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Your Mileage May Vary: A General Theory of Legal Disclaimers

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Your Mileage May Vary: A General Theory of Legal Disclaimers

R. GEORGE WRIGHT*

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I. INTRODUCTION

Disclaimers are a common feature of public and commercial life.¹ While this article will be concerned with disclaimers only in legal contexts,

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1. The author’s disclaimer commonly may take one of two related forms. In the first form, the disclaimer protects an institution with which the author is affiliated from unapproved association with

the range of such legal contexts is broad. This article will refer below to disclaimers² by governmental and non-governmental actors in various circumstances. Disclaimers arise, for example, in Establishment Clause cases in general,³ and of late, in cases involving public school evolution text-

the author's controversial views or conclusions. Sometimes, this first form of disclaimer is accompanied by a disclosure, as that the author had involvement in litigating one or more of the cases discussed. By contrast, the second form of author disclaimer seeks to protect colleagues and others, gratefully thanked by the author for their valuable assistance, from being tarred by association with the work. Since vigorous criticism as to fundamental matters is often the most valuable sort of such collegial assistance, we should all work to strengthen the presumption that being generally thanked by the author does not imply any measure of agreement with the author.

In the extreme case, however, a disclaimer seeking to absolve all of one's mentors and teachers of any and all causal and moral responsibility for any of one's views might be implausible. The customary disclaimer seeks to limit responsibility for all controversial opinions and errors to the immediate author. One could, however, just as well argue that one or more influential other persons may bear shared responsibility. But again, a scholarly convention of confining responsibility to the authors probably encourages more willing assistance by others.

For an unusual externalization of responsibility, see Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1645 n.aa1 (2004), where the authors stated that "[a]ll remaining errors are the sole responsibility of McDonald's." For a more limited disclaimer, grounded in social theory, see Rebecca Tushnet, *Copyright as a Model for Free Speech Law: What Copyright Has in Common with Anti-Pornography Laws, Campaign Finance Reform, and Telecommunications Regulation*, 42 B.C. L. REV. 1, 1 n.a1 (2000), where the author stated, "As I have doubts about the concept of independent authorship, responsibility for any remaining errors is no more mine than responsibility for any insights." For an attempted, if jocular, displacement of responsibility onto pre-publication reviewers, see Jeffrey Evans Stake, *Who's "Number One": Contriving Unidimensionality in Law School Grading*, 68 IND. L.J. 925, 925 n.a1 (1993), where the author thanked specific commenters "who, careful readers as they are, would have to be held responsible for any remaining errors."

The typical scholarly disclaimer, in which the author seeks to bear all possible responsibility, may be questionable as social theory—and even as moral theory—but may have the virtue of encouraging advance critique of academic work. The problem is that, as many academic disclaimers expressly recognize, there is already a well-established broad convention against holding pre-publication readers responsible for an author's controversial opinions, with or without any disclaimer. See, e.g., Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 683 n.aa (1993) (including, as with many such disclaimers, the phrase "of course" while, in this instance, also seeking to "hereby disclaim liability for the costs of any injuries—pecuniary or nonpecuniary—that this article may cause").

This general pattern will be replicated below in several important legal contexts and throughout the law of disclaimers.

2. In the sense in which we are interested, a disclaimer is roughly a form of disavowal, denial, or repudiation. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 645 (1961) (defining "disclaimer"). Social theorists and sociologists occasionally focus on disclaimers, using the term in ways generally compatible with the way the term is developed below. See, e.g., John P. Hewitt & Randall Stokes, *Disclaimers*, 40 AM. SOC. REV. 1, 3 (1975) (stating that "a disclaimer is a verbal device employed to ward off and defeat in advance doubts and negative typifications which may result from intended conduct"); Maryann Overstreet & George Yule, *Formulaic Disclaimers*, 33 J. PRAGMATICS 45, 48 (2001) (describing disclaimers used by their speakers as "an effort to . . . render potentially problematic actions . . . meaningful, and . . . define such actions as an irrelevant basis for a reassessment of the speaker's established identity"). One will occasionally notice throughout the unclear boundary lines between disclaimers on the one hand and disclosures—or even, in some cases, warnings—on the other: for example, "not to be taken internally."

3. See *infra* Section IV.A.

books.⁴ Disclaimers may also be thought of as a remedy for compelled speech, or as themselves an instance of compelled speech.⁵ In addition, commercial speech⁶ is a fertile source of disclaimer problems, as in commercial⁷ advertising by professionals,⁸ the marketing of securities,⁹ and the making of health claims regarding dietary food supplements.¹⁰

For further perspective, this article will also refer to disclaimers in specific¹¹ business and commercial contexts involving employment contract laws,¹² commercial and consumer implied warranty and tort disclaimer¹³ cases,¹⁴ and various sorts of implied warranty of residential habitability cases.¹⁵

These various contexts hardly exhaust the scope of disclaimers in the law. The goal of this article, however, is not to compile a complete taxonomy—as though ambitiously collecting species of butterflies—but to establish a foundation sufficient to make plausible descriptive and normative claims about disclaimers in the law.

Briefly, the conclusion will be that the law should rebuttably presume that disclaimers—both their text or terms—should not be given significant legal weight in their own right, apart from the relevant surrounding circumstances, social conflicts, power relationships, independent rules, and other considerations of public policy. The reasons for this skeptical general result will emerge gradually below. For now, part of the argument can be anticipated by noticing that typically, legal disclaimers arise as a con-

4. See *infra* Section IV.B.

5. See *infra* Section IV.C.

6. For an introduction to some general commercial speech regulation principles, if of uncertain future stability, see *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

7. The dignitary concerns associated with political speech may sometimes be present in more commercial contexts.

8. See *infra* Section IV.D.

9. See *infra* Section IV.E.

10. See *infra* Section IV.F.

11. At a more general level, it may sometimes be hard to see why one genuinely freely bargained for contractual term should be singled out among other freely bargained for terms and thought of as a distinct “disclaimer,” unlike any other bargained for qualification or concession on either side. See generally Robert B. Ahdieh, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033 (2006); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235 (2006).

12. See *infra* Section IV.G.

13. See *infra* Section IV.H.

14. For our purposes, these distinct theories and contexts can be treated together.

15. See *infra* Section IV.I. These contexts could of course be multiplied. Consider one spouse’s classic published disclaimer of liability for newly incurred debts of the other spouse. Should the courts in such cases focus on matters like conspicuousness, clarity, or actual knowledge of the disclaimer, or instead on the underlying policy issues? See, e.g., *Trident Reg. Med. Ctr. v. Evans*, 454 S.E.2d 343, 347–48 (S.C. Ct. App. 1995) (noting historical shifts in power relations between spouses); *Med. Bus. Assoc., Inc. v. Steiner*, 183 A.D.2d 86, 91–92 (N.Y. App. Div. 1992).

sciously strategized move—often an attempt to exonerate, to reassure or allay suspicion, or to shift the burdens of a risk—in a “game” between perhaps unequal players.

Normally, a disclaimer implies some sort of pre-existing tension for which it is meant to address. Disclaimers arise in the context of power relationships, varied conflicts of interest, and for strategic purposes, all of which may implicate questions of public policy and legal values. These underlying questions cannot be meaningfully addressed by any judicial reading of the text or terms of the disclaimer itself. The courts should instead be asked to treat the litigated disclaimer merely as an invitation to consider the underlying relevant circumstances, values, conflicts, power relationships, rules, and public policy considerations apart from the disclaimer itself.

Thus, it would be detrimental to recommend that courts somehow interpret the language of the disclaimer and, on that basis, either give or refuse effect to the disclaimer’s terms. Instead, courts should look more directly to the underlying power relationships, conflicts, and the public and private interests at stake in the adjudication. Courts may, in the process, utilize both broad principles and narrowly specific judgment under the facts. This article will begin by exploring the idea of legal disclaimers and some of the logic of the position stated above. The arguments will then be developed in a variety of more concrete and illustrative legal contexts.

II. WHAT COULD DISCLAIMERS MEAN?

The idea of a legal disclaimer should be something that, in litigation, merely sets in motion a judicial inquiry into related underlying matters. There is a need, of course, to develop some ability to recognize a legal disclaimer. It is helpful to begin by thinking about some familiar disclaimers. One might announce, for example, that past results are no guarantee of future performance, that a party is not responsible for your debts or for damage to your vehicle or for items stolen therefrom, that no animals were injured in the making of a movie, that any resemblance between a literary character and any living person is purely coincidental, that your gas mileage may vary from some posted standard, that someone’s weight loss program results may not be typical, that your views may not be those of station management, or that your sending an e-mail inquiry does not establish an attorney-client relationship.

Typically, legal disclaimers presume an underlying tension of some sort. Generally, a disclaimer tells some audience that some other text or circumstance does not mean or imply what one might otherwise think. Disclaimers usually warn against such apparently reasonable inferences

without themselves offering any independent reasonable grounds. They are thus typically “bare,” and not self-justifying in cautioning against any inference that might be drawn from the pre-existing evidence.

Where disclaimers do try to justify themselves, they are often subject in that respect to contested and conflicting interpretation. Nevertheless, disclaimers seek to somehow affect the rights, statuses, opportunities, risks, and costs at stake. The underlying tension in question may take various forms—including, for example, the form of popular confusion. One court has thus argued that “[d]isclaimers are a favored way of alleviating consumer confusion as to source or sponsorship.”¹⁶

The main problem that generally arises is that the relationship between the text or terms of the disclaimer and the underlying tension is more or less indeterminate or reasonably contestable.¹⁷ It might be said that it is the underlying social circumstances themselves that are contestable, or else that the disclaimer itself is indeterminate or essentially contestable in its meaning, value, and implications. After all, a disclaimer typically tries to discourage us from adopting an otherwise more or less reasonable inference in light of underlying circumstances.

In rare cases, the text or terms of a disclaimer may, on their face, appear simply implausible or plainly unjust and unenforceable. But even in such a case, those terms are likely being used to infer something about the underlying power relationships and conflicting interests. Courts that focus on the disclaimer, or on its text or terms, are as likely to impose their own preconceptions on the disclaimer as to interpret the disclaimer itself in some uniquely appropriate and beneficial way. Further evidence of how judicial interpretation of disclaimers in particular is typically more difficult than judicial interpretation of various kinds of texts in general will be revealed below.

To understand the special problems of interpreting disclaimers, it is helpful to think of the ways in which disclaimers are commonly utilized. Following a movie scene which depicts animals in jeopardy, for example, a disclaimer may inform us that no animals were actually injured. Other disclaimers—such as the scholarly author’s disclaimer—may seek to steer official or unofficial reactions, or perhaps even directly allocate risks and burdens. Disclaimers may have many audiences, including the parties themselves, interested spectators in general, potential regulators, potential litigants in general, and reviewing courts. In some cases, the identities of the real author or authors, sponsors, or endorsers of a disclaimer may

16. *Consumers Union of U.S., Inc. v. Gen. Signal Corp.*, 724 F.2d 1044, 1053 (2d Cir. 1983).

17. *See, e.g., Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, No. 01 C 9389, 2004 WL 532717, at *4–5 (N.D. Ill. Feb. 26, 2004).

themselves be contested; we may not know for whom the disclaimer speaks.

It is important to note that disclaimers—especially litigated disclaimers—are rarely seen in the absence of some sort of relevant underlying group tension, whether suppressed or overt.¹⁸ If the standard scholarly author's disclaimer is sometimes thought to be unnecessary,¹⁹ it is because there is a well established convention for sensible policy reasons, in which controversial theses are not imputed to readers of such. In other cases, a disclaimer seeks to change, deny, distance, or characterize a reality—perhaps a legal reality—in some way that may deserve to be controversial. Disclaiming the consequences of one's own negligence,²⁰ for example, or the government disclaiming its endorsement of religion through other acts,²¹ are typical disclaimers that occur against the background of a relevant underlying tension. Almost without exception, disclaimers are aimed at either avoiding relevant litigation entirely, or at attaining a ruling in accordance with the preferences of the dominant author or authors of the disclaimer. For this reason, it might be said that every disclaimer is merely a purported disclaimer until it somehow becomes effective.

Depending on the particular interpreter, a disclaimer will necessarily seem more or less plausible. Suppose a contemporary performance artist disclaims any intent to insult or scandalize anyone through a particular art exhibit. Some interpreters may find the disclaimer sincere and plausible, others less so. Or suppose a government displays religious objects, but disclaims any intent to promote either a particular religion or religion in general.²² Interpreters, including courts, may find any such disclaimer more or less legitimate. Or an attorney's disclaimer, following an advertisement, of any "implication regarding the quality of legal services"²³ offered may, according to different reasonable interpretations, again be more or less credible.²⁴ There can certainly be no general certainty as to how disclaimers will be interpreted, or of their legal effects.

Disclaimers in the legal context flourish for several reasons. There is always the chance that the disclaimer will be credited by someone having independent credibility, authority, force, or weight, typically in a direction preferred by the party driving the disclaimer. Crucially amongst those who

18. *See id.* (analyzing a disclaimer against consequential damages, where tension existed as to what is sufficiently conspicuous under the U.C.C. to disclaim the remedy).

19. *See supra* note 1.

20. *See infra* notes 166–69 and accompanying text.

21. *See infra* Section IV.B.

22. *See infra* Sections IV.B–C.

23. IND. RULES OF PROF'L CONDUCT R. 7.2(d)(4) (2007).

24. For the cited language in an adjudicated case, see, for example, *In re Anonymous*, 689 N.E.2d 442, 444 (Ind. 1997).

may thus attribute independent weight to the disclaimer—apart from the broader relevant circumstances—may be a court, with the power to bindingly interpret and give legal effect to its preferred reading of the disclaimer.

More subtly, some courts may appreciate and actually value the sheer contestability of typical legal disclaimers, along with the manipulability of the disclaimer analysis and its judicial outcomes.²⁵ Other courts, recognizing the underlying tension or potential conflict that gives rise to a disclaimer in the first place, will sense the openness of the judicial possibilities. There may well be a defensible judicial interpretation of the disclaimer that resolves the underlying tension in accordance with judicial preferences. Such courts might thus be in no hurry to abandon a manipulable process of judicial interpretation regarding disclaimers.

The conflicts and uncertainties underlying disclaimer cases do not mean that an outcome in any disclaimer case is better than any other. Courts should, however, recognize that a typical disclaimer is “bare,” in the sense that it does not present grounds within itself to determine its own credibility, or at best offers only inherently contestable grounds.²⁶ The disclaimer operates against a disclaimed inference that we presumably have some reason to accept; if there were not some reason to accept what is being disclaimed, there would be little reason for the disclaimer.

Courts should thus recognize that typically, a disclaimer does not make an unequivocal or determinate case for itself, or even establish its own meaning. It is a calling into question of what is disclaimed. The disclaimer should be seen by the court as merely setting the litigated case in motion. The substantial grounds for actually deciding the case one way or another—or for accepting one theory of the case over another—lie not in the text or terms of the disclaimer, but rather outside the disclaimer in the relevant underlying facts, circumstances, conflicts and power relations, legal rules, and policies.

A typical disclaimer, especially in cases likely to be litigated, is a strategic move, and sometimes²⁷ a legally self-conscious, manipulative one. Disclaimers are thus typically both responsive and anticipatory. Judges should consider disclaimers, when litigated, merely as invitations to in-

25. See *infra* Section IV.C (providing, for an example of inescapable contestability and practical arbitrariness, disclaimers in the Establishment Clause context generally in the setting of public school textbooks discussing evolutionary theory).

26. See *Streips v. LTV Corp.*, 216 A.D.2d 923, 926 (N.Y. App. Div. 1995) (“The bare disclaimer that defendants had not prejudged plaintiff does not necessarily erase that defamatory implication.”).

27. It seems fair to guess that against the background of so many recent and well-publicized Establishment Clause cases, there is a reasonable chance that any new disclaimer in this context will amount to a self-conscious, calculated, strategic move in a politicized litigation game, whatever else it may also represent. See *infra* Sections IV.B–C.

quire into the legal and policy merits of the underlying circumstances. The disclaimer itself will usually somehow reflect the relevant power relationships amongst the parties, which the court may or may not want to validate, given the interests and policies at stake.

For discussion purposes, a disclaimer may initially be thought of as an attempt to warn against—or even rule out—some sort of otherwise more or less plausible independent inference, or other reaction. This preliminary understanding of a disclaimer will generally suffice. It does not correspond perfectly with all legal usages, whether formal²⁸ or more casual.²⁹ However, there is enough of a preliminary sense of disclaimers in the law to now further explore the distinctive problems associated with such disclaimers. These problems are especially acute in the case of litigated disclaimers, and will not take as severe a form in most other general textual expressions.³⁰

III. SOME PROBLEMS WITH TEXTS IN GENERAL AND WITH DISCLAIMERS IN PARTICULAR

Certain forms of literary and social theory shed light on some of the distinctive problems associated with disclaimers. First, it may be helpful to examine an analogy. The philosopher W.B. Gallie famously suggested that some concepts, including those of democracy and freedom, are “essen-

28. Some statements or actions that the law calls “disclaimers” will not qualify as disclaimers for our purposes. For example, a disclaimer in patent law or in the law of estate planning is roughly a timely and unequivocal substantive repudiation of a specified particular interest. See BLACK’S LAW DICTIONARY 496 (8th ed. 2004) (defining “disclaimer”). A disclaimer as understood by estate law is generally effective as a legal matter where the necessary elements of the disclaimer are present. *Id.* at 496–97; see also RONALD A. BRAND & WILLIAM P. LAPIANA, DISCLAIMERS IN ESTATE PLANNING: A GUIDE TO THEIR EFFECTIVE USE 1 n.1 (1990) (“The law is certainly not so absurd as to force a man to take an estate against his will.” (quoting *Townson v. Tickell*, (1819) 106 Eng. Rep. 575, 576–77 (K.B.))); S. Alan Medlin, *An Examination of Disclaimers Under UPC Section 2-801*, 55 ALB. L. REV. 1233, 1271, 1281 (1992) (discussing waiver of right to disclaim, and the effect of accepting any benefits from the interest purportedly disclaimed).

29. The law sometimes refers to what would normally be thought of as a disclosure—as in publicly disclosing or revealing one’s identity—as a “disclaimer.” For discussion of this arguable confusion of disclosures and disclaimers, see *Majors v. Abell*, 361 F.3d 349, 350, 358 (7th Cir. 2004). Other cases further illustrate the election law and First Amendment contexts. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *ACLU of Nev. v. Heller*, 378 F.3d 979, 1001 (9th Cir. 2004); *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 691 (Tex. 2007).

30. On the other hand, there may be even less reason for courts to focus on the language and substantive textual messages, including a written response to a kidnapper, the language of a medical experiment consent form signed by a prisoner, or of a coerced confession. See, e.g., *Colorado v. Connelly*, 479 U.S. 157, 170 (1986) (discussing the grounds for finding a confession coerced, as well as the voluntariness of a *Miranda* waiver); see also *Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects*, 45 C.F.R. § 46.301 (2006).

tially contested concepts.”³¹ Gallie argued that “there are disputes . . . which are perfectly genuine: which, though not resolvable by argument of any kind, are nonetheless sustained by perfectly respectable arguments and evidence.”³²

It is certainly not suggested that the idea of a disclaimer is itself an essentially contested concept. The problem with disclaimers is not that some of us think that the idea of a disclaimer means one thing, systematically, while others think that it means, or should mean, something crucially different. Instead, one should seek only to borrow some of the flavor of Professor Gallie’s account regarding the struggle in practice over essentially contested concepts.

Even if it can be agreed in general on what a disclaimer is, it is typical to find contrasting attitudes toward a particular disclaimer: complex related arguments; potentially conflicting characterizations of the relevant circumstances and policies; unsettledness in an approach to the disclaimer, even where certain “easy” or uncontroversial cases are presented; and a sense that the potential areas of dispute regarding the disclaimer are of a deep or structural character, even if the occasion for the dispute seems transient. Following Gallie, the contest over the disclaimer seems dualistic³³ in form.³⁴ It is not necessary to view disputes over disclaimers either as reflecting some form of group relativism,³⁵ or as grounded only in verbal confusion and superficial misunderstanding.³⁶

More generally, it is true of disclaimers—at least as much as of texts in general—that the meaning for readers will depend upon the assumptions they bring to bear³⁷ as individuals or as members of some interpreting group.³⁸ These groups may well differ in social position, power, status,

31. See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC’Y 167, 169 (1956).

32. *Id.* There is substantial literature deriving from Gallie’s work. For a recent critique, see David Collier et al., *Essentially contested concepts: Debates and applications*, 11 J. POL. IDEOLOGIES 211 (2006).

33. Admittedly, it may be difficult to separate any distinctive dualism in disclaimers from the general tendency of adversary litigation to reduce disputes to dualistic oppositions.

34. See Collier et al., *supra* note 32, at 212 (incorporating a number of similar elements used in Gallie’s approach).

35. *Id.*

36. See Gallie, *supra* note 31, at 188.

37. See Stanley E. Fish, *Normal Circumstances, Literal Language, Direct Speech Acts, the Ordinary, the Everyday, the Obvious, What Goes Without Saying, and Other Special Cases*, 4 CRITICAL INQUIRY 625, 626 (1978) (“[W]hat anyone sees is not independent of his verbal and mental categories but is in fact a product of them . . .”). To the extent this is true, it may well be true even of judges interpreting litigated disclaimers.

38. See JAY L. LEMKE, TEXTUAL POLITICS: DISCOURSE AND SOCIAL DYNAMICS 9 (1995) (“all meanings are made within communities and . . . the analysis of meaning should not be separated from the social, historical, cultural, and political dimensions of these communities”); Steven Randall, *Fish v. Fish: Review of Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communi-*

and interests. The meanings of texts will in this sense be social,³⁹ and will reflect both the correspondence and the conflicts—overt and suppressed—of social group interests.⁴⁰ Quite understandably, then, “multiplicity and indeterminacy of interpretation”⁴¹ should often be expected.

Given the many differences in power and interests among interpreting groups, one should expect some of the conflicting interpretations to be dominant, even if contested,⁴² other interpretations to be negotiated, even if unstably so, and yet other interpretations to be more or less oppositional and subject to official disapproval.⁴³ Thus, in general,

the meanings and interests of both dominant and non-dominant [groups] act together in proportions that are not predetermined, to constitute the forms and possibilities of meaning at every level. We do not assume that resistance is always successful or potent: but nor do we take it for granted . . . that resistance is always effortlessly incorporated and rendered non-significant.⁴⁴

Whether one finds these characterizations to be descriptive of all sorts of texts is, of course, far beyond the scope of this article. Their applicability to typical cases of litigated disclaimers is of greater concern.

ties, 12 *DIACRITICS* 49, 51 (1982) (explaining that constraints on interpretations of texts “proceed not from stable, objective properties of the text, but from norms and assumptions shared with other members of an interpretive community.”).

39. See, e.g., John Dewey, *Peirce’s Theory of Linguistic Signs, Thought, and Meaning*, 43 *J. PHIL.* 85, 94 (1946) (recognizing that no valid theory of linguistic signs can escape being rooted in social phenomena).

40. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 26 (1989) (discussing the role of cooperation in linguistic discourse); ROBERT HODGE & GUNTHER KRESS, *SOCIAL SEMIOTICS* 266 (1988) (emphasizing interpretive contradiction in the context of attempts to control conflicting interests through text and interpretation); Dewey, *supra* note 39, at 94; see also Geoffrey P. Miller, *Pragmatics and the Maxims of Interpretation*, 1990 *WIS. L. REV.* 1179, 1190 (1990) (discussing philosopher Paul Grice on the study of meaning as often derived from the social setting).

41. Lynn Mario T. Menzes de Souza, *Language, Culture, Multimodality and Dialogic Emergence*, 6 *LANGUAGE & INTERCULTURAL COMM.* 107, 107 (2006); see also UMBERTO ECO, *THE ROLE OF THE READER: EXPLORATIONS IN THE SEMIOTICS OF TEXTS* 22 (2d ed. 1984) (stating “an ideological bias can lead a critical reader to make a given text say more than it apparently says”); JOHN R. SEARLE, *EXPRESSION AND MEANING: STUDIES IN THE THEORY OF SPEECH ACTS* 5 (1979) (showing differences in the status of both speaker and listener in affecting meaning).

42. See HELEN DAVIS, *UNDERSTANDING STUART HALL* 46–47 (2004) (discussing Hall’s theory on the often unstable and sometimes negotiated-among-unequals quality of some interpretations); REPRESENTATION: CULTURAL REPRESENTATIONS AND SIGNIFYING PRACTICES 48 (Stuart Hall ed., 1997) (explaining the development of related ideas in general contexts); JAMES PROCTOR, *STUART HALL* 26 (2004); RAYMOND WILLIAMS, *MARXISM AND LITERATURE* 113 (1977) (defining dominance as “never either total or exclusive”).

43. See *supra* note 41.

44. HODGE & KRESS, *supra* note 40, at 8.

The language of disclaimers is thus not merely purposive,⁴⁵ but typically⁴⁶ conflict-based, power-reflective, and strategic in distinctive ways.⁴⁷ More so than texts in general, disclaimers are directly reflective of conscious social power relationships and at least partially conflicting interests. Disclaimers cannot be read by courts in some conflict-neutral way, even if a court finds a particular disclaimer to be entirely unambiguous.

The crucial problem in judicially responding to disclaimers, then, is not one of textual ambiguity. Many disclaimers are as unambiguous as the non-disclaimer texts that courts are rightly expected to focus on and interpret under their own terms.⁴⁸ Even if one were to choose to call most disclaimers ambiguous, they would still be no more ambiguous than many other texts, including other legal texts.

The lack of uniform ambiguity of disclaimers should not be surprising. If, as is suggested, disclaimers reflect underlying power relationships in circumstances of conflicting interests, one should expect many disclaimers to be no more ambiguous than other social texts. A dominant group may or may not find that an ambiguous disclaimer best reflects its interests. An ambiguous or unambiguous disclaimer may be more or less unilaterally imposed, or else negotiated amongst some of the directly affected parties.

The crucial problem underlying judicial responses to disclaimers is thus not distinctive ambiguity, but rather that a disclaimer's text reflects the complex, subtle, or disguised underlying power relationships, conflicting interests, and strategic purposes that have produced that text.⁴⁹ For a

45. See, e.g., TERRY EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 99 (2d ed. 1996) ("When we understand the 'intentions' of a piece of language, we interpret it as being in some sense *oriented*, structured to achieve certain effects.")

46. "Disclaimers" that arise before any potential conflict has been envisioned would count either as less strategic, less manipulative, less self-conscious disclaimers, or as partial, inadvertent, or even not true disclaimers at all. For a relatively close case even in the context of religious symbols on public land, see *Buono v. Kempthorne*, 502 F.3d 1069, 1072 (9th Cir. 2007), which involved a wooden cross erected by VFW on public land in 1934, accompanied by photographs and signs stating: "The Cross, Erected in Memory of the Dead of All Wars." It can be assumed that such displays might well have been less likely to be subject to Establishment Clause litigation in 1934 than in more recent decades.

47. See C.K. OGDEN ET AL., *THE MEANING OF MEANING* 17 (Harcourt 1989) (1923) ("Another variety of verbal ingenuity . . . is the deliberate use of symbols to misdirect the listener.")

48. In various contexts, the Court has willingly interpreted the Equal Protection Clause. See, e.g., *Baker v. Carr*, 369 U.S. 186, 226 (1962) ("Judicial standards under the Equal Protection Clause are well developed and familiar.")

49. A disclaimer does not arise for practical, cultural, or technical reasons, even though conflicting interests and strategic purposes may be present. *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 576–77 (1995). In *Hurley*, the Court contrasted the greater feasibility of broadcaster versus individual speaker viewpoint disclaimers in *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 655 (1994). *Hurley*, 515 U.S. at 576–77. The Court also controversially contrasted the supposedly unproblematic disclaimer possibilities for shopping mall owners with respect to random unscreened mall speakers in *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 86–87 (1980). For an even less realistic proposed disclaimer, see *Wigg v. Sioux Falls School District 49-5*, 382 F.3d 807, 811 (8th Cir. 2004), which involved an audience of second and third grade students and

court to either validate or invalidate any disclaimer is to inescapably take some non-neutral stance on the status and exercise of those power relationships. A court should, therefore, address the broad moral or public policy-based value and character of those power relationships in the context of the contested disclaimer.

The terms or text of a disclaimer can hardly begin to validate or invalidate the underlying power relationships and the exercise of power embodied in the disclaimer; they can only serve to introduce the court to the substantive public policy interests and concerns that should determine the outcome of the judicial case.⁵⁰ A judicial decision that focuses, formalistically, on the text or terms of the disclaimer—rather than on underlying power relationships, conflicts, and values—will unavoidably be substantively arbitrary, whether or not it validates the disclaimer.

Sometimes a dominant party overreaches and imposes a disclaimer that, on its face, strikes a court as patently unjust and violative of sound public policy.⁵¹ Even in such “easy” cases, the court should view the disclaimer’s terms as suggesting the state of the underlying power relationships and conflicting interests.⁵² It is those power relationships, interests, and the public policy responses thereto that matter. The enforceability of a disclaimer, whether facially appealing to a judge or not, must be determined by some sort of judicial or legislative consideration of the circumstances beyond the text. The disclaimer itself is not typically cogent evidence of those policies. The cases discussed below illustrate when a self-conscious strategic point of a disclaimer is evident.⁵³

explained that a teacher conducting a religious club meeting in a public school library—only minutes after the last school class—is acting only in her capacity as a private citizen, or at least not as an official representative of the school. It seems unlikely that most second or third grade students could read such a disclosure, or grasp the distinction involved.

50. *See, e.g.*, *Stewart v. Bradley*, No. 2070574, 2008 WL 4892150, at *7 (Ala. Civ. App. Nov. 14, 2008) (finding no violation of public policy when disclaiming any right to recover mental-anguish damages).

51. As an extreme hypothetical, consider a disclaimer by which an apparently dominant party sought to avoid any responsibility for its own malicious acts in exchange for no meaningful consideration. *See Markel Am. Ins. Co. v. Dagmar’s Marina*, 161 P.3d 1029, 1031 (Wash. Ct. App. 2007) (discussing the controversy that exists when a disclaimer attempts to exculpate a party from liability for negligent injury).

52. As a matter of the underlying social reality, a disclaimer that seems objectionable on its face may be justifiable in light of circumstances not suggested by the disclaimer itself. Perhaps some concession or payment has elsewhere been made, or the apparently unfair terms advantage the burdened party in some other context. This holds whether the disclaimer has been formally agreed to or is instead apparently unilateral.

53. *See infra* Sections IV.B–C.

Surprisingly, a disclaimer often provides little insight into who has authored it.⁵⁴ It is to be expected that a disclaimer itself will not indicate which among the several affected parties has endorsed, resisted, or been skeptical of the disclaimer. However, it is also common for disclaimers to leave even their own author or authors unspecified.⁵⁵ In some cases, lack of clarity as to the identity of the author may reflect the strategic aims underlying the disclaimer.

Perhaps the most important context in which the identity of the disclaimer's author may be unclear—if not actually concealed—involves speech arguably attributable to the government. To create a meaningful democracy,⁵⁶ the voice of government must be clearly distinguished from the voice of less powerful⁵⁷ private speakers.⁵⁸

Even a clear disclaimer may not establish the public or private authorship of particular speech.⁵⁹ Disclaimers, especially those made or mandated by the government,⁶⁰ may in some cases deserve little credence. But the more basic problem is whether the disclaimer amounts to, at least in part, government speech or not. Often, courts do not know—and cannot tell after careful examination of the disclaimer—the identity of the author.

Issues regarding disclaimers and compelled speech are further addressed below.⁶¹ For the moment, consider the possibility of government-

54. Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1384 (2001) (raising general concern over the risk of “deception about who authored a message”).

55. *Id.*

56. Richard Delgado, *The Language of the Arms Race: Should the People Limit Government Speech?*, 64 B.U.L. REV. 961, 989–91 (1984).

57. *Id.* at 990–91.

58. See MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* (1983) (discussing the broader issues posed by government speech); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 984 (2005) (asserting that “federal, state, and local government entities and officials may engage in pseudonymous or anonymous communications more often than we might imagine”); Frederick Schauer, *Is Government Speech a Problem?*, 35 STAN. L. REV. 373 (1983) (reviewing YUDOF, *supra*); Steven Shiffrin, *Government Speech and the Falsification of Consent*, 96 HARV. L. REV. 1745 (1983) (reviewing YUDOF, *supra*).

59. To note the disagreement on this point within the Court, see generally *Board of Regents of the University of Wisconsin v. Southworth*, 529 U.S. 217 (2000), which discussed student speech subsidized by mandatory student activity fees according to state university criteria. In particular, the Court reasoned that a required disclaimer stating that subsidized private speech is not that of the state university student association cannot be accepted as a valid and sufficient disclaimer. *Id.* at 229. In his concurring opinion, Justice Souter emphasized, “Unlike the majority, I would not hold that the mere fact that the University disclaims speech as its own expression takes it out of the scope of our jurisprudence on government directed speech.” *Id.* at 241 (Souter, J., concurring).

60. For discussion of the distinction between speech by or attributable to the government, and speech by others that is compelled by the government, see generally Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411 (2004). This proposition is discussed more fully *infra* Section IV.C.

61. See *infra* Sections IV.B–C.

tally required disclaimers in the context of governmentally subsidized public broadcasting.⁶² The government in such cases has taken an interest in discouraging the belief “that the broadcaster’s editorials reflect the official view of the government.”⁶³ A governmentally required disclaimer is thought to solve the problem by announcing that station editorials do not reflect the views of the official government or any other station funding source.⁶⁴

But a disclaimer that is compelled by the party—in this case the government—and is suspected of influencing the broadcaster’s speech must be suspicious. Such a disclaimer gives the courts a reason to investigate the underlying power relationships, conflicts, strategic aims, and policies at stake. These disclaimers can hardly be self-validating. Consider, in this context, the colorful analysis of Justice Stevens: “This solution would be laughable were it not so Orwellian: the answer to the fact that there is a real danger that the editorials are really Government propaganda is for the Government to require the station to tell the audience that it is not propaganda at all!”⁶⁵

Disclaimers by the government or governmentally inspired private parties raise many issues. The only point addressed here is that even the most careful examination of the text or terms of the disclaimer cannot always reveal which party is the disclaimer’s author. Whether the disclaimer represents some sort of negotiated compromise—or reflects one degree or another of conflicting interests, inequality, or coercion—are closely related but separate problems.

How should a court go about determining whether a disclaimer was authored by the government or a private party? In this context, courts should not focus on the text and terms of the disclaimer, but rather on ascertaining the disclaimer’s author and real social meaning from available sources. Such courts should instead launch an open-ended inquiry into anything that might shed light on the real authorship of the disclaimer. But many courts, understandably, have preferred a more structured and limited—but still complex—inquiry.⁶⁶

The courts have faced general problems when distinguishing between government speech (or government-sponsored speech) and genuinely pri-

62. See *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

63. *Id.* at 395.

64. *Id.*

65. *Id.* at 417 n.10 (Stevens, J., dissenting). In certain related contexts, some justices are more optimistic about the effective role of disclaimers. See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 829 (1985) (Blackmun, J., dissenting) (“petitioner offer[ed] no explanation why a simple disclaimer in the brochure would not suffice to achieve the Government’s interest in avoiding the appearance of support”).

66. See *infra* text accompanying note 59.

vate speech approved by the government. The most commonly used judicial test in this context consists of four factors, none of which focus on the text or terms of the speech itself.⁶⁷ This may include a physical sign, a written message, or a portion of a broadcast. In the context of a physical sign involving a monument inscribed with the Ten Commandments,⁶⁸ for example, one court considered and adopted four factors, which questioned:

(1) whether the central purpose of the sign was to promote the views of the municipality; (2) whether the municipality exercised editorial control over the content of the sign; (3) whether the literal speaker was an employee of the municipality; and (4) whether ultimate responsibility for the content of the sign rested with the municipality.⁶⁹

It is unnecessary to focus on precisely these four factors when trying to judicially determine the authors of a disclaimer. The factors have to be adopted in cases of joint responsibility. At a general level, the court's focus on underlying issues of purpose, control, and responsibility is well-advised. In any event, courts should in look underneath, or beyond, the disclaimer itself.

IV. SETTING ASIDE THE DISCLAIMER ITSELF AND ASKING ABOUT THE UNDERLYING POWER RELATIONS, CONFLICTS, AND PUBLIC POLICIES: SOME TYPICAL EXAMPLES

A. *Establishment Clause Disclaimers in General*

Few areas of the law illustrate the risks of focusing on the text or terms of disclaimers—as distinct from the underlying social and policy realities—more clearly than their treatment in the Establishment Clause context.

It would be overwhelming to survey here all of the various approaches to Establishment Clause jurisprudence.⁷⁰ For illustration, this analysis will begin with the familiar *Lemon* test, in which the challenged practice “must

67. *Sumnum v. City of Ogden*, 297 F.3d 995, 1004 (10th Cir. 2002).

68. *Id.* at 998.

69. *Id.* at 1004; *see also* *Knights of the Ku Klux Klan v. Curators of Univ. of Mo.*, 203 F.3d 1085, 1095 (8th Cir. 2000) (explaining that public radio station's underwriting acknowledgments were determined to be governmental rather than private speech).

70. For references to three more or less distinct approaches—including the *Lemon* test, the endorsement test, and the coercion test—see *Tangipahoa Parish Board of Education v. Freiler*, 530 U.S. 1251, 1251 (2000) (Scalia, J., dissenting). *See also* *Newdow v. U.S. Cong.*, 292 F.3d 597 (9th Cir. 2002), *rev'd on grounds of lack of standing*, 542 U.S. 1 (2004).

have a secular . . . purpose; . . . its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the [practice] must not foster ‘an excessive government entanglement with religion.’”⁷¹ When one adds in alternative tests focusing on some sort of idea of coercion,⁷² or governmental endorsement,⁷³ a sense of current Establishment Clause jurisprudence can be understood.

Directly relevant, however, is the sheer faith of some judges in the power of a disclaimer, absent investigation into the underlying power relationships, actual and potential conflicts, and relevant policy concerns. The problem is that disclaimers in such contexts tell us little about the *Lemon* test elements, coercion, or government endorsement. The focus should be on the relevant underlying circumstances, rather than on the words of the disclaimer.

Certainly, disclaimers in Establishment Clause cases can be either sincere or strategic. Some disclaimers may be manipulative or a form of propaganda.⁷⁴ Disclaimers may or may not accurately reflect any underlying social reality. Some judges, however, take Establishment Clause disclaimers at face value.

Consider, for example, Justice Scalia’s apparent belief that any appropriate disclaimer would have reversed the outcome in *Lee v. Weisman*, which concerned an otherwise unconstitutional general religious invocation before a public school commencement ceremony.⁷⁵ In the face of the otherwise objectionable religious invocation, the school authorities need only present, in his opinion, a relevant disclaimer by “mak[ing] clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers.”⁷⁶ More precisely, in Justice Scalia’s view, such a disclaimer might take the form of “an announcement, or perhaps a written insertion at the beginning of the graduation program, to the effect that, while all are asked to rise for the invocation and benediction, none is compelled to join in them nor will be assumed, by rising, to have done so.”⁷⁷

71. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted).

72. See generally *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *supra* note 69.

73. See *supra* note 69.

74. See generally EDWARD BERNAYS, PROPAGANDA 52 (Ig Publ’g 2005) (1928) (“Modern propaganda is a consistent, enduring effort to create or shape events to influence the relations of the public to an enterprise, idea or group.”); JACQUES ELLUL, PROPAGANDA: THE FORMATION OF MEN’S ATTITUDES 74–75 (Konrad Kellen & Jean Lerner trans., Vintage Books 1973) (1965). It is unnecessary here to think of propaganda as enduring over time.

75. 505 U.S. at 644–45 (Scalia, J., dissenting).

76. *Id.* at 645.

77. *Id.* But see *Santa Fe*, 530 U.S. at 311–12 (finding an essentially coerced attendance at a football game and coerced prayer participation by those in attendance, further stating that “even if we regard

There is much to say in response here. Importantly, it must be asked how one can be sure that a potentially self-serving governmentally composed disclaimer will carefully track any distinction between an unspecified idea of coercion—including peer and public pressure on this ceremonial occasion—and merely being officially but harmlessly “asked” to perform some act in unison.⁷⁸

The point is not to prefer one understanding of coercion⁷⁹ to another, generally or in this context; nor is it to conclude that under the circumstances of *Lee*, anyone was or was not coerced. This also means that there is no claim to be able to say whether a disclaimer that denied any coercion in *Lee* would be accurate or not.

Instead, the point is that a governmental disclaimer of any coercion, or of any intent to proselytize or promote religion, can hardly begin to solve the constitutional problems or tell us about the underlying power relationships, conflicts, and policy concerns in *Lee*. A disclaimer may be, as has been shown,⁸⁰ merely a willful exercise of power by a dominant party that overrides and obscures the relevant underlying truths.

As a further complication, disclaimers in religious display contexts—whether conspicuous or multitudinous⁸¹—may call attention less to themselves than to the physical scene in general, the government’s role and presence, or the portion of the display thought to create the Establishment Clause problem, thereby backfiring.⁸² Such disclaimers still do not reveal the genuine power relationships and conflicts, but may invite judicial manipulation. Disclaimers may reflect unilateral power, may deny the obvious,⁸³ may seem Orwellian,⁸⁴ or may seem to backfire.⁸⁵ The judicial

every high school student’s decision to attend a home football game as purely voluntary, . . . a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship”).

78. Arguably, such a disclaimer takes insufficient account of possible dissenting student free exercise of religion elements at this point, beyond the Establishment Clause issues.

79. See Robert Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE & METHOD* 444 (Sidney Morgenbesser et al. eds. 1969) (providing an alternative understanding of the idea of coercion); see also ALAN WERTHEIMER, *COERCION* (1987); *NOMOS XVI: COERCION* (J. Roland Pennock & John Chapman eds. 1972).

80. *Supra* notes 61–64.

81. See, e.g., *Am. Jewish Cong. v. City of Chi.*, 827 F.2d 120, 128 (7th Cir. 1987) (discussing a nativity scene in City Hall surrounded by six disclaimer signs).

82. *Id.* at 125–26.

83. *Id.* at 128.

84. See *supra* text accompanying note 60. For a limited rejection of Orwellianism in interpreting and reacting to government disclaimers, see *ACLU of Kentucky v. Wilkinson*, 895 F.2d 1098, 1104 (6th Cir. 1990).

85. See *Am. Jewish Cong.*, 827 F.2d at 125–26; see also *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989) (stating that the city had to disclaim menorah sponsorship “so often that it became ours in some people’s minds”).

focus should be not on the detailed formal minutiae of disclaimers,⁸⁶ but instead on the underlying social realities. Only if courts or legislatures meaningfully investigate these underlying realities can we begin to have confidence that a disclaimer case is rightly decided.⁸⁷

Consider, for example, the alternative readings of a disclaimer accompanying the public display of a crèche, menorah, and Christmas tree in *Allegheny v. ACLU*.⁸⁸ The disclaimer associated with the menorah and the Christmas tree referred to celebrating liberty,⁸⁹ and to the theme of light.⁹⁰ The Court's plurality opinion, while recognizing that some messages are just too undeniable to disclaim plausibly,⁹¹ nonetheless understood the disclaimer to confirm that the display was not an endorsement or promotion of religion,⁹² but instead served to recognize cultural diversity.⁹³

One could easily read such a disclaimer as a manipulative attempt to constitutionally legitimize a traditional religious message; a city could easily recognize cultural diversity in some less overtly religiously tinged way. The point, though, is not that courts should look at the disclaimer itself as the key to deciding the constitutional case. A disclaimer cannot tell us whether it reflects nearly universal secular community sentiment, or was proverbially rammed down a minority's throats in an attempt to sanitize unconstitutional motives and consequences.⁹⁴ Meanwhile, even the questions of who is to be envisioned as reading and interpreting the disclaimer, and in what capacities, are unsolved judicial problems.⁹⁵

86. To examine the sense of arbitrariness in judicial attempts to attach one or another sort of crucial legal import to the disclaimer itself, see *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753, 794 n.2 (1995), which recognized the possible perceived inadequacy of disclaimers in particular contexts. For an example of an inordinate judicial focus on fine-tuning the size, visibility, number, and message of an unusually non-committal, ambiguous disclaimer, see *McCreary v. Stone*, 739 F.2d 716, 727–28 (2d Cir. 1984), *aff'd*, 471 U.S. 83 (1985).

87. See *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 697–98 (7th Cir. 2005) (discussing and crediting the City's disclaimer of and dissociation from a Ten Commandments monument in a privately owned portion of park). *Contra id.* at 706 (Bauer, J., dissenting) (stating that the disclaimer at the monument was "an obvious sham," and no more effective than the Wizard's directive to "pay no attention to that man behind the curtain").

88. 492 U.S. 573 (1989). As has for decades been common, the opinions in this Establishment Clause case seem fractured beyond what any obvious theory could account for.

89. *Id.* at 619 (Blackmun, J., plurality opinion).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. For further examples of the remarkably variable capacity of a disclaimer to sanitize an apparently religious public display, see *Hills v. Scottsdale Unified School District*, 329 F.3d 1044, 1054–56 (9th Cir. 2003) (per curiam). Much more broadly, see JOHN R. SEARLE, FREEDOM AND NEUROBIOLOGY: REFLECTIONS ON FREE WILL, LANGUAGE, AND POLITICAL POWER 105 (2004), which states that "political powers are . . . in large part, linguistically constituted."

95. See, e.g., *Freedom From Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 487, 495–96 n.2 (7th Cir. 2000). As merely one facet of the capacities of the reader problem, consider that in a

B. *Evolution Textbook Disclaimers as Themselves Posing the Establishment Clause Problem*

An unusual case is posed by disclaimers in the context of public school textbooks discussing the theory of evolution. Here, presumably, a secular evolutionary theory textbook by itself does not raise an Establishment Clause issue. The problem arises only when the state introduces some sort of separate oral or written disclaimer, with a range of possible meanings, into the situation.⁹⁶ In this context, the state-mandated disclaimer does not purport to solve or neutralize a preexisting Establishment Clause problem—the disclaimer itself is the problem.

If it is here true that the disclaimer is itself the problem, one cannot make much progress by advising the courts to ignore the text and terms of the disclaimer. It remains true even in this special context that courts should focus on underlying power relationships, actual and potential conflicts, and relevant public policies in resolving the Establishment Clause issue. To understand this, it may be helpful to imagine the evolution disclaimer being rewritten so as not to take the form of a disclaimer, but instead of content seamlessly written into the textbook itself.⁹⁷ The Establishment Clause issue might well remain, but without the element of a disclaimer. As the caselaw has developed, there is no absolute uniformity as to the language of evolution textbook disclaimers. However, a typical such disclaimer may read as follows: “This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things.

classroom Ten Commandments posting case, the statute required that in small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: “The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.” *Stone v. Graham*, 449 U.S. 39, 39 (1980) (per curiam). The Court referred to a trial court characterization of this disclaimer as “self-serving,” but did not ask whether a self-serving disclaimer could also still be valid, or whether typical third and fourth grade students could be expected to make much of the disclaimer’s language. *Id.* at 41.

96. See *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 341 (5th Cir. 1999) (describing how the school board would insert a disclaimer in an attempt to avoid issues involving the teaching of evolution).

97. Establishment Clause issues aside, governments, when thought of as speakers, have broad discretion in selecting, adopting, or bargaining for language in public school textbooks. See *Chiras v. Miller*, 432 F.3d 606, 607–08 (5th Cir. 2005) (stating that the Texas State Board of Education has broad power to review textbooks and textbook material); see also Rebecca Tanglen, Comment, *Local Decisions, National Impact: Why the Public School Textbook Selection Process Should Be Viewpoint Neutral*, 78 U. COLO. L. REV. 1017, 1017 (2007). But see *Ass’n de Educacion Privada de P.R. v. Garcia-Padilla*, 490 F.3d 1, 12–14 (1st Cir. 2007) (stating that the state’s power to select textbooks is a threat to the First Amendment (citing Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 CORNELL L. REV. 62, 111 (2002))).

This material should be approached with an open mind, studied carefully, and critically considered.⁹⁸

To adjudicate the permissibility of such disclaimers under the Establishment Clause, the courts would presumably apply one or more of the tests referred to in the previous section.⁹⁹ Such courts might choose to focus on the text of the disclaimer when applying whatever tests the courts deemed appropriate. A court skeptical of the disclaimer might conclude that referring to evolution as merely a theory amounts to religiously motivated stigmatization.¹⁰⁰ Or perhaps a skeptical court might wonder why the virtue of critical assessment should be officially mandated here, but not elsewhere. In contrast, a court more sympathetic to the disclaimer might focus on the undeniable truth that the theory of evolution is in some sense a theory, and that critical thinking is a good thing in this context.

However, courts need not, and should not, focus on the text of the disclaimer in resolving the Establishment Clause issues. Judicial scrutiny of the text itself is unlikely to be genuinely productive. Consider how the disclaimer would read if it were drafted by school authorities whose sympathies run entirely in favor of official religious proselytizing in public schools. Given the body of Establishment Clause jurisprudence over the past several decades, is it likely that even such a school board would draft a disclaimer that simply overtly endorses religious creationism? Would such a school board not more likely ask itself: how can we best phrase the disclaimer in light of potential legal challenges under the current caselaw? It should be expected that a religiously motivated¹⁰¹ disclaimer—even if envelope-pushing—will be no more overtly religious, textually, than a prudent reading of the caselaw might support. Given the “gameability” of Establishment Clause tests, one might expect “strategic” behavior from all parties.¹⁰² Even religiously motivated disclaimers should tend to stop somewhere in a zone of Establishment Clause indeterminacy.¹⁰³

98. *Selman v. Cobb County Sch. Dist.*, 449 F.3d 1320, 1324 (11th Cir. 2006) (describing a disclaimer as a sticker affixed to textbook’s inside front cover); *see also* *Petition for Writ of Certiorari, Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251, 1251 (2000) (No. 99-1625) (Scalia, J., dissenting) (providing a somewhat lengthier oral disclaimer to accompany every presentation of evolutionary theory).

99. *See supra* Part IV.A; *see also* *Petition for Writ of Certiorari, Tangipahoa*, 530 U.S. 1251 (No. 99-1625).

100. Presumably, no other similarly corroborated theories in other textbooks evoke a similar disclaimer sticker.

101. Recall the significant secular purpose prong, deriving from *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), and as applied in similar contexts thereafter.

102. *See* *Sumnum v. Duchesne City*, 482 F.3d 1263, 1271 (10th Cir. 2007) (stating how a “disclaimer may be sufficient to disassociate the City from private speech for purposes of the Establishment Clause . . .”).

103. While there are of course some rewards for aggressively reading the caselaw in one’s favor, the costs of litigation and the availability of reasonable attorneys’ fees for a prevailing opposing party

It should thus be normally expected that the text of even religiously motivated disclaimers would present reasonably close cases based on current caselaw. But this means that the apparently moderate and secularly phrased text of the disclaimer will not accurately reflect the presumed religious purpose of the drafters of the disclaimer. Realistically, such disclaimers will, at this historical point, typically be drafted—and responded to—strategically, with perhaps an eye toward bare compliance with the caselaw.¹⁰⁴

Rather than focusing on the text of such disclaimers, particularly if they are likely to be strategically crafted to present favorable cases, courts should apply Establishment Clause caselaw in light of the relevant underlying social forces and circumstances. This is not to suggest that doing so will be easier or will generate especially popular results. To at least some degree, however, courts can recognize any politicized manipulation, tactical evasion, strategic record-building, or self-conscious hypersensitivity¹⁰⁵ on one or both sides. As merely one general consideration, real political power may be expressed more naturally by controlling the hundreds of pages of actual content in a required textbook, with or without a disclaimer sticker, rather than by controlling the content of a disclaimer that prefaces hundreds of pages of required text with which one may disagree.¹⁰⁶ But as a matter of political power at the level of typical citizens, belief in some alternative to a purely naturalist evolutionary theory remains remarkably well established.¹⁰⁷

suggest tempering the language of the disclaimer. For one source of attorneys' fees in constitutional litigation against a public school board, see 42 U.S.C. § 1988 (2006).

104. Doubtless even at this point, a disclaimer could still be drafted naïvely, for local political purposes, or from a sense of principle independent of judicial outcome. Again, however, the financial costs of litigating an evolution disclaimer that does not arguably accommodate the caselaw are likely to be high. For discussion of the problem of strategic drafting of the disclaimer, see Louis J. Virelli III, *Making Lemonade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423, 441 (2006).

105. See *Books v. Elkhart County*, 401 F.3d 857, 867 (7th Cir. 2005) (discussing outsidership versus full membership, and perceptions thereof, in the local political community).

106. Historically, note the shift in the issue at stake from *Epperson v. Arkansas*, 393 U.S. 97, 107–09 (1968)—involving the impermissibility of prohibiting the teaching of evolution—to *Edwards v. Aguillard*, 482 U.S. 578, 596–97 (1987)—finding impermissibility in requiring that creation theory be taught alongside evolutionary theory—to *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, 766 (M.D. Pa. 2005)—finding impermissibility of teaching “intelligent design”—to typical contemporary disclaimer cases.

107. While any particular poll question can be criticized, a belief that human beings were created directly by God is apparently held by the majority of college graduates, Democrats, self-identified liberals, adults between 18 and 54, Northeasterners, and Westerners, with a plurality of a random sample of adults preferring that evolution, creationism, and intelligent design all be taught in the public schools. See Harris Interactive, Inc., *The Harris Poll #52: Nearly Two-thirds of U.S. Adults Believe Human Beings Were Created by God* (July 6, 2005), http://www.harrisinteractive.com/harris_poll/index.asp?PID=581; see also National Center for Science Education, *Public View of Creationism and Evolution Unchanged*, Says Gallup (Nov. 19, 2004),

C. Disclaimers and Compelled Citizen Speech

Sometimes even a sincere, clear, voluntary, and apparently relevant disclaimer is unable to affect the legal outcome of a case. Consider the circumstances of the classic compelled flag salute case, *West Virginia State Board of Education v. Barnette*.¹⁰⁸ Compelled citizen speech, in the form of a requirement that all public school students pledge allegiance and salute the flag—regardless of any conscientious scruples—was therein held unconstitutional.¹⁰⁹ In Justice Jackson's words, "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."¹¹⁰

As a rhetorical question, we might ask whether allowing the student plaintiffs in *Barnette* to display any sort of freely composed conspicuous disclaimer, unedited and unpunished by the school, would have changed the outcome of the case. It is hard to imagine how it would. Yet such a disclaimer could have clearly established—for all observers, and on the plaintiffs' own terms—their precise views on the matters at stake.

The inadequacy of any disclaimer¹¹¹ in that compelled speech context may stem from several considerations: the disvalue of the remaining coerced behavior; the remaining elements of government control; any social costs to dissenters for publicly adopting the disclaimer; the sheer indignity of the coerced behavior;¹¹² and even the long-term risks to autonomous thinking from recurring, coerced behavior.¹¹³ The explanation,

http://www.ncseweb.org/resources/news/2004/US/724_public_view_of_creationism_and_11_19_2004.asp (stating that 13% of respondents to the Gallup Poll agreed that "[h]uman beings have developed over millions of years from less advanced forms of life, but God had no part in this process"); PollingReport.com, *Science and Nature: Origin of Human Life* (May 8–11, 2008), <http://www.pollingreport.com/science.htm>.

108. 319 U.S. 624 (1943).

109. *See id.* at 642.

110. *Id.*

111. The Court has suggested that a disclaimer, or a realistic opportunity for a disclaimer, may under other circumstances at least help neutralize any threat to First Amendment values. *See, e.g., PruneYard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (reasoning that a shopping center owner may disclaim any connection with a message spread by petitioners on the shopping center property).

112. One could argue that the dignity of the person is fundamental to freedom of speech as well as to other constitutional values. *See generally* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006); R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271 (2002).

113. *Cf. BLAISE PASCAL, PENSÉES* 61 (A.J. Krailsheimer trans., Penguin Books 1995) (1671) (suggesting that repeated, ritualized actions, performed without or contrary to one's present belief, may actually tend to promote beliefs congruent with one's repeated acts).

though, matters less than recognition of the only quite modest role for disclaimers, actual or possible,¹¹⁴ in the compelled speech context.

The insignificance of any possible disclaimer can be seen as well in *Wooley v. Maynard*,¹¹⁵ where New Hampshire's requirement that passenger vehicle plates display the state motto ("Live Free or Die") was invalidated.¹¹⁶ Dissenting in the case, Justice Rehnquist observed that nothing prevented those who reject such a motto from affixing to their bumper a disclaimer of the required message,¹¹⁷ which would in any event not be imputed to any individual driver, precisely because of the recognized universality of the motto display requirement.¹¹⁸

A disclaimer in such a case could indeed convey an objector's viewpoint. So too, to some degree, might a letter to the editor or to one's state representative, or any one of various other means of communication not amounting to a disclaimer. But disclaiming a message does not undo the inherent indignity of being forced, as a mere Kantian means,¹¹⁹ to personally bear and disseminate the message. Whether any such disclaimer should be given a particular legal status depends not upon the text of the disclaimer, but upon the underlying dynamics of power, dignity, autonomy, and expression.

D. *Compelled Disclaimers and Professional Advertising*

Disclaimers are often legally required in an attempt to negate the risk of what is thought to be at least potentially misleading professional advertising.¹²⁰ In such cases, however, courts may often underestimate the potential for mandatory disclaimers themselves to mislead some consumers. The courts might be better advised to recognize that legislatively mandated

114. Also recall that in some contexts, a disclaimer may for technical or cultural reasons not seem feasible. See, e.g., *Baker v. Carr*, 369 U.S. 186, 226 (1962) (stating that "[j]udicial standards under the Equal Protection Clause are well developed and familiar").

115. 430 U.S. 705 (1977).

116. *Id.* at 713.

117. *Id.* at 722 (Rehnquist, J., dissenting).

118. *Id.* at 721.

119. See *supra* note 111 and accompanying text. By analogy, declaring publicly that "I resent being used" may indeed be an assertion of one's dignity, but there is certainly no guarantee that any such declaration must somehow effectively undo the effects of being used.

120. See *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91, 110 (1990) (holding that a state may require a disclaimer regarding attorney certification or specialization); *In re R.M.J.*, 455 U.S. 191, 201-03 (1982) (holding that states may regulate misleading lawyer advertising by way of disclaimer); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383-84 (1977) (stating that advertising claims about the quality of legal services are misleading and may require a disclaimer).

disclaimers can be the product of interest group influence¹²¹ as much as that of disinterested reflection on the public interest.

Crucially, a state-required disclaimer can itself be actually or potentially misleading—or worse, a disclaimer of some relevant and non-misleading truth.¹²² Legislatures in particular should typically resist the temptation to mandate standard professional advertising disclaimers. Courts should strike down such required disclaimers if the underlying considerations so suggest, including where the disclaimers cannot be shown to decrease overall consumer confusion. The more direct solution, typically, should involve prohibiting the misleading advertising speech, as opposed to the enforced bundling of misleading advertising speech with a potentially deceptive and even dignity-impairing disclaimer.

Consider, as an example, the dentistry advertising case of *Borgner v. Brooks*.¹²³ Borgner practiced general dentistry, with an emphasis on implant dentistry, as a member of the American Academy of Implant Dentistry.¹²⁴ In order to advertise his implant practice emphasis and his Academy membership, Borgner was required to add two specific disclaimers, even in the medium of business card advertising. The first disclaimer read: “[IMPLANT DENTISTRY] IS NOT REGOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.”¹²⁵ The second disclaimer read: “[THE AMERICAN ACADEMY OF IMPLANT DENTISTRY] IS NOT RECOGNIZED AS A BONA FIDE SPECIALTY ACCREDITING ORGANIZATION BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY.”¹²⁶

It can be assumed that these required disclaimers were well-motivated, rather than simply reflecting interest group influence.¹²⁷ However, if the text of the second mandated disclaimer is examined, a possible source of confusion can be found. To say that a group is not recognized as bona fide

121. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 13–37 (1991).

122. Consider the Florida Bar rule prohibiting “self-laudatory” advertisement, as upheld in *Mason v. Florida Bar*, 208 F.3d 952, 959 (11th Cir. 2000). See also Stacy Borisov, Comment, *Commercial Speech: Mandatory Disclaimers in the Regulation of Misleading Attorney Advertising*, 12 U. FLA. J.L. & PUB. POL’Y 377, 377–78 (2001). Query whether literally “self-laudatory” advertisements could also be either demonstrably true or sufficiently well-grounded as to not deserve official condemnation as misleading or confusing. At a minimum, consider a hypothetical advertisement for Clarence Darrow referring to his involvement in historic trials.

123. 284 F.3d 1204 (11th Cir. 2002).

124. Petition for Writ of Certiorari, *Borgner v. Fla. Bd. of Dentistry*, 537 U.S. 1080, 1080 (Dec. 9, 2002) (No. 02-165) (Thomas & Ginsburg, JJ., dissenting).

125. *Id.*

126. *Id.*

127. See *supra* note 120.

may mean only that the group is not recognized for some reason not related to its merits. To other readers, however, the same language may suggest that the group is, in some respect, less than fully meritorious.¹²⁸

State-mandated disclaimers in the professional advertising context may admittedly not carry quite the same dignitary sting as in some other contexts.¹²⁹ Still, there must typically be some dignitary impact¹³⁰ in being forced by the state to qualify—if not somehow minimize or even undermine—one's own representations about one's professional abilities. This impact is to some degree independent of the text or terms of the mandated disclaimer.

If a representation in one's professional advertising is in some sense misleading, it should instead be subject to prohibition, either by specific determination or by some general rule. In terms of legitimate dignitary concerns, it should be more objectionable—from the speaker's standpoint—to be saddled with an unappealing disclaimer, than to be legally barred from engaging in genuinely misleading commercial speech.¹³¹

Attempts to compromise disclaimer requirements in these contexts typically add to the murkiness of the disclaimer. Consider the mandatory disclaimer laws that allow a professional to then truthfully add to the advertisement that the disclaimer is required, uniformly, by state law.¹³² This language might persuade some readers, perhaps correctly, that the professional actually remains convinced of the disclaimed representations. Such language seems to come close to another disclaimer of the mandated disclaimer itself. All of this counsels against the overall legal value of the mandatory disclaimer.

128. See Petition for Writ of Certiorari, *Borgner*, 537 U.S. 1080 (No. 02-165).

129. See *supra* note 111 and accompanying text.

130. Of course, if no potential client or professional takes the required disclaimer seriously, the dignitary impact of the disclaimer is reduced. But one must ask what meaningful public interest the required disclaimer is then serving.

131. There is not much of a dignitary interest in not being allowed to claim that one has never lost a jury trial if one has never conducted one. There may even be some dignitary value in being prevented from objectively demeaning oneself. However, for the standard judicial preference for state-mandated disclaimers over the prohibition of deceptive speech, see *Borgner*, 284 F.3d at 1214, which treated mandatory disclaimers as equivalent to mandatory disclosures of true and relevant information.

132. Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(r)(6)(C) (2006) (explaining that a statement for a dietary supplement may be made if “the statement contains, prominently displayed and in boldface type, the following: ‘This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.’”).

E. Securities “Disclaimers”

Claims of fraud brought by securities investors or the government, based on corporate communications of one sort or another, are common.¹³³ A number of such cases involve the application of a possible “safe harbor” for the companies’ otherwise risky optimistic forecasts concerning future corporate performance.¹³⁴ Such forecasts must be accompanied by “meaningful cautionary statements”¹³⁵ that more or less¹³⁶ identify the risks or contingencies that might derail the corporate speaker’s optimistic projections.¹³⁷ The legal effect of this cautionary language is referred to as the “bespeaks caution” doctrine.¹³⁸

One should initially think of the qualifying, or the less optimistic, language in these corporate statements as disclaimers. Doing so may be somewhat of a departure from typical disclaimer cases. As is stated throughout Section IV above, courts are typically well advised not to try to parse the text and meaning of disclaimers, but to look instead at the underlying realities, including the power relationships, conflicts, and policy concerns at stake. The essence of the securities claim in these cases is the allegedly fraudulent or misleading character of the corporate communication at issue. This corporate communication may not fit the standard model of a main body of communication followed or preceded by a separate and distinct disclaimer.

One can certainly imagine an optimistic “claim” by a corporation, followed, at some distance away, by a separate and distinct disclaimer. However, more realistically, even the “optimistic” forecast will, in itself, contain some implied tempering through inevitable word choice. The claim itself may be tempered in magnitude and in probability. Any allegedly distinct “qualifying” language will in turn also set limits on its own magnitude and probability. Some degree of both optimism and pessimism is

133. See generally *U.S. v. Wenger*, 427 F.3d 840 (10th Cir. 2005); *Rombach v. Chang*, 355 F.3d 164 (2d Cir. 2004); *Harris v. Ivax Corp.*, 182 F.3d 799 (11th Cir. 1999); *In re Nash Finch Co.*, 502 F. Supp. 2d 861 (D. Minn. 2007).

134. See Broc Romanek, *Corporate Web Disclaimers: To Disclaim or Not Disclaim, It Should Not Be a Question*, in 3 WALLSTREETLAWYER.COM: SECURITIES IN THE ELECTRONIC AGE 1, 9 (1999), available at http://www.bowne.com/newsletters/pdf/digest/Nov99_2.pdf.

135. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-5(c)(1)(A)(i) (2006).

136. See *Harris*, 182 F.3d at 807 (demonstrating failure to explicitly mention the eventually decisive countervailing factor as not necessarily controlling).

137. See *id.*

138. *SEC v. Meltzer*, 440 F. Supp. 2d 179, 191 (E.D.N.Y. 2006). The idea is roughly that the cautionary language renders any investor reliance on the more optimistic corporate language unreasonable. *Id.*; see also *Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co.*, 353 F.3d 1125, 1132 (9th Cir. 2004).

inescapable in every sentence that contributes, jointly, to making up the overall integrated forecast.

It may therefore be deeply artificial to try to physically separate positive and negative corporate language and call the latter a distinct disclaimer. If, however, there is separate language that is argued to unsay what the corporation has elsewhere said, one should be extremely reluctant to give the corporation the benefit of that remote disclaimer. Even if such a disclaimer is not classified as mere “boilerplate,”¹³⁹ one must ask why the language was not more usefully integrated into the text it disclaims. What sufficient public interest is served by physically separating the optimism from its own deflation?

Well integrated cautionary language, however, cannot realistically be disentangled from the company’s forecast itself, and thus cannot easily be counted as a separate disclaimer for practical purposes. But a physically separated disclaimer invites investor misanalysis.¹⁴⁰ Such a disclaimer should, in accordance with this article’s general thesis,¹⁴¹ typically be given no substantive judicial effect, with the outcome of the underlying fraud claim resting on other considerations. Presumably the SEC and the courts can determine the grounds and types of corporate claims that should support allegations of fraud in the first place.

F. *Dietary Supplement Health Claims and Mandatory Disclaimers*

Under the present legal regime, dietary supplements¹⁴² may carry true and non-deceptive health claims,¹⁴³ as long as they are determined to relate to the structure and healthy function of the body, but not to the prevention or treatment of any disease.¹⁴⁴ Health claims relating to bodily structure and function must be substantiated by the marketer.¹⁴⁵

139. A mere “boilerplate litany of generally applicable risk factors” will not comprise a sufficient disclaimer or a cautionary language safe harbor. *In re Nash Finch Co.*, 502 F. Supp. 2d at 872 (quoting *Southland Sec. Corp. v. Inspire Ins. Solutions*, 365 F.3d 353, 372 (5th Cir. 2004)); see also Daniel S. Floyd & Sogol K. Pirnazar, *The Safe Harbor Provision of the PSLRA for Forward-Looking Statements*, in *SECURITIES LITIGATION: A PRACTITIONER’S GUIDE* 6-1, 6-17 (Jonathan C. Dickey ed., 2007) (stating that “individuals commonly ignore boilerplate warnings”). Cf. *Rombach v. Chang*, 355 F.3d 164, 176 (2d Cir. 2004) (referring to some of the corporate qualifying language as “formulaic”).

140. See Floyd & Pirnazar, *supra* note 139, at 6–18.

141. See *supra* Section I.

142. For our purposes, dietary supplements typically provide “vitamins, minerals, herbs or other botanicals” R. William Soller et al., *Disclaimers in Dietary Supplement Print Advertising: The Bodybuilding Category as a Model Case for Change*, 62 *FOOD & DRUG L.J.* 375, 375–76 (2007).

143. See *id.* at 376 (providing an example of the role that calcium may play in bone density).

144. *Id.* The distinction between claiming to promote healthy bodily function in some respect and claiming to diminish the risk of a disease that is simply the opposite of that healthy function may be murky.

145. *Id.*

But even so, products making limited and substantiated non-deceptive health claims must bear, on their label, the following mandatory disclaimer: “This statement has not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.”¹⁴⁶

It is necessary to separate here a critique of the distinctive features of this disclaimer rule from a broader critique of the legal value of disclaimers in general. At a specific level, one might well wonder about the value of this particular disclaimer. If the supplement makes only non-misleading claims that have indeed been substantiated according to FDA standards,¹⁴⁷ then the mandated FDA disclaimer, if it has any effect at all, may discourage the use of a helpful supplement more than it discourages the use of a risky or ineffective supplement. Under this assumption, the supplement’s health claims have been supported by FDA standards; for the FDA to then distance itself from the supplement’s health claims through the mandatory disclaimer may lead potential consumers to conclude that the health claims are more speculative than they really are, resulting in underconsumption.¹⁴⁸

However, more broadly, is there not a vital role for a required FDA disclaimer when the supplement’s health claims are false, deceptive, misleading, unsubstantiated, or properly subject to some sort of qualification? It is, frankly, hard to see why. False or genuinely misleading commercial speech is subject to prohibition without further free speech interest balancing.¹⁴⁹ Mere potentially misleading claims¹⁵⁰ should simply be rewritten until deemed not misleading.¹⁵¹ There is, in this commercial context, no reason to prefer a potentially misleading health claim—conjoined with some sort of corrective, but also perhaps confusing, disclaimer—over a straightforward, non-misleading health claim. No vital free speech interest is upheld in this commercial scenario by judicially preferring the first such

146. *Id.* Again, to the extent that a disease is defined simply as a substantial deviation from some healthy function, the logic underlying the regulation may be imperfect.

147. For an interesting discussion of related issues, see *Pearson v. Shalala*, 164 F.3d 650, 661 (D.C. Cir. 1999), which found invalid an FDA regulation requiring marketers of dietary supplements to obtain FDA approval before labeling supplements with health-related claims.

148. If the advertising—as opposed to the sale itself—of the supplement does not require a similar disclaimer, the effect of the disclaimer on reasonable consumption of the supplement might be limited. See Soller et al., *supra* note 142, at 376 (stating how federal law does not require a disclaimer on print advertising for a dietary supplement that makes structure and function claims).

149. See *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980).

150. See *Pearson*, 164 F.3d at 655–59 (finding that marketers of dietary supplements could remedy the problem of potentially misleading health claims with more clearly crafted disclaimers).

151. *Id.* at 659–60.

option over the second.¹⁵² For the sake of consumer health, safety, or even medical efficacy, potentially misleading health claims should be rewritten, by one entity or another,¹⁵³ so as to not be thus misleading. There is no useful role here for the disclaimer.

G. *Employment Contract Disclaimers*

Disclaimers frequently play a role in contract disputes between employees and employers. Often, the employer will appear to have supplied language that may seem inconsistent with employment at will.¹⁵⁴ But it has been said that “[a]n employer may include a clear disclaimer . . . to avoid contractual liability for a personnel policy.”¹⁵⁵ Courts often consider apparent disclaimers of employee job rights in rather formalistic ways; the clarity and conspicuousness of a particular disclaimer involving employment rights beyond an at-will status may thus be the central focus, and may even be determined by the court as a matter of law.¹⁵⁶

The conspicuousness of such a disclaimer is, however, no guarantee that it will be judicially recognized as effective.¹⁵⁷ Even a prominent disclaimer of employee rights beyond at-will employment may be denied legal effect if, among other grounds, it is deemed to involve “confusing legalese,”¹⁵⁸ as opposed to “straightforward terms.”¹⁵⁹ Nor are even clear and conspicuous disclaimers always given effect; inconsistent writings, oral representations, or actual employment practices may negate a disclaimer of employment rights beyond at-will employment.¹⁶⁰

While the focus in such cases is often on parsing the language of the disclaimer to determine whether it is sufficiently clear and conspicuous, it is difficult to believe that courts are as invariably focused on the bare disclaimer itself as is sometimes suggested. Often, there seem to be deeper issues at stake than the form, the content, or even the context of the disclaimer in question.

152. See *Central Hudson*, 447 U.S. at 562–63 (“The Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

153. See *id.* at 659. Presumably the supplement seller or manufacturer would typically offer to re-draft and then document the health claim found potentially misleading.

154. *Zahodnick v. IBM Corp.*, 135 F.3d 911, 914 (4th Cir. 1997) (per curiam) (citing *Bagwell v. Peninsula Reg'l Med. Ctr.*, 665 A.2d 297, 309 (Md. Ct. Spec. App. 1995)).

155. *Id.*

156. See *Greene v. Quest Diagnostics Clinical Labs., Inc.*, 455 F. Supp. 2d 483, 491 (D. S.C. 2006) (finding a handbook disclaimer conspicuous as a matter of law).

157. See *Nicosia v. Wakefern Food Corp.*, 643 A.2d 554, 561–62 (N.J. 1994) (finding a handbook disclaimer that was not prominent to be ineffective).

158. *Id.* at 560.

159. *Id.*

160. See *Swanson v. Liquid Air Corp.*, 826 P.2d 664, 675 (Wash. 1992) (en banc) (employer’s inconsistent statements may negate a disclaimer).

Consider, for example, one court's declaration that "[w]e reject the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make."¹⁶¹ Whether one agrees with this disfavoring of employment contract disclaimers or not, the logic and grounds of the judicial attitude here goes well beyond the text and terms of the disclaimer itself.

Such an approach to employment contract disclaimers naturally leads the courts to wonder about the underlying power relationships, actual and potential interest conflicts, and the broader policy issues at stake. One might be tempted to ask first whether the disclaimer was fairly bargained for. One might then wonder why it should be characterized as a disclaimer—of some otherwise plausible employee claim, perhaps¹⁶²—rather than as just one of the terms of the employment contract. If the disclaimer was not fairly bargained for, one might instead wonder why it should be enforced, however it might be interpreted.

In any event, courts should resist the simplistic tendency to find employment disclaimers either clear and conspicuous, and therefore enforceable, or not clear and conspicuous, and therefore unenforceable. This focus on the disclaimer itself can often be evasive or superficial, and may encourage judicial manipulateness in grounding what may really be a deeper policy judgment on doubtful formalistic grounds.¹⁶³

This is not to suggest that either employers or employees should win more of the employment disclaimer cases. The point is rather that such employment termination cases should be decided, whether by statute or common law, by way of candid reference to the significant underlying substantive elements,¹⁶⁴ as opposed to either a simple or complex reference to the disclaimer.¹⁶⁵

161. *Id.* at 674.

162. *See supra* note 2.

163. Some disclaimers are rejected on grounds of ambiguity, apparently apart from the underlying power relationships, conflicts, and public policies at stake. *See Whittington v. City of Crisfield*, 204 Fed. App'x 183, 184 (4th Cir. 2006) (per curiam) (citing *Elliot v. Bd. of Trs. of Montgomery County Cmty. Coll.*, 655 A.2d 46, 50 (Md. Ct. Spec. App. 1995)); *Haselrig v. Pub. Storage, Inc.*, 585 A.2d 294, 300 (Md. Ct. Spec. App. 1990).

164. The disclaimer itself, prior to litigation, may have practical effects, including effects on employee morale. *See Swanson*, 826 P.2d at 679 n.3. If many employees are involved in different circumstances, disclaimers may be difficult to apply uniformly and consistently. *Id.* More broadly, every disclaimer may be seen to some extent as an attempt to influence power relationships either between primary parties or with respect to some outside party, including the public or the courts. Any adverse effect on employee morale, productivity, or turnover caused by disclaimers would simply be an anticipated or unanticipated element of the underlying problem.

165. A variety of public policy considerations have been offered to counter familiar freedom of contract arguments, and thus deployed against employment contract disclaimer provisions. *See Mi-*

H. Commercial and Consumer Implied Warranty and Tort Disclaimer Cases

When one turns to implied warranty disclaimers for both commercial and ordinary consumer customers¹⁶⁶—as well as to attempts to disclaim liability for tort injuries—one again finds an unjustifiable focus on various aspects of the disclaimer itself, at the expense of inquiring into more fundamental substantive matters. Again, there is no need to take sides as to how willing or reluctant the courts should be to give legal effect to such a disclaimer. The courts and the legislatures should, however, both attend to power relationships and conflicts between the parties, as well as to the relevant public policy considerations.

The standard first—and too often final—step in testing a disclaimer under the Uniform Commercial Code involves invoking some generalized boilerplate principle,¹⁶⁷ such as conspicuousness. Commonly, the required conspicuousness of a disclaimer is measured by the manipulable test directed towards what a “reasonable person against whom it is to operate”¹⁶⁸ should have noticed.

The question then might arise whether a particular disclaimer could be conspicuous to a merchant buyer, even if unclear to a non-merchant consumer. Courts often emphasize broader “reasonable person” language as distinct from the more contextual “reasonable person against whom it is to operate.”¹⁶⁹ Considering the disclaimer itself in light of the U.C.C., such courts perform a judicial examination of the disclaimer’s format. This inquiry may involve typefaces, fonts, capitals, set-offs, boxes, lines of asterisks, margin sizes, boldface and italics, colors, contrasting colors of ink, placement in a document and reference thereto, and visual contrasts.¹⁷⁰

Out of such typographical inquiries, a judicial result of some sort may emerge. If all courts were to focus on matters such as actual power relationships among the parties, they might be more open to asymmetries be-

chael J. Philips, *Disclaimers of Wrongful Discharge Liability: Time For a Crackdown?*, 70 WASH. U. L.Q. 1131, 1154–55 (1992). *But see id.* at 1156–57 (stating contrary public policy arguments).

166. For a concise definition of a disclaimer in this specific context, see *Lecates v. Hetrich Pontiac Buick Co.*, 515 A.2d 163, 171 (Del. Super. Ct. 1986), which stated that a “disclaimer clause is a device used to control the seller’s liability by reducing the number of situations in which the seller can be in breach of a warranty.”

167. See *Clark v. DeLaval Separator Corp.*, 639 F.2d 1320, 1323 (5th Cir. 1981) (discussing U.C.C. § 2-316 (1977) when stating that “[a] disclaimer is ‘conspicuous’ when it is so written that a reasonable person against whom it is to operate ought to have noticed it”).

168. *Cate v. Dover Corp.*, 790 S.W.2d 559, 560 (Tex. 1990); *supra* note 166.

169. *Wheeler v. Phoenix Co. of Chi.*, 658 N.E.2d 532, 536 (Ill. App. Ct. 1995); *supra* note 167.

170. See *Accurate Transmissions, Inc. v. Sonnax Indus., Inc.*, No. 04 C 7441, 2007 WL 1773195, at *3–4 (N.D. Ill. June 14, 2007); *Cate*, 790 S.W.2d at 560.

tween repeat-player merchants and one-time-player consumers¹⁷¹—particularly if the latter tend, perhaps quite reasonably, not to read warranty disclaimers in standard form contracts.¹⁷² Realistic consideration of power relations and policy considerations leads some legislatures and courts to sometimes refuse to give effect to even clear and conspicuous disclaimers in consumer cases.¹⁷³

Courts may decide, in a more formalistic way, whether a phrase like “in its present condition” either is¹⁷⁴ or is not¹⁷⁵ sufficiently like the term “as-is” to “immunize the seller.”¹⁷⁶ But courts and legislatures may more justifiably focus on substantive matters such as the minimal reasonableness—assuming the freedom and understanding of the parties—of exchanging what is purportedly being sold for the specified price in question.¹⁷⁷ It may be unclear, for example, why a free and knowledgeable consumer would consent to paying a given sum for a dizzyingly complex durable good with only minimal warranty protection, when a similar price normally buys a comparable good with genuine warranty protection. It is reasonable for courts to ask, as merely one question among others, roughly what packages of goods, services, and warranty protections the particular purchase price would normally be expected to buy.

There has been controversy over whether strict liability in tort should be any more or less disclaimable than liability for breach of implied warranties.¹⁷⁸ Some courts have decisively rejected attempts to disclaim liability for injurious products where the claim is brought either in negligence or in strict liability.¹⁷⁹ To the extent that courts hold open the possibility of disclaiming tort injuries, though, the recommendation herein would remain the same. Instead of reading a number of aspects of the typography within

171. See *Cate*, 790 S.W.2d at 560 (rejecting the argument that there should be a lesser standard of conspicuousness for a disclaimer made to a merchant).

172. See *id.* at 565 (Spears, J., concurring).

173. *Id.* at 565–66 (citing statutes and cases); see also Michael J. Phillips, *Unconscionability and Article 2 Implied Warranty Disclaimers*, 62 CHI.-KENT L. REV. 199, 261–63 (1985) (arguing that implied warranty disclaimers should generally not be enforced against consumers).

174. *First Nat'l Bank of Elgin v. Husted*, 205 N.E.2d 780, 784–85 (Ill. App. Ct. 1965).

175. *Hull-Dobbs, Inc. v. Mallicoat*, 415 S.W.2d 344, 346–47 (Tenn. Ct. App. 1966).

176. *Lecates v. Hetrich Pontiac Buick Co.*, 515 A.2d 163, 168 (Del. Super. Ct. 1986).

177. See *Blankenship v. Northtown Ford, Inc.*, 420 N.E.2d 167, 170–71 (Ill. App. Ct. 1981). In *Blankenship*, the court initially engaged in a merely formalistic investigation into the disclaimer's conspicuousness, *id.* at 170, but then focused on realistic underlying considerations, *id.* at 171 (citing U.C.C. § 2-313 cmt. 4).

178. See *Victorson v. Bock Laundry Mach. Co.*, 335 N.E.2d 275, 280 (N.Y. 1975) (Fuchsberg, J., concurring) (discussing confusion over whether a cause of action for strict liability is the same as that for breach of implied warranty, assuming no disclaimer defense). Cf. *Elite Prof'ls, Inc. v. Carrier Corp.*, 827 P.2d 1195, 1201 (Kan. Ct. App. 1992) (citing William Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 799, 833 (1966)) (providing a starkly limited approach to disclaimers in strict liability tort cases).

179. See *Ruzzo v. LaRose Enters., Inc.*, 748 A.2d 261, 268–69 (R.I. 2000).

the disclaimer,¹⁸⁰ courts and legislatures should focus on underlying power relationships, conflicts of interest, and public policies. As one possible avenue, courts might look to injury avoidance costs and to the price agreed upon to help determine whether fairness suggests that the buyer or the seller bears the risk of non-negligent injuries.¹⁸¹

I. *Disclaimers of the Implied Warranty of Habitability*

In consumer as well as commercial contexts, the courts and legislatures differ in their readiness to enforce disclaimers of an implied warranty of habitability.¹⁸² Regardless of the outcome, however, courts in this context too often focus on the disclaimer and its surrounding language. An Illinois Supreme Court case involving a condominium garage, for example, was decided at the trial court level based on the absence of the magic language stating “implied warranty of habitability” in the disclaimer.¹⁸³ The trial court focused also on the conspicuousness of the location,¹⁸⁴ typeface size,¹⁸⁵ and the “plain language”¹⁸⁶ of the disclaimer. The Illinois Supreme Court endorsed the relevance of the latter considerations on a case-by-case basis,¹⁸⁷ but decided the case solely on the grounds that the disclaimer had failed to refer explicitly to an implied warranty of habitability.¹⁸⁸

Courts often decide habitability disclaimer cases on similarly formalistic grounds, such as on the supposed clarity or lack of clarity of a read or unread disclaimer.¹⁸⁹ Rather than focusing on the clarity regarding often unread language, the courts could instead consider, for example, the status, expertise, and any distinctive bargaining leverage of the parties; which party took the initiative in proposing the underlying transaction, if not also the disclaimer terms at issue; whether one or both parties was represented

180. See *supra* note 169 and accompanying text (providing various conspicuousness factors).

181. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 17–33 (1970).

182. See *P.H. Inv. v. Oliver*, 818 P.2d 1018, 1021 n.1 (Utah 1991) (talking in terms of “waivers,” but assuming that a waiver of an implied warranty of habitability by a tenant is essentially the mirror image of a disclaimer of that warranty by a lessor).

183. *Bd. of Managers of the Vill. Ctr. Condo. Ass’n v. Wilmette Partners*, 760 N.E.2d 976, 979 (Ill. 2001).

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.* at 981.

188. *Id.*

189. See *Frickel v. Sunnyside Enters., Inc.*, 725 P.2d 422, 426 (Wash. 1986) (en banc) (asking, “What could be more clear to a buyer than the following contract language . . .”).

by independent counsel; and whether the buyer or lessee had ample opportunity to meaningfully inspect the property.¹⁹⁰

Courts often take into account one or more of the relevant underlying considerations in habitability warranty cases.¹⁹¹ To judicially inquire into underlying matters is, admittedly, not to absolutely ensure the best outcome. It can also be costly even if ultimately accurate. To reduce such costs by relying on generalizations invites the occasional inaccuracy.¹⁹² Thus if a court always assumes, for example, that grossly unequal bargaining power will characterize residential tenancies¹⁹³ but not commercial tenancies,¹⁹⁴ there will inevitably be some misclassifications in both kinds of cases.

Still, some cost-reducing judicial generalizations will be worth the occasional error. It is therefore worth assuming that modern residential tenants are interested more in living space than in land,¹⁹⁵ have a limited repair skill set,¹⁹⁶ are geographically mobile and thus only minimally interested in making elaborate repairs,¹⁹⁷ would require access to expensive equipment and common areas to effect some repairs,¹⁹⁸ and may simply not have enough of an interest in the property to justify repair financing.¹⁹⁹ At the very least, these considerations should be weighed, along with safety and health concerns, against any possible reduction in the otherwise anticipated rent when courts move beyond the text of the disclaimer in habitability cases.

V. CONCLUSION

It is illuminative to conclude with a brief reflection on a disclaimer that has popularly come to represent all disclaimers. A recent Google web

190. In *Frickel*, virtually all these considerations cut in favor of the seller and thus in favor of enforcing the disclaimer. *Id.* at 423. However, even the dissenters adopted a formalistic approach, focusing on the disclaimer itself. *Id.* at 434 (Pearson, C.J., dissenting) (stating that “a valid disclaimer of the implied warranty of a residential structure should be written, conspicuous, . . . include the term ‘habitability,’ [and] should be explicitly negotiated.”).

191. See *Gym-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 913–14 (Tex. 2007) (considering “unequal bargaining power” between the parties).

192. See *id.* at 914 (finding, without considering other factors, that “as-is” language negated claims for breach of implied warranty and negligence).

193. *Id.* at 913 (citing 2 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 232 [2][b] (1991)).

194. *Id.*

195. *Foisy v. Wyman*, 515 P.2d 160, 163–64 (Wash. 1973) (en banc).

196. *Id.* at 164.

197. *Id.*

198. *Id.*

199. *Id.*

search for the phrase “your mileage may vary” resulted in 822,000 hits.²⁰⁰ But it is best to think of this disclaimer in something like its original automobile gas mileage context in order to illustrate the basic theme of this article.

It may be tempting to put the disclaimer “your mileage may vary” under the microscope, and to look for qualities like clarity and conspicuousness in order to decide whether to give it legal effect. The recommended approach set forth above, however, is to look elsewhere, and specifically at matters such as the conflicting interests, power relationships, and public policies at stake. Of course, that task cannot be undertaken here in any detail. But the mistake of judicially focusing on the disclaimer itself can be briefly illustrated by simply asking about the real social value of this particular disclaimer under ordinary circumstances.

Suppose, as has sometimes been suggested in the past,²⁰¹ that official EPA gas mileage estimates are not only inaccurate, but inaccurate in a systematic way, particularly in a way that tends to overstate gas mileage figures by about fifteen percent.²⁰² In any event, begin by assuming, hypothetically, that the EPA mileage figures—for both stop-and-go city and uninterrupted highway driving, as displayed on vehicles for sale—are consistently and substantially higher than what many drivers would experience. Further suppose that for one reason or another,²⁰³ the official EPA mileage figures, as advertised, are nevertheless credible enough to have some impact on vehicle buyers’ choices—but are also skewed sufficiently high, on a percentage basis, to in some cases count as misleading, or at least potentially so.²⁰⁴

It must then be asked what the real value of the disclaimer “your mileage may vary” is. If the idea is that this disclaimer may dampen unrealis-

200. Google Search Results, <http://www.google.com/search?hl=en&q=%22your+mileage+may+vary%22&aq=f&oq=> (last visited June 29, 2008). Few hits were obtained under Google News and Shopping respectively. Remarkably, the Internet abbreviation “YMMV” turned up 1,980,000 hits the same day.

201. CNN Money, *Your Mileage May Vary: The EPA’s Fuel Efficiency Estimates Are in the Hot Seat These Days* (Oct. 8, 2004), <http://money.cnn.com/2004/09/02/pf/autos/epa/index.htm>; see also 49 U.S.C. § 32904 (2006) (providing a calculation of average fuel economy); 40 C.F.R. § 600.307-08 (2006) (setting forth fuel economy label requirements); *True v. Am. Honda Motor Co.*, 520 F. Supp. 2d 1175 (C.D. Cal. 2007) (discussing a buyer suit against a car manufacturer for false claims of fuel efficiency).

202. CNN Money, *supra* note 201. For a claim of more recent EPA improvement in this regard, see FuelEconomy.gov, *Your Mileage Will Still Vary*, http://www.fueleconomy.gov/FEG/why_differ.shtml (last visited Sept. 28, 2008).

203. For critical reference to “agency capture” theory, see David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 121–22 (2000).

204. For the permissibility of governmental regulation regarding misleading private commercial speech, as opposed to government speech or government-mandated commercial speech, see *Central Hudson*, 447 U.S. at 564–66.

tic expectations generated by the assumedly misleading mileage figures, it must be asked why it is best to create unrealistic mileage expectations and then, to whatever degree, dampen those expectations with the disclaimer. Does a fifteen percent error really have an equal effect on all car models? Would there not be less need for the disclaimer if the mileage figures were more accurately presented, or at least not systematically skewed upward? What is the real social value of the disclaimer? Why not focus regulation instead on the accuracy of the mileage figures?

Suppose that the EPA mileage figures were more realistic. It would still be true that many drivers would experience gas mileages at some variance from any posted figures.²⁰⁵ But what would then be the value of the disclaimer? Presumably, most competent adults do not believe that their gas mileage is entirely independent of anything and everything they do. But even if they do, the EPA disclaimer itself, in the form of the standard slogan, offers only minimal guidance in improving one's mileage.²⁰⁶

This, of course, is not to suggest that most disclaimers in general are useless or harmful. But the example of the EPA vehicle mileage disclaimer usefully redirects the attention away from the disclaimer itself, and toward more important issues of public understanding, possibly misleading or deceptive speech, sensible regulatory policy, and the public interest quite apart from the disclaimer. The standard EPA mileage disclaimer should thus serve mainly to call one's attention to those underlying circumstances and policies. In this respect, this disclaimer is entirely typical of the various sorts of disclaimers surveyed above.

205. *See supra* note 201 (revealing some relevant factors).

206. The EPA language does go on to raise issues relating to driver behavior and vehicle condition, with a nod toward useful additional pamphlet material. *See* 40 C.F.R. § 600.307-08(b)(4), (9) (2006). But an extrinsic educational pamphlet has generally moved well beyond what is thought of as a disclaimer.