

**FREILER V. TANGIPAHOA PARISH BOARD OF
EDUCATION: DISCLAIMING "THE GOSPEL OF
MODERN SCIENCE"**

The Universe is but the Thing of things,
The things but balls all going round in rings.
Some of them mighty huge, some mighty tiny,
All of them radiant and mighty shiny.

They mean to tell us all was rolling blind
Till accidentally it hit on mind
In an albino monkey in a jungle,
And even then it had to grope and bungle,

Till Darwin came to earth upon a year
To show the evolution how to steer.
They mean to tell us, though, the Omnibus
Had no real purpose till it got to us.

Never believe it. At the very worst
It must have had the purpose from the first
To produce purpose as the fitter bred:
We were just purpose coming to a head.

Whose purpose was it? His or Hers or Its?
Let's leave that to the scientific wits.
Grant me intention, purpose, and design –
That's near enough for me to the Divine.

And yet for all this help of head and brain
How happily instinctive we remain,
Our best guide upward further to the light,
Passionate preference such as love at sight.²

— Robert Frost

¹ ROBERT FROST, *Some Science Fiction*, in *THE POETRY OF ROBERT FROST* 465, 466 (Edward Connery Lathem ed., 1979). Frost writes:

But I know them what they are:
As they get more nuclear
And more bigoted in reliance
On the gospel of modern science

Id. Darwinists are "*preaching*" a "universal, naturalistic version of evolution." PHILLIP E. JOHNSON, *EVOLUTION AS DOGMA: THE ESTABLISHMENT OF NATURALISM* 33 (1990) (emphasis added).

² ROBERT FROST, *Accidentally on Purpose*, in *THE POETRY OF ROBERT FROST* 425 (Edward Connery Lathem ed., 1979).

I. INTRODUCTION

In the nineteenth and twentieth centuries, scientific theory and discovery grew at unprecedented rates, revolutionizing every aspect of life. This rapid development and the accompanying societal changes have stirred up intense debate among scientists, theologians, academicians, and legal practitioners as they confront new issues and competing values. The flames of this fiery debate have risen especially high in the field of science education in public schools.

Natural and physical sciences are "an integral part of liberal education."³ "Indeed, in our time, the principal contributions to knowledge have been made in the physical and natural sciences; to be ignorant of science, therefore, is to neglect whatever the men of the past hundred years and more have added to human wisdom."⁴ However, a multitude of problems arise when science acts as a "presumptuous substitute for religion, politics, and humane studies."⁵ One of those problems is when science tries to explain the origin of life and matter through the theory of evolution.⁶

In *Freiler v. Tangipahoa Parish Board of Education*, the Court of Appeals for the Fifth Circuit struck down the latest in a series of attempts by state officials to address the controversy of teaching evolution in public schools.⁷ The *Freiler* court applied the three-prong test set forth by the Supreme Court in *Lemon v. Kurtzman*⁸ to conclude that a local school board's use of a disclaimer before teaching evolution in science classes violated the Establishment Clause.⁹ Although it found that the disclaimer had a secular purpose, the disclaimer violated the Establishment Clause because its primary effect was to advance religion.¹⁰

This casenote posits that the court incorrectly limited the School Board's authority to disclaim the inerrancy of evolutionary inquiry and to protect the impressionable minds of students. In making its determination, the court expressed its misunderstanding of the proper

³ Jeremy M. Beer, *Science Genuine and Corrupt: Russell Kirk's Christian Humanism*, in 35 THE INTERCOLLEGIATE REV. 28, 30 (Fall 1999).

⁴ *Id.*

⁵ *Id.*

⁶ "Twentieth-century experience demonstrates that scientific technology can work wonders, of course. It also demonstrates that dubious doctrines based upon philosophy can achieve an undeserved respectability by cloaking themselves in the mystique of science." JOHNSON, *supra* note 1, at 16.

⁷ 185 F.3d 337 (5th Cir. 1999), *reh'g denied en banc*, 201 F.3d 602 (5th Cir. 2000), *cert. denied*, 530 U.S. 1251 (2000) (mem.).

⁸ 403 U.S. 602 (1971).

⁹ *Freiler*, 185 F.3d at 348.

¹⁰ *Id.*

scope of scientific inquiry. Section II of this casenote discusses the background facts of the *Freiler* case and summarizes the court's decision. Section III analyzes the court's misapplied *Lemon* test analysis. Section IV explores the conflict between religion and science, and establishes the validity of parental and school board concerns over how evolution is taught in public schools. This section shows that evolution cannot speak to the origin of life and matter because science is limited to finding truth through observation and experimentation. Section V concludes this casenote by urging a principled pursuit of truth in all disciplines.

II. BACKGROUND

A. Factual Background

On April 19, 1994, the Tangipahoa Parish Board of Education adopted the following resolution, which passed by a 5-4 vote, disclaiming the endorsement of evolution:¹¹

Whenever, in classes of elementary or high school, the scientific theory of evolution is to be presented, whether from textbook, workbook, pamphlet, other written material, or oral presentation. The following statement shall be quoted immediately before the unit of study begins as a disclaimer from endorsement of such theory.

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

It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion or¹² 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.¹³

In adopting the disclaimer,¹⁴ the School Board sought to address "parental concerns that the schools' lessons on evolution were confusing and troubling their children, since the lessons seemingly contradicted what the children were taught at home and at church about the origin of

¹¹ *Id.* at 341.

¹² The *Freiler* court misquoted the disclaimer by replacing "to form his/her own opinion or maintain beliefs taught by parents" with "to form his/her own opinion and maintain beliefs taught by parents."

¹³ Appellants' Petition for Rehearing *En Banc* at 3-4, *Freiler* (No. 97-30879).

¹⁴ Teachers in the Tangipahoa Parish school system "had long implemented on an *ad hoc* basis a disclaimer policy in responding to students' questions during lessons on evolution." Brief for Appellants at 17, *Freiler* (No. 97-30879). See also Brief for Appellees at 13, *Freiler* (No. 97-30879).

life and matter.”¹⁶ The Board believed that the disclaimer would “assure students and parents that teaching evolution was not intended to enforce a doctrinal, evolution-only orthodoxy about the origin of life and matter.”¹⁶ The School Board also believed that it chose “a nonintrusive means of sating the concerns of a diverse, pluralistic group of people, without altering the curriculum to teach theories about the origin of life and matter other than evolution and without in any manner trammeling the rights of students and their parents to hold their own beliefs.”¹⁷

The School Board did not seek to adopt creationism;¹⁸ rather, it sought to “affirm each student’s right to form or maintain his or her own opinions or beliefs about the origin of life and matter, notwithstanding the school system’s teaching only the scientific theory of evolution.”¹⁹ The Board’s purpose was “in part to allow students to think about the issues concerning life’s origin and to discuss them with their parents.”²⁰

When asked why he voted in favor of the disclaimer, one board member replied that children should “make their own decisions about matters” and also that he was concerned about “interfering with their

¹⁶ Brief for Appellants at 15, *Freiler* (No. 97-30879). See also Brief for Appellees at 6, *Freiler* (No. 97-30879). Yale law professor Stephen L. Carter has observed of such parents:

These parents, very devout and very worried, are trying to protect the core of their own beliefs. It is not that the parents want the public schools to proselytize in their favor; it is rather that they do not want the schools to press their own children to reject what the parents believe by calling into question a central article of their faith. The response of the Christian fundamentalist to evolutionary theory may thus be more consistently viewed as a reaction to a fear of indoctrination: religion demands one intellectual position, and the state seeks to command another. Liberalism is curiously intolerant of what certainly may be viewed as a classic case of conscience interposed before the authority of the state . . . The creationist parents are not a superstitious rabble. They are independent thinkers who insist on a right to their own means for seeking knowledge of the world, and they deny the right of the state to tell their children that their world view is wrong.

Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977, 981.

¹⁶ Brief for Appellants at 17, *Freiler* (No. 97-30879).

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 5. Mr. Bailey, the Board member who proposed the disclaimer, stated that “[w]e’re not here tonight to ask you to adopt creationism.” *Id.*

¹⁹ *Id.* at 5-6.

It is a fallacy to suppose that by omitting a subject you teach nothing about it. On the contrary you teach that it is to be omitted, and that it is therefore a matter of secondary importance. And you teach this not openly and explicitly, which would invite criticism; you simply take it for granted and thereby insinuate it silently, insidiously, and all but irresistibly.

Id. at 6 n.5 (quoting W. MOBERLY, *THE CRISIS IN THE UNIVERSITY* 56 (1949)).

²⁰ Brief for Appellants at 6, *Freiler* (No. 97-30879).

[the children's] religious beliefs."²¹ As suggested by the Board member who proposed the disclaimer, the Board adopted the resolution out of a belief that "evolution theory as taught in science class should not be confused with fact and that the School Board should explicitly decline to endorse evolution theory because of its inconsistency with the faith of the larger community."²² When confronted with "concerns that the reference to the Bible excluded non-Christian viewpoints from the disclaimer," the same Board member

justified including the phrase, arguing that because "there are two basic concepts out there" (presumably creation science and evolution), and because he believed that "perhaps 95 percent of the community fall into the category of believing [in] divine creation" the Board should not "shy away, or hide away from saying that this is not to dissuade from the Biblical version."²³

On November 7, 1994, approximately seven months after the School Board adopted the resolution, several parents of children in the Tangipahoa Parish Public Schools brought suit in the U.S. District Court for the Eastern District of Louisiana, challenging the validity of the disclaimer under provisions in the United States and Louisiana constitutions barring laws "respecting an establishment of religion."²⁴ The district court concluded that the resolution violated the first part (secular purpose) of the three-prong test in *Lemon v. Kurtzman*²⁵ and discredited the School Board's asserted secular purpose to promote critical thinking and information gathering.²⁶ Instead, the court found "a religious purpose—i.e., to satisfy the religious concerns of the majority that the teaching of evolution in public school contradicted lessons taught in Sunday school."²⁷

²¹ *Id.* at 9. In response to the question, "How did you respond to those concerns?" the Board member went on to say, putting a disclaimer giving the children an opportunity to arrive at their own conclusion about the creation of mankind, it would be left up to the students to make their own conclusion and be aware that there are other types of beliefs . . . We're in education, and the person is not educated if they [sic] are browbeaten to one theory of everything that comes along.

Id.

²² *Freiler*, 185 F.3d at 342.

²³ *Id.*

²⁴ *Id.* (quoting U.S. CONST. amends. I, XIV; LA. CONST. art. I, § 8).

²⁵ 403 U.S. at 615.

²⁶ *Freiler*, 185 F.3d at 342.

²⁷ *Id.* at 342. Although the Court of Appeals for the Fifth Circuit affirmed the decision of the district court, its analysis under the *Lemon* test differed. The district court held that the disclaimer violated the first part, but the court of appeals held that the disclaimer passed the first part and failed the second part. *Id.* at 348.

B. The Freiler Court's Lemon Test Analysis

On appeal from the district court, the court of appeals considered the sole issue of "whether the specific disclaimer adopted by the Tangipahoa Parish Board of Education contravenes the First Amendment."²⁸ In addressing this issue, the court recognized the Board of Education's right to prescribe academic curricula and the great "care and restraint" that the court should exercise in intervening upon the operation of public schools.²⁹ However, the court also affirmed the "vigilant protection of constitutional freedoms" in public schools and the need to limit the scope of the School Board's power.³⁰

The court acknowledged three tests that can be used for evaluation of state action challenged on Establishment Clause grounds;³¹ however, it explained that "the decision to apply a particular Establishment Clause test rests upon the nature of the Establishment Clause violation asserted."³² Therefore, the court determined that only the *Lemon* test,

²⁸ *Id.* The court limited its analysis to the "precise language of the disclaimer and the context in which it was adopted" and declined to "confront the broader issue of whether the reading of any disclaimer before the teaching of evolution would amount to an unconstitutional establishment of religion." *Id.* By narrowly defining the issue, the court could strike this particular disclaimer down while avoiding the legal morass of making *any* attempt to disclaim evolution unconstitutional.

²⁹ *Freiler*, 185 F.3d at 342-43 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). See *infra* text accompanying notes 73-74.

³⁰ *Id.* at 343. "States may not require that teaching and learning be tailored to the principles or prohibitions of any religious sect or dogma." *Id.* (quoting *Epperson*, 393 U.S. at 106). See *infra* text accompanying notes 73-74.

³¹ *Id.* at 343. The court stated that "[o]ur multi-test analysis in past cases has resulted from an Establishment Clause jurisprudence rife with confusion and from our own desire to be both complete and judicious in our decision-making." *Id.*

³² *Id.* at 344. The court considered, but did not apply, the Coercion Test and the Endorsement Test. First, the court correctly rejected the Coercion Test because "the practice at issue does not direct student participation in a formal religious exercise." *Id.* See also *Lee v. Weisman*, 505 U.S. 577 (1992) (holding unconstitutional a school district's policy permitting school principals to invite clergy to give "nonsectarian" invocations and benedictions at graduation ceremonies). The school-sponsored activity violates the First Amendment under the Coercion Test, when "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Freiler*, 185 F.3d. at 343 (quoting *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992)).

Second, the *Freiler* court equated the Endorsement Test to the second prong of the *Lemon* test. Under this test, the court seeks "to determine whether the government endorses religion by means of the challenged action." *Freiler*, 185 F.3d at 343 (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989) ("holding that the display of a creche on the Grand Staircase of the Allegheny County Courthouse violated the First Amendment but that the display of a menorah as part of a secular exhibit was constitutional"). The government unconstitutionally endorses religion when it "conveys a message that religion is 'favored,' 'preferred' or 'promoted' over other beliefs." *Id.* at 342 (quoting *County of Allegheny*, 492 U.S. at 593).

which had the “longest lineage,” was applicable.³³ The three-prong *Lemon* test deems a state practice unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles religion.³⁴

1. Secular Purpose: The First Prong of the *Lemon* Test

Under the first prong of the *Lemon* test, the challenged state action must have a secular purpose. “In order for state activity to pass muster under *Lemon*’s first criterion a sincere secular purpose for the contested state action must exist; even if that secular purpose is but one in a sea of religious purposes.”³⁵ In considering this prong, the court considered three purposes for the disclaimer articulated by the school board: “(1) to encourage informed freedom of belief, (2) to disclaim any orthodoxy of belief that could be inferred from the exclusive placement of evolution in curriculum, and (3) to reduce offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution.”³⁶ Under the deferential standard adopted by the court, “[i]f the disclaimer furthers just one of its proffered purposes and the same purpose proves to be secular, then the disclaimer survives scrutiny under *Lemon*’s first prong.”³⁷

Despite the language of the last sentence of the disclaimer, which urges students “to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion,” the court ruled that the “disclaimer as a whole furthers a contrary purpose, namely the protection and maintenance of a particular religious viewpoint.”³⁸ The court found that the disclaimer did not serve the first articulated purpose of encouraging “informed freedom of belief

³³ *Id.* at 343. Although the *Freiler* court acknowledged that the *Lemon* test was “widely criticized and occasionally ignored,” it validated its reliance on the “continued viability of the general *Lemon* principles”—in particular, “the nature of the inquiry under *Lemon*’s purpose prong has ‘remained largely unchanged.’” *Id.* at 344. (quoting *Agostini v. Felton*, 521 U.S. 203, 223 (1997)).

³⁴ *Lemon*, 403 U.S. at 612-13.

³⁵ *Freiler*, 185 F.3d at 344. *See also* *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). In laying the foundation for determining the first prong, the court sought to “treat the School Board’s three-fold articulation of purpose with deference.” *Freiler*, 185 F.3d at 344. *See also* *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 816 (5th Cir. 1999). However, the court added that deference “ought not be confused with blind reliance.” *Freiler*, 185 F.3d at 344. Therefore, the court examined each avowed purpose to ensure that the purpose was sincere and not a sham. *Freiler*, 185 F.3d at 344. *See also* *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 816 (citing *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987)).

³⁶ *Freiler*, 185 F.3d at 344.

³⁷ *Id.*

³⁸ *Id.* at 344-45.

or critical thinking by students.³⁹ The court came to this “inescapable” conclusion by coupling the message of the first paragraph of the disclaimer with the statement in the last paragraph that it is the “basic right and privilege of each student to . . . maintain beliefs taught by parents on . . . [the] matter of the origin of life.”⁴⁰ According to the court, this message was contrary to an intent to encourage critical thinking, which requires that students approach new concepts with an open mind and a willingness to alter and shift existing viewpoints. For that reason, the “first articulated purpose was a sham.”⁴¹ However, the failure of this purpose did not yield a violation of the first prong because of the validity of the second and third purposes.

The court had no doubt that the disclaimer would further the School Board’s second and third purposes of “disclaiming any orthodoxy of belief that could be implied from the exclusive place of evolution in the public school curriculum and reducing student/parent offense caused by the teaching of evolution.”⁴² Therefore, the disclaimer passed constitutional muster under the *Lemon* test’s first prong. The disclaimer “explicitly acknowledged the existence of at least one alternative theory for the origin of life” and “remind[ed] school children that they can rightly maintain beliefs taught by their parents on the subject of the origin of life.”⁴³

After establishing the sincerity of the second and third purposes, the court considered “whether disclaiming orthodoxy of belief and reducing student/parent offense are permissible secular objectives.”⁴⁴ The court was “mindful that a purpose is no less secular simply because it is infused with a religious element.”⁴⁵ “[T]he fact that evolution . . . is

³⁹ *Id.* Initially, the court stated that the School Board’s first articulated purpose was “to encourage freedom of belief.” *Id.* However, when the court analyzed this, it restated the purpose as “to encourage informed freedom of belief or critical thinking by students.” *Id.* (emphasis added). Then, the court found that the disclaimer did not promote critical thinking; therefore, this purpose was a sham. The court failed to consider in its analysis the purpose of encouraging informed freedom of belief, which the court originally stated to be one of the School Board’s purposes. By ignoring the School Board’s purpose of encouraging freedom of belief, the court ignored the legislative authority of the School Board, the concerns of the community, and the interests of parents in directing their children’s education.

⁴⁰ *Id.* at 345.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* *Cf.* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) (explaining that the *Lemon* test, which requires that the law at issue serve some secular legislative purpose, does not require that the contested law’s purpose be unrelated to religion); Lynch v. Donnelly, 465 U.S. 668 (1984)

religiously charged and that the sensitivities and sensibilities to which the School Board sought to reduce offense are religious in nature, does not per se establish that those avowed purposes are religious purposes.⁴⁶ In an effort to avoid “callous indifference,”⁴⁷ the court concluded that “under the instant facts, the dual objectives of disclaiming orthodoxy of belief and reducing student/parent offense are permissible secular objectives that the School Board could rightly address”⁴⁸ and thereby satisfy the secular purpose prong of the *Lemon* test.

2. Primary Effect: The Second Prong of the *Lemon* Test

Under the *Lemon* test’s second prong, a court must determine whether the primary effect of the state action either advances or inhibits religion.⁴⁹ In the words of the *Freiler* court, the “second prong asks whether, irrespective of the School Board’s actual purpose, ‘the practice under review in fact conveys a message of endorsement or disapproval.’”⁵⁰ However, “where the benefit to religion or to a church is no more than indirect, remote, or incidental, the Supreme Court has advised that ‘no realistic danger [exists] that the community would think that the [contested government practice] was endorsing religion or any particular creed.’”⁵¹ In light of these pronouncements, the court disagreed with the School Board’s argument that the primary effect of the disclaimer was “to communicate to students that they are free to form their own opinions or maintain beliefs taught by parents concerning the origin of

(noting that the Constitution mandates accommodation of all religions to avoid callous indifference).

⁴⁶ *Freiler*, 185 F.3d at 345 (citation omitted).

⁴⁷ *Id.* (quoting *Zorach v. Clauson*, 343 U.S. 306, 314 (1952)).

⁴⁸ *Id. Cf. Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (observing that “in the context of a civil rights action, fundamental values essential to a democratic society include ‘tolerance of divergent political and religious views’ and ‘consideration of the sensibilities of others, and in the case of a school, the sensibilities of fellow students’”).

⁴⁹ *Lemon*, 403 U.S. at 612-13.

⁵⁰ *Freiler*, 185 F.3d at 346 (quoting *Santa Fe Indep. Sch. Dist.*, 168 F.3d at 817). Although the court did not apply the endorsement test separately, it noted the similarity between that test and the second prong of the *Lemon* test. “Under either the second *Lemon* prong or the endorsement test, the Supreme Court has cautioned that a government practice may not aid one religion, aid all religions, or favor one religion over another.” *Id.* The Establishment Clause means that the state may not officially prefer religion over nonreligion nor may it prefer one particular sect or creed. See e.g., *County of Allegheny*, 492 U.S. at 605 (1989).

⁵¹ *Freiler*, 185 F.3d at 346 (quoting *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 395 (1993)). Ironically, the *Freiler* court accepted the limitations set forth in *Lamb’s Chapel* and even used it as part of its rule, its jurisprudential backdrop for deciding this case, but later in the opinion, the court distinguished the facts of *Lamb’s Chapel* from the instant case such that the Petitioner could not rely on its holding for precedent.

life and matter” and “to advance[] freedom of thought, as well as sensitivity to, and tolerance for, diverse beliefs in a pluralistic society.”⁶²

The court concluded that “the primary effect of the disclaimer was to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation.”⁶³ In so deciding, the court focused on the message that the disclaimer conveyed to its intended audience, the students.⁶⁴ The court relied on

the interplay of three factors: (1) the juxtaposition of the disavowal of endorsement of evolution with an urging that students contemplate alternative theories of the origin of life; (2) the reminder that students have the right to maintain beliefs taught by their parents regarding the origin of life; and (3) the “Biblical version of Creation” as the only alternative theory explicitly referenced in the disclaimer.⁶⁵

The court also noted that the term “disclaimer” was inaccurate.⁶⁶ Besides “disclaiming” the endorsement of evolution, the passage encouraged critical thinking, the gathering of information, and the examination of alternatives.⁶⁷ As a whole the disclaimer encouraged students to “read and meditate upon religion in general and the ‘Biblical version of Creation’ in particular.”⁶⁸

The court admitted that the introduction of religion or religious concepts into public school curriculum is not unconstitutional per se.⁶⁹ Religion may be admitted appropriately in the “study of history, civilization, ethics, comparative religion, or the like”⁷⁰ in which thinking about religion provides context; however, despite broad acceptance in these subjects, religion may not be introduced in science classes, especially if for the purpose of stating “an alternative to evolution, the State-mandated curriculum.”⁷¹

In holding that the disclaimer violated the *Lemon* test’s second prong, the court stated that the benefit conferred to religion by the reading of the disclaimer was “more than indirect, remote, or

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* The *Freiler* court seems to assert that encouraging critical thinking, the gathering of information, and the examination of critical alternatives undermine the credibility and efficacy of the disclaimer. However, by including these goals in the disclaimer, the School Board does not transform the resolution into a non-disclaimer; rather, these goals explain the proper scope of scientific inquiry, which should not be hemmed in by blind commitment to the theory of evolution.

⁶⁸ *Id.*

⁶⁹ *Id.* at 347.

⁷⁰ *Id.* (quoting *Stone v. Graham*, 449 U.S. 39, 42 (1980)).

⁷¹ *Id.* See discussion *infra* Part III. A. 3.

incidental.⁶² The court distinguished the *Freiler* case from two cases cited by the petitioner: *Widmar v. Vincent*⁶³ and *Lamb's Chapel v. Center Moriches Union Free School District*.⁶⁴ According to the *Freiler* court, “[a] teacher’s reading of a disclaimer that not only disavows endorsement of educational materials but also juxtaposes that disavowal with an urging to contemplate alternative religious concepts implies School Board approval of religious principles.”⁶⁵ The court went on to explain that since the only alternative theory explicitly referenced in the disclaimer was religious, the disclaimer “serves only to promote a religious alternative to evolution.”⁶⁶ The court also saw a great “danger of students and parents perceiving that the School Board endorses religion, specifically those creeds that teach the Biblical version of creation.”⁶⁷ Consequently, the court determined that the disclaimer impermissibly advanced religion and violated the *Lemon* test’s second prong as well as the Endorsement test.⁶⁸

3. Excessive Entanglement: The Third Prong of the *Lemon* Test

Under the *Lemon* test’s third prong, the court must determine whether the state practice excessively entangles government with religion.⁶⁹ The *Freiler* court did not address the third prong of the *Lemon* test because it held that the disclaimer violated the second prong. The three prongs are disjunctive, and violation of any one prong amounts to a constitutional violation.

⁶² *Id.* at 348.

⁶³ 454 U.S. 263 (1993). The *Widmar* Court allowed a registered religious group at a state university to utilize university facilities that were available to other registered student groups. This “incidental” benefit does not violate the prohibition against “primary advancement” of religion; it does not confer state approval on religious sects; and the facilities are available to various student groups, religious and non-religious. *Id.* at 273 (quoting *Comm’n for Pub. Educ. v. Nyquist*, 413 U.S. 756, 771 (1973)).

⁶⁴ 508 U.S. 384 (1993). Permitting the use of a public school after hours to show religiously-oriented films did not violate the Establishment Clause. *Id.* The films were shown after school hours, were open to the public, and were not sponsored by the school. *Id.* at 395.

⁶⁵ *Freiler*, 185 F.3d at 348.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Lemon*, 403 U.S. at 612-13.

III. ANALYSIS

A. Critique of the Freiler Court's Jurisprudence

The *Freiler* court's reasoning represents an erroneous application of Establishment Clause jurisprudence. First, in applying two separate standards to two prongs of the *Lemon* test, the court takes back with one hand what it gave with the other. Under the first prong, the court applied a deferential standard⁷⁰ to the decision of the School Board as a legislative entity. However, under the second prong, the court applied a no-aid standard⁷¹ that nullified the court's analysis of the disclaimer under the first prong. Second, the court used the same facts to uphold the disclaimer under the first prong (secular purpose) that it used to defeat it under the second prong (effects). Third, the proposition that religion is appropriate to provide context in non-science classes⁷² but inappropriate in science classes, though substantiated by precedent, was misused. These three errors provide the jurisprudential backdrop for the *Freiler* court's poorly staged rationale for superimposing its preferences over those of the School Board and the majority of parents and children in the Tangipahoa Parish.

1. Two Standards Are Not Better Than One

The court began its analysis by outlining the broad scope of its interpretative power. On one hand, the court must show great "care and restraint," recognizing the School Board's role in prescribing academic curricula.⁷³ On the other hand, the court must vigilantly protect constitutional freedoms in public schools and limit the scope of the School Board's power.⁷⁴ Instead of choosing one standard for applying the

⁷⁰ Under the deferential standard, the court examines "each of the disclaimer's avowed purposes to ensure that the purpose is sincere and not a sham." *Freiler*, 185 F.3d at 344. See *Edwards*, 482 U.S. at 589 (examining the Balanced Treatment for Creation-Science and Evolution-Science Act's purposes and determining that it "does not serve to protect academic freedom, but has the distinctly different purpose of discrediting evolution"). "Deference, however, ought not be confused with blind reliance." *Freiler*, 185 F.3d at 344.

⁷¹ Under the no-aid standard, "a government practice may not aid one religion, aid all religions, or favor one religion over another." *Freiler*, 185 F.3d at 346; See *County of Allegheny*, 492 U.S. at 605 (holding that the Establishment Clause means no official preference even for religion over nonreligion); See also *Lamb's Chapel*, 508 U.S. at (stating that indirect, remote, or incidental benefit to religion or to a church is constitutional).

⁷² See *Stone v. Graham*, 449 U.S. 39, 42 (1980).

⁷³ *Freiler*, 185 F.3d at 342-43 (quoting *Epperson*, 393 U.S. at 104).

⁷⁴ *Id.* at 343 (quoting *Epperson*, 393 U.S. 97 at 104). "States may not require that teaching and learning be tailored to the principles or prohibitions of any religious sect or dogma." *Id.* (quoting *Epperson*, 393 U.S. at 106).

Lemon test, the court applied two different standards to each of the first two prongs.

Under the first prong, the court applied a deferential standard in considering the School Board's purpose in adopting the disclaimer. Though seeking to avoid "callous indifference,"⁷⁵ the court did not equate deference with "blind reliance."⁷⁶ In deciding that the disclaimer passed the first prong, the court appropriately deferred to the power of the School Board to address "the concerns of students and parents troubled by the teaching of evolution in public classrooms."⁷⁷ However, the court only applied this deference to the School Board's power to have a secular purpose. The court showed no deference for the School Board's power to effect its purpose.

Under the second prong, the court applied a no-aid standard that nullified the court's analysis of the disclaimer under the first prong. Under this standard, "a government practice may not aid one religion, aid all religions, or favor one religion over another."⁷⁸ If the benefit conferred to religion is more than indirect, remote, or incidental, the government action fails to pass constitutional muster.⁷⁹ Under the no-aid standard, the court determined that the disclaimer "*implies* School Board approval of religious principles" and "*promote[s]* a religious alternative to evolution."⁸⁰ Also, the court saw a great "danger [of] students and parents *perceiving* that the School Board endorses religion, specifically those creeds that teach the Biblical version of creation."⁸¹ To understand the implications of the court's fears as set forth in the previous sentence, consider the words *implies*, *promotes*, and *perceiving*. As guard dogs for the no-aid standard, these words protect the periphery of the penumbral region of the Establishment Clause. The court sniffs out an implication, digs up a promotion, and drags out a perceivable danger without considering the disclaimer as a whole or the legitimate needs that it serves.

2. The School Board Can't Have Its *Purpose* And *Effect* It Too

In holding that the disclaimer failed the second (effects) prong of the *Lemon* test, the *Freiler* court stated that "the primary effect of the

⁷⁵ *Freiler*, 185 F.3d at 345 (quoting *Zorach*, 343 U.S. 306 at 314).

⁷⁶ *Id.* at 344.

⁷⁷ *Id.* at 346.

⁷⁸ *Id.* See also *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (stating that if the state may aid religious schools, it may regulate them).

⁷⁹ *Freiler*, 185 F.3d at 348. See also *Lamb's Chapel*, 508 U.S. at 395; *County of Allegheny*, 492 U.S. at 605.

⁸⁰ *Freiler*, 185 F.3d at 348 (emphasis added).

⁸¹ *Id.* (emphasis added).

disclaimer was to protect and maintain a particular religious viewpoint, namely belief in the Biblical version of Creation.⁸² However, the court used that exact reason to establish a religious purpose,⁸³ which did not prove fatal for the disclaimer under the first (purpose) prong.⁸⁴

The two objectives set forth by the School Board, which the court deemed sincere and permissibly secular under the first prong, were deemed impermissibly religious under the second prong. Under the first prong, the court claimed that the School Board can have the permissible purpose of disclaiming orthodoxy of belief by explicitly acknowledging “the existence of at least one alternative theory for the origin of life.”⁸⁵ However, under the second prong, the School Board cannot effect the disavowal of the endorsement of evolution and urge “that students contemplate alternative theories of the origin of life,” nor can the School Board acknowledge the “Biblical version of Creation” as the only alternative theory explicitly referenced in the disclaimer.⁸⁶

Under the first prong, the School Board can have the purpose of reducing student/parent offense by reminding “school children that they can rightly maintain beliefs taught by their parents on the subject of the origin of life.”⁸⁷ But, under the second prong, the School Board cannot effect that purpose by reminding children that they have “the right to maintain beliefs taught by their parents regarding the origin of life.”⁸⁸

In short, the *Freiler* court held that the School Board may recognize that evolution is fallible, and it may respect the beliefs of students and parents offended by the theory of evolution, specifically as “regarding the origin of life and matter.”⁸⁹ However, these “permissible secular objectives that the School Board could *rightly address*”⁹⁰ under the first (purpose) prong cannot be *addressed* under the second (effects) prong. The *Freiler* court’s convoluted rationale leaves us with this incomprehensible directive: By enacting the disclaimer, the School Board’s *purpose* may be to address community concerns, but the *effect* may not be to address community concerns.

⁸² *Id.* at 346.

⁸³ *Freiler*, 185 F.3d at 344-45.

⁸⁴ The existence of two secular purposes rectified this religious purpose under the first prong.

⁸⁵ *Id.* at 345.

⁸⁶ *Id.* at 346.

⁸⁷ *Id.* at 345.

⁸⁸ *Id.* at 346.

⁸⁹ Appellants’ Petition for Rehearing *En Banc* at 3, *Freiler* (No. 97-30879 & 98-30132).

⁹⁰ *Freiler*, 185 F.3d at 345 (emphasis added).

3. The “Wall of Separation” Between Religion and Science

The *Freiler* court declared that “there is a fundamental difference between introducing religion and religious concepts in ‘an appropriate study of history, civilization, ethics, comparative religion, or the like’ and the reading of a School Board-mandated disclaimer.”⁹¹ Under this line of reasoning, the court concluded that the disclaimer “does not encourage students to think about religion in order to provide context.”⁹² Religion, in its role of providing context, is appropriate to explain “political controversies” or “to promote understanding of different religions.”⁹³ However, religion may not be introduced in science classes, especially for the purpose of encouraging children “to exercise critical thinking” or stating “an alternative to evolution, the State-mandated curriculum.”⁹⁴ 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.

Contrary to the opinion of the court, the disclaimer was an appropriate means of providing context for scientific inquiry.⁹⁵ Similar to its usefulness in explaining political controversies, religion provides context for teaching the “religiously charged”⁹⁶ and much controverted theory of evolution. The disclaimer recognized the controversy and encouraged students to decide their beliefs for themselves.

Most importantly, this disclaimer promoted understanding of science and religion, especially in areas in which both disciplines claim

⁹¹ *Freiler*, 185 F.3d at 347 (quoting *Stone*, 449 U.S. at 42).

⁹² *Id.*

⁹³ *Id.* See also *Edwards*, 482 U.S. at 607 n.8 (Powell, J., concurring) (giving political controversies in Northern Ireland and the Middle East as appropriate examples); *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963) (stressing the importance of comparative religions as a complete part of one’s education).

⁹⁴ *Freiler*, 185 F.3d at 347. The court tries to bolster the validity of evolution by referring to it as part of the “State-mandated curriculum.” However, the court forgets that the Louisiana legislature, which mandates evolution, also tried to mandate the teaching of creation in public schools. See *Edwards*, 482 U.S. at 578. Also, the “Louisiana Committee for Scientific Standards recently revised the state’s exit exam for high school students The Committee identified evolution as a topic to avoid on the test; other such topics to be avoided include incest, the occult, witchcraft, unwed mothers, and drug use.” Randy Moore, *The Courage & Convictions of Don Aguillard*, 61 THE AMERICAN BIOLOGY TEACHER 166, 173 (Mar. 1999).

⁹⁵ Though beyond the scope of this article, it bears noting that the *Freiler* court’s rationale, positing that religion is only useful for providing “context,” omits the many other virtues of infusing a religious element in education. Morality, ethics, tradition, philosophical foundations, and respect for authority represent a partial, though clearly not exhaustive, list of religious values vital to education.

⁹⁶ *Freiler*, 185 F.3d at 345. See *Edwards*, 482 U.S. at 593 (acknowledging the controversial nature of the theory of evolution).

to answer the same question: what is the origin of life and matter? This inquiry encourages students to differentiate between the two disciplines and to understand the proper boundaries for scientific and religious inquiry. By disallowing the School Board's attempt to provide context for the study of evolution, the court suppressed a principled approach to discovering truth. The court assumed that science, through the theory of evolution, can discover the origin of life and matter and that religion should not interfere with this process.

IV. THE APPROPRIATE SCOPE OF SCIENTIFIC INQUIRY

A. At the Crossroads of Science and Religion

When all the jurisprudential dust settles, we are left with two competing notions. First, the School Board, under democratic pressure, believed that the purpose and effect of the disclaimer was to promote freedom of belief, freedom of thought, and tolerance. Second, the court viewed the disclaimer as the protection and maintenance of a particular religious viewpoint—Biblical creationism. But, even more fundamental than these two claims is a bitter controversy: who has the authority to define the origin of life and matter?⁹⁷ If science has the authority, then religiously motivated concerns are immaterial and superfluous. Therefore, religious concerns are out of context and the disclaimer should be disallowed. However, if religion has the authority to answer this question, then not only is the disclaimer appropriate but it serves as a vital check on the scope of scientific inquiry. Understanding the debate within the context of public education is essential to properly determining who has the authority to define the origin of life and matter.

B. Why the Big Bang over Teaching Evolution in Public Schools?

Public schools play a central role in the education and socialization of children.

Whenever two or more groups within a state differ in religion, or in language and in nationality, the immediate concern of each group is to use the schools to preserve its own faith and tradition. For it is in the school that the child is drawn towards or drawn away from the religion and patriotism of its parents.⁹⁸

⁹⁷ See JOHNSON, *supra* note 1, at 8. "Victory in the creation-evolution dispute therefore belongs to the party with the cultural authority to establish the ground rules that govern the discourse." *Id.*

⁹⁸ Robert M. Gordon, Note, *McLean v. Arkansas Board of Education: Finding the Science in "Creation Science"* 77 NW. U.L. REV. 374, 393 n.112 (1982) (quoting W. LIPPMAN, *AMERICAN INQUISITORS* 22, 23 (1928)).

The parents in the Tangipahoa Parish wanted to halt the destructive implications of evolution, which “extend far beyond the assumptions of organized religion to a much deeper and more pervasive belief, held by the vast majority of people, that non-mechanistic organizing designs or forces are somehow responsible for the visible order of the physical universe, biological organisms, and human moral order.”⁹⁹ The School Board tried to prohibit science education from overstepping the boundary between science and religion.

Parents send their children to public schools to be educated, not indoctrinated. Science educators should lay the foundation for children to understand science and its relation to other fields. They should not “engage[] in a campaign of indoctrination against the concept of creation.”¹⁰⁰ In this sense, “creation” does not mean “biblical literalism but the much broader notion that a purposeful intelligence is responsible for our existence.”¹⁰¹

Parents are empowered through the democratic process to elect legislators and school board members. In so doing, parents vote for the way they believe their children should be educated. Parents and school boards, not politically unaccountable educators, should determine public school curriculum.¹⁰² This viewpoint is contrary to the political and ideological agenda of some public school teachers. Don Aguillard, the lead plaintiff in *Edwards v. Aguillard*,¹⁰³ summarized the position of many public school educators. When interviewed recently, Aguillard stated,

The case [*Edwards v. Aguillard*] showed me what a particular special interest group can do to impact public education. It's not just science educators who must be wary; all educators must be wary. What topics will be pushed because some group has the ear of a sympathetic legislator?

We must continually be at meetings of textbook adoption committees. We must continually be wary of parents who are members of curriculum-writing teams. We can't turn the curriculum over to the community; if we do, we shouldn't be surprised if they insert their agenda into the curriculum and quality goes down.¹⁰⁴

Mr. Aguillard's position defeats the purpose of having an elected School Board and transforms educators into administrators who have the power to make and carry out ideologies without the political process. If educators who are dogmatically committed to evolutionary theory are

⁹⁹ JOHNSON, *supra* note 1, at 10-11.

¹⁰⁰ JOHNSON, *supra* note 1, at 36.

¹⁰¹ *Id.* See *supra* text accompanying note 2.

¹⁰² See Carter, *supra* note 15, at 981.

¹⁰³ 482 U.S. 578 (1987).

¹⁰⁴ Moore, *supra* note 94, at 173.

given the sole power to determine academic curricula, then parents and school board members are rendered powerless. Those who believe that only religion can determine the origin of life and matter are ignored and labeled as irrational dissidents.

C. Halting the Scientific Exploration of the Origin of Life and Matter

Understanding the background of this issue in the context of public education reveals the importance of a correct resolution. The Tangipahoa Parish School Board drafted the disclaimer because the scientific theory of evolution, as taught in their public schools, sought to explain the origin of life and matter. Acknowledging the limitations of the scientific process, the School Board adopted the disclaimer to encourage students to consider the origin of life and matter outside of the scientific process. In so doing, the Board aimed to sharpen the students' critical thinking skills and broaden their scope of inquiry into the origin of life and matter beyond the scientific.

1. The "Un"scientific Theory of Evolution

One must realize that evolution has not determined the origin of life and matter.¹⁰⁵ In trying to determine the origin of life and matter, science may have crossed over into the realm of religion.¹⁰⁶ Thus, the "danger to science is that it is being linked to a dogma [evolution] that can't stand close examination in order to further an ideological agenda that goes way beyond the proper concerns of science."¹⁰⁷ Dogmatic commitment to

¹⁰⁵ Scientists committed to philosophical naturalism do not claim to have found the precise answer to every problem, but they characteristically insist that they have the important problems sufficiently well in hand that they can narrow the field of possibilities to a set of naturalistic alternatives. Absent that insistence, they would have to concede that their commitment to naturalism is based upon faith rather than proof. Such a concession could be exploited by promoters of rival sources of knowledge, such as philosophy and religion, who would be quick to point out that faith in naturalism is no more "scientific" (i.e. empirically based) than any other kind of faith.

JOHNSON, *supra* note 1, at 5. This blind commitment to naturalism is apparent in the *Freiler* court's protection of evolution from religious criticism.

¹⁰⁶ See *id.* at 14.

It may well be, however, that there are certain questions—important questions, ones to which we desperately want to know the answers—that cannot be answered by the methods available to our science. These may include not only broad philosophical issues such as whether the universe has a purpose, but also questions we have become accustomed to think of as empirical, such as how life first began or how complex biological systems were put together.

Id.

¹⁰⁷ *Id.* at 37.

the theory of evolution contaminates science and cripples its ability to find truth.

Science is “the systematic knowledge of the physical or material world gained through observation and experimentation.”¹⁰⁸ Any scientific claim of knowledge must exist within the boundaries of this definition; therefore, science cannot make an assertion of truth that is not based on observation and experimentation of the physical or material world.

The genuine scientist is aware of the limits of his discipline and does not aspire to the role of priest, ruler, or artist. Nor can the genuine scientist be misled into thinking it his duty to evangelize the world with the gospel of skepticism. On the contrary, it is only in accepting the existence of a transcendent order and an objective reality that the scientist finds an anchorage for his work and can pursue pure science, which is “the pursuit of truth, with no end except the apprehension of the truth.”¹⁰⁹

Since the origin of life and matter is neither observable nor capable of experimentation, any claim that science makes about the origin of life and matter is speculative at best. Ironically, evolutionists reject creationism because it fails to meet these two criteria, yet the theory of evolution faces the same limitation.

2. The “Grand Theory”¹¹⁰ of Evolution

According to the theory of evolution, “life developed gradually from nonliving matter to its present state of diverse complexity through purposeless natural mechanisms that are known to science.”¹¹¹ From this “we can extrapolate from the very modest amount of evolution that can actually be observed, to a grand theory that explains how moths, trees, and scientific observers came to exist in the first place.”¹¹² In making these claims, evolution postulates a metaphysical system that contradicts religious notions of the origin of life and matter.¹¹³

“[T]he Darwinists have established philosophical naturalism as educational orthodoxy in a nation in which the overwhelming majority of people express some form of theistic belief inconsistent with naturalism.”¹¹⁴ They have achieved this success by defining evolution vaguely enough to permit theistic interpretation.¹¹⁵ But, in actuality,

¹⁰⁸ WEBSTER’S ENCYCLOPEDIA UNABRIDGED DICTIONARY 1716 (1996).

¹⁰⁹ Beer, *supra* note 3, at 30.

¹¹⁰ JOHNSON, *supra* note 1, at 2

¹¹¹ *Id.* at 33.

¹¹² *Id.* at 2.

¹¹³ *Id.*

¹¹⁴ *Id.* at 10.

¹¹⁵ *Id.* at 33.

theism is irreconcilable with the basic tenets of evolution. By extracting the possibility of theism from the definition, evolution is limited to an atheistic definition based on naturalism and mechanization.

3. Properly Defining the Theory of Evolution

By realizing that evolution cannot explain the origin of life and matter, the proper scope of scientific inquiry can be defined. Thus, when educators introduce evolution into science class, it will be subject to critical discussion just like other scientific theories. But, science educators must define "evolution' precisely . . . use it consistently"¹¹⁶ and show the boundaries of its application. If the theory of evolution is subject to proper scientific limitations, then there is no need for a disclaimer. Students would know that evolution cannot determine the origin of life and matter. Furthermore, parental concerns that their children are being indoctrinated instead of educated would be sated.

IV. CONCLUSION

Religion and science are integral parts of a progressive, ordered society. However, both disciplines have boundaries. When both function within their respective limitations, the interests of society are well-served; however, when either encroaches on the domain of the other, societal order is disrupted. To remedy an encroachment, the violation must be accurately defined and addressed. In *Freiler v. Tangipahoa Parish Board of Education*, the court failed to correctly identify the problem, then offered an inappropriate remedy. Since the theory of evolution cannot explain the origin of life and matter, the School Board's disclaimer appropriately cabins the extent of scientific exploration. This disclaimer is an expression of respect for the democratic will of the people. The court should have applied a deferential standard to both the first and second prongs of the *Lemon* test in order to encourage critical thinking and to protect the sensitivities and sensibilities of parents and students.

In denying the School Board's writ of certiorari, the Supreme Court of the United States missed an opportunity to correct the Fifth Circuit's misunderstanding of the First Amendment,¹¹⁷ to recognize that "we are a religious people whose institutions presuppose a Supreme Being,"¹¹⁸ and to prohibit the invasion of science into the sphere of religious inquiry. Public schools should encourage honest, critical debates regarding the

¹¹⁶ *Id.* at 37.

¹¹⁷ *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251 (2000) (mem.), *denying cert.* to 201 F.3d 602 (5th Cir. 2000), *denying reh'g en banc* to 185 F.3d 337 (5th Cir. 1999).

¹¹⁸ *Zorach*, 343 U.S. at 313.

interrelation of religion and science to foster appreciation for the role of both in our society as we consider the challenges and discoveries of the twenty-first century.

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