# An Education in Evolution: Silencing Scientific Inquiry in

# *Selman v. Cobb County School District*

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## I. INTRODUCTION

Although the question, "what is science?" seems straightforward, the term "science" is difficult to define. Modern dictionaries describe science as the "observation, identification, description, experimental investigation, and theoretical explanation of phenomena;"[1] encompassing "the systematic study of the structure and behaviour of the physical and natural world through observation and experiment."[2] Therefore, if science originates in research and reasoned investigation, the term "scientific fact" is somewhat misleading. Essentially there are no facts in science, only tested and re-tested assumptions.[3]

One of the most profound questions in science is the origin of the Earth and its inhabitants.[4] The scientific community widely accepts Darwin's theory of evolution[5]

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[1] AMERICAN HERITAGE COLLEGE DICTIONARY (4th ed. 2002) (including "such activities applied to an object or inquiry of study").

[2] OXFORD DICTIONARY OF ENGLISH 1580 (2d ed. 2003).

[3] *Science*, WIKIPEDIA, THE FREE ENCYCLOPEDIA, http://en.wikipedia.org/wiki/Science (last visited Oct. 24, 2006) (stating that "[s]cientists never claim absolute knowledge").

[4] *See* Carl Zimmer, *How and When Did Life on Earth Arise*?, 309 SCIENCE MAGAZINE 5371, 89 (July 1, 2005), *available at* http://www.sciencemag.org/cgi/content/full/309/5731/89 (listing origin of the universe as one of the top twenty-five questions facing science today).

as the accurate depiction of how life and the universe began.[6] Based on research and observation, the weight of Darwin's evidence supporting evolution persuades most scientists that his ideas are correct.[7] However, evolution has been heavily criticized by fundamentalist creationists and, more recently, by proponents of Intelligent Design Theory ("ID").[8] While the debate continues to foster inquiry in the scientific community, the American judicial system looks for an accurate and immediate answer to the question of which origin theory is appropriate for the public school classroom. Because the First Amendment to the United States Constitution advocates the separation of church and state,[9] and the American public school is a state entity,[10] it follows that church and school must also be separate.[11] Thus, the American judiciary must determine which origin theories are science and which propose a religious philosophy.[12]

In its zeal to keep religion out of the public school science curriculum, the United States District Court for the Northern District of Georgia held that a sticker[13] placed in science textbooks, which encouraged students to approach the subject of evolution with an open mind, was unconstitutional.[14] Although the court in *Selman v. Cobb County School District* determined that the School Board had a valid secular purpose for adopting the sticker,[15] the court invalidated the measure based on its conclusion that an informed, reasonable observer might believe the sticker was pro-religious.[16] By this holding, the court improperly indicated a rule making any attempt by a school to encourage students to critically consider evolution *per se* an unconstitutional religious endorsement. If science truly is "a pursuit of knowledge,"[17] then students in the science classroom should not only learn pre-

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[5] CHARLES DARWIN, THE ORIGIN OF THE SPECIES (Signet Classics 2003) (1859) (revolutionizing thinking about the natural sciences and the development of life in the universe with his suggestion that current species evolved from former versions of themselves through the process of natural selection).

[6] Raju Chebium, *75 Years after the Scopes trial pitted science against religion, the debate goes on*, CNN, July 13, 2000, http://www.cnn.com/2000/LAW/07/13/scopes.monkey.trial/index.html.

[7] Richard Milner & Vittorio Maestro, *Intelligent Design?* NATURAL HISTORY MAGAZINE, Apr. 2002, at 73.

[8] *Id*. (commenting on the recent resurgence of ID).

[9] *See* U.S. CONST. amend. I (prohibiting Congress from making laws regarding the establishment of religion, or preventing the free exercise thereof).

[10] *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (stating that "[b]y and large, public education in our Nation is committed to the control of state and local authorities").

[11] *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962) (holding that the use of prayer in a New York public school system breached the Constitutional wall of separation between church and state).

[12] *See Epperson*, 393 U.S. at 107 (finding that the right of the states to prescribe their secondary school curriculum does not include the right to prohibit the teaching of evolution simply because the theory is contrary to a particular religious belief); *see also* Kitzmiller v. Dover Area School District, 400 F. Supp. 2d 707, 765 (M.D. Pa. 2005) (concluding that ID cannot be taught in public science classrooms because it is not science and cannot uncouple itself from its religious antecedents).

[13] The sticker that spurred the controversy in Georgia reads as follows: "This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things [sic]. This material should be approached with an open mind, studied carefully, and critically considered." Selman v. Cobb Country School District, 390 F. Supp. 2d 1286, 1292 (N.D. Ga. 2005).

[14] *Selman*, 390 F. Supp. 2d at 1292.

[15] *Id*. at 1303.

[16] *Id*. at 1306.

[17] 10 THE NEW ENCYCLOPEDIA BRITANNICA 552 (15th ed. 2002) (introducing science as "any system of knowledge that is concerned with the physical world and its phenomena and that entails unbiased

existing rules, but also learn to challenge and experiment with established theory.

This case note critically examines the *Selman* court's analysis under the "Lemon Test" set forth by the United States Supreme Court in *Lemon v. Kurtzman*.[18] Under the Lemon Test's three-pronged approach, the *Selman* court asks: (1) whether the state's use of the sticker serves a secular purpose; (2) whether an informed, reasonable observer would believe that the sticker conveyed a message approving or disapproving of religion; and (3) whether the effect of the statement creates an excessive entanglement of the government with religion.[19] Section II of this note provides a brief overview of the competing origin theories[20] of creationism, evolution, and ID. Section III outlines the history of the origin theory debate in the American judicial system, beginning with *Scopes v. State*.[21] Section IV gives a detailed account of the facts, procedural history, and court's analysis in *Selman*. Section V analyzes the court's opinion in *Selman* and argues that it incorrectly held that any suggestion to critically consider evolution is religiously motivated. The article concludes by advocating the Cobb County Board of Education's critical thinking approach, which encourages students to disregard the notion of a "proper" origin theory and to respect their fellow classmates' varied beliefs regarding the origin of the species.

## II. The Competing Theories of Origin

Inevitably, religious ideology and scientific theories on the origin of life collided. According to Darwin enthusiast and biologist Thomas Henry Huxley "the great tragedy of science [is] the slaying of a beautiful hypothesis by an ugly fact."[22] Huxley argued that in the scientific world, the religious idea that God created the universe – while a beautiful concept – could not co-exist with the research-based theory of evolution.[23] Judicial precedent likewise shows that creationism and evolution can not co-exist in the American public education system.[24]

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observations and systematic experimentation").

[18] 403 U.S. 602, 612-13 (1971) (the U.S. Supreme Court developed the three prongs of the Lemon Test to determine if a governmental action constitutes an unconstitutional endorsement of religion: (1) Is there a "secular legislative purpose" underlying the government action or enactment? (2) Is the "effect" of the action to inhibit or advance religion? (3) Is there an "excessive government entanglement with religion?") [hereinafter "the Lemon Test"].

[19] *Selman*, 390 F. Supp. 2d at 1298-99 (citing *Lemon*, 403 U.S. at 612-13).

[20] "Origin Theory" is used in the context of this article to describe the various propositions regarding the origin of the universe and life.

[21] 289 S.W. 363 (Tenn. 1927) (challenging the validity of Tennessee's anti-evolution statute).

[22] Thomas Henry Huxley, *Biogenesis and Abiogenesis* (1870), *in* Collected Essays of Thomas Huxley: Discourses Biological and Geological 244 (Kessinger Publishing 2005).

[23] *Id*. at 256 ("[b]elief, in the scientific sense of the word, is a serious matter, and needs strong foundations. To say, therefore, in the admitted absence of evidence, that I have any belief as to the mode in which the existing forms of life have originated, would be using the words in the wrong sense").

[24] *See Epperson*, 393 U.S. at 107 (finding that the state of Arkansas prohibited the teaching of evolution solely because it is contrary to the story of creation as told in the Book of Genesis); *see also* Edwards v. Aguillard, 482 U.S. 578, 580 (1987) (considering a Louisiana stature requiring a "balanced" treatment of evolution and creationism to be an unconstitutional hindrance on effectively teaching evolution). *Edwards* will be discussed in more detail in Section III B of this note.

A. Creationism

Creationism refers to the belief, rooted in the traditional teachings of Judaism and Christianity and expounded in the Biblical book of Genesis, that a higher being, "God" or "Yahweh," created the Earth and all its life forms over the course of six days.[25] While particular beliefs in creation science vary,[26] it is the commonly accepted belief among creationists that human beings, and other high life forms, did not originate from substantially lower organisms.[27]

B. Evolution

With Charles Darwin's 1859 publication *On the Origin of the Species*, evolution became, and remains, the scientifically accepted standard on the origin of life.[28] The evolution theory states that all life forms developed gradually over millions of years.[29] Through the process of natural selection, organisms that were able to adapt to their environment survived over those that could not.[30] Natural selection theorizes that populations alter over time as a result of slight modifications based on heritable traits, which permit the organism to thrive in its environment.[31] In effect, Darwin's concept of evolution states that living creatures adapt according to random natural processes.[32] This idea, macroevolution, proposes that high life forms, including humans, originated from significantly lower beings.[33] By contrast, the theory of microevolution[34] posits that life forms change gradually over time, but only within certain parameters that cannot account for the variety of species presently in existence.[35]

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[25] Chebium, *supra* note 6.

[26] There are a number of books available discussing the history and development of modern creationism. *See generally* JOBE MARTIN, THE EVOLUTION OF A CREATIONIST (Biblical Discipleship Publishers 2002) (emphasizing the inherent differences between evolutionary theory and the Bible from the perspective of a scientist turned creationist); HENRY M. MORRIS, A HISTORY OF MODERN CREATIONISM (Master Books 1984) (providing a historical background and a commentary on the reawakening of interest in creation science); CHRISTOPHER P. TOURMEY, GOD'S OWN SCIENTISTS: CREATIONISM IN A SECULAR WORLD (Rutgers University Press 1994) (bringing a social anthropologist's view to the study of "scientific creationism").

[27] Milner & Maestro, *supra* note 7.

[28] *Id*. (noting that design "prevailed as an explanation of the natural world" until Darwin's publication "swiftly convinced scientists that evolution by natural selection better explained life's complexity and diversity").

[29] DARWIN, *supra* note 5, *passim*.

[30] *Id*. at 168 (explaining that the ancestors of animals displaying physical characteristics "highly perfected for any particular habit, [such] as the wings of a bird for flight…seldom have survived to the present day, for [the ancestors] will have been supplanted by their successors, which were gradually rendered more perfect through natural selection").

[31] *Id*. at 89 (describing natural selection, or the survival of the fittest, as"the preservation of favourable individual differences and variations, and the destruction of those which are injurious").

[32] *Id*. at 168 (according to Darwin, species will spontaneously reproduce minor genetic deviations, which are better suited to thriving within the particular environment, at a greater overall rate than genetic non-deviation in order to survive; as a result, the species will ultimately breed the non-deviation out of existence).

[33] *See* SYLVIA S. MADER, BIOLOGY G-11 (McGraw-Hill 8th ed. 2003) (1985) (defining "macroevolution" as "large scale evolutionary change, such as the formation of a new species").

[34] *See id.* at G-12 (defining "microevolution" as "change in gene frequencies between populations of species over time").

[35] Milner & Maestro, *supra* note 7 (conceding that ID supporters differ from fundamentalist creationists

C. Intelligent Design

Natural selection is the foremost area of dispute between advocates of ID theory[36] and evolutionists.[37] According to ID proponent and biochemist Michael Behe, some systems in nature are irreducibly complex.[38] That is, some biological systems are simply too complicated to result from minor, successive modifications as the theory of evolution suggests.[39] For example, Behe points to the intrinsically complicated mechanism in the human body that permits blood to clot. Conclusively, Behe determines that such complex biological mechanisms look designed because they *are* designed.[40]

While the official stance of current ID proponents does not acknowledge the "designing agent" as God, the theory is rooted in religious philosophy. In *Summa Theologica*, Thomas Aquinas used design as the fifth of his five proofs for the existence of God.[41] Formulating a syllogism to describe his theory, Aquinas reasoned that nature is complex, and therefore it must have an intelligent designer; the only designer capable of creating a system as complex as nature is God.[42] Reverend William Paley refined Aquinas's ID theory in the nineteenth century by using a philosophical "watchmaker" analogy.[43] Like Aquinas, Paley used ID to bolster a "scientific" argument for the existence of God.[44] Paley explained that when a watch is found in a field, its finder infers that the watch's presence in the field must be the product of a designing human intellect. That is, the watch was created by a designer and placed or left in the field. The watch is not, and could not be, the result of a random natural process.[45] Accordingly, Paley concluded that when a species is found, we should likewise infer that its creator was a designing agent.[46] Paley conceded that everyone understood this agent to be God.[47]

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in their belief that "some species do change (but not much)" over time).

[36] David K. Wolf, Stephen C. Meyer & Mark Edward DeForrest, *Teaching the Origins Controversy: Science, Or Religion, Or Speech?* 2000 UTAH L. REV. 39, 46 (2000).

[37] *Compare e.g.* William A. Dembski, *Detecting Design in the Natural Sciences,* NATURAL HISTORY MAGAZINE, Apr. 2002, at 76 (arguing that natural selection insufficiently explains the signature of "specified complexity" in nature left by design); *with e.g.* Robert T. Pennock, *Mystery Science Theater*, NATURAL HISTORY MAGAZINE, Apr. 2002, at 77 (rebutting Dembski's argument in favor of Darwin's studied and proven concept of natural selection).

[38] Michael Behe, *The Challenge of Irreducible Complexity*, NATURAL HISTORY MAGAZINE, Apr. 2002, at 74.

[39] *Id*.

[40] *Id*.

[41] THOMAS AQUINAS, SUMMA THEOLOGICA 14, Part 1, Question 2, Art. 3 (Fathers of the English Dominican Province, trans., Benziger Brothers 1948) (13th c) (using the governance of the world as proof for God's existence).

[42] *Id*. ("[t]herefore, some intelligent being exists by whom all natural things are directed to their end; and this being we call God").

[43] WILLIAM PALEY, NATURAL THEORY: REVISED TO HARMONIZE WITH MODERN SCIENCE 9 (F. le Gros Clark, ed., Adamant Media Corp. 2001) (1802).

[44] *Id*. at 453.

[45] *Id.* at 9-10 (contrasting the discovery of a designed watch in a field, which first must be created and then placed there, to finding a natural stone lying in the same field, "which, for anything I knew to the contrary, [could have] lain there forever").

[46] *Id*. at 11.

[47] *Id*.

More recently, in *Kitzmiller v. Dover Area School District*,[48] the United States District Court for the Middle District of Pennsylvania noted that many of ID's supporters hold the personal belief that God is the "designing agent."[49] Connecting ID to the teachings of Thomas Aquinas, the court in *Kitzmiller* found that the initial purpose of ID theory was to reconcile science with the existence of a divine creator.[50] The *Kitzmiller* court additionally noted that the current popularity of ID arose after the United States Supreme Court's *Edwards v. Aguillard* ruling,[51] which definitively held that creationism is not a scientific theory.[52] Accordingly, the *Kitzmiller* court found the history and events leading up to the resurgence of ID strongly indicated that ID is a religiously motivated origin theory.[53]

## III. PRIOR LAW

### A. Case History

The Middle District of Pennsylvania's recent decision in *Kitzmiller* follows a line of cases suggesting that origin theories rooted in scientific inquiry, such as evolution, are permissible in the American public school science curriculum, whereas origin theories rooted in religious ideology, like creationism, are not. This trend is fairly recent.[54] Until the United States Supreme Court decided the seminal case of *Epperson v. Arkansas* in 1968, courts generally permitted states to enforce statutes prohibiting the teaching of evolution in its public schools.[55]

The debate over which origin theory to teach in the public school science classroom generated great public attention in the 1920s, culminating in the 1925 case *Scopes v. State* [the "Scopes Monkey Trial"].[56] In *Scopes*, the Supreme Court of Tennessee upheld the constitutionality of the state's anti-evolution statutes. These

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[48] *Kitzmiller*, 400 F. Supp. 2d at 718. In *Kitzmiller,* the debate focused on a school board decree that teachers must read students an oral disclaimer before introducing material on evolution. This disclaimer pointed students to a reference book on ID entitled *Of Pandas and People*. *Id*. at 709. *Kitzmiller* was a case of first impression involving the constitutionality of teaching ID theory in public schools, and is distinguishable from *Selman*, as will be further discussed in Section IV.

[49] *Id.* at 718 (noting that Professor Michael Behe and Professor Scott Minnich, expert witnesses testifying in support of intelligent design as a valid origin theory, admitted that they personally believed that the intelligent designer was God).

[50] *Id.* at 717-18.

[51] *Id.* at 721 (noting that in its revisions to *Of Pandas and People* (post the *Edwards* ruling), the editors changed the word creation (creationism and creationist) to the phrase "ID" approximately 150 times throughout the book).

[52] *See Edwards*, 482 U.S. at 580 (noting that because creationism is not science it is inappropriate material for the public school science curriculum).

[53] *Kitzmiller,* 400 F. Supp. 2d at 722.

[54] *See Epperson*, 393 U.S. 97 (marking the first time the United States Supreme Court addressed the constitutionality of an anti-evolution statute); *but see* Scopes v. State, 289 S.W. 363 (Tenn. 1927) (seminal case in which the Supreme Court of Tennessee upheld a statute prohibiting the teaching of any theory that denied the story of creation as told in the Bible).

[55] By 1968 twenty states had enacted bills to the effect of prohibiting the teaching of evolution in the state's public school system. *See Epperson*, 393 U.S. at 102.

[56] 289 S.W. at 366-67 (finding that the anti-evolution statute was not in violation of the Due Process Clause, Fourteenth Amendment, or Section 8, Article I, of the Tennessee Constitution, but reversing the criminal conviction of Tennessee school district teacher John Scopes, who had been charged and convicted for introducing evolution in his public school science classroom).

"Monkey Laws" forbade the teaching of "any theory that denies the story of the divine creation of man as taught in the Bible."[57] This law was particularly geared toward prohibiting any scientific theories stating that "man descended from a lower order of animals."[58] The Supreme Court of Tennessee found that the state was free, in its capacity as an employer of the school's faculty, to prescribe what kind of work should be performed in its service, including "what shall be taught in its schools."[59] Furthermore, the court held that the statute was not unconstitutional because it merely forbade the teaching of evolution and did not impose a *contrary* origin theory.[60] The court ordered that if any school board considered the 1925 Anti-Evolution Acts so detrimental to teaching of the biological sciences, then the subject of biology could be entirely omitted from its public school science curriculum.[61] The Tennessee Supreme Court's decision in *Scopes* was never overruled.

The United States Supreme Court did not consider the constitutionality of an anti-evolution statute until 1968 in *Epperson v. Arkansas*, four decades after the *Scopes* decision. In *Epperson*, the Court definitively held that anti-evolution statutes were not constitutionally enforceable because the statutes impermissibly favored the beliefs of a particular religious denomination.[62] The Arkansas law in dispute made it a misdemeanor crime for a public school educator to teach that man descended from a lower order of life.[63] The U.S. Supreme Court found that the state issued this restriction primarily to bolster the community's favored Christian viewpoint.[64] Citing a string of precedents, the Court acknowledged that the First Amendment required "governmental neutrality between religion and religion, and between religion and nonreligion."[65] Although the Court averted making a declaration on which theory of origin is "appropriate" for the public classroom, it held that education could not be constitutionally tailored in accordance with the principles or prohibitions of any set of religious beliefs.[66] The Court concluded that because anti-evolution statutes were fundamentally tailored to support religious origin theories, these statutes could no longer be applied to American public schools without violating the Constitution.[67]

B. State Responses

In response to the Supreme Court's ruling in *Epperson*, some states attempted to

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[57] *Scopes,* 289 S.W. at 363.
[58] *Id*.
[59] *Id.* at 366.
[60] *Id*.
[61] *Id*. at 367.
[62] *Epperson*, 393 U.S. at 103 ("[t]he overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group").
[63] *Id*. at 98.
[64] *Id*.
[65] *Id*. at 104, n.12 (citing Everson v. Board of Education, 330 U.S. 1, 18 (1947); *see also* McCollum v. Board of Education, 333 U.S. 203, 203 (1948); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952); Fowler v. Rhode Island, 345 U.S. 67, 67 (1953); Torcaso v. Watkins, 367 U.S. 488, 495 (1961)).
[66] *Id*. at 106.
[67] *Id.* at 106.

implement variations on the infamous Monkey Laws.[68] For example, Louisiana created a statute mandating that if either evolution-science or creation-science was introduced in the public school science classroom, then the other theory must also be taught.[69] In *Edwards v. Aguillard*, the Supreme Court applied the Lemon Test[70] to determine if this "balanced approach" to evolution instruction violated the Establishment Clause.[71] Rejecting the state's argument that a "balanced approach" to evolution instruction enabled students to obtain a more complete science education,[72] the Court found the state's requirement to teach evolution in correlation with creationism an inhibition on effectively teaching science.[73] Finding "no valid secular reason for prohibiting the teaching of evolution" in public schools, the Court invalidated the statute under the Lemon Test's purpose prong.[74] In *Edwards,* the Court clearly articulated that any attempt to "balance" science through the addition or deletion of religious material would lead to an improper governmental entanglement with religion.[75]

## IV. SELMAN V. COBB COUNTY SCHOOL DISTRICT

### A. Facts

This historical background of origin theory, statutes, and case law sets the stage for the debate in *Selman v. Cobb County School District.*[76] In *Selman*, the United States District Court for the Northern District of Georgia questioned the constitutionality of a sticker, placed in certain science textbooks, advocating that students approach evolution theory with an open mind.[77] The plaintiffs were parents whose children attended public schools in the Cobb County School District.[78] The defendants were the Cobb County School District (the "School District") and the Cobb County Board of Education (the "Board of Education" or the "School Board").[79]

The basis for this action began in the fall of 2001 when the School District decided to implement new science textbooks into the biology curriculum.[80] A textbook committee recommended Kenneth Miller's *Biology* as the best science

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[68] *See, e.g.* LA. REV. STAT. ANN. § 17:286.1 (1985) (the "Louisiana Creationism Act"); *invalidated by Edwards*, 482 U.S. at 580; *see also* Freiler v. Tangipahoa Parish Board of Education, 185 F.3d 337, 341 (5th Cir. 1999) (questioning a Louisiana school board's mandate that children must first read a disclaimer before being taught evolution theory), *cert. denied*, 120 S.Ct. 2706 (2000).
[69] *See* LA. REV. STAT. ANN. § 17:286.1 (1985).
[70] *See* the Lemon Test, *supra* note 18.
[71] *Edwards*, 482 U.S. at 582-83.
[72] *Id*. at 587.
[73] *Id*.
[74] *Id.* at 582 (citing Aguillard v. Treen, 634 F. Supp. 426 (E.D. La. 1985)) (having found a constitutional violation under the purpose prong, it was not necessary for the Court to further analyze the facts under the Lemon Test).
[75] *Id.* at 587.
[76] 390 F. Supp. 2d 1286 (N.D. Ga. 2005).
[77] *Id*. at 1292.
[78] *Id*. at 1288.
[79] *Id*.
[80] *Id*. at 1290.

textbook for high school students.[81] However, Miller's *Biology* explicitly discussed evolution, thus conflicting with the School District's policy not to compel "any student to study the origin of the human species."[82] After conducting a legal review of the issues raised by the textbook committee, the School District concluded that the former policy should be revised, and evolution instruction strengthened.[83]

At the same time, certain Cobb County parents expressed concern over the School District's plan to adopt new science textbooks.[84] After receiving numerous complaints from parents about the textbooks, the Board of Education consulted its legal counsel, who, in turn, drafted a sticker for incorporation into the disputed science books.[85] The sticker read:

> This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.[86]

The School Board unanimously voted to adopt Miller's *Biology* as the new high school science textbook, provided that the books include this sticker.[87] Between the summer and fall of 2002, the School Board produced the stickers with money from the general public fund, and sent the sticker to individual schools.[88] Personnel at the schools then physically affixed the stickers into all science textbooks containing material on evolution.[89]

Following the adoption of the new textbooks and accompanying sticker, the School Board revised both its policy and its regulation regarding the teaching of origin theory. [90] Recognizing the potential conflict that evolution might present to

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[81] *Id*. at 1291 (praising the book as the most comprehensive guide to current scientific thinking regarding the origin of the species).

[82] COBB COUNTY SCHOOL DISTRICT ADMINISTRATIVE RULES, RULE IDBD (1)-(5) (1994) *reprinted in Selman,* 390 F. Supp. 2d at 1290 [hereinafter "Rule IDBD"]. The former School District policy also restricted teaching evolution to students at the high school level (Rule IDBD (2)). The study of evolution was an "elective" and not required for graduation (Rule IDBD (4)). Under the former policy, many teachers believed they were not required to teach evolutionary theory. As a result, some teachers removed material on evolution from students' textbooks.

[83] *Id.* In pertinent part, the revised policy aimed to provide students with a broad science education, which included instruction on the origin of the species.

[84] *Selman*, 390 F. Supp. 2d at 1291.

[85] *Id*. at 1292.

[86] *Id*.

[87] *Id*. at 1292, n.6. Most of the individuals present at the Board meeting understood that the adoption of the textbooks was subject to the placement of the sticker in these books. Others either did not remember the specifics of the vote or did not understand that the adoption of the textbooks was conditioned upon placing the sticker in these books.

[88] *Id*. at 1295-96.

[89] *Id.* at 1296.

[90] COBB COUNTY SCHOOL DISTRICT ADMINISTRATIVE RULES, THEORIES OF ORIGIN (1994), http://www.cobb.k12.ga.us/centraloffice/adminrules/I_Rules/Rule%20IDBD.htm.

The revised policy read as follows:

It is the educational philosophy of the Cobb County School District to provide a broad based curriculum; therefore, the Cobb County School District believes that discussion of disputed views of academic subjects is a necessary element of providing a balanced education, including the study of the origin of the species. This subject remains an area of intense interest, research, and discussion among

certain students' religious beliefs, the Board recommended that classroom discussion "distinguish between scientific and philosophical or religious issues."[91] Similarly, the revised regulation advised teachers "to set limits on discussion of theories of origin in order to respectfully focus discussion on scientific subject matter."[92] The regulation noted that providing instruction in origin theory is difficult because of the social controversy surrounding the topic, but supported its teachers' efforts "to provide objective and professional instruction."[93] Some parents remained skeptical about the sticker's contents.[94] These parents believed that the sticker implicitly promoted a religious view on the origin of life, which might prompt students to bring faith into the science classroom.[95]

B. Procedural History

Parents who questioned the constitutionality of the sticker brought this suit under 42 U.S.C. § 1983[96] against Defendants Cobb County School District and the Cobb County Board of Education.[97] Defendants adopted the sticker in March 2002 and implemented the sticker into certain science textbooks later that year.[98] Michael Selman, a Cobb County parent, initially filed the lawsuit in January 2004 in the Northern District of Georgia.[99] On January 28, 2004, the court permitted Plaintiff leave to amend the Complaint, adding additional Plaintiffs Debra Anne Power, Kathleen Chapman, Jeff Silver, Paul Mason, and Terry Jackson.[100] Plaintiffs contended that the sticker violated the Establishment Clause of the First Amendment,[101] as incorporated by the Fourteenth Amendment,[102] of the United States Constitution, and Article I, Section II, Paragraph VIII of Georgia's state Constitution.[103]

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scholars. As a result, the study of this subject shall be handled in accordance with this policy and with objectivity and good judgment on the part of teachers, taking into account the age and maturity level of their students.

The purpose of this policy is to foster critical thinking among students, to allow academic freedom consistent with legal requirements, to promote tolerance and acceptance of diversity of opinion, and to ensure a posture of neutrality toward religion. It is the intent of the Cobb County Board of Education that this policy not be interpreted to restrict the teaching of evolution, to promote or require the teaching of creationism, or to discriminate for or against a particular set of religious beliefs, religion in general, or non-religion.

[91] *Selman*, 390 F. Supp. 2d at 1296.

[92] *Id*.

[93] Rule IDBD*, supra* note 82, at Rule 4.

[94] *Selman*, 390 F. Supp. 2d at 1297.

[95] *Id*.

[96] 42 U.S.C. § 1983 (2005) (providing that every person who "subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction to the deprivation of any rights, privileges, or immunities secured by the Constitution and the laws, shall be liable to the party in an action at law, suit in equity, or other proper proceeding in redress…").

[97] *Selman*, 390 F. Supp. 2d at 1288.

[98] *Id.*

[99] Selman Motions, 2004 U.S. Dist. LEXIS 5960 *2, n.1 (N.D. Ga Mar. 31, 2004).

[100] *Id*. at *2.

[101] The First Amendment of the United States Constitution states: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I.

[102] U.S. CONST. amend. XIV (incorporating the First Amendment against the states).

[103] Article I, Section II, Paragraph VII of the Georgia Constitution provides that "no money shall ever be

On March 31, 2004, the United States District Court for the Northern District of Georgia denied Defendant's Motion to Strike Affidavits and Motion for Summary Judgment.[104] The question presented in the Summary Judgment Motion was whether the Plaintiffs could prevail under an Establishment Clause claim.[105] The Establishment Clause forbids any government action "respecting an establishment of religion."[106] In order to decide if Defendants should prevail on their Summary Judgment Motion, the court applied the Lemon Test[107] to Plaintiffs' constitutional claims. The court found little evidence suggesting that a religious purpose existed for the sticker's adoption, but held that genuine issues of material fact did exist under the Lemon Test's effects prongs.[108]

During the summary judgment proceedings, the parties contested whether or not the sticker's purpose and effect had religious implications, although both parties agreed that the language of the sticker was neutral on its face.[109] Defendants asserted that their purpose in implementing the sticker was to foster scientific inquiry and reduce any offense that might arise from the School District's decision to strengthen evolution instruction.[110] The court conceded that, while it generally defers to a state's articulated secular purpose for adopting a measure, it remains bound to investigate whether or not that articulated purpose is sincere.[111] After considering the circumstances surrounding its adoption, the court concluded that the sticker satisfied the purpose prong of the Lemon Test.[112] The court nevertheless concluded that the essence of the dispute, whether the Defendant's placement of the sticker was a permissible accommodation of religion or an impermissible governmental entanglement with religion, was a matter to be determined at trial.[113]

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taken from the public treasury, directly, or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution."

[104] Selman Motions, 2004 U.S. Dist. LEXIS 5960, at *11, *28. Defendants based their Motion to Strike Affidavits on the assertion that certain portions of the Plaintiffs' affidavits contained information not based on the affiant's personal knowledge as required by the *Federal Rules of Civil Procedure*. *Id.* at *10. *See* Fed.R.Civ.P. 56(e) (2005). The court nevertheless considered the evidence presented in the Plaintiff's challenged affidavits with regard to the Defendant's Motion for Summary Judgment. According to *Federal Rule of Civil Procedure* 56(c), summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

[105] *Id*. at * 14.

[106] U.S. CONST. amend. I. *See also Everson*, 330 U.S. at 8 (applying the Establishment Clause); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying the Free Exercise Clause to states). Selman Motions, 2004 U.S. Dist. LEXIS 5960, *13, n.5. The court noted that although great deference is generally given to state and local school boards, this discretion must be exercised in a manner that "comports with the transcendent imperatives of the *First Amendment.*" *Id*. at *14 (quoting Bd. of Educ. v. Pico, 457 U.S. 853, 864 (1982)).

[107] *See* the Lemon Test, *supra* note 18.

[108] Selman Motions, 2004 U.S. Dist. LEXIS 5960 at *27, 31-32.

[109] *Id*. at *16, 28-29.

[110] *Id*. at *17.

[111] *Id*. at *15 (citing *Edwards*, 482 U.S. at 587).

[112] *Id*. at *27 (citing Wallace v. Jaffree, 472 U.S.38, 56 (1985) (finding that "even if all of the Board members admitted that they were motivated in part by a religious purpose, the [s]ticker still satisfies the first prong of the Lemon Test because the adoption of the [s]ticker clearly was not motivated *wholly* by an impermissible purpose").

[113] *Id*. at *32 (finding genuine issues of material fact under Plaintiffs' Establishment Clause claims, the court concluded that such material issues likely remained under the state law claim as well).

The parties subsequently presented their case before the Court of the Northern District of Georgia in Atlanta.

C. Court's Analysis

At the *Selman* trial, the Northern District of Georgia sought to answer the narrow issue of the sticker's constitutionality under the Establishment Clause of the United States Constitution and/or Article I, Section II, Paragraph VII of the Constitution of the State of Georgia. [114] The court applied the Lemon Test to Plaintiffs' constitutional claim.[115] Considering the second and third prongs of the Lemon Test interrelated, the court decided to combine these factors into a single "effect" inquiry.[116]

*1. The Purpose Prong*

The court proceeded by examining the facts of the case under the Lemon Test's "purpose" prong.[117] This test asked whether the government's actual purpose in adopting the sticker was to endorse or disapprove of religion.[118] The Establishment Clause prohibited a state from enacting a measure to exclusively advance religion.[119] An enactment may be "motivated in part by a religious purpose,"[120] if the religious purpose was not pre-eminent.[121] The court must defer to the state's sincere articulation of a secular purpose, as determined by the language of the statement itself.[122]

To determine the sincerity of the School Board's articulated secular purpose in adopting the sticker, the court looked to the circumstances surrounding the sticker's adoption, together with testimony by its School Board members.[123] The School

[114] *Selman*, 390 F. Supp. 2d at 1288.

[115] *Id*. at 1298. *See* the Lemon Test, *supra* note 18. *See, e.g*., Santa Fe Independent School District v. Doe, 530 U.S. 290, 314 (2000); Glassroth v. Moore, 335 F.3d 1282, 1295-96 (11th Cir. 2003).

[116] *Selman,* 390 F. Supp. 2d at 1299 ("[b]oth the Supreme Court and the Eleventh Circuit have acknowledged that the second and third prongs of the Lemon test are interrelated insofar as courts often consider similar factors in analyzing them"). *See* Agostini v. Felton, 521 U.S. 203, 232-33 (1997); Holloman v. Harland, 370 F.3d 1252, 1284-85 (11th Cir. 2004).

[117] *Id.* at 1300. (declining Defendants' contention that the case should be decided under U.S. v. Salerno, 481 U.S. 739 (1987)). Under the *Salerno* analysis, a plaintiff challenging a legislative act "must establish that no set of circumstances exists under which the Act would be valid." *Salerno,* 481 U.S. at 745. The court in *Selman* stated that the sticker was a message, and not an application, therefore the facts did not fall within the line of cases dealing with challenges to legislative acts, statutes, or policies, as contemplated by *Salerno*. *Selman*, 390 F. Supp. 2d at 1299.

[118] *Selman,* 390 F. Supp. 2d at 1300 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

[119] *See supra* note 101 for text.

[120] *Selman,* 390 F. Supp. 2d at 1300 (quoting *Wallace*, 472 U.S. at 56).

[121] *Id.* (citing Stone v. Graham 449 U.S. 39, 41 (1980)).

[122] *Id*. (citing *Edwards*, 482 U.S. at 586-87, 594).

[123] *Id*. at 1301. Defendants contended that the School District's revised policy on origin theory offered an explanation of the School Board's purpose. The court noted that it did not look favorably on evidence of purpose that is not contemporaneous with the challenged action, and reviewed the policy with caution, because it went into effect six months after the sticker's adoption. The court further commented, however, that lack of evidence chronicling the School Board's original intent will not fail Defendants under the Lemon Test's purpose prong. *Id*. (citing King v. Richmond County, 331 F.3d 1271, 1277 (11th Cir. 2003)).

Board stated that its purpose in adopting the sticker was to motivate critical thinking among its students.[124] Distinguishing the sticker in this case from the oral disclaimer in *Freiler v. Tangipahoa Parish Board of Education*,[125] the court noted that, unlike the oral disclaimer in *Freiler,*[126] the sticker here did not refer to religion in general, any particular religion, or any religious theory, nor did the sticker mention any other alternative theories of origin.[127] In fact, the court considered the sticker's express language to comport with the School Board's articulated secular purpose to encourage critical thinking among its students.[128]

The court also noted that the sticker enabled the School Board to strengthen its position on evolution instruction.[129] Prior to the implementation of the new science textbooks and accompanying sticker, many students in the Cobb County School District were not being taught evolution in the science classroom.[130] Therefore, the court conceded that the purpose for adopting the new textbooks was, in part, to advance Cobb County's science curriculum.[131] Although the court believed that the sticker's reference to evolution as a theory undermined the School Board's purpose to this end,[132] it nevertheless concluded that enhancement of evolution instruction constituted a second, sincere secular purpose for the sticker's adoption.[133]

While only one sincere secular purpose need exist to satisfy the first prong of the Lemon Test, the court chose to further consider Defendants' justifications for implementing the sticker.[134] Particularly, the court looked at Defendants' reasoning that incorporating the sticker into science textbooks would accommodate parents and students whose beliefs might conflict with the teaching of evolution.[135] Because this purpose would be intertwined with religion, the court examined this justification in detail.[136]

The law is well established that the government may not further religious purposes through legislation,[137] however, the Constitution does not require that school systems ignore the religious concerns of students and parents "troubled by the teaching of evolution in public classrooms."[138] Although some parents clearly had

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[124] *Id.* at 1302.

[125] 185 F.3d 337 (5th Cir. 1999) (invalidating the School Board's "critical consideration" defense for requiring teachers to make an oral disclaimer before teaching students origin theory).

[126] The challenged disclaimer in the *Freiler* case instructed students "to exercise critical thinking and gather all information possible and examine each alternative toward forming an opinion," but also stated that the teaching of evolution was "not intended to influence or dissuade the Biblical version of Creation or any other concept." *Freiler*, 185 F.3d at 341.

[127] *Selman*, 390 F. Supp. 2d at 1302.

[128] *Id*.

[129] *Id*.

[130] *Id*.

[131] *Id*. at 1290.

[132] *Id.* (recognizing that many members of the scientific community argue that evolution is factual in some respects).

[133] *Selman*, 390 F. Supp. 2d at 1303 (noting that the court is not required to further analyze the purpose prong once it determines that the state has at least one sincere, secular purpose in adopting its measure).

[134] *Id.* at 1303 (citing *Lynch*, 465 U.S. at 681, n. 6).

[135] *Id*.

[136] *Id*.

[137] *Id*. (citing Adler v. Duval County School Board, 206 F.3d 1070, 1086 (11th Cir. 2000)).

[138] *Id*. at 1304 (quoting *Freiler*, 185 F.3d at 346).

religious motivations in opposing the teaching of evolution,[139] the court found no reason to transfer the religious motivations of individual parents onto the School Board.[140] Noting that the School Board did not implement any other parental recommendations, such as teaching alternative origin theories,[141] the court determined that Defendants merely sought to show consideration for its citizens' personal beliefs "while still maintaining a posture of neutrality toward religion."[142] The court concluded that a showing of religious accommodation was insufficient to render the sticker unconstitutional.[143] Finding these valid, secular purposes in the School Board's adoption of the sticker, the court concluded that the sticker was constitutional under the purpose prong of the Lemon Test.[144]

*2. The Effects Prong*

Under the second prong of the Lemon Test, however, the court determined that the sticker disavowed evolution and implicitly advanced the maintenance of contrary religious theories on the origin of the species.[145] A government measure can fail an Establishment Clause challenge if it fails any prong of the Lemon Test, notwithstanding any findings of a valid governmental purpose behind the measure.[146] In *Selman*, the court held that the sticker failed the effects prong of the Lemon Test because an "informed, reasonable observer" could infer a message of religion in the state's endorsement of the sticker.[147]

Basing its analysis on the views of a "disinterested, reasonable observer,"[148] the court found that the sticker sent an implicit message that Defendants agreed with the religious origin theories advanced by Christian fundamentalists and creationists.[149] Although the court noted that a governmental action cannot be struck down simply because it coincides with certain religious beliefs,[150] the court concluded that the reasonable observer would know anti-evolution sentiment traditionally stemmed

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[139] *Selman*, 390 F. Supp. 2d at 1291-92 (showing evidence from the record that Marjorie Rogers, a Cobb County parent, wrote a letter to the School Board two weeks prior to the sticker's adoption suggesting, among other things, that a disclaimer be placed in science textbooks containing information on evolution; the record also revealed that over 2,300 Cobb County citizens signed a petition asking the School Board to place a warning in science books that evolution was not factual).
[140] *Id*. at 1303.
[141] *Id*. (including teaching origin theories that posit the existence of a creator or ordering specially printed books that omit certain evolutionary materials).
[142] *Id*. at 1304.
[143] *Id*. (*citing* Hobbie v. Unemployment Appeals Commission, 480 U.S. 136, 144 (1987)). The court also ruled that the desire of individual School Board members to advance religion is not enough to impute a religious purpose onto the School Board collectively. One School Board member did inquire about introducing alternative origin theory into the curriculum, including creationism and ID theory. This idea was struck down however, once the School Board received advice from the school's legal counsel that such theories are improper material for public school classrooms.
[144] *Id*. at 1305.
[145] *Selman*, 390 F. Supp. 2d at 1312.
[146] *Id*. at 1305.
[147] *Id*. at 1305-06
[148] *Id*. at 1306.
[149] *Id*. at 1312.
[150] *Id*. at 1308 (citing Harris v. McRae, 448 U.S. 297, 318-320 (1980); McGowan v. Maryland, 366 U.S. 420, 442 (1961)).

from religious communities.[151] This observer would also know that some Cobb County citizens voiced concerns over teaching evolution in the public schools for religious reasons.[152]

The court reasoned that the sticker conveyed a message that "those who oppose evolution for religious reasons are favored members of the community and those who believe in evolution are political outsiders."[153] Although the court maintained that no evidence indicated that Defendants aligned themselves with proponents of religious origin theories, the court concluded that it was possible for an informed, reasonable observer to have this perception.[154]

The court also considered the sticker's assertion that evolution is a theory and not a fact, together with the isolation of evolution as the only topic to be "critically considered" in the biology curriculum, to be improper suggestions that evolution is problematic even in the field of science.[155] The court reasoned that because the sticker denigrated evolution as *merely* a theory, it implicitly advocated that students consider alternative origin theories.[156] Therefore, the court concluded that the sticker could not be constitutionally valid under the effects prong of the Lemon Test.[157]

### D. Court's Conclusion

After weighing the facts and circumstances surrounding the sticker's creation and adoption, the court concluded that the sticker improperly conveyed a message of religious endorsement, which favored citizens who held certain religious beliefs, while marginalizing those citizens who believed in evolution.[158] The court determined that the primary effect of the sticker was to endorse religious origin theories, thus the sticker impermissibly entangled religion with public education.[159] Holding the sticker unconstitutional based on Plaintiffs' Establishment Clause claims, the court likewise found that the sticker "ran afoul" of Article I, Section II, Paragraph VII of the Georgia Constitution.[160] As a result, the court ordered Defendants to remove the sticker from all science textbooks and permanently enjoined Defendants from disseminating the sticker in any form.[161]

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[151] *Selman*, 390 F. Supp. 2d at 1306 (considering the history of opposition to evolution, the court noted that anti-evolution sentiment is loaded with religious undertones); *see, e.g., Edwards,* 482 U.S. at 624 (Scalia, J., dissenting) (arguing that the Senator who opposed teaching evolution theory as fact did so because it indicated to students that "science has proved their religious beliefs false").

[152] *Id.* at 1307.

[153] *Id*. at 1306.

[154] *Id.* at 1308.

[155] *Id*. at 1308-09 (concluding that the combination of these two factors could lead students to believe that a scientific problem existed peculiar to the study of evolution).

[156] *Id*. (emphasizing that the sticker did not explain that evolution is a theory in the scientific context, that is, it is a theory widely accepted by the scientific community and that has been extensively studied and researched).

[157] *Selman*, 390 F. Supp. 2d at 1309.

[158] *Id.* at 1306.

[159] *Id*.

[160] *Id*. at 1313 (noting that Georgia's constitutional provisions were intended to have a stronger application than the First Amendment of the U.S. Constitution, thus it followed that a measure would be in violation of Georgia's state constitution where an Establishment Clause violation was found).

[161] *Id.* at 1313.

## V. PERSONAL ANALYSIS

The *Selman* decision problematically created a precedent that suggests *any* criticism of evolution by an American public school system is *per se* an endorsement of religious origin theories.[162] By upholding the sticker under the purpose prong of the Lemon Test, the court acknowledged the School Board's valid, secular purposes for adopting this measure.[163] In fact, the court recognized that the School District's decision to adopt new science textbooks was actually an effort to *strengthen* the teaching of evolution.[164] The court nevertheless invalidated the sticker by finding that the School Board's clearly secular purposes might be misconstrued as a religious endorsement by the "informed, reasonable observer."[165]

Any postulations about the sticker's likely perception were the creation of the court, not the intent of the School Board. Reasoning that opposition to the teaching of evolution traditionally stems from religious communities, the court found that the measure could be seen as an endorsement of religious viewpoints.[166] If the court classified an "informed, reasonable" observer as one familiar with the history of evolutionary debate in the United States generally, and in Cobb County in particular, then that observer would also be familiar with the School Board's valid, secular reasons for adopting the sticker.

The evolution versus creationism debate did not end when the United States Supreme Court decided *Epperson*. This debate continued both in and out of the courtroom.[167] To this end, it is important to expose students to prevalent scientific viewpoints. Therefore, the Cobb County School District was correct to introduce evolution into the science curriculum. Given the historical debate over evolution, and the knowledge that many of its students' religious beliefs contradicted evolution theory,[168] it was also proper for the School District to implement a sticker for the purpose of ensuring a posture of religious neutrality.

### A. Court's Findings under the Purpose Prong

Finding that the Cobb County School District advanced two sincere, secular reasons for adopting the sticker, the court in *Selman* correctly held the sticker constitutional under the Lemon Test's purpose prong.[169] Under the seminal cases *Meyer v. Nebraska*[170] and *Pierce v. Society of Sisters*,[171] courts generally grant School Boards broad discretion in the management of school affairs, provided that the school's decisions comport with its students' fundamental interests.[172] In

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[162] *Id*.
[163] *Selman,* 390 F. Supp. 2d at 1305.
[164] *Id*. at 1290.
[165] *Id*. at 1308.
[166] *Id*. at 1306.
[167] *See* Ernst Mayr, *80 Years of Watching the Evolutionary Scenery*, 305 SCIENCE MAGAZINE, at 46-47 (July 2, 2004) (recounting the various disputes in evolution over the past eighty years and noting that "evolutionary biology is an endless frontier" with much "still to be discovered").
[168] *Selman*, 390 F. Supp. 2d at 1290.
[169] *Id*. at 1300.
[170] 262 U.S. 390, 402 (1923).
[171] 268 U.S. 510, 534 (1925).
[172] Board of Education v. Pico, 457 U.S. 853, 868 (1982).

*Selman*, the court uncovered two secular purposes for the School Board's adoption of the sticker, purposes which served to protect the fundamental interests of its students.[173]

First, the court found that the sticker appropriately encouraged students to think critically.[174] A School Board measure properly advocates critical thinking where it requires students to approach new concepts with an openness and a willingness to alter and shift existing viewpoints.[175] Accordingly, the *Selman* court found that by encouraging students to study evolution carefully,[176] the School Board intended to spur scientific exploration, and to encourage students to keep an open mind about the diverse viewpoints of their fellow classmates.[177]

Second, the court found that the School Board implemented the sticker to reduce offense to students and parents whose beliefs conflicted with evolution.[178] Quoting *Frieler*, the Selman court noted that school systems can constitutionally enact measures, in part, to accommodate the religious concerns of parents.[179] In *Selman*, the School Board chose to present controversial material in a manner that would not be "unnecessarily hostile" to the divergent religious views of its students.[180] Thus, the court properly concluded that the School Board's consideration for parents' and students' religious beliefs, in conjunction with the desire to foster critical thinking, amounted to two valid, secular reasons for adopting the sticker.[181]

B. Court's Findings under the Effects Prong

The court chose to invalidate the sticker, however, based on its presumptively pro-religious effect.[182] Although the sticker was religiously neutral on its face, [183] the court found that the measure might have a religious effect because: (1) the sticker advanced the idea that evolution is a theory, not a fact;[184] and (2) the sticker isolated evolution as a controversial topic.[185] At the same time, the court acknowledged that a governmental action or measure that coincides with religion cannot, without more, invalidate that action or measure.[186]

Although the sticker categorized evolution as theory, the court improperly found that this categorization would have the effect of endorsing religion and favoring certain religious viewpoints.[187] Under the Establishment Clause, the government is

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[173] *Selman*, 390 F. Supp. 2d at 1295.
[174] *Id*. at 1293.
[175] *Id*. at 1302 (citing *Freiler*, 185 F.3d at 345).
[176] *Id.* at 1292.
[177] *Id.*
[178] *Id*. at 1303.
[179] *Selman*, 390 F. Supp. 2d at 1304 (quoting *Freiler*, 185 F.3d at 346) (noting that the Constitution does not require that school boards ignore parents' religious concerns).
[180] *Id*. at 1305.
[181] *Id*.
[182] *Id*. at 1312.
[183] *Id*. at 1295.
[184] *Id*. at 1307-08.
[185] *Selman*, 390 F. Supp. 2d at 1308-1309.
[186] *Id*. at 1308 (citing Harris v. McRae, 448 U.S. 297, 318-320 (1980)).
[187] *Id*. at 1307.

prohibited from taking "sides" regarding questions of religion.[188] Recounting the discord among evolutionists and creationists regarding evolution, the court concluded that emphasizing evolution's theoretical nature would undermine its wide acceptance by the scientific community, and effectively align the School Board with proponents of religious origin theories.[189] However, the court itself acknowledged that evolution is indeed a *scientific theory*,[190] and thus not a fact. Furthermore, by its language, the sticker made no mention of preferring one religion over another or preferring religion to non-religion.[191] The sticker stated that evolution is a theory, which neither undermines its widely-accepted nature nor contradicts any scholarly definition of evolution.[192] The sticker merely, in accord with the weight of scholarly definition, emphasizes evolution's theoretical nature. It was erroneous for the court to conclude that the sticker improperly denigrated evolution as *merely* a theory,[193] because even the most unimpeachable science *is merely* a theory.

By finding that presenting evolution as theory rather than fact violated the Lemon Test's effects prong,[194] the court fundamentally created a new precedent making it unconstitutional *per se* for a school to even suggest that evolution is theoretical. It is true that, under *Epperson*, schools cannot suppress evolution instruction simply because it conflicts with a particular religious doctrine.[195] In *Selman*, however, the School Board did not suppress evolution instruction, but rather acted to strengthen it.[196] Not finding the School Board at fault on this account, the court identified the emphasis of evolution as *merely* a theory problematic.[197]

This logic is confusing especially considering that the *Edwards* Court noted that the dictionary definition of evolution is "the *theory* that the various types of animals and plants have their origin in other preexisting types, the distinguishable differences being due to modifications in successive generations."[198] As this paper earlier espoused, the academic community also regards evolution as a theory. It would therefore be contradictory for the court to require public schools to de-emphasize evolution's theoretical nature, or to require the presentation of evolution as

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[188] *Id*.
[189] *Id*.
[190] *Id*. at 1309 (noting that "[e]volution is the dominant scientific theory regarding the origin of the diversity of life and is accepted by the majority of the scientific community")
[191] *See Epperson*, 393 U.S. at 104, n. 12 (reading the First Amendment to mandate neutrality between religions and between religion and non-religion).
[192] *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 402 (10th ed. 1999) (among its many definitions, evolution is described as "a theory that the various types of animals and plants have their origin in other preexisting types and that the distinguishable differences are due to modifications in successive generations; also : the process described by this theory"); 4 THE NEW ENCYCLOPEDIA BRITANNICA 623 (15th ed. 2002) (defining evolution as the "theory in biology postulating that the various types of plants, animals, and other living things on Earth have their origin in other preexisting types and that the distinguishable differences are due to modifications in successive generations. The theory of evolution is one of the fundamental keystones of modern biological theory.")
[193] *Selman*, 390 F. Supp. 2d at 1308.
[194] *Id*.
[195] *Epperson*, 393 U.S. at 103.
[196] *Selman*, 390 F. Supp. 2d at 1302.
[197] *Id*. at 1311.
[198] *Edwards*, 482 U.S. at 599 (Brennan, J., concurring) (citing WEBSTER'S NEW INTL' DICTIONARY 789 (3rd ed. 1981)).

unimpeachable theory, or worse yet, as indisputable fact. Although the court stated that it did not intend to dictate whether schools should refer to evolution as fact or theory,[199] its holding suggests that distinguishing evolution as theory denigrates evolution. The court concludes that this 'denigration' is unconstitutional because it indicates that a public school favors alternative, religious origin theories.[200]

The court further reasons that isolating evolution as the only theory to be critically considered improperly leads an ordinary observer to believe that there is some "problem peculiar to evolution."[201] It is true that, in Cobb County, there was a problem "peculiar to evolution." Any "informed, reasonable observer" would have been aware of this problem.[202] The court noted, under its purpose prong analysis, that the School Board may permissibly take measures to show consideration for individual student's religious beliefs.[203] As such, the School Board should be permitted to pinpoint, and attempt to alleviate concerns about, the issues causing controversy for its students. The School Board may appropriately take measures to present controversial material in a less offensive manner;[204] thus the court should not consider the sticker's focus on evolution to be improper, but rather view it as a valid way to alleviate students' and parents' concerns about the revised School Board policy strengthening evolution instruction.

## VI. CONCLUSION

While no court has found evolution to be the factually "correct" origin theory,[205] likewise no court has found a valid, secular reason for opposing its teaching.[206] Courts have a keen interest in adhering to the Constitution and keeping church and state separate. Thus, even a "balanced approach" to teaching origin theory would create an improper governmental entanglement with religion.[207]

In *Selman*, both Plaintiffs and Defendants agree that evolution should be taught in the science classroom;[208] yet, in the effort to keep church and state separate, the court chose to invalidate a measure enacted, in part, to strengthen a school's evolution instruction.[209] Although the court accepts the School Board's articulated reasons for adopting the sticker as valid, secular purposes,[210] the court invalidates the

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[199] *Selman*, 390 F. Supp. 2d at 1288.
[200] *Id*. at 1310-11.
[201] *Id*. at 1309. The court also noted that the School Board did not adopt an alternative sticker, drafted by a teacher, which would have put less emphasis on evolution as the only scientific theory needing critical consideration. The court failed to consider that the School District's legal counsel drafted the sticker ultimately chosen by the Board. This legal staff believed the language to be constitutionally permissible.
[202] *Id*. at 1311.
[203] *Id*. at 1303-04.
[204] *Id*. at 1305.
[205] *Selman*, 390 F. Supp. 2d at 1288 (stating from the outset that the court will take "no position on the origin of the human species" nor will it resolve "the ongoing debate regarding whether evolution is a fact or a theory or whether evolution should be taught as fact or a theory").
[206] *Edwards*, 482 U.S. at 588 (finding that schools have no valid, secular reason for *not* teaching evolution in public schools).
[207] *Id.* at 587.
[208] *Selman*, 390 F. Supp. 2d at 1296.
[209] *Id*. at 1291.
[210] *Id*. at 1305.

sticker based on a presumed religious effect.[211] By holding the sticker unconstitutional based on this presumption,[212] the *Selman* court creates a new precedent which suggests that teaching evolution as theory is *per se* a religious endorsement.

This conclusion does not follow the Supreme Court holdings in *Epperson*[213] and *Edwards*,[214] which sought to bolster, not hinder, scientific inquiry. The Supreme Court's decisions in those cases freed evolution from undue restrictions, permitting the topic to be taught openly in the public school science classroom.[215] The School Board in *Selman* similarly sought to revise its former policy which kept evolution out of the compulsory curriculum.[216] Through adopting the new textbooks and the accompanying sticker, the Cobb County School District makes students aware of the fact that evolution is the pre-eminent, and scientifically accepted, theory regarding the origin of life.[217] At the same time, evolution is a theory worthy of additional exploration.[218] In asking students to approach evolution with an open mind, to study it carefully, and to critically consider the topic,[219] the School Board merely is asking that students continue to explore the "endless frontier" that is evolutionary biology.[220]

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[211] *Id*. at 1312.
[212] *Id*. at 1313.
[213] 393 U.S. at 109 (finding that Arkansas' anti-evolution statute improperly violated the First Amendment because it was a confined attempt to prevent teaching evolutionary theory).
[214] 482 U.S. at 580 (finding that "[i]f the Louisiana Legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind").
[215] *See Edwards*, 482 U.S. at 586 (considering "[t]he goal of providing a more comprehensive science curriculum [not] furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science"); *Epperson*, 393 U.S. at 109 (noting that "as early as 1923, the Court did not hesitate to condemn under the Due Process Clause "arbitrary" restrictions upon the freedom of teachers to teach and of students to learn") (citing *Meyer*, 262 U.S. 390; Bartels v. Iowa, 262 U.S. 404 (1923)).
[216] *Selman*, 390 F. Supp. 2d at 1296.
[217] *Id*. at 1292-94.
[218] *Id*. at 1295.
[219] *Id*. at 1292.
[220] *See* Mayr, *supra* note 167, at 47.