

Selman v. Cobb County School District:
The Evolution of Establishment Clause Jurisprudence

By

Matthew Cutchen*

Introduction

[1] “The attempts to maintain a uniform orthodox opinion among teachers should be opposed. . . . The attempts of education authorities to inject into public schools and colleges propaganda in the interest of any particular theory of society to the exclusion of others should be opposed.”¹ In *Selman v. Cobb County School District*, plaintiffs challenged the constitutionality of a sticker placed on the science textbooks in a public school district.² The United States District Court for the Northern District of Georgia found that the sticker, which stated that evolution, was “a theory . . . [and] . . . should be . . . critically considered,”³ violated the Establishment Clause of the Constitution.⁴

* Graduate of the Walter F. George School of Law at Mercer University in Macon, Georgia. History and Geography teacher in the public schools of Tampa, Florida. During his tenure at Mercer, clerked for the Paul Perez, U. S. Attorney for the Middle District of Florida, and Justice Hugh P. Thompson of the Supreme Court of Georgia. Currently, a lieutenant (junior grade) in the Judge Advocate General’s Corps of the United States Navy.

¹ American Civil Liberties Union, *The Fight for Free Speech: A Brief Statement of Present Conditions in the United States and of the Work of the American Civil Liberties Union Against the Forces of Suppression*, 17-18 (1921).

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

³ *Id.* at 1292.

⁴ *Id.* at 1313.

[2] The case is significant because the trial court found that a legitimate secular purpose existed.⁵ It was not until the court determined that the primary effect of placing the sticker on science textbooks was to advance religion that the validity of the sticker was in jeopardy.⁶ At that point of the analysis, though, the court failed to consider the myriad scientific theories outside of Darwinist evolution. Thus, the court limited any scientific discussion of the origin of life to Darwin's theory of evolution. Moreover, the sticker does not refer to religion.⁷ Since there is a legitimate secular purpose, other non-religious theories of the evolution of life exist, and the sticker does not endorse a religious perspective; the sticker does not violate the Establishment Clause.

I. Factual Background

[3] Originally, the Cobb County School District ("District") supported a bifurcated approach to the teaching of human origins.⁸ The 1995 policy stated that the "instructional program and curriculum of the school system shall be planned and organized with respect for . . . family teachings" that reference creationism.⁹ In addition, texts on creation-science theory were required in school libraries.¹⁰ Paying homage to the Dark Ages, the policy went on to say that "[n]o . . . study dealing with theories of the origin of human species shall be required. . . ."¹¹

⁵ *Id.* at 1305.

⁶ *Id.* at 1312.

⁷ *Id.* at 1292.

⁸ *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1289-90.

⁹ *Id.* at 1289.

¹⁰ *Id.* at 1290.

¹¹ *Id.*

[4] Enlightened by new developments and new attitudes toward science, the Cobb County School Board (“Board”) revised the District’s policy to strengthen instruction on evolution.¹² In 2002, the Board acknowledged the benefit of studying matters of intense discussion among scholars, including the origin of species.¹³ As part of this enlightenment, the Board revised the District’s policy to encourage the teaching of evolution.¹⁴ The Board also adopted new standards within the Quality Core Curriculum.¹⁵ Those standards required students to “demonstrate proficiency in understanding . . . aspects of the theory of origins” and the impact of the theory.¹⁶

[5] The Board went even further when it adopted a new science textbook for its high schools.¹⁷ George Stickel, supervisor of the high school science curriculum, saw “the [new] textbook as offering a comprehensive perspective of current scientific thinking regarding theory of origins.”¹⁸ The Board offered parents an opportunity to comment on the new text.¹⁹ Of three parents who submitted formal comments, one parent praised the inclusion of evolution, one parent did not comment specifically on evolution, and one parent criticized the presentation of

¹² *Id.* at 1292.

¹³ *Id.* at 1296.

¹⁴ *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1296.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1292.

¹⁸ *Id.* at 1291.

¹⁹ *Id.*

evolution.²⁰ The critical parent based her objection on religious grounds.²¹ The Board also received further complaints from several parents that the book did not present any of the scientific criticisms of the theory of evolution.²²

[6] In response, the Board consulted legal counsel to determine a constitutionally viable way to assuage the parents' concerns.²³ The Board decided to place a sticker on the inside of the science texts with language drafted by the Board's counsel.²⁴ The sticker reads: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living thing [*sic*]. This material should be approached with an open mind, studied carefully, and critically considered."²⁵

[7] Purposes stated by the Board for adopting the sticker vary.²⁶ The most prominent of those purposes include the enrichment of critical thinking, the introduction to the controversy regarding several possible theories, the desire to encourage teachers to teach the subject, and the need to notify parents.²⁷ The Board directed the language toward evolution because evolution

²⁰ Selman v. Cobb County Sch. Dist., 390 F. Supp.2d at 1291.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 1292.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Selman v. Cobb County Sch. Dist., 390 F. Supp.2d at 1292-94.

²⁷ *Id.*

“was the only subject creating the controversy.”²⁸ It cannot be denied, however, that the religious beliefs of some parents played a role in the adoption of the sticker.²⁹

[8] Plaintiffs sought an injunction under 42 U.S.C. § 1983.³⁰ Plaintiffs claimed the sticker violated the Establishment Clause of the Constitution.³¹ The court held that a sticker placed in a public school biology textbook claiming that evolution is merely a theory to be considered critically violates the Establishment Clause of the Constitution.³²

II. Legal Background

A. A Brief History of the Establishment Clause

[9] The struggle to define the boundaries between government and religion is evident throughout the history of the United States.³³ From the colonial era to the Court’s most recent term, both the people and the courts have followed a winding path in Establishment Clause legislation and jurisprudence.³⁴ While a review of the case law is required, the *Selman* decision does not hinge on a specific case precedent. Considering that there are no cases directly on point

²⁸ *Id.* at 1294.

²⁹ *Id.* at 1291.

³⁰ *Id.* at 1288.

³¹ *Id.*

³² *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1313.

³³ *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984).

³⁴ *Id.*

for deciding *Selman v. Cobb County*, this court did expand the Establishment Clause further than any previous court that dealt with teaching evolution in public schools.³⁵

[10] The original intent of the Founders in writing the Establishment Clause is muddled at best. First, a debate raged at the Constitutional Convention as to whether prayer should open the session.³⁶ The majority ruled against praying.³⁷ The Constitution itself makes only minimal religious references.³⁸ At the same time, however, prior to passing the Bill of Rights, Congress passed several thanksgiving bills containing open references to God over objection of those wishing to maintain a strict separation of religion and government.³⁹ The country was already finding difficulty defining the appropriate level of separation.

[11] The language of the First Amendment seemingly ended the controversy, stating that “Congress shall make no law regarding the establishment of religion.”⁴⁰ However, that language was a compromise.⁴¹ In debating the language of the amendment, Representative James Madison argued that the clause should refer to “any national religion,” implying a disavowal of state sponsorship like that of England’s Anglican Church.⁴² The Virginia delegation proposed

³⁵ See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (determining the constitutionality of prohibiting evolution instruction in public schools).

³⁶ JAMES H. HUTSON, *RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC* 76 (1998).

³⁷ *Id.*

³⁸ See U.S. CONST. art. I, § 7, cl. 2; U.S. CONST. art. VII.

³⁹ See *Lynch*, 465 U.S. at 675.

⁴⁰ U.S. CONST. amend. I.

⁴¹ See HUTSON, *supra* note 36, at 78.

⁴² *Id.*

that no particular Christian sect should receive favored treatment over another.⁴³ Some went further by wanting to allow the government to support Christianity in a non-coercive manner.⁴⁴ In a letter to the Danbury Baptist Association, Thomas Jefferson referred to the oft-repeated “wall of separation,” indicating he desired to block any connection between government and organized religion.⁴⁵ As president however, Jefferson conceded to states the authority to discipline religion.⁴⁶ He also regularly attended church services held in the hall of the House of Representatives.⁴⁷ Subsequent presidents resumed the Thanksgiving proclamations.⁴⁸ Thus, the only guidance provided by the Founders is that the First Amendment represents a delicate balance between religious ideals of the majority and the free exercise of religion (or non-religion) of the minority interpreted through a contemporary lens.

B. Case Law Interpreting the Establishment Clause

1. Accommodation Required

[12] With few exceptions, the field of Establishment Clause jurisprudence laid fallow until 1947. In *Everson v. Board of Education*, the school district subsidized bus fares for all students attending elementary and secondary schools.⁴⁹ The subsidization included students who attended

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 92-93.

⁴⁶ *Id.* at 93.

⁴⁷ HUTSON, *supra* note 36, at 93.

⁴⁸ *Id.* at 96.

⁴⁹ *See Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947).

Catholic schools.⁵⁰ The Supreme Court held that subsidizing bus fares for students, including those attending sectarian schools, is constitutional.⁵¹ The Court reasoned that the funding was appropriate because the aim of the school board was to protect children.⁵² In introducing its accommodation principle, the Court announced that “[s]tate power is no more to be used so as to handicap religions than it is to favor them.”⁵³

[13] A significant case elucidating accommodation of religion within the public square is *Lynch v. Donnelly*. The Court declared that a publicly funded crèche display on public property during Christmas does not violate the Establishment Clause.⁵⁴ According to the Court, accommodation is a fundamental requirement of the Establishment Clause.⁵⁵ Moreover, accommodation is beyond mere “tolerance.”⁵⁶ “[N]ot every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon [religion] is, for that reason alone, constitutionally invalid.”⁵⁷

⁵⁰ *Id.*

⁵¹ *Id.* at 17.

⁵² *Id.*

⁵³ *Id.* at 18.

⁵⁴ *See Lynch v. Donnelly*, 465 U.S. at 687 (1984).

⁵⁵ *Id.* at 673.

⁵⁶ *Id.*

⁵⁷ *Id.* at 683 (citing *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

[14] In its analysis of *Lynch*, the Court identifies two circumstances under which a government action advances religion.⁵⁸ First, a government action violates the Establishment Clause if “there [is] no question that the statute or activity was motivated wholly by religious considerations.”⁵⁹ In addition, a statute violates the Establishment Clause when the statute grants an important governmental power to churches.⁶⁰

[15] *Lynch* is perhaps most significant for the introduction of the endorsement test in Justice O’Connor’s concurrence.⁶¹ The endorsement test has two elements; failing either element means a violation of the Establishment Clause.⁶² First, the subjective intention of the speaker must be to endorse religion.⁶³ Second, the objective meaning of the language of the statement within the community must endorse religion.⁶⁴ The objective meaning may not necessarily “endorse” religion even if the statement’s primary effect advances religion.⁶⁵ Justice O’Connor held that the city government violated neither element when it placed the crèche in the public square.⁶⁶ According to Justice O’Connor, the city’s subjective secular purpose was a general celebration of

⁵⁸ *Id.* at 680.

⁵⁹ *Id.* (citing *Epperson v. Arkansas*, 393 U.S. at 107-09).

⁶⁰ *See Lynch*, 465 U.S. at 683 (citing *Larkin v. Grendel’s Den*, 459 U.S. 116 (1982)).

⁶¹ *See Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

⁶² *See id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *See id.* at 691-92.

⁶⁶ *Id.* at 691 (O’Connor, J., concurring).

a culturally significant holiday with its traditional symbols.⁶⁷ Those symbols are constitutional “even if they also have religious aspects.”⁶⁸ Additionally, she concluded, the objective meaning of the statement within the community was not one of endorsement.⁶⁹ Based on the setting, which included other traditional symbols, as well as the lack of political divisiveness, the crèche did not objectively endorse religion.⁷⁰

[16] *Lynch* is instructive for the facts of *Selman*. First and foremost, the Establishment Clause allows accommodation of religious perspectives.⁷¹ The teaching of evolution has a profound effect on humanity’s place in the universe. It touches not only biology, but astronomy, religion and philosophy, as well. The fact that the theory offends certain religious beliefs is not unexpected. The sticker is also the result of parents who were disappointed in the textbook’s lack of criticism of some of the weaker points of Darwinist evolution.⁷² Moreover, the sticker merely accommodates those whose fundamental beliefs are contrary to evolution. Since there is no reference to religion, religion is neither advanced nor impugned. Diminishing Darwinism does not automatically benefit or endorse religious ideas of creation. Combined with the secular purposes found by the trial court,⁷³ it is reasonable to presume that the sticker is a constitutional accommodation.

⁶⁷ *Lynch v. Donnelly*, 465 U.S. at 691.

⁶⁸ *Id.*

⁶⁹ *Id.* at 692.

⁷⁰ *See id.* at 692-93.

⁷¹ *See id.* at 673.

⁷² *See Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1291.

⁷³ *See id.* at 1305.

[17] The *Lynch* Court gives the principle effect prong of the *Lemon* test extensive treatment.⁷⁴ *Lynch* cites several cases demonstrating the expansive boundaries of the primary effects prong of the test.⁷⁵ For example, appropriating non-specific grants to church-sponsored colleges and universities is constitutional according to *Roemer v. Board. of Public Works*.⁷⁶ With such precedent, religiously neutral language in a sticker should be well within the constitutional limits of the Establishment Clause.

[18] Applying the reasoning of O'Connor's concurrence in *Lynch* could have led to a finding for the school board in *Selman*, as well. Furthermore, to be an Establishment Clause violator, the subjective intent of the statement must be to endorse religion.⁷⁷ Based on the testimony of the board members, the court found that the intent was not to endorse religion.⁷⁸ Thus, the subjective intent of the school board is without reproach, according to the trial court.⁷⁹

[19] The objective prong must then be determinative of constitutionality. In *Selman*, the plain language of the sticker does not refer to, much less endorse, religion. If any endorsement can be

⁷⁴ See *Lynch v. Donnelly*, 465 U.S. at 681-83.

⁷⁵ *Id.* at 681-82. See, e.g., *Roemer v. Bd. of Pub. Works*, 426 U.S. 736 (1976); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday closing laws); *Zorach v. Clauson*, 343 U.S. 306 (1952) (allowing release time program for religious training).

⁷⁶ *Roemer*, 426 U.S. at 766.

⁷⁷ See *Lynch*, 465 U.S. at 690.

⁷⁸ *Selman*, 390 F. Supp.2d at 1305 (finding that the secular purposes iterated by the school board were not "sham" purposes).

⁷⁹ *Id.*

deciphered, it is certainly “‘indirect,’ ‘remote,’ or ‘incidental.’”⁸⁰ Thus, an unengaged observer would detect no objective endorsement of religion.

[20] However, the court must weigh the meaning of the statement to an informed objective observer as well. *Selman* seems to differ from *Lynch* in this instance. In *Selman*, the nature of the sticker appears singular because it references only evolution, whereas the crèche in *Lynch* was part of a traditional ensemble of symbols in a holiday setting.⁸¹ That should not be dispositive, because the court must factor in the context of the sticker, much as the Court did with the crèche in *Lynch*.⁸² Here, the perspective of the reader of the sticker is not just the text but the entire science curriculum of Cobb County. Recently, Cobb County School District dramatically increased its focus on evolution.⁸³ Factoring in that the engaged objective observer would also be aware that Cobb County had greatly improved and increased its evolution curriculum, the setting seems much more like accommodation than endorsement.

2. *Lemon* Test Applied to the Evolution Curriculum in Public Schools

[21] From the late 1800’s until the middle of the twentieth century, scientists began to accept Darwin’s evolution as the dominant theory of the origin of all life.⁸⁴ This acceptance led to the introduction of evolution into the curriculum of schools around the country. However, not all school districts were prepared to teach a subject that appears to contradict the religious beliefs of

⁸⁰ *Lynch v. Donnelly*, 465 U.S. at 683 (citing *Committee for Public Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 771 (1973)).

⁸¹ Compare *Selman v Cobb County Sch. Dist.*, F. Supp.2d at 1294, 1304, with *Lynch*, 465 U.S. at 691.

⁸² See *Lynch*, 465 U.S. at 691.

⁸³ See *Selman*, F. Supp.2d. at 1290-91.

⁸⁴ DAVID YOUNG, *THE DISCOVERY OF EVOLUTION*, 219 (1992).

many of its citizens.⁸⁵ Thus, several states passed laws affecting the teaching of evolution.⁸⁶

Plaintiffs often challenged these measures for violating the Establishment Clause of the Constitution.⁸⁷

[22] The seminal constitutional case dealing with evolution in the public schools is *Epperson v. Arkansas*.⁸⁸ In *Epperson*, Arkansas passed a law that made 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.”⁸⁹ In deciding *Epperson*, the Court relied on the *Everson* analysis, requiring the government to remain denominationally neutral in matters of religion.⁹⁰ The Court reasoned that Arkansas proscribed teaching evolution “for the sole reason that it is deemed to conflict with a particular religious doctrine.”⁹¹ To support its conclusion, the Court stated that Arkansas did not eliminate all discussion of the origin of humanity, only evolution.⁹²

Conceivably, the state could allow teachers to teach creationism. Furthermore, the intent of the

⁸⁵ Deborah Jordan Brooks, *Substantial Numbers of Americans Continue to Doubt Evolution as Explanation for Origin of Humans*, GALLUP NEWS SERVICE, March 5, 2001, available at <http://www.asa3.org/archive/asa/200103/0031.html> (citing a 2001 poll that found only about one in ten Americans believe in non-theistic evolution).

⁸⁶ See, e.g., LA. REV. STAT. ANN §§ 17:286.1 – 17:286.7 (2004); ARK. CODE ANN. §§ 80-1627, 80-1628 (2005).

⁸⁷ See, e.g., *Edwards v. Aguillard*, 482 U.S. 578 (1987).

⁸⁸ *Epperson v. Arkansas*, 393 U.S. 97 (1968).

⁸⁹ *Id.* at 98-99.

⁹⁰ *Id.* at 103-04.

⁹¹ *Id.* at 103.

⁹² *Id.* at 109.

law was “confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account”⁹³ Thus, Arkansas failed to maintain neutrality between the different understandings of human origins.⁹⁴

[23] On its face, *Epperson* appears instructive for the Court in *Selman*. The Arkansas statute did not allude to religion in banning the teaching of evolution. In fact, the state’s supreme court upheld the law as an “exercise of the State’s power to specify the curriculum in public schools.”⁹⁵ However, the Arkansas limitation is far more dramatic in its effect than is the sticker in *Selman*. The Arkansas ban deprived students of knowledge, promoting religious beliefs at the expense of scientific inquiry. That was the harm caused, and it was harm created to benefit particular religious beliefs.

[24] *Selman* differs from *Epperson*, though. First, the standard against which the Arkansas legislature graded evolution was the Bible, prohibiting only material contrary to the Bible.⁹⁶ Thus, the Court reasonably concluded that the state did more than simply accommodating religion.⁹⁷ In *Selman*, Cobb County allowed, and perhaps even encouraged, the teaching of evolution.⁹⁸ The sticker, unlike the statute, did not harm students by precluding them from certain controversial material.

⁹³ *Id.*

⁹⁴ *Epperson v. Arkansas*, 393 U.S. at 109.

⁹⁵ *Id.* at 101.

⁹⁶ *Id.* at 107-08.

⁹⁷ *Id.* at 109.

⁹⁸ *See Selman v. Cobb County Sch. Dist.*, F. Supp.2d at 1291.

[25] The progeny of *Epperson*, upon which the trial court relied predominately, is easier to distinguish from the facts of *Selman*. After *Epperson*, schools began teaching evolution. However, evolution remained subordinate to the Bible.⁹⁹ It would be several years before the Supreme Court would hear a case based on the new dispute between teaching both evolution and creationism in public schools.¹⁰⁰ In the meantime, several lower federal courts ruled on cases following the *Epperson* precedent.

[26] *Daniel v. Waters* presented the initial challenge.¹⁰¹ In *Daniel*, the Tennessee legislature enacted a statute calling for “balanced treatment” of evolution and creationism.¹⁰² The statute first required any textbook containing material on evolution to carry a disclaimer stating that evolution does not represent scientific fact.¹⁰³ In addition, any textbook mentioning evolution had to include material on Creationism as illustrated in Genesis.¹⁰⁴ Furthermore, the statute specifically excluded the Bible from requiring a disclaimer.¹⁰⁵

[27] The *Daniel* court held that the primary effect of the statute gave preference to certain religious beliefs.¹⁰⁶ The court conceded that “[c]ourts . . . cannot intervene in the resolution of

⁹⁹ See, e.g., *Daniel v. Waters*, 515 F.2d 485 (6th Cir. 1975); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E. D. Ark. 1982).

¹⁰⁰ *Edwards v. Aguillard*, 482 U.S. 578 (1986).

¹⁰¹ *Daniel*, 515 F.2d 485.

¹⁰² *Id.* at 487.

¹⁰³ *Id.*

¹⁰⁴ *Id.*.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 491.

conflicts . . . which do not directly and sharply implicate basic constitutional values.”¹⁰⁷

However, Judge Edwards reasoned that the “result of the legislation is a clearly defined preferential position for the Biblical version of creation.”¹⁰⁸ Enforcing such a preference is “to accomplish the very establishment of religion which the First Amendment to the Constitution of the United States squarely forbids.”¹⁰⁹

[28] *Daniel* is clearly distinguishable from *Selman*. The statute in *Daniel* had one of two effects. The obvious effect is the one to which the statute speaks. Science teachers will be required to teach Creationism, a specific religious theory, along with evolution.¹¹⁰ Alternatively, it could effectively end the teaching of evolution if biology teachers refuse to teach Creationism. This effect would parallel the purpose of the Arkansas statute in *Epperson*.¹¹¹ Either effect warrants a finding of unconstitutionality.

[29] *McLean v. Arkansas Bd. of Educ.* deals with an issue similar to that of *Daniel*.¹¹² In *McLean*, the Arkansas legislature passed Act 590 calling for the balanced treatment of “creation-science” and “evolution-science.”¹¹³ The act prohibited the teaching of evolution in public schools unless accompanied by instruction about “creation-science.”¹¹⁴ Teachers were to

¹⁰⁷ *Daniel v. Waters*, 515 F.2d at 490.

¹⁰⁸ *Id.* at 489.

¹⁰⁹ *Id.*

¹¹⁰ See 1973 Tenn. Pub. Acts ch. 377.

¹¹¹ See *Epperson v. Arkansas*, 393 U.S. at 107.

¹¹² *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255 (E.D. Ark. 1982).

¹¹³ *Id.* at 1256 (citing ARK. STAT. ANN § 80-1663 (1981)).

¹¹⁴ *Id.*

implement “creation-science,” rather than creationism, in biology classrooms.¹¹⁵ Basically, “creation-science” states that there is scientific evidence for the following: (1) sudden creation of the universe; (2) natural selection being an insufficient mechanism to explain biological diversity; (3) transmutation of species not being possible; (4) humans not evolving from apes; (5) a worldwide flood that explains geological formations entirely, and; (6) the earth being less than 20,000 years old.¹¹⁶

[30] The court in *McLean* also applied the *Lemon* analysis.¹¹⁷ Ultimately, the statute was unconstitutional because it failed all three prongs of the *Lemon* test.¹¹⁸ First, the court found that the author and the sponsor of the bill were motivated solely by religious beliefs.¹¹⁹ Second, since “creation-science” was simply a reiteration of the first chapters of Genesis without solid scientific reasoning, the primary effect was the advancement of religion.¹²⁰ Lastly, entanglement is unavoidable because the state will have to require teachers to do the impossible - teach Genesis in a secular manner.¹²¹

¹¹⁵ *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. at 1256.

¹¹⁶ *Id.* at 1264.

¹¹⁷ *Id.* at 1258. The three prongs of the *Lemon* test are: (1) the statute must have a secular legislative purpose; (2) its primary effect must not advance nor inhibit religion; and (3) the statute must not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

¹¹⁸ *McLean*, 529 F. Supp. at 1264, 1272.

¹¹⁹ *Id.* at 1263.

¹²⁰ *Id.* at 1264.

¹²¹ *Id.* at 1272.

[31] The Supreme Court case of *Edwards v. Aguillard* presented a similar statute.¹²²

Louisiana passed the Creationism Act, forcing schools to give balanced treatment to “creation-science” and “evolution-science.”¹²³ Again, the issue before the Court in *Edwards* was whether the act was a violation of the Establishment Clause.¹²⁴ According to Louisiana officials, the act promoted academic freedom.¹²⁵ However, the Court disagreed.¹²⁶ Utilizing the endorsement test, the Supreme Court held that the “Act furthers religion in violation of the Establishment Clause.”¹²⁷

[32] While the facts of *McLean* and *Edwards* signal clearly unconstitutional action, the reasoning used by the court is instructive for *Selman*. First, both the Arkansas act and the Louisiana act call for teaching Genesis, though veiled as “creation-science.”¹²⁸ The facts of *Selman* are not nearly so egregious. There is no requirement to supplement evolution instruction with any religious “science” or belief.

[33] Second, an analysis of the facts of *Edwards* generates a different conclusion than the facts of *Selman* will. In *Edwards*, the Court did not accept “academic freedom” as the actual purpose for the legislation.¹²⁹ When the Court dismissed the only secular purpose for the act, the

¹²² *Edwards v. Aguillard*, 482 U.S. 578 (1987).

¹²³ *Id.* at 581 (citing LA. REV. STAT. ANN. §§ 17:286.1 – 17:286.7 (1982)).

¹²⁴ *Edwards*, 482 U.S. at 580-81.

¹²⁵ *Id.* at 581.

¹²⁶ *Id.* at 586-87.

¹²⁷ *Id.* at 593.

¹²⁸ See note 87, *supra*.

¹²⁹ See *id.* at 586-87.

only remaining purpose was to advance religion.¹³⁰ Thus, the statute was unconstitutional.¹³¹

That is not the case in *Selman*. Here, the court accepts that the sticker has a secular purpose.¹³²

Thus, the sticker meets the first standard of both the *Lemon* test and the endorsement test.

[34] Moreover, the logic of the *McLean* court could support a finding for Cobb County in the

Selman case. The *McLean* court repeatedly criticized the creationists for adopting an overly

simplistic dichotomy to explain the origins of man.¹³³ There, the defenders of the act argued a

“contrived dualism that assumes only two explanations for the origins of life . . . It was either the work of a creator or it was not.”¹³⁴ Unfortunately, Judge Cooper repeats the mistake of the

McLean creationists in *Selman*. The judge concluded that, if the sticker discourages acceptance

of the Darwinist theory of evolution, the only alternative theory is creationism.¹³⁵ That simply is

not true, according to the *McLean* court.¹³⁶ Lastly, “[a] theory that is by its own terms dogmatic,

absolutist and never subject to revision is not a scientific theory.”¹³⁷ Evolution must remain open

¹³⁰ See *Edwards v. Aguillard*, 482 U.S. at 594.

¹³¹ See *id.* at 593.

¹³² See *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1303.

¹³³ See, e.g., *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. at 1260.

¹³⁴ *Id.* at 1266.

¹³⁵ See *Selman*, 390 F. Supp.2d at 1308-09.

¹³⁶ Cf. *McLean*, 529 F. Supp. at 1267 (listing several alternatives to a purely natural selection mechanism), 1269 (theorizing that an astronomical event might have seeded the earth).

¹³⁷ *Id.*

to criticism in order to maintain its scientific status.¹³⁸ Therefore, the primary effect of the *Selman* sticker need not be limited to bolstering religious beliefs.

[35] The facts of *Freiler v. Tangipahoa Parish Board of Education*¹³⁹ are similar to those of *Selman*. In *Freiler*, the school board required teachers to read a disclaimer aloud prior to beginning any instruction on evolution.¹⁴⁰ The statement “urged [students] to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion” about the origin of life.¹⁴¹ The disclaimer also stated that material on evolution is “not intended to influence or dissuade the Biblical version of Creation or any other concept.”¹⁴² Predictably, the court held that the disclaimer was unconstitutional.¹⁴³

[36] In applying a *Lemon* analysis, the court reasoned that the school board’s purpose to disclaim any orthodoxy of belief and reduce offense to student and parent sensibilities was constitutional.¹⁴⁴ The disclaimer did not survive the second prong of the *Lemon* test, though.¹⁴⁵ The statement appears to encourage critical thinking.¹⁴⁶ However, the statement’s own language gives special protection to the Biblical creation by discouraging students from applying those

¹³⁸ *Id.* at 1267 (identifying criteria that constitute science).

¹³⁹ *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999).

¹⁴⁰ *Id.* at 341.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 341.

¹⁴⁴ *Id.* at 344.

¹⁴⁵ *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d at 344-46.

¹⁴⁶ *Id.* at 345.

critical thinking skills to the Biblical creation story.¹⁴⁷ The school board apparently desires students to consider Darwinist ideas of origins critically but does not intend them to critically consider Biblical ideas of origins, at least in a public school science class. If the school had more definitively separated Genesis as a religion not subject to scientific inquiry or criticism because it is not a science, the disclaimer may have been constitutional.

[37] Once again, *Freiler* is distinguishable from *Selman*. First, the disclaimer in *Freiler* specifically references Biblical creationism.¹⁴⁸ Then the statement sets creationism apart from the critical inquiry applied to other theories. The disclaimer gives creationism prominence and probably even preference. Thus, the school board advanced religion, creating an Establishment Clause violation.

[38] Another noteworthy distinction is the method of delivery. Teachers were required to read the *Freiler* disclaimer to students immediately prior to beginning instruction on evolution.¹⁴⁹ This gives the statement a proximity to instruction that the *Selman* sticker does not have. Also, the verbal delivery by the teachers calls attention to the disclaimer, whereas a sticker in the front of the text may go unnoticed. Finally, because the teacher is the source of the disclaimer, it may give undue significance to the disclaimer. Thus, *Freiler* is not dispositive of the issue in *Selman*.

III. Scientific Background

[39] It is impossible to analyze *Selman* intelligently without a basic understanding of evolution's precepts and history. Many people misunderstand the idea of evolution. In addition,

¹⁴⁷ *Id.*

¹⁴⁸ *See id.* at 341.

¹⁴⁹ *Id.* at 346.

the scientific terminology is often confused with its colloquial counterparts. A brief science primer should elucidate any problems.

[40] Much confusion surrounds the word “theory.” One definition of “theory” is an “assumption or guess”¹⁵⁰ which is how many non-scientists would define “theory.”¹⁵¹ Scientists, however, use a different definition. “Scientific theories are explanations of natural phenomena built up logically from testable observations and hypotheses.”¹⁵² Essentially, a “theory” is an abstract construct or structure used to explain why nature behaves in a certain way.

[41] Another source of consternation is the desire of many non-scientists to organize certain labels hierarchically.¹⁵³ For example, a law is often deemed superior to a fact. A fact may be considered a law after extensive testing and clear proof.¹⁵⁴ A fact is superior to a hypothesis. A hypothesis (or “theory,” when too often misapplied) may become a fact after many successful experiments.¹⁵⁵ Thus, hypotheses are less significant than laws and should be viewed more critically. The misuse of “theory” often appears in this situation. Second, a theory is used to

¹⁵⁰ THE AMERICAN HERITAGE DICTIONARY 704 (Office ed., 1983).

¹⁵¹ *See Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1297.

¹⁵² National Academy of Sciences, *Frequently Asked Questions About Evolution and the Nature of Science*, available at <http://www.nap.edu/readingroom/books/evolution98/evol15.html> (last visited March 1, 2005).

¹⁵³ *See, e.g., Selman*, 390 F. Supp.2d at 1291.

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

explain *why* laws cause the phenomena scientists observe.¹⁵⁶ Theories “do not develop into laws with the accumulation of evidence. Rather, theories are the goal of science.”¹⁵⁷ Incorporating “theory” into the hierarchy is, once again, misusing the term.

[42] The concept of evolution generates as much or more confusion than the word “theory.” Contrary to popular belief, ideas about evolution predated Charles Darwin.¹⁵⁸ Darwin’s primary contribution to evolution was describing a mechanism causing evolution, natural selection.¹⁵⁹ Even then, Darwin did not posit the hypothesis that natural selection accounted for all of the species on Earth.¹⁶⁰ Understanding that animals within a population will breed to produce a new generation, the new generation will have variations caused randomly within the population.¹⁶¹ Certain variations will cause some of the species to flourish in their environment while other variations will actually hinder other individuals within the species, perhaps leading to extinction of those individuals within that same environment.¹⁶² When the second and successive generations mate, the surviving individuals that have the beneficial variation will likely mate

¹⁵⁶ National Academy of Sciences, Science and Creationism, *available at* <http://newton.nap.edu/html/creationism/introduction.html> (last visited on April 16, 2006).

¹⁵⁷ *Id.*

¹⁵⁸ See PETER J. BOWLER, EVOLUTION: THE HISTORY OF AN IDEA, (Revised ed., University of California Press 1989) (1983).

¹⁵⁹ See generally CHARLES DARWIN, ON THE ORIGIN OF THE SPECIES, A FACSIMILE (Harvard University Press 1996) (1859).

¹⁶⁰ *Id.* at 14 (stating that he [Darwin] was “convinced that natural selection has been the main but not the exclusive means of modification”).

¹⁶¹ *Id.* at 466-68.

¹⁶² *Id.* at 319-21.

with other individuals who have the beneficial variation.¹⁶³ Over time, the beneficial variation will emerge as the status quo within that environment.¹⁶⁴ Eventually, a new species will develop based on the initial random mutation, having adapted to the challenges of the environment.¹⁶⁵ Since the publication of *On the Origin of the Species*, scientists have challenged Darwinist evolution sufficiently to conclude that it is at least a valid theory explaining the diversity of life.¹⁶⁶

[43] That does not mean that Darwin's theory is without problems. First, if natural selection works gradually, one might expect fossilized evidence of such a progressive change. Instead, and for a variety of potential reasons, there is a dearth of transitional material.¹⁶⁷ Furthermore, the explosion of new species during the Cambrian Era suggests a rapid speciation during that time.¹⁶⁸ Other critics point to "irreducible complexity."¹⁶⁹ A complex organism is a mechanism dependent on several actions, without which the organism would fail.¹⁷⁰ According to Darwin, fundamentally complex organisms cannot exist.¹⁷¹ According to some critics however, certain

¹⁶³ See *id.* at 470-71.

¹⁶⁴ See *id.* at 134.

¹⁶⁵ DARWIN, *supra* note 159, at 87.

¹⁶⁶ See YOUNG, *supra* note 84.

¹⁶⁷ See PHILLIP E. JOHNSON, *DARWIN ON TRIAL* 50 (2d ed. 1993) (1991).

¹⁶⁸ *Id.*

¹⁶⁹ See, e.g., Douglas Wilson, *Neutrality and Evolution in Public Schools*, 7 TEX. REV. LAW & POL. 423 (2003).

¹⁷⁰ *Id.* at 434-35.

¹⁷¹ See CHARLES DARWIN, *THE ORIGIN OF SPECIES AND THE DESCENT OF MAN* 135 (Bennett A. Cerf & Donald S. Klopfer eds., The Modern Library 1859).

bacteria are complex organisms that are not reducible to simpler life forms.¹⁷² Even the Colorado Citizens for Science, a group that filed an amicus brief for the plaintiffs in *Selman*, conceded that “evolution is not a theory of the origin of life but is a theory concerning the origin of the diversity of life.”¹⁷³ As of today, these problems remain unsolved through Darwinist evolution.

[44] Consequently, the unsolved problems provide an opportunity which allows other scientists to introduce their own theories of evolution. The late Stephen Jay Gould, a professor of paleontology at Harvard, once advanced the idea of punctuated equilibrium.¹⁷⁴ Gould asserted that Darwinist adaptationism is insufficient to create the diversity of life on the planet.¹⁷⁵ Furthermore, drastic change in a species required drastic environmental change.¹⁷⁶ Otherwise, a species would remain generally within its *bauplan*, the structural limitation defining a species.¹⁷⁷ According to punctuated equilibrium, a species proceeds relatively unchanged throughout the generations.¹⁷⁸ When a significant new variable is introduced into the environment, adaptation and natural selection will favor those individuals more suited to the new situation.¹⁷⁹

¹⁷² *Id.*

¹⁷³ Brief of Colorado Citizens for Science et al. as Amicus Curiae Supporting Plaintiff at 4, *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005) (No. 88).

¹⁷⁴ MICHAEL RUSE, *THE EVOLUTIONARY WARS: A GUIDE TO THE DEBATES* 233-34 (2001) (2000).

¹⁷⁵ *Id.* at 236.

¹⁷⁶ See STEPHEN J. GOULD, *THE STRUCTURE OF EVOLUTIONARY THEORY* 835 (The Belknap Press 2002).

¹⁷⁷ See RUSE, *supra* note 174, at 240.

¹⁷⁸ See GOULD, *supra* note 176, at 776.

¹⁷⁹ See RUSE, *supra* note 174, at 233-34.

[45] Punctuated equilibrium differs from Darwin's natural selection. First, speciation in punctuated equilibrium occurs relatively quickly compared to the gradual process envisioned by Darwin's natural selection.¹⁸⁰ Also, punctuated equilibrium requires a major alteration to the environment for speciation to occur.¹⁸¹

[46] When punctuated equilibrium was first disseminated, the scientific community saw punctuated equilibrium as a challenge to Darwinist evolution.¹⁸² Later, Gould pushed for an expanded view of Darwinist evolution, one where natural selection was not the sole mechanism for change.¹⁸³ That was not enough to satisfy some Darwinist proponents. One critic states that Gould "should be more respectful of and appreciative toward the ideas that have been developed and inherited.... It is not just that Gould's ideas are wrong. . . . [T]hey are presented as [the] position of reason and tolerance and common sense, and the outside world believes him. That really irritates."¹⁸⁴

[47] Random drift is a second theory of origins other than Darwinist evolution with support in the scientific community. According to supporters of this theory, many variations develop among species that have nothing to do with adapting to the environment.¹⁸⁵ The variations result

¹⁸⁰ Compare DARWIN, *supra* note 159, at 108-109, with GOULD, *supra* note 176, at 835.

¹⁸¹ See GOULD, *supra* note 176, at 835.

¹⁸² YOUNG, *supra* note 84, at 229.

¹⁸³ YOUNG, *supra* note 84, at 229.

¹⁸⁴ RUSE, *supra* note 175, at 248.

¹⁸⁵ JOHN BEATTY, KEYWORDS IN EVOLUTIONARY BIOLOGY 273 (Evelyn Fox Keller & Elisabeth A. Lloyd eds. 1992).

in individuals who are equally fit for the environment.¹⁸⁶ J. T. Gulik posited that a natural catastrophe, a volcano for example, could indiscriminately kill a significant number of one variation of the species. Thus, the succeeding generation would exhibit the variation inherited from the survivors for no other reason than that the parenting generation did not live near the volcano.¹⁸⁷

[48] A variation of random drift is the divergent evolution of recently isolated breeding groups.¹⁸⁸ This concept applies to a smaller group of individuals separated from the larger majority.¹⁸⁹ The “newly split-off group, especially if small, would be unlikely to have all the inheritable variations – and certainly not in the same proportions – as the original group.”¹⁹⁰ Over time, certain genetic traits will disappear from a limited gene pool based solely on chance rather than any environmental force.¹⁹¹ According to Sewall Wright, a major proponent of random drift, if the population is not infinitely large, some factor other than natural selection and mutation must be at work.¹⁹²

[49] Disputes developed over the role of random drift in evolution.¹⁹³ Initially, scientists viewed random drift as a separate agent of evolution.¹⁹⁴ Later, Sewall Wright “regarded

¹⁸⁶ *Id.* at 274.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 276.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ BEATTY, *supra* note 185, at 275.

¹⁹² BEATTY, *supra* note 185, at 275.

¹⁹³ BEATTY, *supra* note 185, at 278.

evolution by random drift not as a strict alternative to evolution by natural selection but, rather, as a principal component of evolution by natural selection.”¹⁹⁵ Nonetheless, there is a guarded hesitancy in accepting random drift as either an alternative or supplement to Darwinist evolution.¹⁹⁶

[50] The reason for discussing these theories in some depth is that both punctuated equilibrium and random drift have a significant number of supporters within the mainstream scientific community. Scientists like Gould and Wright have broadened our conception of evolution. However, Darwin’s conception of evolution seems to have acquired a sacrosanct status among many scientists. Very often, legitimate scientific hypotheses are rejected out of hand simply because the ideas are not in perfect agreement with Darwinism. Consider the controversy initiated by an authority no less than the British Museum of Natural History. In 1981, the museum described Darwin’s theory of evolution as “one possible explanation” in part of a display.¹⁹⁷ The outcry was so vehement that the description had to be removed.¹⁹⁸ Dogmatic reverence is inappropriate when viable alternatives from legitimate scientists are dismissed without serious review. However, when scientists objectively test new ideas (finding

¹⁹⁴ *Id.* See also SEWELL WRIGHT, “ADAPTATION AND SELECTION” IN GENETICS, PALEONTOLOGY AND EVOLUTION 369 (G.L. Jepson, G.G. Simpson & E. May eds. 1949)

¹⁹⁵ See BEATTY, *supra* note 185, at 279.

¹⁹⁶ BEATTY, *supra* note 185, at 281.

¹⁹⁷ JOHNSON, *supra* note 167, at 133.

¹⁹⁸ JOHNSON, *supra* note 167, at 133.

them valid or not), the results will supplement, alter, or strengthen evolution and science will benefit.

[51] Furthermore, the scientific community almost requires a scientist to disregard certain shortfalls in Darwinist evolution.¹⁹⁹ In one sense, “[e]volutionary science became the search for confirming evidence, and the explaining away of negative evidence.”²⁰⁰ Holding evolution on an unapproachable pedestal does nothing to encourage scientific inquiry and likely takes society back to a time when challenging orthodoxy with legitimate scientific findings simply was not permitted.

[52] This critique is not an attack on Darwinism, evolution, or natural selection, *per se*; nor is this an attempt to accredit creationists with scientific legitimacy. It is an attack on the rigid defense of Darwinist evolution to the exclusion of other scientific theories. The history of the scientific debate about evolution demonstrates that Darwin’s theory is neither absolute nor conclusive. Other scientists have real contributions to help the theory of evolution evolve through supplementation, alternative theories, and new discoveries.²⁰¹ Protection of a strict adherence to Darwinist evolution is contrary to generating new ideas and discoveries. “There is nothing like a good fight to promote the health of a science: progress comes out of the clash of different opinions plus a supply of new information.”²⁰² Intended or not, that can legitimately be considered the primary effect of the sticker.

IV. The Court’s Rationale in *Selman*

¹⁹⁹ See GOULD, *supra* note 176, at 152, 153.

²⁰⁰ See JOHNSON, *supra* note 167, at 150.

²⁰¹ See, e.g., GOULD, *supra* note 176; WRIGHT, *supra* note 194.

²⁰² YOUNG, *supra* note 84, at 229.

[53] Initially, the Court appears to rely on the *Lemon* test to guide the analysis.²⁰³ In actuality, the analysis blends a combination of the *Lemon* test with the endorsement test put forth by Justice O'Connor in her concurrence in *Lynch*.

[54] The Court begins with the purpose prong of the test.²⁰⁴ The Court finds that the sticker accomplishes two secular purposes²⁰⁵. The sticker fosters critical thinking and reduces offense to students and parents.²⁰⁶ So far, the sticker survives scrutiny.

[55] Moving deeper into the analysis, the Court then considers the primary effect of the sticker.²⁰⁷ At this point, Judge Cooper combines the *Lemon* test with the endorsement test of *Lynch*.²⁰⁸ Since the court found the school board intended a secular purpose, the effects prong based on an objective observer will be determinative.²⁰⁹ Ultimately, the Court attempted to determine whether a disinterested, reasonable observer would think the sticker has the primary effect of endorsing religion.²¹⁰

[56] The court relied on several beliefs and facts to find that the sticker is an endorsement of religion. The court asserted that “impressionable public school students who are likely to view

²⁰³ See *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1298.

²⁰⁴ See *id.* at 1299.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1305.

²⁰⁷ *Id.* at 1310-12.

²⁰⁸ *Id.* at 1305-06.

²⁰⁹ *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1306.

²¹⁰ See *id.*

the message on the Sticker as a union of church and state.”²¹¹ The judge granted that an objective observer would also be aware of the historical debate over teaching evolution in public schools, a debate initiated primarily by religious advocates.²¹² Awareness of this history would lead a reasonable observer to realize that the language of the sticker mirrors the viewpoint of the religiously-motivated activists.²¹³ Demonstrating concern for science pedagogy, the court claimed that teachers will have to take time out of the evolution lesson to review the differences between “fact” and theory.”²¹⁴ The court cursorily acknowledged that evolution is not without some questions.²¹⁵ However, the “informed, reasonable [observer] would perceive the School Board to be aligning itself with proponents of religious theories of origin.”²¹⁶ Thus, the sticker must be an endorsement of religion, according to the *Selman* court.²¹⁷

[57] The court skews its analysis toward finding a violation. First, the court stated that an “impressionable” student will insightfully discern a union of church and state in a sticker that explicitly mentions neither.²¹⁸ A student capable of such wisdom is likely not that “impressionable.” The court correctly acknowledged that a reasonable observer would be

²¹¹ *Id.* at 1306.

²¹² *Id.*

²¹³ *Id.* at 1307.

²¹⁴ *Id.* at 1297.

²¹⁵ *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1309.

²¹⁶ *Id.* at 1308.

²¹⁷ *See id.* at 1309.

²¹⁸ *Id.* at 1311.

familiar with the debate over the history of evolution in public schools.²¹⁹ That observer should then know that all previous case situations differed, often substantially, from the case at bar.²²⁰

Next, the court assigned itself curriculum coordinator for Cobb County by stating that review over the difference between “fact” and “theory” is subordinate to learning the principles of evolution.²²¹ In actuality, it appears that many of the actors involved in this case would benefit from such a review. Nevertheless, several of the court’s primary assumptions appear dubious.

[58] Eventually, the court recognized that Darwinist evolution has some weak areas.²²²

Alternative theories of evolution exist that mitigate some of those weak areas.²²³ The objective language of the sticker implicates those alternatives. Thus, an objective observer unaware of the specific nature of the controversy could assume the sticker refers to the alternative theories of the diversity of life. Unfortunately, the Court adopts the very dichotomy *McLean* discouraged.²²⁴

The issue is not “Darwinist evolution *or* religious creationism.” The issue is whether Darwinist evolution will be dogmatically preached to the exclusion of all other scientific ideas. The Court conceded that “a governmental action or message that coincides with the beliefs of certain religions does not, without more, invalidate the action or message.”²²⁵ An objective student

²¹⁹ *Id.* at 1306.

²²⁰ *See, e.g.,* *Edwards v. Aguilard*, 482 U.S. at 580-82.

²²¹ *See Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1307, 1310.

²²² *Id.* at 1309.

²²³ *See BOWLER, supra* note 158, at 335.

²²⁴ *See McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. at 1266.

²²⁵ *Id.* at 1308 (citing *Harris v. McRae*, 338 U.S. 297, 318-20 (1980)).

finds herself the successor of Gould and Wright, fighting establishmentarian canon. Essentially, *Selman* is the reciprocal of *Scopes*.²²⁶

[59] *Selman v. Cobb County Board of Education* seems to descend directly from the *Epperson* line of cases. The defendant in *Selman* is a public school board. The defendant in *Epperson* was a public school body. Both cases revolved around the teaching of evolution. *Selman* and *Epperson* had participants acting, at least in part, with religious motivation. The comparisons end there.

[60] *Epperson* completely eliminated teaching on evolution.²²⁷ *Selman* does no such thing. The facts clearly demonstrate that Cobb County was trying to strengthen its evolution curriculum.²²⁸ The Board adopted new textbooks that contained hundreds of pages on evolution.²²⁹ Moreover, the school board developed new standards to improve instruction on evolution.²³⁰ Thus, *Selman* is clearly distinguishable from *Epperson*.

[61] The progeny of *Epperson* are also distinguishable. Statutes and disclaimers in *McLean*, *Daniel*, *Freiler*, and *Edwards* all required teaching creationism or “creation-science.”²³¹

Teaching religious beliefs as facts in a public school is clearly unconstitutional by any standard. Those facts are not present in *Selman*. Moreover, there is no reference to religion in the sticker.

²²⁶ See generally *Scopes v. State*, 289 S.W. 363 (Tenn. 1927) (upholding statute prohibiting teaching alternatives to Biblical creationism).

²²⁷ *Epperson v. Arkansas*, 393 U.S. at 98.

²²⁸ See *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d 1290-91.

²²⁹ *Id.* at 1311.

²³⁰ *Id.* at 1290-91.

²³¹ See *Daniel v. Waters*, 515 F. 2d at 487; *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. at 1256; *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F. 3d at 341; *Edwards v. Aguilard*, 482 U.S. at 581.

The courts in each case analyzed the facts according to the *Lemon* test or the endorsement test.²³² The *Selman* court follows the lead of the previous cases. In *Selman*, there were at least two secular purposes for the sticker recognized by the court.²³³ Thus, the court deemed the primary effect of the sticker to advance religion.²³⁴ However, the sticker cannot do that. Again, the debate is not “creationism or evolution.” There are a variety of non-theistic scientific theories that supplement or supplant Darwinist evolution. Limiting the impact of one theory of evolution does not advance religion. Had the sticker stated “all non-religious theories of evolution are to be considered critically,” the case would be much closer. Perhaps a sticker clearly separating religious beliefs from scientific scrutiny would be a close case, as well. The sticker does not do that, though. Therefore, the primary effect may hinder Darwinist evolution, but it does not advance religion. Under the *Lemon* analysis, the sticker appears constitutional.

[62] The sticker does not fail the endorsement test either. The first prong of the endorsement test is virtually the same as the first prong of *Lemon*.²³⁵ Thus, it is reasonable to conclude that the secular purpose found by the *Selman* court would suffice to meet the endorsement standard. The endorsement test next requires that the objective meaning of the government statement not

²³² See *Daniel*, 515 F. 2d at 489 (applying the *Lemon v. Kurtzman* standard); *McLean*, 529 F. Supp. at 1264 (applying the *Lemon v. Kurtzman* standard); *Freiler* 185 F. 3d at 343, 345 (applying both the *Lemon v. Kurtzman* standard and the accommodation test of *Lynch v. Donnelly* described in *supra* note 33 and accompanying text); *Edwards* 482 U.S. at 585, 617 (applying both the *Lemon v. Kurtzman* standard and the accommodation test of *Lynch v. Donnelly* described in *supra* note 33 and accompanying text).

²³³ See *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. at 1305.

²³⁴ *Id.* at 1312.

²³⁵ The endorsement test states that an act violates the Establishment Clause when the state endorses a religion through the subjective intent of the speaker or the objective meaning of the statement within the community. *Lynch v. Donnelly*, *supra* note 33, at 690, 692.

endorse religion when applying two neutral perspectives.²³⁶ The court must first ask whether an objective observer aware only of the plain language of the statement would find the statement endorses religion.²³⁷ That finding is unlikely here. The statement does not mention religion, and considering the array of theories available, the sticker could refer to any of them. If the statement survives the first two steps, the court must then ask whether an objective observer aware of the all of the relevant facts would find the statement to be an endorsement of religion.²³⁸ That conclusion is unfortunately not as clear. Of course, on its face the sticker may appear to endorse a religious viewpoint to a person aware of the religious motivation of Ms. Rogers and others, as well as the *Epperson* line of cases. However, the sticker must be considered in the context of the curriculum, much as the crèche was viewed in *Lynch*.²³⁹ When put in the proper setting, the conclusion of unconstitutionality is not so certain. The objective observer would be aware that the school board had actively pursued an updated curriculum that would enrich the study of evolution. Furthermore, the school board adopted new texts that included hundreds of pages on evolution.²⁴⁰ If asked whether the Cobb County school board's actions endorse religion, the conclusion is not clear, even to an informed observer. In fact, the sticker just may pass constitutional muster.

[63] An analogy may be helpful. In lay terms, endorsement is an active process. One cannot endorse something without mentioning it. Consider this example: there are five candidates vying

²³⁶ See *Lynch*, 465 U.S. at 690.

²³⁷ *Id.*

²³⁸ See *Selman*, 390 F. Supp.2d at 1306-07.

²³⁹ See *Lynch*, 465 U.S. at 673-78.

²⁴⁰ See *Selman v. Cobb County Sch. Dist.*, 390 F. Supp.2d at 1311.

for a political office. A political activist speaks out against Candidate A. That does not mean that the activist endorses Candidate D. Also, just because Candidate D will benefit does not translate to an endorsement from the activist. The Court relies on Justice O'Connor's concurrence in *Lynch* to determine whether the primary effect of the sticker is to endorse religion.²⁴¹ To do that, the Court had to disregard Justice O'Connor's own explanation for what it takes to find an endorsement. O'Connor states plainly that analyzing the objective meaning of a statement does not rest solely on whether the statement's primary effect advances religion.²⁴² The sticker evidences endorsement neither in the constitutional interpretation of endorsement by *Lynch* nor in its colloquial meaning.

[64] *Selman* departs significantly from *Everson*, the grandfather of Establishment Clause jurisprudence relating to public and private schools. In *Epperson*, the Supreme Court advocated accommodation, even with a significant benefit of religion. Other cases have followed suit.²⁴³ The sticker in *Selman* meets the standard set by *Everson*. Darwinist evolution is no longer the only legitimate scientific theory. True, certain religious advocates do not want evolution considered at all.²⁴⁴ That will not, and should not, be allowed to happen. Such advocates would see benefit from diminishing Darwinism. However, the alternative scientific theories will benefit, too. Finally, the sticker does not refer to religion, negatively or positively, in any way.

²⁴¹ *Id.* at 692.

²⁴² *Id.*

²⁴³ *See, e.g., McGowan v. Maryland*, 366 U.S. 420 (1961).

²⁴⁴ *See, e.g., Selman*, 390 F. Supp.2d at 1291.

According to *Lynch*, the act is constitutional, even if it coincides with religious beliefs.²⁴⁵

Therefore, the court should not have found the sticker to violate the Establishment Clause.

V. Conclusion

[65] Evolution is controversial. In a 2001 poll conducted by Zogby International, “seven in ten respondents . . . believe that God or some intelligent design played a role in the creation of life.”²⁴⁶ Even more startling was a Gallup poll also conducted in 2001. That poll found that almost 60% of Americans consider themselves creationist to one extent or another.²⁴⁷ Apart from the religious implications and polls of lay people, many scientists disagree on significant aspects of Darwinist evolution.²⁴⁸ The only thing upon which most scientists agree is that evolution is not “a fixed and final theory.”²⁴⁹ Overzealous protection of a flawed theory could have a chilling effect on future research. If courts and society view the debate like the court in *Selman* did, as between proven scientific theories and religious zealots, few young students of science will begin the search for the truth. Many may assume that one subscribes to evolution as taught in the school, or one is a fringe religious extremist. The reality is that evolution is not settled. The ideas espoused by Charles Darwin require a new generation of scientists to perfect

²⁴⁵ *Lynch v. Donnelly*, 465 U.S. at 692.

²⁴⁶ Rebecca Wittman, *Zogby America Report Methodology*, available at <http://www.discovery.org/articleFiles/PDFsZogbyFinalReport.pdf> (Last visited Apr. 13, 2006).

²⁴⁷ See Brooks, *supra* note 85.

²⁴⁸ See, e.g., Dr. David Nord, Discussion on Schools and Religion at Proceedings before the United States Commission on Civil Rights (Dec. 1999) (transcripts available in (name of group holding transcripts) in Washington, D.C., New York City, and Seattle, Washington) (stating that teachers should make students aware of the controversial nature of Evolution to further the liberal education).

²⁴⁹ See YOUNG, *supra* note 84 at 15-16.

his work. Science only evolves when one person challenges the prevailing idea. It is then that a new Galileo, or Einstein, or Darwin is born.