishment analysis from the free exercise analysis.

In the latter, the court looks for a secular legislative purpose in a government action; if one is found, the inquiry is satisfied and the measure will be considered constitutional. For example, the court in Department of Human Resources of Oregon v. Smith⁹³ held there would be no violation of the Free Exercise Clause if a drug rehabilitation organization fired employees who ingested peyote for sacramental purposes.⁹⁴ The state law forbidding use of peyote was generally applicable to religious and non-religious individuals alike and was supported by a reason unrelated to religious beliefs; thus the lack of discriminatory purpose was sufficient grounds for upholding the law.⁹⁵

In contrast, in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,⁹⁶ the Court struck down city ordinances prohibiting animal sacrifice, finding the ordinances were motivated by animus against the Santeria Church. As such, they were considered “not neutral” nor generally applicable and therefore in violation of the Free Exercise Clause.⁹⁷ The Court did not look to the effect of the statutes; all that mattered was their underlying purpose.

The discriminatory purpose rule was first articulated in Everson v. Board of Education of Ewing Township,⁹⁸ in which the Court held that the First Amendment did not prohibit a state

⁹³ 494 U.S. 872 (1990).

⁹⁴ *Id.* at 890.

⁹⁵ *Id.*

⁹⁶ 508 U.S. 520 (1993).

⁹⁷ *Id.* at 533.

⁹⁸ 330 U.S. 1 (1947).

from using tax-raised funds to pay the bus fares of parochial school pupils⁹⁹ as part of a general program covering the fares of all local students. The Court stated the “‘establishment of religion’ clause of the First Amendment means at least this Neither [the state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another.”¹⁰⁰

The rule was again articulated in School District of Abingdon Township, Pennsylvania v. Schempp,¹⁰¹ in which the Court explained “to withstand the strictures of the Establishment Clause, there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.”¹⁰² Also in Epperson v. Arkansas,¹⁰³ the Court held the government “may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.”¹⁰⁴ The dual concern of the Establishment Clause with both discriminatory purpose and effect was encapsulated in Lemon’s three-prong test, which was intended to capture the cumulative criteria developed by the Court in its establishment cases over the course of many years and prevent “[t]he three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity.”¹⁰⁵

A comparison of Free Exercise and Establishment cases shows that in establishment jurisprudence, if a measure is said to have a neutral purpose, that neutrality must be actualized in its effect. In contrast, free exercise jurisprudence places less importance on effect. Smith shows that a disparate effect is irrelevant as long as the government measure has a generalized

⁹⁹ *Id.* at 18.

¹⁰⁰ *Id.* at 16.

¹⁰¹ 374 U.S. 203 (1963).

¹⁰² *Id.* at 223.

¹⁰³ 393 U.S. 97 (1968).

¹⁰⁴ *Id.* at 104.

¹⁰⁵ Walz v. Tax Commission of New York, 397 U.S. 664, 668 (1970).

purpose.¹⁰⁶ Similarly, Lukumi suggested that if a law outlawed animal sacrifice on the basis of neutral criteria, it would be upheld regardless of its effect on Santeria religious practice.¹⁰⁷

C. Tension between Free Exercise and Establishment Principles

The Free Exercise and Establishment Clauses are meant to work together to ensure religion is neither favored nor disfavored; that is, it is not only important that government not endorse a particular religious measure, but also that it not be hostile to religion. This concern about anti-religious bias has to do with the “inhibition prong” of the Establishment Clause.¹⁰⁸ One of the ideas behind the Religion Clauses was that there was a source of “public good” outside of—and perhaps higher than—the government or individual.¹⁰⁹ The Establishment Clause embodies this idea by prohibiting the state from inhibiting religion:

The inhibition prong acts then as a free exercise component of the Establishment Clause. In Justice Brennan's words, the prong prevents the Establishment Clause from being used “as a sword to justify repression of religion . . . from any aspect of public life.” Presumably, then, the same degree of protection that prevents the state from promoting religion should apply to prevent it from inhibiting religion, since both are forms of religious coercion.¹¹⁰

Despite this free exercise element of the Establishment Clause, in practical application, the negotiation between free exercise and establishment principles at times complicates the determination of a given government measure’s unconstitutionality. Consider, for example, Elk Grove Unified School District v. Newdow,¹¹¹ which dealt with the claim the phrase “under God” in the Pledge of Allegiance was unconstitutional. In this case, Newdow, the father of an

¹⁰⁶ 494 U.S. at 881.

¹⁰⁷ 508 U.S. at 530.

¹⁰⁸ Winton E. Yerby III, Comment, Toward Religious Neutrality in the Public School Curriculum, 56 U. CHI. L. REV. 899, 919 (1989).

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ 124 S. Ct. 2301 (2004).

elementary school student, challenged the constitutionality of “under God” by arguing it violated the neutrality principle of the Establishment Clause.¹¹² As the amici curiae briefs in favor of *Newdow* pointed out, the phrase can be seen both as discriminating between religion and non-religion, and among religions. Regarding the former, these briefs contended “[t]o recite the Pledge is ‘to declare a belief,’ ... to affirm ‘a belief and an attitude of mind.’”¹¹³ Not only this, the phrase “under God” also discriminates between monotheistic and polytheist belief systems; as one brief pointed out: “The definition of ‘God’ is especially important, particularly in its singular, capitalized form, a form that is unique to monotheistic religions.”¹¹⁴ It follows from this position that in requiring students to recite, or even only listen to, the Pledge, the school is coercing students to partake in a government-sponsored religious practice in violation of the Establishment Clause.

Yet the religious nature of the phrase “under God” may not be as clearly unlawful as these proponents made it seem. As Justice O’Connor pointed out in her *Newdow* concurrence, the Pledge of Allegiance, even with the “under God” phrase, does not have a discriminatory effect; the Pledge “acknowledges religion in a general way: a simple reference to a generic ‘God’ [it] represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.”¹¹⁵ To hold such a generalized invocation of religion unconstitutional may constitute anti-religion hostility in violation of the Free Exercise Clause. There is thus a conflict between the free exercise principle

¹¹² *Id.*

¹¹³ Amicus Curiae Brief of Americans United For Separation of Church and State, American Civil Liberties Union, and Americans For Religious Liberty in Support of Affirmance at *11, *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (No. 02-1624).

¹¹⁴ Amicus Curiae Brief of Religious Scholars and Theologians in Support of Respondent at *16, *Elk Grove Unified School Dist. v. Newdow*, 124 S. Ct. 2301 (2004) (No. 02-1624).

¹¹⁵ 124 S. Ct. at 2326.

of preventing anti-religion hostility and the establishment principle of preventing government support of religious matters.

The solution to the conflict may be found in the differences between the establishment and free exercise analyses. In the free exercise context, a subjective, discriminatory purpose is sufficient to invalidate the measure at issue. In the establishment context, the relationship between purpose and effect suggests that what is important is the objective purpose (defined in terms of an objectively verifiable neutral effect) rather than the subjective motivations of disclaimer proponents. As long as the government measure has a neutral primary effect, its discriminatory purpose is not problematic.

However, the Supreme Court has not always defined the establishment purpose analysis in this manner, as in some cases, it has chosen to undertake an inquiry into subjective intent. For example, the Court analyzed balanced treatment statutes—statutes that mandate equal time for evolution and creationism in public school classrooms—in terms of their legislative history.¹¹⁶ In a number of other cases the Court looked to the larger history of anti-evolutionism to ascertain the purpose of a given anti-evolution measure.¹¹⁷ In these cases, the Court focused on the actual, subjective purpose behind the government measure at issue.

In contrast, the Court has in other cases chosen to look to the objective purpose (that is, neutral effect) rather than the subjective intent of the legislators. For instance, in a series of cases

¹¹⁶ The Supreme Court in Edwards v. Aguillard, 482 U.S. 578, 587 (1987), struck down Louisiana’s balanced treatment statute on the basis of its legislative history. During the legislative hearings, the legislative sponsor Senator [Bill] Keith stated: “My preference would be that neither [creationism nor evolution] be taught’ . . . Such a ban on teaching does not promote—indeed, it undermines—the provision of a comprehensive scientific education.” 482 U.S. at 586-89. *See also* Wallace v. Jaffree, 472 U.S. 38 (1984), a case dealing with prayer in public schools. Among other factors, the statements of the statute’s sponsor in the legislative record and in his testimony before the District Court were used to define the statute’s legislative purpose. *Id.* at 63. In particular, what the Court found relevant was the sponsor’s indication that the statute was solely an effort to return voluntary prayer to the public. *Id.*

¹¹⁷ *See, e.g., Selman*, 2005 U.S. Dist LEXIS, at *49.

dealing with long-established practices such as Sunday closing laws¹¹⁸ and public Christmas displays,¹¹⁹ the Court held the initial religious purpose behind these laws is irrelevant in terms of proving an establishment violation.¹²⁰ As these practices have become so deeply established in society, their effect has become secularized, so their primary purpose was deemed secular.¹²¹

These two approaches to the secular legislative purpose analysis suggest that although all three Lemon prongs have to be met, the Court in some establishment cases is focusing on effect as the primary inquiry, while in other cases purpose is the dispositive prong. One cause of confusion in establishment jurisprudence is the Court's labeling of primary effect as an analysis into objective purpose.

Another way of conceptualizing this problem is by seeing the meaning of "secular purpose" as plural and non-monolithic.¹²² Establishment cases demonstrate the definition of "secular purpose" is fact-dependent and changes according to the nature of the government measure at issue. Therefore in negotiating between free exercise and establishment principles, to best protect both establishment and free exercise rights, it appears of paramount importance the

¹¹⁸ McGowan v. Maryland, 366 U.S. 420, 442-5 (1961).

¹¹⁹ Lynch v. Donnelly, 465 U.S. 668 (1984).

¹²⁰ Consider McGowan, 366 U.S. at 442-5, where "Sunday Blue Laws" were upheld despite their religious roots. The Court stated:

Sunday Closing Laws have become part and parcel of a great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals. To say that the states cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.

¹²¹ Both of these approaches can be distinguished from the scenario where support for a statute is based on one's religious inclinations. Scott W. Breedlove and Victoria S. Salzmann, The Devil Made Me Do It: The Irrelevance of Legislative Motivation Under the Establishment Clause, 53 BAYLOR L. REV. 419, 439 (2001). In this case, religion serves merely as another source of knowledge. As one's beliefs can inform one's choices and actions, to forbid the use of religion in this case would be to unconstitutionally disfavor religion and brand it as an illegitimate source of truth. *Id.*

¹²² See Mark V. Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 WM. AND MARY L. REV. 997, 1005 (1986) (suggesting a "differentiated approach to questions of purpose under the religion clauses").

definition of “secular purpose” change depending on whether a subjective or objective definition is needed.

One way of determining how the establishment prongs work in any given case is to compare the government measure at issue with other measures that raise similar free exercise dilemmas, then group all such similar measures under the same category, with each category determining how the establishment prongs will be applied (the categorical approach). As such, the “untainted fruits” category will be proposed as a way to help negotiate the free exercise-establishment tension implicated in the case of evolution disclaimers.¹²³

III. CONSTITUTIONAL ANALYSIS OF EVOLUTION DISCLAIMERS

The tension between establishment and free exercise principles is evident regarding disclaimers on evolution teaching. As will be demonstrated below,¹²⁴ evolution disclaimers are part of a long history of religious opposition to evolution, which in their present form have the effect of discriminating among religions and between religion and non-religion. This history and proof of effect raises two important but conflicting considerations: (1) because disclaimers have the effect of establishing religion and are motivated by a religious purpose, they are likely constitutionally problematic; and (2) because religious parents have a strong, persistent concern related to the teaching of evolution in public schools, ignoring this concern altogether may constitute anti-religious bias.

This Article will first determine the constitutionality of disclaimers as they stand now. The constitutional analysis will provide insight into why a categorical approach generally and an

¹²³ See discussion *infra* [Part IV.B.](#)

¹²⁴ See discussion *infra* [Part III.A.](#)

“untainted fruits” category specifically are needed. The current approach to establishment analysis, where the terms “secular purpose” and “effect” are not defined on a fact-specific basis, may be inadequately protecting free exercise rights, thus signaling the need for an analytic method that can respond to the free exercise elements in establishment cases. Further, the analysis will highlight the problems with disclaimers that will later be addressed in the proposed generalized disclaimer.

A. Secular Legislative Purpose

As described above,¹²⁵ “secular legislative purpose” requires essentially an analysis of intent. The long history of evolution education in public schools reflects the religious purpose behind disclaimers on evolution teaching and therefore provides the necessary framework for the secular legislative purpose analysis.

As one commentator has pointed out:

Many religious groups have tried to use public schools as a forum to teach ideas consistent with their religious beliefs. These efforts have historically taken two forms, "the public school presentation of religious doctrine for its religious value and the prohibition of teaching material that conflicts with religious doctrine." Prayer in school and the posting of the Ten Commandments are examples of public school presentation of religious doctrine. The removal of objectionable textbooks stand[s] as an obvious example of creationists' efforts to prohibit teaching material that conflicts with religious doctrine.¹²⁶

As will become evident from the history of anti-evolution measures in public schools, evolution disclaimers are an example of the latter. The “addition of disclaimers to textbooks”¹²⁷ and/or “the

¹²⁵ See *supra* [Part II.A.1.i.](#)

¹²⁶ Douglas E. Stewart, Jr., Note, Going Back in Time: How the Kansas Board of Education's Removal of Evolution from the State Curriculum Violates the First Amendment's Establishment Clause, 20 REV LITIG. 549, 562 (2001).

¹²⁷ *Id.*

reading of disclaimers after a teacher lectures about evolution”¹²⁸ is a fallback position of the larger effort to allow creationism an “equal chance in the schools.”¹²⁹

The history of evolution education in public schools can be categorized in terms of three methods for giving creationism greater space in public schools.¹³⁰ The first method, anti-evolution legislation,¹³¹ was exemplified by the Scopes Trial of 1927, which upheld a Tennessee statute prohibiting the teaching of evolution in the state’s public schools¹³² despite the statute’s clear purpose of promoting Biblical creationism.¹³³

The Scopes controversy had long-lasting effects: “Textbooks published throughout the late 1920s ignored evolutionary biology, and new editions of older volumes deleted the word evolution and the name Darwin from their indexes. Some even added religious material.”¹³⁴ These effects were not countered until after the Soviet Union launched Sputnik in 1957, sparking concerns about America’s technological progress.¹³⁵ The Biological Sciences Curriculum Study (BSCS)¹³⁶ then discovered that biology education in the U.S. had not been updated for twenty

¹²⁸ *Id.*

¹²⁹ Anti-Defamation League, Teaching Science, Not Dogma: The Creationism Controversy (visited on Jan. 13, 2005) <http://www.adl.org/issue_religious_freedom/create/creationism_print.asp>.

¹³⁰ Lisa D. Kirkpatrick, Note, Forgetting the Lessons of History: The Evolution of Creationism and Current Trends to Restrict the Teaching of Evolution in Public Schools, 49 DRAKE L. REV. 125, 130-41 (2000).

¹³¹ *Id.*

¹³² 154 Tenn. 105, 289 S.W. 363 (Tenn. 1927). The statute defined evolution as “any theory that denies the story of the divine creation of man as taught in the Bible [but instead posits] that man has descended from a lower order of animals.” *Id.* at 364.

¹³³ *Id.* at 364:

[T]he Act’s title clearly indicates the purpose of the Statute to be the prohibition of teaching in the Schools of the State that man has developed or descended from some lower type or order of animals. When the draftsman came to express this purpose in the body of the Act he first forbade the teaching of “any theory that denies the story of the divine creation of man as taught in the Bible”—his conception evidently being that to forbid the denial of the Bible story would ban the teaching of evolution. To make the purpose more explicit he added that it should be unlawful to teach “that man has descended from a lower order of animals.”

¹³⁴ *Id.*

¹³⁵ See McLean v. Ark. Bd. of Educ., 529 F. Supp 1255, 1259 (E.D. Ark. 1982), *aff’d*, 723 F.2d 45 (8th Cir. 1983).

¹³⁶ *Id.*

years.¹³⁷ BSCS published several textbooks including discussion of evolution that eventually came to be accepted by “half the biology textbook market.”¹³⁸

In response to the efforts of BSCS, anti-evolutionists introduced balanced treatment statutes.¹³⁹ These statutes require that if evolution is taught in public schools, then creationism should (1) also be taught; and (2) be given treatment equal to that given evolution.¹⁴⁰ Moreover, anti-evolutionists dubbed creationism “creation science”¹⁴¹ thus implying that creationism properly belonged in science classrooms. By 1981, balanced treatment statutes had been proposed in twenty-five state legislatures.¹⁴² However, in Edwards v Aguillard,¹⁴³ the Supreme Court struck down such statutes as unconstitutional.¹⁴⁴

After the defeat of balanced treatment statutes, evolution disclaimers were introduced into public school classrooms.¹⁴⁵ Viewed within the framework of the creationism-evolution battle, it is clear the purpose of these disclaimers is to “restrict evolutionists’ influence in public schools by disclaiming that evolution is a fact, thereby leaving the possibility of Biblical creation open.”¹⁴⁶

Parents who support disclaimers usually see them as a part of a larger effort to teach religious origins theories. For example, the Selman court pointed out that “[e]vidence in the record suggests that the idea of placing a sticker in the textbooks originated with parents who

¹³⁷ Kirkpatrick, *supra* note 130, at 134.

¹³⁸ *Id.*

¹³⁹ See McLean, 529 F. Supp at 1259.

¹⁴⁰ See Daniel, 515 F.2d at 487.

¹⁴¹ Kirkpatrick, *supra* note 130, at 134.

¹⁴² *Id.*

¹⁴³ 482 U.S. at 587.

¹⁴⁴ *Id.*

¹⁴⁵ Edwards was decided in 1987. Seven years later, the Tangipahoa Parish Board in Kansas passed the first disclaimer law. See *supra* text accompanying note 24.

¹⁴⁶ Kirkpatrick, *supra* note 130, at 137. See also National Center for Science Education, Antievolutionism and Creationism in the United States (visited Oct. 21, 2004) <http://www.natcensci.org/resources/articles/4506_antievolutionism_and_creationi_2_13_2001.asp> (“Although antievolutionists pay lip service to supposed scientific problems with evolution, what motivates them to battle its teaching is apprehension over the implications of evolution for religion.”).

opposed the presentation of only evolution in science classrooms and sought to have other theories, including creation theories, included in the curriculum.”¹⁴⁷ The Cobb County, Georgia Board of Education drafted its evolution disclaimer “in response to a petition effort that gained support via local Bible study classes.”¹⁴⁸ One parent was not satisfied, as she wanted the disclaimer to “more clearly define alternative explanations” and preferred that it be supplemented with “an elective science course exploring the controversy.”¹⁴⁹ Another parent was blunter in expressing the religious purpose behind the disclaimer: “We believe the Bible is correct in that God created man. I don't expect the public school system to teach only creationism, but I think it should be given its fair share.”¹⁵⁰

In addition to promoting consideration of religious creation theories, disclaimers are seen as promoting morality as it is understood by religion. As evolutionary theory is seen as amoral, a disclaimer that detracts from its credibility is viewed as necessary to the teaching of morality.¹⁵¹

Interestingly, advocates of disclaimers also support the teaching of intelligent design in science classrooms.¹⁵² Intelligent design theory holds that creation has a purpose and is designed by a higher, “intelligent” Being.¹⁵³ In many respects, intelligent design is a modified version of

¹⁴⁷ 2005 U.S. Dist. LEXIS, at *49 (emphasis added).

¹⁴⁸ People for the American Way, Back to School with the Religious Right (visited Jan. 13, 2005) <<http://www.pfaw.org/pfaw/general/default.aspx?oid=3636>>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ Religion, Evolution Revolution (visited Jan. 13, 2005) <<http://www.pbs.org/wgbh/evolution/religion/revolution/1990.html>> (With respect to the tragedy at Columbine High School, Republican Representative Tom DeLay of Texas linked the “moral decline specifically to the teaching of evolution: ‘Our school systems teach the children that they are nothing but glorified apes who are evolutionized [sic] out of some primordial soup.’ DeLay's accusation, while outrageous to many, expresses a common fear anti-evolutionists have voiced for two centuries.”).

¹⁵² *Id.* (“[A] new breed of creationist activism now dominates the movement, and has adopted the moniker “intelligent design” (ID). The main methods of injecting the ID/creationist agenda into public school curricula are via textbook disclaimers and the language of state science standards.”). *See also* Church Business, Different Approaches: What Should Public School Kids be Taught About Evolution and Creation? (visited Jan. 13, 2005) <<http://www.churchbusiness.com/articles/2b1legal.html>>, where the author lists intelligent design and textbook disclaimers as two methods of responding to the desire of the “[m]ore than two-thirds of Americans” who “favor teaching both evolution and creation in public schools.”

¹⁵³ *See* Wendy F. Hanakahi, Comment, Evolution-Creationism Debate: Evaluating the Constitutionality of Teaching Intelligent Design in Public School Classrooms, 25 HAWAII L. REV. 9, 29-30 (2002).

creationism, and its proposed injection into public schools is roughly equivalent to past attempts to teach creationism alongside evolutionary theory.¹⁵⁴ That intelligent design garners support from the same people who support disclaimers further underscores the fact that disclaimers are motivated by the desire to advance religious belief in public schools.

Consider, for example, Kitzmiller.¹⁵⁵ The defendants in the case were the same school board members who had previously approved an evolution disclaimer¹⁵⁶ and openly admitted their religious opposition to the teaching of evolution.¹⁵⁷ The court's opinion in Kitzmiller lays out in detail the religious motivations of the board and describes how the evolution disclaimer outlining intelligent design theory emerged from a series of board retreats where members discussed the importance of teaching creationism.¹⁵⁸

Although the defendants in cases such as Freiler, Selman, and Kitzmiller presented other purposes for their disclaimers, the court in each of those cases made clear that all purported

Intelligent design "assumes the work is too complex to be anything but the plan of an intelligent agent." This theory differs from the classical creationism version of the origin of life. First, intelligent design accepts the belief in an "old" earth, while creationism adopts the Biblical narrative of the earth's creation by "God." Intelligent design is also more "theologically diverse" than creationism, a belief held primarily by Fundamentalist and Evangelical Christians. Furthermore, intelligent design advocates describe the theory as "a new program for scientific research," while creationism lacks a research program. Despite these differences between intelligent design and creationism, however, intelligent design still differs notably from the theory of evolution, which attributes the complexity and diversity in the world to natural causes, not to the design of an intelligent agent.

¹⁵⁴ *Id.*

¹⁵⁵ 2005 U.S. Dist. LEXIS 33647.

¹⁵⁶ Economist.com, Evolution and Intelligent Design: Life is a Cup of Tea (visited Dec. 15, 2005) <http://www.economist.com/displaystory.cfm?story_id=4488706> ("Last year, the school board in Dover, a small rural school district near Harrisburg, mandated a brief disclaimer before pupils are taught about evolution. They are to be told that "The theory [of evolution] is not a fact. Gaps in the theory exist for which there is no evidence."").

¹⁵⁷ Washingtonpost.com, Michael Powell, Pa. Case is Newest Round in Evolution Debate: "Intelligent Design" Teaching Challenged (visited Dec. 15, 2005) <<http://www.washingtonpost.com/wpdyn/content/article/2005/09/26/AR2005092600817.html>>:

Dover school board members—who voted 6 to 3 for the new policy—made it clear that they believed that the origin of life was guided by a heavenly hand. Several of them suggested that their views on evolution are far closer to Young Earth Creationism, which holds that God created the world 6,000 years ago and that Noah's flood covered Earth, than to intelligent design. One board member told a public meeting—in a remark he has since tried to deny—that the nation "was founded on Christianity, and our students should be taught as such."

¹⁵⁸ Kitzmiller, 2005 U.S. Dist. LEXIS, at *120.

purposes must be genuine.¹⁵⁹ One alleged purpose was that the disclaimers were meant to quell the concerns of parents who for religious reasons did not want their children to learn about evolutionary theory.¹⁶⁰ Admittedly, responding to the concerns of religious parents is a legitimate, secular purpose¹⁶¹ (as it neither hinders nor promotes religious belief), and constitutionally permissible ways in which this can be done will be discussed below.¹⁶² Yet in the case of anti-evolution measures, the Court has looked for the actual, subjective purpose of the statute, and in determining whether an alleged purpose is the actual purpose of the statute, the Court has taken into account the process by which a particular disclaimer was developed.¹⁶³ Specifically, the Court has used the views expressed in the legislative history of a statute to define the statute's legislative purpose.¹⁶⁴

For example, the Louisiana disclaimer was the brainchild of the Louisiana Family Forum (LFF), a Christian fundamentalist organization that has sponsored "Citizens for School Prayer" rallies¹⁶⁵ and touts as an accomplishment its intervention "in Louisiana's science textbook review and adoption process."¹⁶⁶ Specifically, the LFF has made several presentations "about the many factual errors contained in proposed textbooks, particularly concerning the theory of macro-evolution."¹⁶⁷ The organization's purpose in proposing the evolution disclaimer is evident from

¹⁵⁹ See, e.g., Freiler, 185 F.3d at 343 (the "avowed purposes" must be "sincere and not a sham").

¹⁶⁰ *Id.* Another alleged purpose was to "encourage informed freedom of belief." *Id.* As will be demonstrated, this is an inherently problematic assertion in the public school context. See discussion *infra* Part III.

¹⁶¹ See *id.* at 345 ("reducing student/parent offense" is a permissible secular objective "that the School Board could rightly address").

¹⁶² See discussion *infra* [Part IV.A.](#)

¹⁶³ See *infra* note 169.

¹⁶⁴ Edwards, 482 U.S. at 586-89.

¹⁶⁵ Jones, *supra* note 4, at 534.

¹⁶⁶ Louisiana Family Forum, 2002 Accomplishments (visited Sept. 19, 2004) <<http://www.lafamilyforum.org/>>.

¹⁶⁷ *Id.*

its mission statement: “[t]o persuasively present biblical principles in the centers of influence on issues affecting the family through research, communication, and networking.”¹⁶⁸

In addition to the history of specific statutes, the history of anti-evolutionism in general has helped the Supreme Court to determine the purpose of anti-evolution measures. For example, in Epperson v. Arkansas,¹⁶⁹ the Supreme Court evaluated the constitutionality of a statute forbidding the teaching of evolution in public schools, colleges and universities.¹⁷⁰ The Court’s opinion noted the statute “was a product of the upsurge of ‘fundamentalist’ religious fervor of the twenties. The Arkansas statute was an adaption [sic] of the famous Tennessee ‘monkey law’ which that State adopted in 1925.”¹⁷¹ In striking down the statute as unconstitutional, the Court said:

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas’ law may be justified by considerations of state policy other than the religious views of some of its citizens.¹⁷²

Similarly, the Selman court used the long history of anti-evolutionism to support its conclusion regarding the unconstitutionality of the Cobb disclaimer.¹⁷³ Regarding the disclaimer, which read, “evolution is a theory, not a fact, concerning the origin of living things,”¹⁷⁴ the court said:

[T]he first problem with this language is that there has been a lengthy debate between advocates of evolution and proponents of religious theories of origin specifically concerning whether evolution should be taught as a fact or as a theory, and the School

¹⁶⁸ Louisiana Family Forum, Mission Statement (visited Sept. 19, 2004) <<http://www.lafamilyforum.org>> (emphasis added).

¹⁶⁹ 393 U.S. 97, 106 (1968).

¹⁷⁰ *Id.* at 98-99. “The Arkansas law makes it unlawful for a teacher in any state-supported school or university ‘to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,’ or ‘to adopt or use in any such institution a textbook that teaches’ this theory.”

¹⁷¹ *Id.* at 98.

¹⁷² *Id.* at 107.

¹⁷³ 2005 U.S. Dist. LEXIS, at *62.

¹⁷⁴ *Id.*

Board appears to have sided with the proponents of religious theories of origin in violation of the Establishment Clause. As the Supreme Court stated in County of Allegheny v American Civil Liberties Union, "... the Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief," and this is exactly what the School Board appears to have done.¹⁷⁵

As this evidence demonstrates, instead of merely responding to the concerns of religious parents, disclaimers serve religious groups by casting doubt on a theory these groups find troublesome.¹⁷⁶ Therefore the historical evidence satisfies both the subjective and objective purpose inquiries. On the one hand, the history of anti-evolutionism proves the actual, subjective intent behind evolution disclaimers is to undermine the credibility of evolutionary theory in order to strengthen the credibility of creationism. The history also satisfies the objective purpose inquiry by showing that regardless of subjective intent, the objective purpose behind disclaimers must be unconstitutional by virtue of the fact that disclaimers continue a long series of anti-evolution efforts that themselves were deemed unconstitutional.

However, the question is whether the relation between current disclaimers and past anti-evolution efforts should be enough to invalidate the former. As the discussion of the "primary effect" prong will demonstrate,¹⁷⁷ disclaimers as they stand now are unconstitutional independent of the history of religious anti-evolution efforts because they single out certain belief systems for favorable treatment. The compromise between free exercise and establishment principles mandates that although raising epistemological concerns about scientific theories may be a legitimate educational objective, for a disclaimer that does this to be constitutionally permissible,

¹⁷⁵ *Id.* at 62-63. "Just as citizens around the country have been aware of the historical debate between evolution and religion, an informed, reasonable observer in this case would be keenly aware of the sequence of events that preceded the adoption of the Sticker." *Id.* at 60. (internal citation omitted).

¹⁷⁶ Hanakahi, *supra* note 153, at 50 ("[C]onsideration of the larger history would reveal that the purpose of a disclaimer is to diminish the teaching of evolution because it contradicts the creationist view. This is an improper religious purpose under the Lemon test, and a disclaimer is therefore unconstitutional.")

¹⁷⁷ See discussion *infra* [Part III.B.](#)

it must do so without compromising government neutrality toward religion.¹⁷⁸ Arguably then, a disclaimer that serves religious concerns without discriminating among religions, or between religion and non-religion, may be constitutional despite its relation to previous religious attempts at countering the teaching of evolution.

B. Primary Effect

The “primary effect” analysis of evolution disclaimers asks whether such disclaimers endorse either a particular religious viewpoint or religion in general.¹⁷⁹ The emphasis is on bias, promotion, or favoritism.¹⁸⁰ In considering evolution disclaimers under this test, a number of factors indicate such bias.

First, as evolution is the only academic subject preceded by a disclaimer, the selectivity of this approach suggests favoritism toward religion.¹⁸¹ As the plaintiffs in Selman noted about the Cobb disclaimer:

Evolution is the only theory mentioned in the Sticker, and there is no sticker placed in textbooks related to any other theory, topic, or subject covered in the Cobb County School District's curriculum ... However, there are other scientific topics taught that have religious implications, such as the theories of gravity, relativity, and Galilean heliocentrism [sic].¹⁸²

¹⁷⁸ See discussion *infra* [Part IV.A.](#)

¹⁷⁹ Lemon, 403 U.S. at 612-13.

¹⁸⁰ See Capitol Square v. Pinette, 515 U.S. 753, 764 (1995) (“‘Endorsement’ connotes an expression or demonstration of approval or support. Our cases have accordingly equated ‘endorsement’ with ‘promotion’ or ‘favoritism.’”).

¹⁸¹ It should be noted that disclaimers are markedly different from religious measures classified as “ceremonial deism.” Unlike the latter acts, which Justice Brennan defined in Lynch as “protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content,” evolution disclaimers are a relatively new phenomenon and are still charged with religious significance. 465 U.S. at 716.

¹⁸² 2005 U.S. Dist. LEXIS, at *14. “[T]he Sticker targets only evolution to be approached with an open mind, carefully studied, and critically considered without explaining why it is the only theory being isolated as such.” *Id.* at *68.

Moreover, this selectivity is not viewpoint-neutral, as evolution may be offensive to only certain religions while being neutral or even favorable to other religious beliefs. For example, as evolutionary theory may be offensive to Christians but not to Hindus,¹⁸³ requiring a disclaimer in association with the teaching of evolution may constitute favoritism among religions.¹⁸⁴

Even though other scientific (or, for that matter, historical or literary) ideas may be offensive to some religions,¹⁸⁵ evolution alone is selected for special treatment.¹⁸⁶ For example, the fact the majority of students are Christian rather than Hindu does not affect the unconstitutionality of the disclaimer.¹⁸⁷ Rather, it provides even more reason to prohibit such

¹⁸³ See Hinduism and the Evolution of Life (visited Oct. 4, 2004) <<http://www.hinduwebsite.com/evolution.htm>>:

Hinduism believes in the concept of evolution of life on earth. Although it is not the same as the one known to modern science, in many ways and in a very fundamental sense, it is not much different from the latter. Modern science speaks of physical evolution and the evolution of nervous system, starting with simple life forms and proceeding to more organized and complex beings with well developed and self-regulating biological and mental mechanisms. Man is so far the known and the ultimate product of this very complex and continuous process. Hinduism, on the other hand, places its emphasis on the mental and spiritual evolution of life on earth. It speaks of evolution of the beings from a state of ignorance to a state of illumination through progressive and successive intermediate states of partial ignorance and partial illumination.

¹⁸⁴ Requiring disclaimers may also favor theist religions and philosophies over deist ones. Merriam-Webster Online Dictionary defines “theism” as “belief in the existence of a god or gods; specifically: belief in the existence of one God viewed as the creative source of man and the world who transcends yet is immanent in the world,” and “deism” as “a movement or system of thought advocating natural religion, emphasizing morality, and in the 18th century denying the interference of the Creator with the laws of the universe.” (visited Oct. 11, 2004) <<http://www.m-w.com/>>. Deism acknowledges God’s existence, but disagrees with theist religions about God’s role or nature. The limited role ascribed to God by deism fits with the suggestion in evolutionary theory that once the universe was created and set in motion, the process of evolution, or natural selection, determined the course of life from that point onwards. Synthetic Theory of Evolution, Natural Selection (visited Oct. 15, 2004) <http://anthro.palomar.edu/synthetic/synth_7.htm> (“Natural selection is usually the most important mechanism of evolution.”). This idea of life as dependent on physical laws rather than on an interactive Creator is the antithesis of the theist notion of an immanent Creator.

¹⁸⁵ Consider, for example, the case of pacifist religions such as Quakerism and Mennonitism, which may be against the teaching of literary works that depict violence.

¹⁸⁶ See *supra* note 32. Jeffrey Selman, the parent-plaintiff who initiated the lawsuit, “said placing advisories in science texts is an attempt to inject religion into public schools. ‘Why single out evolution? It has to be coming from a religious basis, and that violates the separation of church and state.’” Similarly, Michael Manley, attorney for the American Civil Liberties Union (ACLU), noted: “‘Why are they singling out evolution? Because from a creationist’s standpoint, they don’t have a problem with the theory of gravity.’”

¹⁸⁷ On petition for a rehearing en banc, the dissent in Freiler argued that because “ninety-five percent of the students in Tangipahoa Parish believed in Biblical Creation,” the disclaimer’s exclusive mention of the Biblical theory of origins served merely “to give context to the message.” Freiler v. Tangipahoa Parish Bd. of Educ., 201 F.3d 602, 604 (5th Cir. 2000). This argument clearly did not solve the disclaimer’s constitutional problems.

disclaimers as they favor the majority religion (Christianity) over minority religions.¹⁸⁸ In addition, the singling out of evolution alone to be preceded by a disclaimer suggests a preference of religion over non-religion and of those religious groups wielding greater political power over those that do not have power.¹⁸⁹ Significantly, the Supreme Court made clear in Lynch v Donnelly¹⁹⁰ that because such preference is politically problematic, it is unconstitutional:

The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . [Governmental endorsement of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.¹⁹¹

This favoritism may be subtle. For instance, in Freiler, the disclaimer not only made specific mention of Biblical theory, but also juxtaposed a disavowal of evolution with encouragement of students to contemplate alternative origin theories.¹⁹² The court held this combination promoted belief in religious theories at the expense of scientific ones.¹⁹³ Moreover, the Court interpreted the disclaimer's reminder to students that they had the right to maintain the

¹⁸⁸ See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

¹⁸⁹ Moreover, favoring the religious beliefs of Christianity supports the idea of a “Christian America,” that is, the idea of America as a Christian country. Stephen M. Feldman, Book Review, Principle, History, and Power: The Limits of the First Amendment Religion Clauses, 81 IOWA L. REV. 1067, 1072 (1996). See also Joseph R. Duncan, Jr., Commentary, Privilege, Invisibility, and Religion: A Critique of the Privilege that Christianity Has Enjoyed in the United States, 54 ALA. L. REV. 617 (2003) (“In the United States, Christians are privileged. Despite a constitutional guarantee that the government will be faceless when concerning religion, a system has developed that has absorbed Christian practice at every turn.”).

¹⁹⁰ 465 U.S. 668 (1984).

¹⁹¹ *Id.* at 687-88. This concern was echoed by the Selman court when it considered the primary effect of the Cobb disclaimer:

[T]he Sticker sends a message to those who oppose evolution for religious reasons that they are favored members of the political community, while the Sticker sends a message to those who believe in evolution that they are political outsiders. This is particularly so in a case such as this one involving impressionable public school students who are likely to view the message on the Sticker as a union of church and state.

2005 U.S. Dist. LEXIS, at *59.

¹⁹² *Id.*

¹⁹³ *Id.*

beliefs taught to them by their parents as specifically encouraging religious views.¹⁹⁴ Taken together, these aspects of the disclaimer violated the “primary effect” prong of the Lemon test.¹⁹⁵

It may be argued that the prohibition of evolution disclaimers does not promote neutrality among religious viewpoints or between religion and non-religion, because it reflects a dogmatic approach toward evolution and hostility toward religion.¹⁹⁶ Although this concern may be valid, evolution-specific disclaimers are not the solution. A more appropriate response would be to create a generalized disclaimer that responds to religious concerns without compromising government neutrality.¹⁹⁷ Permissible objectives can include increasing awareness of the nature of the scientific enterprise and sources of knowledge; generalized disclaimers that present this information can help students think critically about science and inquiry—including evolutionary theory—without singling out evolution for special treatment.

IV. ACCOUNTING FOR FREE EXERCISE ELEMENTS IN THE DISCLAIMER CASE STUDY

The history of anti-evolutionism and the specific legislative history of various anti-evolution measures show the objective purpose of evolution disclaimers as they stand now is to establish religion. Although this Article has concluded that disclaimers on evolution teaching are constitutionally problematic, it will argue this same history suggests the inquiry should not be

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See DeMott, *supra* note 26 at 611 (In Freiler, “the court implicitly found that there is a wall of separation between science and religion. In so deciding, the court assumed the inerrancy of science and the irrationality of religion without considering which discipline is best suited to determine the origin of life and matter.”). See also MSNBC.com, Alex Johnson, “Intelligent Design” faces first big court test: Parents sue after alternate to evolution added to science curriculum (visited Dec. 15, 2005) <<http://www.msnbc.msn.com/id/9444600/from/RL.2>> (The Discovery Institute, a think-tank in Seattle, “criticized the ACLU for pursuing an ‘Orwellian’ stifling of scientific debate”).

¹⁹⁷ See discussion *infra* [Part IV.A.](#)

thus limited; that is, the establishment analysis should not preclude scrutiny of the free exercise elements involved. Because religious parents have strong feelings about the issue of evolution teaching in public schools, the question becomes whether these feelings can be addressed by other means, or whether any means at all will be constitutionally invalid simply by virtue of its being connected to the problematic history of religious anti-evolutionism.

C. Evolution Toward Neutrality: Generalized Disclaimers

As a solution to the free exercise-establishment tension in the current form of disclaimers, this Part proposes a generalized disclaimer. The aim is to rectify the constitutional flaws with the form of the disclaimer itself, thus addressing the discriminatory effect of disclaimers, an effort based on the need to protect the legitimate free exercise principles that are implicated in the case of disclaimers in general—that is, the desire of religious parents to raise epistemological concerns about evolutionary theory.

The proposed generalized disclaimer is one that would concede the non-absolute nature of science and scientific theories without singling out evolutionary theory. The religious parents who contest the teaching of evolutionary theory sometimes characterize evolution as a dogma of the “religion of humanism”¹⁹⁸, in other words claiming that secularism is a religion in its own right. Although this characterization of secularism as religion may be flawed in a number of

¹⁹⁸ Sheila Jasanoff, Biology and the Bill of Rights: Can Science Reframe The Constitution?, 13 AM. J.L. AND MED. 249, 286-87 (1987):

A perception of this inescapable conflict may explain the recent attacks on the concept of “secular humanism” by fundamentalist public school students. In early 1987, for example, a federal district judge in Alabama banned a wide range of public school textbooks on the ground that their failure to pay sufficient attention to the significance of religion in America and their treatment of morality as a matter of personal choice impermissibly promoted the religion of secular humanism.

See also Is “Secular Humanism” a “Religion”? (visited Nov. 27, 2005) <http://members.aol.com/Patriarchy/definitions/humanism_religion.htm>.

ways,¹⁹⁹ the underlying concern regarding dogmatism can be addressed by a disclaimer that places science and scientific inquiry in a realist²⁰⁰ framework.

Such a disclaimer may, for instance, describe the uniquely human nature of scientific discovery and explain how scientists, as humans, are necessarily both constrained by their physical and mental capacities and shaped by their background beliefs: “The world we humans inhabit is not brute nature, but nature modified by our physical activities and overlaid by our semiotic webs, including the imaginative constructions of writers and artists, and the explanations, descriptions, and theories of detectives, historians, theologians, etc.—and of scientists.”²⁰¹ What scientists think is relevant or worth discovering will influence the data they collect and even the serendipitous discoveries they may stumble upon. For instance, the corpus of scientific knowledge and the current form of scientific methodology will determine for scientists which unusual occurrence is important enough to note, or what is “unusual” to begin with.²⁰²

For instance, the disclaimer can relay the story of Galileo or other inventors who recognized the importance of the discoveries they stumbled upon only because of their training. For instance, when Galileo turned his telescope on Venus and saw that Venus showed distinct “phases,” he knew to relate that to the Moon orbiting the Earth, and from thence discovered that

¹⁹⁹ Is Humanism the Answer? (visited Nov. 27, 2005) <<http://www.mwillett.org/atheism/humanism1.htm>>.

²⁰⁰ God, Humanity, and the Cosmos, Critical Realism in Science and Religion (visited Nov. 27, 2006) <<http://www.meta-library.net/ghc-outl/criti-body.html>>

We revert to assessing a more sophisticated form of realism, frequently referred to as “critical realism”. The critical realist holds that there is a progressive closing between our views of reality and reality itself, but recognises that we hold our views provisionally, that we cannot simply read off the nature of the world from scientific data. The theories and presuppositions with which we approach our studies are acknowledged to affect our selection of what data we count as important to collect, as well as the ways in which we interpret these data. For example, simple measurements using something as basic as an electricity meter rest upon commitments to theories about interactions between current-carrying conductors and magnetic fields. Experimental data are never other than theory-laden, and there is never enough data totally to demonstrate every element of a theory. Other reasons for adopting a critical approach take into account the fact that observations themselves affect the character of an entity as it is observed.

²⁰¹ SUSAN HAACK. DEFENDING SCIENCE—WITHIN REASON. 123 (2003).

²⁰² *Id.*

Venus orbits the Sun in similar fashion.²⁰³ From this fact, Galileo was able to expand out and hypothesize that because “Venus orbited the Sun [and], small moons orbited Jupiter ... it was more natural to believe that the Earth itself orbited the Sun.”²⁰⁴ Galileo’s previous knowledge directed him to look out for certain things and to distinguish certain sights as unusual and worthy of further research and analysis. If the corpus of knowledge and existing scientific controversies were different, Galileo perhaps would have overlooked the “phases” of Venus, just as he may well have overlooked other things that were visible through his telescope that today may be considered scientifically valuable.

Assumptions and epistemological frameworks thus shape and constrain the scientific enterprise, perhaps in more obvious ways than they do in other knowledge areas. A disclaimer that encourages students to explore the role background assumptions play in the process of intellectual inquiry will serve a secular purpose, as is required by the Establishment Clause. To disentangle how scientists’ knowledge of the physical is necessarily shaped by the tools they use and the beliefs they hold is to think critically; therefore the laying out of such a philosophical framework will serve the secular purpose of encouraging critical thinking.

Moreover, science is based on observation of the physical and collection of empirical data. It is therefore constrained by the limited capacity of the sensory organs with which humans interact with the world.

Our sensory organs put us in touch with things and events in the world, but our senses are limited, imperfect, and sometimes distorted by our expectations; and there is no cleanly identifiable class of purely observational statements, or of observable things. There are real kinds; but this is only to say that some knots of properties are held together by laws. There are objective truths, and the sciences sometimes succeed in discovering some of them; but truth is not transparent, and progress is not guaranteed.²⁰⁵

²⁰³ Galileo (visited Dec. 25, 2005) <<http://burro.astr.cwru.edu/JavaLab/MoonsWeb/backGalileo.html>>.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 124.

A generalized disclaimer that describes such limitations of science is not necessarily pointing to larger metaphysical truths, but is simply describing perception realistically. To describe intellectual inquiry in this manner is to prevent a dogmatic approach to science that is intrinsically hostile to religion.

Previous disclaimers that have been enacted and struck down as unconstitutional provide some guidance on the linguistics of the generalized disclaimer. For instance, downplaying scientific theories by manipulating lay connotations of “theory” would lead students to consider any scientific theory presented in class as unsupported by substantial empirical evidence. Further, current disclaimers encourage students to “keep an open mind” and think critically, but the nature of the generalized disclaimer is that it encourages students to think critically without saying so explicitly. Relaying anecdotes of actual scientists and their process of discovery gives an accurate picture of the scientific enterprise without suggesting that students should doubt the information presented in class.

For those parents who are concerned that schools are indoctrinating their children regarding a false theory, such a generalized disclaimer may respond to their concerns as it opens up the possibility that evolutionary theory is a product of limited capacities. However, it is debatable whether a generalized disclaimer would serve religious needs to the satisfaction of evolution disclaimers’ original proponents because it does not single out evolutionary theory. If the only disclaimer that serves these proponents’ needs is one limited to evolutionary theory, then it becomes even more evident that evolution disclaimers have an improper religious purpose. On the other hand, acceptance of the generalized disclaimer by these proponents does not compromise its neutrality.²⁰⁶

²⁰⁶ An even more generalized disclaimer would explain the nature of inquiry generally, rather than focus on scientific inquiry alone. However, it appears that focusing on science as a whole is generalized enough to meet the

D. The Jurisprudential Solution: The “Untainted Fruits of the Poisonous Tree” Approach

1. Variety v. Unity

The tension between the clauses is built into establishment jurisprudence, which can essentially be condensed down to the establishment tests’ main prongs of “secular purpose” and “primary effect.” In developing a jurisprudential approach that accounts for legitimate free exercise elements, the very nature of the establishment tests and the prongs’ definitions are at issue, with the definitions varying according to the specific facts of the case.

Consider, for example, Justice O’Connor’s concurrence in Board of Education of Kiryas Joel Village School District v. Grumet,²⁰⁷ a case in which the Court reaffirmed the prohibition against singling out a particular religious group for disparate treatment. A plurality of the justices held that a state statute constituting a village occupied only by Hasidic Jews as a separate public school district was based on religious favoritism and thus was not neutral between religion and non-religion or among religions. According to the Court, if the statute had been a generalized one that gave Kiryas Joel “its authority ... ‘simply as one of many communities eligible for equal treatment under the law,’” the statute would likely have been constitutional.²⁰⁸ In her concurrence, O’Connor noted:

constitutional standard. See Kitzmiller, 2005 U.S. Dist. LEXIS, at *49. In its discussion of how the intelligent design disclaimer has an impermissible effect because it singles out evolutionary theory, the court says, “[t]he evidence in this case reveals that Defendants do not mandate a similar pronouncement about any other aspect of the biology curriculum or the curriculum for any other course.” The court’s statement suggests that if other, or all, aspects of the biology curriculum were addressed by the disclaimer, the disclaimer’s effect may well be constitutionally permissible.

²⁰⁷ 512 U.S. 687 (1994).

²⁰⁸ Stephanie E. Russell, Note, Sorting Through the Establishment Clause Tests, Looking Past the Lemon, 60 MO. L. REV. 653, 664 (1995):

Because this benefit was given to this group based on its religion, it seems proper to treat it as a legislatively drawn religious classification. I realize this is a close question, because the Satmars may be the only group who currently need this particular accommodation. The legislature may well be acting without any favoritism, so that if another group came to ask for a similar district, the group might get it on the same terms as the Satmars.²⁰⁹

O'Connor goes on to focus on the need for diverse establishment tests, with the definitions of "effect" and "purpose" dependent on the facts of each case. She insisted that a "Grand Unified Theory"²¹⁰ does not address adequately the range of cases that fall under the Establishment Clause.²¹¹ Although the primary aim of establishment analysis is to look for an improper discriminatory purpose and effect, the manner of the inquiry may vary according to the nature of the specific case.²¹²

[S]etting forth a unitary test for a broad set of cases may sometimes do more harm than good. Any test that must deal with widely disparate situations risks being so vague as to be useless . . . Moreover, shoehorning new problems into a test that does not reflect the special concerns raised by those problems tends to deform the language of the test.²¹³

Some may see O'Connor's recommendation of a non-unified test as further exacerbating the confusion surrounding establishment jurisprudence.²¹⁴ However, as will be seen below, a focus on facts may actually make the doctrine more comprehensible and predictable.²¹⁵

For instance, an act written broadly to apply to any group that meets certain criteria would describe the standards a group would have to meet to receive the benefit of the act. On the other hand, a "series of special acts" would provide examples of the kinds of organizations that were eligible.

²⁰⁹ 512 U.S. at 716.

²¹⁰ *Id.* at 718.

²¹¹ *Id.* ("Any test that must deal with widely disparate situations risks being so vague as to be useless.")

²¹² *Id.* at 719: "Relatively simple phrases like 'primary effect . . . that neither advances nor inhibits religion' and 'entanglement' . . . acquire more and more complicated definitions which stray ever further from their literal meaning."

²¹³ *Id.* at 718-19.

²¹⁴ See Russell, *supra* note 208, at 672. On Scalia's dissent in *Grumet*: "Justice O'Connor's recommendation, he thought, would leave the Court with no guidelines and would instead 'announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle.'"

Significantly, O'Connor frames her argument in terms of religious concerns:

Religious needs can be accommodated through laws that are neutral with regard to religion What makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief. Accommodations may thus justify treating those who share this belief differently from those who do not; but they do not justify discriminations based on sect.²¹⁶

O'Connor distinguishes permissible accommodation of religious practices from impermissible favoritism toward religious groups. Favoritism implies government endorsement of religious views, either religion over non-religion or among religious viewpoints. On the other hand, accommodation, on the other hand, does not establish religion but simply serves to protect rather than hinder or punish the free exercise of religion. As such, cases upholding concessions to religion are a good place to start in evaluating the way in which establishment analysis turns on specific facts.

For example, in Lynch the Court upheld the constitutionality of a city's Christmas display,²¹⁷ stating that it was justified by a secular purpose—taking “note of a significant historical religious event long celebrated in the Western World.”²¹⁸ On its face, a government-sponsored display directly connected to a religious holiday appears to be the quintessential establishment violation. Yet the Court was reluctant to disallow a display that served a valid secular purpose simply because it was related to a particular set of religious beliefs. For the Court, it was the objective purpose rather than the subjective intent behind the original use of Christmas displays that was dispositive.

²¹⁵ See Mark V. Tushnet, Reflections on the Role of Purpose in the Jurisprudence of the Religion Clauses, 27 WM. AND MARY L. REV. 997, 1005 (1986) (suggesting a “differentiated approach to questions of purpose under the religion clauses”).

²¹⁶ 512 U.S. at 715 (emphasis added).

²¹⁷ 465 U.S. 668.

²¹⁸ *Id.* at 687.

Similarly, in her concurrence in Lynch, Justice O'Connor pointed out that the direct religious reference in the "statutorily prescribed national motto 'In God We Trust'"²¹⁹ was not enough to invalidate a government measure; what mattered was the objective purpose of the measure and its secular effect. In the same concurrence, O'Connor defined the purpose and effect prongs as not forbidding the "advancement or inhibition of religion";²²⁰ rather, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."²²¹ Thus, a permissible accommodation may be distinguished from an impermissible advancement of religion on the basis of its political significance (or lack thereof)—that is, whether it reflects government endorsement or disapproval of religion.

In determining whether a given measure constitutes a permissible accommodation or an establishment of religion, the perspective of the objective, reasonable observer is of central importance. How the measure is perceived by an objective observer is dependent on its primary effect; if the measure does not discriminate among religions or convey a religious message, its purpose—measured according to objective observations rather than subjective intent—will be secular.²²²

2. Losing the "Taint": Generalized Disclaimers as the Hypothetical Untainted Fruit

²¹⁹ *Id.* at 693.

²²⁰ *Id.* at 692.

²²¹ *Id.*

²²² See Kitzmiller, 2005 U.S. Dist. LEXIS, at *47-80 (discussing purpose according to how the objective observer would perceive it).

Government measures falling under the “untainted fruits” category are those that present a unique factual scenario and a correspondingly unique question: whether they are permissible despite being rooted in a history of legislation motivated by impermissible purposes. That is to say, despite their being “fruits of the poisonous tree,” can these measures be purged of their historical taint?

Generalized disclaimers are an example of one such government measure. If enacted, they will have a neutral, non-discriminatory effect, but if the analysis of their purpose takes into account the history of anti-evolutionist measures, then generalized disclaimers may well be constitutionally invalidated on that basis. The fact-based categorical approach is one that allows for the definition of “secular purpose” to be tailored to the unique free exercise elements of a given government measure. In the case of measures falling under the untainted fruits approach, this unique free exercise element is the fact that they are products of a long history that reflects the genuine religious concerns of a group of citizens. Whereas a non-fact-based approach may disregard this persistent concern because it is not adequately focused on how free exercise principles are intertwined with the facts of the case, the categorical approach generally and the “untainted fruits” category specifically will negotiate adequately between the free exercise and establishment principles involved.

The differentiating element between government measures falling under the “untainted fruits” category and those falling under other sorts of categories would be a definition of “secular purpose” that is more attuned to the unique free exercise elements of measures that are “fruits of the poisonous tree.” Therefore, the constitutional determination depends on which definition of “secular purpose” applies to the “untainted fruits” category. Using generalized disclaimers as an illustration, if the “sham purpose” inquiry applies to generalized disclaimers, then the

constitutionally problematic history of anti-evolutionism may be enough to invalidate generalized disclaimers despite their religiously-neutral effect (although, as mentioned above,²²³ invalidating generalized disclaimers on this basis may breach free exercise rights). If however, what matters is the objective purpose (or primary effect), then government measures such as generalized disclaimers that fall within the “untainted fruits” category can be constitutional despite their relation to a history of unconstitutional measures as long as the modified form has truly lost the religious taint of its original source (that is, their primary effect has become neutralized). Such measures may still serve religious concerns, but only incidentally.

Overall, the untainted fruits approach serves to bring the primary effect analysis to the forefront and to define “secular purpose” in objective rather than subjective terms. Determining whether generalized disclaimers (and measures like them) should be analyzed for their objective purpose requires sorting through a number of intricate factual questions. When analyzed alongside cases of permissible accommodation (that is, cases where the objective purpose analysis is used), it is apparent that generalized disclaimers are both similar and different in important ways. For example, the Christmas display in Lynch is a measure that over time has become so deeply established in society that its primary purpose is no longer religious, but secular.²²⁴ The essential difference between these types of deeply ingrained practices and

²²³ See discussion *infra* [Part IV.A.](#)

²²⁴ Tushnet, *supra* note 122, at 1003-04. This category covers something akin to “ceremonial deism.” See Richard F. Suhrheinrich and T. Melindah Bush, The Ohio Motto Survives the Establishment Clause, 64 OHIO ST. L.J. 585, 588 (2003) (“Ceremonial deism, then, considers the country's traditional invocations of religion to determine whether the challenged government action falls within that permitted tradition. By contrast, under the endorsement test, government conduct is unconstitutional if, at the very least, a “reasonable observer” would view it as endorsing one religion over another.”). Consider the case of McGowan, 366 U.S. at 442-45, where “Sunday Blue Laws” were upheld despite their religious roots. The Court stated:

The Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions ... Sunday Closing Laws have become part and parcel of a great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals. To say that the states cannot prescribe Sunday as a

generalized disclaimers is that the former have become purged of their religious roots through the passage of time. In contrast, the evolution controversy has not lost its religious significance, and generalized disclaimers, if used, will for a long time be an innovation rather than a time-worn practice.²²⁵ It is not the passage of time but the modification in form and substance that sets generalized disclaimers apart from their constitutionally problematic origins.

On the other hand, deeply ingrained practices and generalized disclaimers are importantly similar in that they involve community values that overlap with religious values. Like deeply ingrained practices, generalized disclaimers serve purposes other than responding to the religious sentiments of certain groups. Encouraging critical thinking and educating students about theories and sources of knowledge can be a legitimate and beneficial goal of educational institutions (such as public schools),²²⁶ one that is acceptable to evolution's supporters and detractors and to religious and non-religious groups alike.

Also important is the fact that public schools, as agents of the state, are limited in the extent to which they can interfere with a parent's right to instill religion in his/her children. A line of parent-state rights cases has held that a "custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture and educate the child."²²⁷ A generalized disclaimer can help protect this constitutional right by limiting the indoctrination of children in what is often called the religion of "humanism" or anti-religion.²²⁸

day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.

²²⁵ Distinguishing these two categories may require the Court to determine how long it takes for a religious measure to become secularized and what it means for something to lose its religious significance.

²²⁶ See discussion *infra* [Part IV.A.](#)

²²⁷ William G. Ross, Symposium, Education and The Constitution: Shaping Each Other and the Next Century: The Contemporary Significance of Meyer and Pierce for Parental Rights Issues Involving Education, 34 AKRON L. REV. 177, 182-33 (2000).

²²⁸ Michael R. O'Neill, Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools? 21 PEPP. L. REV. 478, 501 (1994).

Preventing the endorsement of anti-religion and limiting state interference in parental rights are other values that can be supported by religious and non-religious groups alike. Significantly, if “secular purpose” is defined to take into account the secular objectives served by generalized disclaimers, then these disclaimers will be better able to withstand establishment scrutiny.

On the basis of the foregoing analysis, the criteria for measures being classified under the “untainted fruits” category and being adjudicated as “untainted” are: (1) these measures are rooted in an unconstitutional source; (2) the current version of the measure is a fundamentally modified version of its original version, that is, its primary effect is no longer unconstitutionally discriminatory; (3) these measures serve one or more secular purposes; (4) despite the fact that the primary effect of the measure is no longer unconstitutional, these measures are different from deeply established practices in that their origins are still religiously controversial; and (5) this religiously controversial original source reflects strong religious interests such that a subjective definition of “secular purpose” would implicate and likely violate free exercise interests.

3. Losing the “Taint”: Case Law

i. Grumet.

The untainted fruits approach is a novel suggestion that does not have jurisprudential precedent. However, the subsequent history of the statute at issue in Grumet is a case study in how the untainted fruits approach may be employed,²²⁹ as the same case that provoked Justice O’Connor’s suggestion for a fact-based analysis provides an interesting vantage point from which to analyze how the process of modification may work. Moreover, the subsequent history of the Grumet statute shows that, without the “untainted fruits” category, courts may remain

²²⁹ 512 U.S. 687.

uncertain about how to negotiate between establishment and free exercise principles in this unique type of scenario.²³⁰

As mentioned above, the statute in Grumet served to designate as a separate public school district a village occupied only by Hasidic Jews. The decision to create this separate school district was based on special educational challenges faced by some of the handicapped Hasidic children.²³¹ These handicapped children were unable to receive remedial classes in their private religious schools and were forced to go to public schools for these classes.²³² In these public schools, these children were taunted because of their different language, dress, and religious practices.²³³ In order to provide state funding for these children without forcing them to endure the ridicule they faced in public schools, the state created a separate school district encompassing only the Hasidic village.²³⁴

This statute was challenged, and eventually invalidated, as unconstitutionally establishing religion because it singled out a religious group for special treatment.²³⁵ After the Supreme Court struck down the statute, the state attempted to pass a broader, more generalized version of the statute such that in applying for a school district, the eligibility criteria were not religious.²³⁶ By opening up eligibility to a larger number of people, the statute was meant to be generalized enough to pass establishment scrutiny.

²³⁰ The fruits approach will help accommodate the strong religious interests reflected in Grumet, 512 U.S. 687 (1997), and its subsequent history, whereas without it such interests may be ignored. See Mark D. van der Laan, Comment: Up Against the Wall: Board of Education of Kiryas Joel Village School District v. Grumet, 56 OHIO ST. L.J. 1335, 1354 (1995) (“Scalia observed that in light of history, the Court’s opinion in Kiryas Joel showed a new, unnatural discomfort with accommodation in general.”).

²³¹ Deidre M. Glasser, Casenote: The Curious Case of Kiryas Joel: Board of Education v. Grumet (Kiryas Joel), 114 S. Ct. 2481 (1994), 63 U. CIN. L. REV. 1947, 1949 (1995).

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 1950.

²³⁶ Calvin Massey, The Political Marketplace of Religion, 57 HASTINGS L.J. 1, 46 (2005) (“New York ... responded to Kiryas Joel by twice reenacting legislation to deliver the originally intended effects to the Satmar Hasidic community of Kiryas Joel, but employing more facially neutral means of doing so.”).

The first of such attempts at generalization was a statute that required the seceding district have at least 2,000 children and possess greater wealth than the state average.²³⁷ Despite these seemingly neutral criteria, the statute was challenged and invalidated as unconstitutionally discriminatory in favor of a particular religious group because in application the only group that could meet the statutory criteria was the Hasidic Jews involved in the Grumet case.²³⁸ Subsequent modifications of the statute continued to broaden the qualifying criteria but were successively challenged and invalidated until at last the challengers gave up.²³⁹ The latest version—the one that now governs and allows the Hasidic Jews a separate school district—uses criteria that are broad enough to cover twenty-nine municipalities in New York. As this latest version has never been legally challenged, no court has ever analyzed its constitutionality.²⁴⁰

The Grumet statute raises an important question about measures falling under the “untainted fruits” category: at what point is a measure sufficiently generalized so that it no longer singles out a religious group for special treatment? This inquiry is largely one of “primary effect” and is a prerequisite to the “untainted fruits” analysis—that is, before an objective purpose analysis of these measures is conducted, it must first have truly lost its discriminatory effect (after all, a discriminatory effect is sufficient to invalidate a measure on establishment grounds). In the case of the several subsequent amendments of the Grumet statute, despite its increasingly generalized criteria, the statute was time and again deemed inadequately generalized because of its discriminatory effect. In the case of evolution disclaimers, generalized disclaimers will likely be considered neutral enough because they remove the primary constitutional flaw of

²³⁷ Glasser, *supra* note 231, at 1974 n.206.

²³⁸ Massey, *supra* note 236, at 46 (“The first attempt failed because only the Kiryas Joel community met the ostensibly neutral criteria.”).

²³⁹ *Id.* (“The second attempt, which permitted municipalities within an existing school district to form their own independent school district if they met certain wealth and population criteria designed to ensure the sustainability of each resulting school district, also failed because it had the ‘impermissible effect of advancing one religious sect.’”).

²⁴⁰ *Id.* (“Whether New York could devise any method of enabling Kiryas Joel to create its own school district, given this history, remains unsettled.”).

current disclaimers—the discrimination among belief systems in favor of religious beliefs that find evolutionary theory problematic.

Besides raising this question about how generalized a measure has to be in order for it to lose the “taint” of its source, the subsequent history of the Grumet statute also reveals an important benefit about the untainted fruits approach. As the post-Grumet statutory history may be read to suggest, in the absence of the untainted fruits approach, a court may refuse to save a modified version of an originally unconstitutional measure as long as its history points to an invalid purpose. Arguably, the successive challenges to the statute were likely centered on, or motivated by, the fact that the original statute unconstitutionally favored a particular religious group. Subsequent changes to the statute were never considered sufficient because they kept allowing the originally favored religious group to be singled out for special treatment. The statute that currently allows for a special school district for the Hasidic Jew community in New York has never been challenged, and it therefore remains unknown whether any court would have looked beyond the history of the statute and instead conducted an objective secular purpose analysis, as the untainted fruits approach would require if implemented.

ii. McCreary.

McCreary County v. American Civil Liberties Union of Kentucky²⁴¹ provides another example of a government measure that is rooted in a constitutionally problematic history but is evolving (or purporting to evolve) toward neutrality. McCreary deals with the latest of a series of exhibits involving the Ten Commandments. After previous displays of the Commandments in the county courthouses had been challenged by the ACLU and struck down on establishment grounds, the counties adopted resolutions calling for exhibits that were broader in scope—that is,

²⁴¹ 125 S. Ct. 2722 (2005).

exhibits that demonstrated the Ten Commandments' effect on the larger American legal framework.²⁴² In response to these resolutions, the counties revised the exhibits, titling them "Foundations of American Law and Government" and alleging that the purpose of the exhibits was to educate citizens about all of the documents displayed, including the Ten Commandments.²⁴³

The key difference between the series of exhibits in McCreary and the modification of the current form of disclaimer to a generalized one is that the McCreary exhibit did not change in any fundamental, substantive way from its previous form. The Court emphasized that in order for the exhibits to be truly secularized rather than simply purporting to be, the Ten Commandments had to be integrated "into a secular scheme to forestall the broadcast of an otherwise clearly religious message."²⁴⁴ Despite the county's statement that the Ten Commandments were serving the secular purpose of educating citizens about their country's legal history, the Court ruled that such a statement was merely a cover up and that the genuine purpose was religious.²⁴⁵

Interestingly, the Court used the controversial history of previous displays to support its conclusion, stating that from the perspective of the "reasonable observer," the history of litigation surrounding the Ten Commandment display was a key factor in determining the constitutionality of the current exhibit.²⁴⁶ The role of history in determining the display's purpose was the center of the Sixth Circuit's analysis as well, as an amicus curiae brief in favor of the petitioners argued:

The Sixth Circuit's use of the "unconstitutional taint" concept presupposes present unconstitutionality, unless enough time has passed to remove the stigma. In so doing, the

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 2737.

²⁴⁵ *Id.* at 2734.

²⁴⁶ *Id.* at 2737.

Sixth Circuit has refused to accept the government's articulated purpose and has treated the stated purpose with automatic suspicion simply because the actor "has a past."²⁴⁷

The Court's approach in McCreary may appear to counter the premises of the untainted fruits approach, but the essential difference between the Court's analysis in McCreary and the proposed jurisprudential approach to the generalized disclaimer is the Court's emphasis on how despite claims of secularization, the Ten Commandment display remained overtly and obviously religious.²⁴⁸ In order for a measure to be classified as "untainted," it must become genuinely secularized (as determined by the "sham" inquiry). The key factor in determining secularization is the primary effect of the government measure at issue. The secular purpose and primary effect analyses intersect and overlap in this regard, with the latter informing the former; when the effect is neutral, the purpose of a government act—viewed through the eyes of an objective, reasonable observer—is secular as well.²⁴⁹

Although in some establishment cases the Court has used a subjective definition of "secular purpose," in the case of measures that are rooted in a history of unconstitutionality but have since been modified, an objective analysis is more suited to addressing and protecting the free exercise elements involved. Otherwise, as noted by the amicus brief quoted above, the very history of a measure may determine its present constitutional status, despite the fact that on the whole, the measure is both perceived as secular and serves a secular goal.

In comparing the successive displays in McCreary, the Court noted the vast similarities and allowed the history of litigation to define the constitutional analysis because no fundamental

²⁴⁷ Amicus Curiae Brief of Thomas More Law Center, in support of Petitioners at *6, McCreary County v. American Civil Liberties Union of Kentucky, 125 S. Ct. 2722 (2005) (No. 03-1693).

²⁴⁸ *Id.*

²⁴⁹ Brief of Freedom from Religion Foundation as Amicus Curiae in Support of the Respondents at *15, McCreary County v. American Civil Liberties Union of Kentucky, 125 S. Ct. 2722 (2005) (No 03-1693).

The issue is not the subjective motives of the individual legislator or official; the issue is the government's intended purpose, which is demonstrated by the public acts and statements of the government itself ... a court does not "psychoanalyze" the individual legislator ... The legislative intent is determined through a rational, objective process from the public statements and acts of the government.

change had occurred between the current and former displays.²⁵⁰ In contrast, the generalized disclaimer seeks to accommodate religious concerns not through artificial modifications to the disclaimer, but through altering the very facet of disclaimers that make them unconstitutional—that is, by making disclaimers neutral where they before discriminated among religions and between religion and non-religion. If the primary effect of a generalized disclaimer is religiously neutral, its purpose—viewed objectively—would be neutral as well.

iii. Kitzmiller.

The court in Kitzmiller²⁵¹ went into extensive detail regarding various aspects of intelligent design’s problematic history. This analysis dealt largely with the religious roots of intelligent design theory and then went on to link the teaching of this theory to the larger history of creationism in public schools.²⁵² The first part of the court’s discussion is not relevant to the untainted fruits analysis of generalized disclaimers because the generalized disclaimer is in no way related to intelligent design theory nor any theory about the origins of life. With respect to generalized disclaimers, no history exists which would mark it as a measure that is inherently religious. Perhaps the substance of the proposed disclaimer with its focus on the scientific enterprise as a specifically human endeavor—that is, with human limitations—can somehow be linked to religion, but such a connection is tenuous at best.

The latter portion of the court’s objective purpose analysis is important to an assessment of the untainted fruits approach because it emphasizes the neutral primary effect requirement. The court notes that the reasonable observer, whether he/she is a student or an adult Dover citizen,

²⁵⁰ *Id.* at 2736 (The previous display and the current one “had two obvious similarities ... both set out a text of the Commandments as distinct from any traditionally symbolic representation, and each stood alone, not part of an arguably secular display”).

²⁵¹ 2000 U.S. Dist. LEXIS 33647.

²⁵² *Id.* at 34-82.

would interpret the insertion of intelligent design theory as part and parcel of the religious attempt at countering evolution teaching.²⁵³ The religious underpinnings of intelligent design link it to creationism. Further, the specific wording of the intelligent design disclaimer and the manner in which it is presented underscores this religious connection: “while encouraging students to keep an open mind and explore alternatives to evolution, [the intelligent design disclaimer] offers no scientific alternative; instead, the only alternative offered is an inherently religious one, namely intelligent design.”²⁵⁴

Moreover, the fact that no other topic taught in school was preceded by a disclaimer meant evolution was distinguished as somehow being worthy of special caution, thus emphasizing the link to the history of creationism in public schools.²⁵⁵ The disclaimer was accompanied by the statement “there will be no other discussion of the issue and your teachers will not answer questions on the issue”—leading the reasonable, objective student to “conclude that [intelligent design] is a kind of ‘secret science that students apparently can’t discuss with their science teacher.’”²⁵⁶ Finally, the “opt out” feature, whereby students who do not want to hear the disclaimer can opt out of being exposed to it, “adds ‘novelty,’ thereby enhancing the importance of the disclaimer in the students’ eyes.”²⁵⁷ All of these features about the substance and presentation of the disclaimer led to the primary effect of establishing religion, causing the court, in speaking from the perspective of the objective observer, to attribute a religious purpose to the intelligent design disclaimer. As such, the Kitzmiller opinion underscores the fundamental premise of the untainted fruits approach—a measure can be distinguished as an “untainted fruit” of its unconstitutional roots only if its primary effect is religiously neutral.

²⁵³ *Id.* at 46.

²⁵⁴ *Id.* at 56.

²⁵⁵ *Id.* at 57.

²⁵⁶ *Id.* at 58.

²⁵⁷ *Id.* at 60.

4. Implications of the Untainted Fruits Approach

The generalized disclaimers analysis proposes that mere history of religious bias is not, or should not, be enough to invalidate a government measure that is motivated by a legitimate secular purpose and that has a secular primary effect. The way in which generalized disclaimers secularize an otherwise religious measure while effectively responding to valid concerns provides a model for purging the taint of other measures that are designed to reform historically impermissible statutes for the purposes of responding to legitimate free exercise concerns. The focus in each such case of modification is changing the primary discriminatory effect of the original measure into a neutral one. As discussed in the “primary effect” analysis of currently enacted evolution disclaimers, singling out one religious group or religious groups in general is constitutionally problematic. Any modified version of a measure must remedy this flaw such that the overall effect is neutral and adequately generalized.

Significantly, the untainted fruits approach saves these types of measures from being constitutionally invalidated by responding to and protecting the unique free exercise issues raised by them. Measures that serve legitimate free exercise concerns are worth salvaging as long as they serve the larger neutrality principles of the Establishment Clause. Therefore, once a measure becomes sufficiently generalized, it should not be rejected on the basis of a subjective purpose analysis. The “untainted fruits” category ensures this much.

CONCLUSION

Establishment Clause jurisprudence is complicated, and at times confusing. Simple labels such as “secular purpose” and “primary effect” are used to explain a multitude of establishment

tests, thus collapsing important differences among unique religious issues. Justice O'Connor's fact-based approach, implemented in the form of a categorical analysis, suggests a method more attuned to the complexities of establishment problems and may go a long way toward resolving jurisprudential confusion in this area.

The value of the fact-based method is demonstrated by the "untainted fruits" category and its use in analyzing the proposed generalized disclaimers. Because these generalized disclaimers are rooted in the religiously charged evolution controversy, they raise important questions about how the "secular purpose" analysis should be conducted in cases that involve presently generalized, non-discriminatory government measures that emerge from a constitutionally problematic history. The untainted fruits approach is designed to analyze such measures in a manner more attuned to their free exercise implications. The determination in all such cases is whether the fruit of the poisonous tree has in fact lost its taint; thus protecting the untainted fruit, despite its problematic origins, will ensure a proper balance between free exercise and establishment interests and facilitate the evolution toward neutrality of similar such measures.