Your Mileage May Vary: A General Theory of Legal Disclaimers

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I. Introduction

Disclaimers are a common feature of public and commercial life. While we will be concerned here about disclaimers only in legal contexts, the range of such legal contexts is broad. We will refer below to disclaimers by governmental and non-

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An author's disclaimer most commonly takes 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 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. Particularly 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 that sought 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, however, see Adam Benforado, Jon Hanson & David Yosifon, Broken Scales: Obesity and Justice in America, 53 Emory L.J. 1645, 1645 n.aaa1 (2004) ("[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) ("[a]s 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) (thanking 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 well thus be questionable as social theory, and even as moral theory, but may have the virtue of encouraging helpful advance critique of academic work. The
problem is that as many academic disclaimers expressly recognize, there is already a quite 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) (as with many such disclaimers, including 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").

In sum, given our background assumptions, the typical academic author disclaimer itself does at this point no useful risk-allocation work, and leads distinctively to no judicial result not already and independently justifiable on sensible public policy grounds. We shall see this general pattern replicated in several important legal contexts, and indeed throughout the law of disclaimers.

1 In the sense in which we are interested, a disclaimer is roughly a form of disavowal, denial, or repudiation. See Oxford English Dictionary (2d ed. 1989), available at http://dictionary.oed.com/cgi/entry, lasted visited May 21, 2008. Social theorists and sociologists occasionally focus on disclaimers, using the term in ways generally compatible with the way we develop the term below. See, e.g., John P. Hewitt & Randall Stokes, Disclaimers, 40 Am. Sociological Rev. 1, 3 (1975) ("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) (disclaimers used by their speakers as "an effort to . . . render potentially problematic actions . . . meaningful, and . .
governmental actors in varied circumstances. Disclaimers arise, for example, in establishment clause cases in general, and of late in public school evolution textbook disclaimer cases in particular. Disclaimers may also be thought of as a remedy for compelled speech, or as themselves an instance of compelled speech. As well, commercial speech is a fertile source of disclaimer problems, as in commercial advertising by professionals, in the marketing of securities, and in the making of health claims on behalf of dietary food supplements.

. define such actions as an irrelevant basis for a reassessment of the speaker's established identity”). We will throughout occasionally notice the unclear boundary lines between disclaimers on the one hand and disclosures, or even, in some cases, warnings: e.g., "not to be taken internally."

2 See infra Section IV.A.

3 See infra Section IV.B.

4 See infra Section IV.C.

5 For an introduction to some general commercial speech regulation principles, if of uncertain future stability, see Central Hudson Gas & Elec. Corp. v. Public Service Com'n, 447 U.S. 557 (1980).

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

7 See infra Section IV.D.

8 See infra Section IV.E.

9 See infra Section IV.F.
For further perspective, we also refer below to disclaimers in specific\textsuperscript{10} business and commercial contexts, and in particular, in employment contract laws;\textsuperscript{11} in commercial and consumer implied warranty and tort disclaimer\textsuperscript{12} cases;\textsuperscript{13} and in various sorts of implied warranty of housing habitability cases.\textsuperscript{14}

These various contexts hardly exhaust the scope of disclaimers in the law. Our goal, though, is not to compile a complete taxonomy, as though ambitiously collecting

\textsuperscript{10} 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. For general background, see Todd D. Rakoff, The Law and Sociology of Boilerplate, 104 Mich. L. Rev. 1235 (2006); Randy E. Barnett, Consenting to Form Contracts, 71 Fordham L. Rev. 627 (2002); Robert Ahdieh, The Strategy of Boilerplate, 104 Mich. L. Rev. 1033 (2006).

\textsuperscript{11} See infra Section IV.G.

\textsuperscript{12} See infra Section IV.H.

\textsuperscript{13} For our purposes, these distinct theories and contexts can fairly be treated together.

\textsuperscript{14} 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., Medical Business Associates, Inc. v. Steiner, 183 App. Div. 2d 86, 588 N.Y.S.2d 890 (1992); Trident Reg. Medical Center v. Evans, 317 S.C. 346, 454 S.E.2d 343 (1995) (noting historical shifts in power relations between spouses).
species of butterflies, but to establish a foundation sufficient to make plausible
descriptive and normative claims about disclaimers in the law.

Briefly, our conclusion will be that the law should rebuttably presume that
disclaimers--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, we will anticipate
part of the argument by noticing that typically, legal disclaimers arise as a consciously
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 that the
disclaimer is meant to address. Disclaimers arise in the context of power relationships,
varied conflicts of interest, and 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. We should
instead ask the courts 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 we cannot 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. Below, we begin
to explore the idea of legal disclaimers and some of the logic of our position in the abstract. We will then develop our argument in a variety of more concrete and illustrative legal contexts.

II. What Could Disclaimers Mean?

We are thus working with the idea of a legal disclaimer as something that, in litigation, should merely set in motion a judicial inquiry into related underlying matters. But we will of course need to develop some ability to recognize a legal disclaimer. Let us begin to think about some familiar disclaimers. I might announce, for example, that past results are no guarantee of future performance, that I am 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 this 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 me 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 typically warn us against such apparently reasonable inferences without themselves offering us any independent reasonable grounds. Disclaimers are thus typically "bare" disclaimers, and are not-self-justifying in cautioning against an inference we might well have drawn from the pre-
existing evidence.

Where disclaimers do try to justify themselves, they are typically subject in that respect to contested and conflicting interpretation. Yet disclaimers seek to somehow affect the rights, statuses, opportunities, risks, and costs at stake. The underlying tension in question may take various forms, including, merely 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 of sponsorship."

The main problem is that generally, the relationship between the text or terms of the disclaimer and the underlying tension is more or less indeterminate, or reasonably contestable. We might say either 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 again typically tries to discourage us from adopting an otherwise more or less reasonable inference in light of underlying circumstances.

Now, in a rare case, the text or terms of a disclaimer may strike us as on their face simply implausible or as plainly unjust and unenforceable. But even in such a case, we are likely really using those terms 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. We shall see that judicial interpretation of disclaimers in particular is typically more difficult than judicial interpretation of various kinds of texts in general.

15 Consumers Union v. General Signal Corp., 724 F.2d 1044, 1053 (2d Cir. 1983).
To see the special problems of interpreting disclaimers, let us think of the ways in which disclaimers are commonly utilized. Despite a movie's scene suggesting jeopardy to animals, for example, a disclaimer may inform us that no animals were actually injured. Other disclaimers, as in the scholarly author disclaimer, may seek to steer official or unofficial reactions or perhaps even to 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. The identities of the real author or authors, sponsors, or endorsers of a disclaimer may also in some cases themselves be contested; we may thus not know for whom the disclaimer speaks.

Importantly, though, we rarely see disclaimers--especially litigated disclaimers--in the absence of some sort of relevant underlying group tension, whether suppressed or overt. If the standard scholarly author's disclaimer is sometimes thought to be nearly unnecessary, that is because we have a well-established convention, for sensible policy reasons, under which we do not impute controversial theses to mere readers of such theses. 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, for example, or a government's disclaiming its endorsement, through other acts, of religion are typical disclaimers that occur against the background of a relevant underlying tension. Almost without

16 See supra note *

17 See infra notes 166-169 and accompanying text.

18 See infra Section IV.B.
exception, disclaimers aim either at avoiding relevant litigation entirely, or else at a ruling in accordance with the preferences of the dominant author or authors of the disclaimer. For this reason, we might say that every disclaimer is merely a purported disclaimer, until it somehow becomes effective.

For any particular interpreter, a disclaimer will be 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 then disclaims any intent to promote either a particular religion or religion in general.¹⁹ Interpreters, including courts, may find any such disclaimer more or less plausible. Or an attorney's disclaimer, following an advertisement, of any "implication regarding the quality of legal services"²⁰ offered may, according to different reasonable interpreters, again be more or less plausible.²¹ 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 with having independent credibility, authority, force, or weight, typically in a direction preferred by a party driving the disclaimer. Crucially among those who may thus attribute independent weight to the disclaimer, apart from the broader relevant circumstances, may be a court, with the power

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¹⁹ See infra Sections IV.B.-C.

²⁰ Ind. Rule Prof. Conduct 7.1(d)(4) (West 2003).

²¹ For the cited language in an adjudicated case, see, e.g., In re Anonymous, 689 N.E.2d 442, 444 (Ind. 1997).
to bindingly interpret and give legal effect to their preferred reading of the disclaimer.

More subtly, some courts may appreciate and actually value the sheer contestability of typical legal disclaimers, along with the sheer manipulability of the disclaimer analysis and of its judicial outcomes. Some 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 accord with judicial preferences. Such courts might thus be in no hurry to abandon a manipulable process of judicial interpretation of disclaimers.

The conflicts and uncertainties underlying disclaimer cases do not mean that no outcome in any disclaimer case is any better than any other. Courts should, however, recognize that a typical disclaimer is a 'bare' disclaimer, in the sense of not presenting grounds in itself for its own credibility, or at best offering only inherently contestable grounds. The disclaimer operates against a disclaimed inference we presumably have at least 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. The disclaimer is a calling into question of what is disclaimed. The disclaimer should be seen

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22 For merely one example of inescapable contestability, and even of practical arbitrariness, consider disclaimers in the establishment clause context generally, and in the oddly distinctive context of public school textbooks discussing evolutionary theory. See infra Section IV.C.
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 rather than another, lie not in the text or terms of the disclaimer, but 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 thus a strategic move, and sometimes a legally self-conscious manipulative move. Disclaimers are thus typically both responsive and anticipatory. Judges should consider disclaimers, when litigated, merely as invitations to inquire into the legal and policy merits of the underlying circumstances. The disclaimer itself will typically somehow reflect the relevant power relationships among the parties, which the court may or may not want to validate, given the interests and policies at stake.

For our purposes, then, we may initially think of a disclaimer roughly 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 for our purposes. It does not correspond perfectly with all legal usages, whether formal or more casual. But we have enough of a preliminary sense of

23 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 an establishment clause case 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.

24 Some things the law calls 'disclaimers' will not qualify as disclaimers for our purposes.
disclaimers in the law to now further explore the distinctive problems associated with such disclaimers. Generally, these problems are especially acute in the case of litigated disclaimers, and will not take as severe a form in most other forms of general textual

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. A disclaimer as understood by estate law is generally effective as a legal matter where the necessary elements of the disclaimer are present. See Black's Law Dictionary, disclaimer (8th ed. 2004); 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); Ronald A. Brand & William P. LaPiana, Disclaimers in Estate Planning: A Guide to Their Effective Use 1 n.1 (1990) ("[t]he law is certainly not so absurd as to force a man to take an estate against his will") (quoting Townson v. Tickell, 106 Eng. Rep. 575, 576-77 (K.B. 1819) (Abbot, C.J.)).

25 The law sometimes refers to what would normally be thought of as a disclosure--as in publicity disclosing or revealing one's identity--as a 'disclaimer.' For discussion of this arguable confusion of disclosures and disclaimers, see, e.g., Majors v. Abell, 361 F.3d 349, 350 (7th Cir. 2004) (Posner, J., for the court); id. at 358 (Easterbrook, J.) (noting the same anomaly). For further illustration in the election law and first amendment contexts, see ACLU v. Heller, 378 F.3d 979, 1001 (9th Cir. 2001); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). See also HEB Ministries, Inc. v. Texas Higher Educ. Coordinating Bd., 235 S.W.3d 627, 691 (Tex. 2007).
expression.  

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, a sort of analogy. The philosopher W.B. Gallie famously suggested that some concepts, including those of democracy and freedom, are "essentially contested concepts." 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."  

26 On the other hand, there may be even less reason for courts to focus on the language and substantive textual messages of, say, 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., Additional Protections Pertaining to Biomedical and Behavioral Research Involving Prisoners as Subjects, 45 C.F.R. § 46.301 et seq. (2001); Colorado v. Connelly, 479 U.S. 157 (1986) (discussing the grounds for finding a confession to have been coerced and for the voluntariness of a Miranda waiver).


28 Id. There is a substantial literature deriving from Gallie's work. For a recent critique, see David Collier et al., Essentially Contested Concepts: Debates and Applications, 11 J. Political Ideologies 211 (2006).
We certainly do not suggest that the idea of a disclaimer is itself an essentially contested concept. The problem with disclaimers is surely not that some of us think that the idea of a disclaimer means one thing, systematically, while others think that a disclaimer means, or should mean, something crucially different. Instead, we seek only to borrow some of the flavor of Professor Gallie's account of the struggle in practice over essentially contested concepts.

Thus even if we can all agree in general on what a disclaimer is, we typically find contrasting attitudes toward a particular disclaimer; complex related arguments; potentially conflicting characterizations of the relevant circumstances and policies; unsettledness in approach to the disclaimer, even where certain "easy" or uncontroversial cases can also be seen; and a sense that the potential disputedness of the disclaimer is of a deep or structural character, even if the occasion for the dispute seems transient. Often, and again following Gallie, the contest over the disclaimer seems dualistic in form. And we do not need to see disputes over disclaimers either as reflecting some form of group relativism, or as grounded only in verbal confusion and superficial misunderstanding.

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

30 For a synthesis of Gallie's approach, incorporating a number of similar elements, see David Collier, et al., supra note 28, at 212.

31 See id.

32 See W.B. Gallie, supra note 27, at 188.
More generally, it is true of disclaimers, at least as much as of texts in general, that meanings for all readers will depend upon the assumptions that the readers bring to bear, as individuals or as members of some interpreting group. The groups may well differ in their social position, in their power and status, and in their interests. The meanings of texts will thus in this sense be social, and will reflect both the correspondence and the conflicts, overt and suppressed, of social group interests. Quite

33 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) ("what 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.

34 See Steven Randall, Fish v. Fish: Review of Stanley Fish, Is There a Text in This Class? The Authority of Interpretive Communities, 12 Diacritics 49, 51 (1982) (per Fish, 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"); 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").

35 See, e.g., John Dewey, Peirce's Theory of Linguistic Signs: Thought and Meaning, 43 J. Phil. 85, 94 (1946) (Dewey on Peirce as recognizing that no valid theory of linguistic signs can escape being rooted in social phenomena).

36 See id. See also Geoffrey P. Miller, Pragmatics and the Maxims of Interpretation,
understandably, then, we should often expect "multiplicity and indeterminacy of interpretation."  37

Given any differences in power and interests among the interpreting groups, we would expect some of the conflicting interpretations to be dominant, even if contested;  38

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other interpretations to be negotiated, even if unstably so; and yet other interpretations to be more or less oppositional and subject to official disapproval. 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.

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

As we shall further see, the language of disclaimers is thus not merely purposive, but typically conflict-based, power-reflective, and strategic in distinctive

39 See the sources cited supra note 38.
40 Robert Hodge & Gunther Kress, supra note 36, at 8.
41 See, e.g., Terry Eagleton, Literary Theory: An Introduction 99 (2d ed. 1996) ("[w]hen we understand the 'intentions' of a piece of language, we interpret it as being in some sense oriented, structured to achieve certain effects") (emphasis in the original).
42 "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
More 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 the courts are rightly expected to focus on and interpret, on their own terms.44 Even if we were to choose to call most disclaimers ambiguous, they would still be no more ambiguous than many other texts in general, including other legal texts.

The lack of uniform serious ambiguity of disclaimers should not be surprising. If, as we suggest, disclaimers reflect underlying power relationships in circumstances of conflicting interests, we would expect many disclaimers to be no more ambiguous than

context of religious symbols on public land, see Buono v. Kempthorne, 502 F.3d 1069, 1072 (9th Cir. 2007) (wooden cross erected by VFW on public land in 1934 as then accompanied by sign referring to the memory "of the dead of all wars"). We assume that such displays might well have been, realistically, less likely to be subject to establishment clause litigation in 1934 than in more recent decades.

43 For the extreme case, see C.K. Ogden & I.A. Richards, The Meaning of Meaning 17 (1989 ed.) (1923) ("[a]nother variety of verbal ingenuity . . . is the deliberate use of symbols to misdirect the listener").

44 Note, e.g., the Court's willingness to interpret the equal protection clause in various contexts. See, e.g., Baker v. Carr, 369 U.S. 186, 226 (1962) ("[j]udicial standards under the Equal Protection Clause are well developed and familiar").
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 among some of the directly affected parties.

The crucial problem underlying judicial responses to disclaimers is thus not distinctive ambiguity, but that a disclaimer’s text reflects the complex, subtle, or disguised underlying power relationships, conflicting interests, and strategic purposes that have produced that text. For a court to either validate or invalidate any disclaimer is to inescapably take some non-neutral stand on the status and exercise of those power

45 Sometimes the conflicting interests and strategic purposes may be present, but for practical, cultural, or technical reasons, a disclaimer does not arise. See Hurley v. Irish-American Gay Lesbian and Bisexual Group of Boston, 515 U.S. 557, 576-77 (1995). The Court here contrasted the greater feasibility of broadcaster versus individual speaker viewpoint disclaimers in Turner Broadcasting System v. FCC, 512 U.S. 622, 655 (1994). The Court in Hurley also more 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, 87 (1980). For an even less realistic proposed disclaimer, consider the written disclaimer, for an audience including second and third grade students, explaining that a teacher conducting a religious club meeting in a public school library, 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. See Wigg v. Sioux Falls School Dist., 382 F.3d 807, 811 (8th Cir. 2004). It seems unlikely that most second or third grade students could read such a disclosure, or grasp the distinction involved.
A court should thus somehow address the broadly moral or public policy-based value and character of those power relationships, in the context of the contested disclaimer.

The terms or text of the disclaimer itself can hardly begin to validate or invalidate the underlying power relationships and the exercise of power embodied in the disclaimer. The terms or text can only serve to introduce the court to the substantive public policy interests and concerns that should determine the outcome of the judicial case. 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 it validates the disclaimer or not.

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. But even in such an "easy" case, the court should look to the disclaimers’ terms as suggesting the

\[\text{46}\] As an extreme hypothetical example, consider a disclaimer by which an apparently dominant party sought to avoid any responsibility for its own malicious acts, in exchange, apparently, for no meaningful consideration. Less extremely, attempts to exculpate a party from liability for negligent injury are legally controversial. See Markel Am. Ins. v. Dagmar's Marina, 139 Wash. App. 469, 474-75, 161 P.3d 1029, 1031 (2007).

\[\text{47}\] 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.
state of the underlying power relationships and conflicting interests. 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 and policies beyond the text. The disclaimer itself is not typically cogent evidence of those policies. This is true generally, though most clearly so in the cases below in which the self-consciously strategic point of a disclaimer is evident.

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

The most important context in which the identity of the author of the disclaimer may be unclear—if not actually concealed— involves speech arguably attributable to the government. The importance of such cases lies in the need, for the sake of a meaningful democracy, that the voice of government be as clearly distinguished as possible from the voice of less powerful private speakers.

48 See infra Sections IV.B.-C.


50 See id.

51 See Gia B. Lee, Persuasion, Transparency, and Government Speech, 56 Hastings L.J.
Even a clear disclaimer may not genuinely establish the public or private authorship of a particular speech. Disclaimers, especially disclaimers made by the government or mandated of others by the government, may in some cases deserve little


52 Note the disagreement on this point within the Court in Board of Regents of Univ. of Wisconsin v. Southworth, 529 U.S. 217 (2000) (student speech subsidized by mandatory student activity fees according to state university criteria), in particular id. at 229 (required disclaimer that the subsidized private speech is not that of the state university student association accepted as a valid and sufficient disclaimer) and id. at 241 & 241 n.8 ("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") (Souter, J., with Stevens & Breyer, JJ., concurring in the judgment).

53 For discussion of the distinction between speech "by" or attributable to the government and speech by others that is compelled by the government, see Note, The Curious
credence. But the more basic problem is often whether the disclaimer amounts, at least in part, to government speech or not. Courts often do not know, and certainly cannot tell merely from carefully examining the disclaimer, who has genuinely authored the disclaimer.

We shall further address issues of disclaimers and compelled speech below. For the moment, consider the possibility of governmentally required disclaimers in the context of governmentally subsidized public broadcasting. The government in such cases is taken to have an interest in discouraging the belief "that the broadcaster’s editorials reflect the official view of the government." A governmentally required disclaimer is thought to solve the problem by announcing that station editorials do not reflect official government views, or the views of any other station funding source.

But a disclaimer that is compelled by the party, in this case the government, that is suspected of influencing the broadcaster’s speech must inescapably be suspicious. Such a disclaimer can, at most, merely invite a court to investigate the underlying power relationships, conflicts, strategic aims, and policies at stake. The disclaimers can hardly be even minimally self-validating. Consider, in this context, Justice Stevens’ more colorful analysis: "This solution would be laughable were it not so Orwellian: the

Relationship Between the Compelled Speech and Government Speech Doctrines, 117 Harv. L. Rev. 2411 (2004), and Section IV.C. infra.

54 See infra Section IV.B.-C.


56 Id. at 395.

57 See id.
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!"\textsuperscript{58}

These governmental, or governmentally inspired private party disclaimers raise many issues. Our only point is that not even the most careful examination of the text or terms of the disclaimer can tell us, in realistic terms, which one or more parties are the responsible authors of the disclaimer. Whether the disclaimer represents some sort of negotiated compromise, or reflects one degree or another of conflicting interests, inequality, or coercion, is closely related but further problems.

How, then, should a court go about determining whether a disclaimer was authored by or otherwise fairly attributable either to the government or to a private party? In this context, some courts do the generally right thing. These courts do not focus on the text and terms of the disclaimer, and on ascertaining the disclaimer’s author and real social meaning from such sources. Such courts might 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

\textsuperscript{58} Id. at 417 n.10 (Stevens, J., dissenting). In some 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) (in context of avoiding appearance of governmental favoritism in federal workplace charitable fund drive, "petitioner offers no explanation why a simple disclaimer in the brochure would not suffice to achieve the Government's interest in avoiding the appearance of support) (Blackmun, J., dissenting).
The courts have faced general problems of distinguishing between government speech, or government-sponsored speech, and genuinely private speech that a government might happen to agree with. The most commonly used judicial test in this context consists of four factors, none of which focuses on the text or terms of the speech itself, which may be a physical sign, a written message, or a portion of a broadcast. In the context of a physical sign listing sponsors of a holiday display, for example, one court thus considered and adopted four factors: (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.

We need not endorse a focus on precisely these four factors in trying to judicially distinguish between government speech and private speech.

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59 See the source cited infra note 60 and accompanying text.

60 See Wells v. City and County of Denver, 257 F.3d 1132, 1140-42 (10th Cir. 2001).

61 Id. at 1241 (quoted in Summum v. City of Ogden, 297 F.3d 995, 1004 (10th Cir. 2002)) (Ten Commandments monument case). See also Knights of the Ku Klux Klan v. Curators of University of Missouri, 203 F.3d 1085, 1095 (8th Cir. 2000) (public radio station’s underwriting acknowledgments determined to be government rather than private speech).
determine the author or authors of a disclaimer. The factors would probably have to be adapted in some cases of joint responsibility. But at a general level, the court’s focus here on underlying issues of purpose, control, and responsibility is well-advised. In any event, courts should in some way focus 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 the treatment of disclaimers in the establishment clause context.

We cannot survey here the various approaches to establishment clause jurisprudence. But merely for illustration, we can begin with the familiar Lemon test,

62 For references to three more or less distinct approaches, including the Lemon test, the endorsement test, and the coercion test, see Tangiahapoa Parish Bd. of Educ. v. Freiler, 530 U.S. 1251 (2000) (Scalia, J., dissenting from denial of certiorari). See also Newdow v. U.S. Congress, 292 F.3d 597 (9th Cir. 2002), rev'd on grounds of lack of standing, 542 U.S. 1 (2004).
under which the challenged practice “must 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.” 63

When we add in alternative tests focusing on some sort of idea of coercion 64 or of governmental endorsement, 65 we have at least a minimal sense of current establishment clause jurisprudence.

Directly relevant for our purposes, however, is the sheer faith of some judges in the power of a disclaimer, without much investigation into the underlying power relationships, actual and potential conflicts, and relevant policy concerns. Sometimes, we find a one-sided judicial characterization of the underlying circumstances, without much concern for alternative accounts. The problem, for our purposes, is that disclaimers in such contexts normally tell us little or nothing of real relevance to the Lemon test elements, or about coercion, or about governmental endorsement. The focus, in our view, should be on the relevant underlying circumstances, rather than on the words of the disclaimer.

Disclaimers, certainly, in the establishment clause cases, can be either sincere or more or less strategic. Some disclaimers may count as manipulative, or even as a form of propaganda. 66 Disclaimers may or may not accurately reflect any underlying social


65 See, e.g., the sources cited supra note 62.

66 Consider, e.g., Edward Bernays, Propaganda 52 (2005) (1928) (“[m]odern propaganda
reality. Some judges, however, have been known to respond to an establishment clause disclaimer apparently at face value.

Consider, for example, Justice Scalia’s apparent belief that any appropriate disclaimer would reverse the outcome in the case of an otherwise unconstitutional general religious invocation before a public school commencement ceremony. In the face of the otherwise objectionable religious invocation, the school authorities must merely present a relevant disclaimer. They must “make clear that anyone who abstains from screaming in protest does not necessarily participate in the prayers.” More precisely, on Scalia’s view, such a disclaimer might take the form of

[a]n 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.

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. reprinted 1973) (1965). It is for our purposes unnecessary to think of propaganda as enduring over time.

See Lee, 505 U.S. at 644-45 (Scalia, J., dissenting).

Id. at 645.

Id. For a contrasting view on the nature of coercion, see the judicial finding of essentially coerced attendance at a football game, and coerced prayer participation by those in attendance, in Santa Fe, 530 U.S. at 311-12 (“even if we regard every high
There is much to say in response here. Most centrally, though, we must ask how we 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.\(^{70}\)

Our point is not to prefer one understanding of coercion\(^{71}\) 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 we do not claim to be able to say whether a disclaimer that denied any coercion in Lee would be accurate or not.

Instead, our point is that a governmental disclaimer of any coercion, or of any intent to proselytize or promote religion, could hardly begin to solve the constitutional problems in Lee, or to tell us about the underlying power relationships, conflicts, and policy concerns in Lee. A disclaimer may be, as we have seen,\(^{72}\) merely a willful 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\(^{\text{70}}\)).

\(^{70}\) Arguably, such a disclaimer takes insufficient account of possible dissenting student free exercise of religion elements at this point, beyond the establishment clause issues.

\(^{71}\) For alternative understandings of the idea of coercion, see, e.g., Alan Wertheimer, Coercion (2006); Robert Nozick, Coercion, in Philosophy, Science & Method 444 (Sidney Morgenbesser et al. eds. 1969); Nomos XVI: Coercion (J. Roland Pennock & John Chapman eds. 1972).

\(^{72}\) See supra notes 55-58 and accompanying text.
exercise of power by a dominant party that overrides and obscures the relevant underlying truths.

As a further complication, disclaimers in religious display contexts, if they are conspicuous or multiple,\(^73\) may call attention less to themselves than to the physical scene in general, to the government’s role and presence, or to the portion of the display thought to create the establishment clause problem, thereby backfiring.\(^74\) Such disclaimers still do not tell us about genuine power relationships and conflicts, but may invite judicial manipulation. Disclaimers may reflect unilateral power, may deny the obvious,\(^75\) may seem Orwellian,\(^76\) or may seem to backfire.\(^77\) The judicial focus should be not on the detailed formal minutiae of disclaimers,\(^78\) but on the underlying social realities. Only if

\(^{73}\) See, e.g., American Jewish Cong. v. City of Chicago, 827 F.2d 120, 128 (7th Cir. 1987) (nativity scene in City Hall surrounded by six disclaimer signs).

\(^{74}\) See id. at 125-26.

\(^{75}\) See id. at 128.

\(^{76}\) See supra text accompanying note 58. For a limited rejection of Orwellianism in interpreting and reacting to government disclaimers, see ACLU v. Wilkinson, 895 F.2d 1098, 1104 (6th Cir. 1990).

\(^{77}\) See American Jewish Cong., 827 F.2d at 125-26. See also Kaplan v. City of Burlington, 891 F.2d 1024, 1030 (2d Cir. 1989) (city had to disclaim menorah sponsorship "so often that it became ours in some people's minds").

\(^{78}\) Note, e.g., the sense of arbitrariness in judicial attempts to attach one or another sort of crucial legal import to the disclaimer itself in Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 794 n.2 (1995) (recognizing the possible perceived inadequacy of
courts or legislatures meaningfully investigate those underlying realities can we begin to have confidence that a disclaimer case is rightly decided. 79

Consider, for example, the alternative readings of a disclaimer accompanying the public display of a crèche, menorah, and Christmas tree in Allegheny v. ACLU. 80 The disclaimer associated with the menorah and the Christmas tree referred to celebrating liberty, 81 and to the theme of light. 82 The plurality, while recognizing that some messages are just too undeniable to disclaim plausibly, 83 nonetheless took the disclaimer 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 mem. by an equally divided Court sub nom. Board of Trustees v. McCreary, 471 U.S. 83 (1985).

79 Compare, e.g., 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 privately owned portion of park) with id. at 706 (Bauer, J., dissenting) (disclaimer at the monument as "an obvious sham," and no more effective than the Wizard's directive to "pay no attention to that man behind the curtain").

80 494 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.

81 See id. at 619 (Blackmun, J., for the plurality).

82 See id. (Blackmun, J., for the plurality).

83 See id. (Blackmun, J. for the plurality).
to confirm that the display was not a matter of endorsing or promoting religion, but instead about recognizing cultural diversity.

Plainly, though, 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. Our 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. Meanwhile, even the question of who, and with what capacities, is to be envisioned as reading and interpreting the disclaimer is an unsolved judicial problem.

84 See id. (Blackmun, J., for the plurality).
85 See id. (Blackmun, J., for the plurality).
86 For further examples of the remarkably variable capacity of a disclaimer to sanitize an apparently religious public display, see the contrasting cases discussed in Hills v. Scottsdale Unified School Dist., 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) ("political powers are . . . in large part, linguistically constituted").
87 For discussion, see, e.g., Freedom From Religion Foundation v. City of Marshfield, 203 F.3d 487, 495-96 & 495 n.2 (7th Cir. 2000). As merely one facet of the capacities of the reader problem, consider that in a classroom Ten Commandments posting case, the statute required that
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 problem. The establishment clause problem arises only when the state introduces some sort of separate oral or written disclaimer, with a range of possible meanings, into the situation. 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 establishment clause problem, we cannot make much progress by advising the courts to ignore the text and terms of the disclaimer. But it remains true even in this special context that courts should focus on

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,' id. at 41, 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.
underlying power relationships, actual and potential conflicts, and relevant public policies in resolving the establishment clause problem. To see this, it may help to imagine the evolution disclaimer being rewritten so as not to take the form of a disclaimer, but of content seamlessly written into the textbook itself.\(^88\) The establishment clause issue might well remain, but without the element of a disclaimer.

As the cases have developed, there is no absolute uniformity as to the language of evolution textbook disclaimers. A typical such disclaimer, however, read as follows:

This textbook contains material on evolution. Evolution is a theory, not a fact, regarding the origin of living things. This material should be approached with an open mind, studied carefully, and critically considered.\(^89\)


\(^89\) Selman v. Cobb County School Dist., 449 F.3d 1320, 1324 (11th Cir. 2006) (disclaimer as a sticker affixed to textbook's inside front cover). For a somewhat lengthier oral disclaimer to accompany every presentation of evolutionary theory, see Tangipahoa
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.\(^90\) Such courts might choose to focus on the text of the disclaimer in applying whatever tests the court deemed applicable. A court skeptical of the disclaimer might conclude that referring to evolution as (merely) a theory amounts to religiously motivated stigmatization.\(^91\) Or 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.

But 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 are entirely with 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

\(^{90}\) See supra Section IV.A. See also Freiler, 530 U.S. at 1251 (Scalia, J., dissenting from denial of certiorari).

\(^{91}\) Presumably, no other similarly corroborated theories in other textbooks evoke a similar disclaimer sticker.
likely ask itself: How can we best phrase the disclaimer, in light of potential legal challenges under the current case law? We should expect a religiously motivated disclaimer, even if envelope-pushing, to be no more overtly religious, textually, than a prudent reading of the case law might support. Given the "gameability" of establishment clause tests, we might expect "strategic" behavior from all parties. Even religiously motivated disclaimers should, textually, tend to stop somewhere in a zone of establishment clause indeterminacy.  

We should thus expect the text of even religiously motivated disclaimers to normally present reasonably close cases on the current case law. 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 an eye toward perhaps bare compliance with the case law.  

92 Recall the significant secular purpose prong, deriving from Lemon, 403 U.S. at 612, and as applied in similar contexts thereafter.  

93 While there are of course some rewards for aggressively reading the case law in one's favor, the costs of litigation and the availability of reasonable attorneys' fees for a prevailing opposing party 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 (2007).  

94 Doubtless even at this point, a disclaimer could still be drafted naively, or for local political purposes, or from a sense of principle independent of judicial outcome. But again, the financial costs of litigating an evolution disclaimer that does not arguably
Rather than focusing on the texts of such disclaimers, particularly if they are likely to be strategically crafted to present favorable cases, courts should apply establishment clause case law 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. But to at least some degree, the courts can recognize any politicized manipulation, tactical evasion, strategic record-building, or self-conscious hypersensitivity on either 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 of a required textbook, with or without a disclaimer sticker, than by controlling the content of a disclaimer that prefaces hundreds of pages of required text with which one disagrees. But as a matter of political power at the level of typical accommodate the case law are likely to be high. For discussion of the problem of strategic drafting of the disclaimer, see Louis J. Virelli, Making Lemonade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause, 60 U. Miami L. Rev. 423, 441 (2006).

95 For discussion, see, e.g., 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).

96 Historically, note the shift in the issue at stake from Epperson v. Arkansas, 393 U.S. 97 (1968) (impermissibility of prohibiting the teaching of evolution) to Edwards v. Aguillard, 482 U.S. 578 (1987) (impermissibility of requiring that creation theory be taught alongside evolutionary theory) to Kitzmiller v. Dover Area School Dist., 400 F. Supp. 2d 708 (M.D. Pa. 2005) (impermissibility of teaching "intelligent design") to the
citizens, belief in some alternative to a purely naturalist evolutionary theory remains remarkably well-established.\textsuperscript{97}

\textbf{C. Disclaimers and Compelled Citizen Speech}

Sometimes, even a sincere, clear, voluntary, and apparently relevant disclaimer is unable to change the legal outcome of a case. Consider the circumstances of the classic typical contemporary disclaimer cases.

\textsuperscript{97} While any particular poll question formulation can be criticized, apparently, a belief that human beings were created directly by God is currently held by majorities even of college graduates, Democrats, self-identified liberals, adults between 18-54, Northeasters, 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 The Harris Poll #52, July 6, 2005: Nearly Two-Thirds of U.S. Adults Believe Human Beings Were Created [Directly] by God, available at http://www.harrisinteractive.com/harris_poll (last visited January 8, 2008). See also National Center for Science Education, Public View of Creationism and Evolution Unchanged, Says Gallup, available at http://www.ncseweb.org/resources/news/2004 (last visited January 4, 2008) (13\% agreed that ”Human beings have developed over millions of years from less advanced forms of life, but God had no part in this process”), along with the various recent poll summaries collected under Science and Nature: Origin of Human Life, available http://www.pollingreport.com/science.htm (last visited January 4, 2008).
compelled flag salute case of West Virginia State Board of Education v. Barnette.\textsuperscript{98} 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.\textsuperscript{99} 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 official control."\textsuperscript{100}

As a merely 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 in Barnette. We can hardly imagine so. And yet such a disclaimer could have clearly established, for all observers, and on the plaintiff's own terms, their precise views on the matters at stake.

The inadequacy of any disclaimer in that\textsuperscript{101} compelled speech context may stem from several considerations. These considerations might involve 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

\textsuperscript{98} 319 U.S. 624 (1943).

\textsuperscript{99} See id. at 642.

\textsuperscript{100} Id.

\textsuperscript{101} 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).
behavior, and even the long-term risks to autonomous thinking from recurrently coerced behavior. The explanation, though, matters less than the recognition of the only quite modest role for disclaimers, actual or possible, in the compelled speech context.

We see the insignificance of any possible disclaimer as well in Wooley v. Maynard, in which New Hampshire required passenger vehicle plates to display the state motto of "Live Free Or Die." 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, which would in any event not be imputed to any

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102 One could argue that the dignity of the person is fundamental to freedom of speech as well as to other constitutional values. See, e.g., 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 Richmond L. Rev. 271 (2002).

103 Cf. Blaise Pascal, Pensees ch. 3 § 233 (A.J. Krailsheimer trans.) (Penguin ed. 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).

104 We should recall as well that in some contexts, a disclaimer may for technical or cultural reasons not seem feasible. See supra note 45 and accompanying text.


106 See id. at 713.

107 See id. at 722 (Rehnquist, J., dissenting).
individual driver, precisely because of the recognized universality of the motto display requirement.\footnote{See id. at 721 (Rehnquist, J., dissenting).}

A disclaimer in such a case could indeed convey an objector's viewpoint. So, to some degree, might a letter to the editor, or to one's state representative, or any of various other means of communication not amounting to a disclaimer. But more crucially, a disclaimer, however phrased, cannot make up for the dignitary injury inherent in being forced into service as the bearer, personally, of a repugnant message. Disclaiming a message does not undo the indignity of being forced, as a mere Kantian means,\footnote{See supra note 102 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 thus being used.} to personally bear and thus disseminate the message. Whether any such disclaimer should be given any 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.\footnote{See, e.g., Bates v. State Bar, 433 U.S. 350, 384 (1977); In re R.M.J., 455 U.S. 191, 201-03 (1982); Peel v. Attorney Registration and Disciplinary Com'n, 496 U.S. 91, 110} In such cases,
however, the courts often underestimate the potential for the mandatory disclaimers themselves to mislead some consumers. The courts might well be better advised to recognize that legislatively mandated disclaimers can be the product of interest group influence\(^\text{111}\) as much as 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.\(^\text{112}\) 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 also misleading (1990).


\(^{112}\) Consider the Florida Bar rule prohibiting "self-laudatory" advertisement, as upheld in Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000). See Stacy Borisov, Comment, Commercial Speech: Mandatory Disclaimers in the Regulation of Misleading Attorney Advertising, 12 U. Fla. J.L. & Pub. Pol'y 377 (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.
and even dignity-impairing disclaimer.

Consider, as an example, the dentistry advertising case of Borgner v. Brooks.\footnote{284 F.3d 1204 (11th Cir. 2002), cert. denied sub nom. Borgner v. Florida Bd. of Dentistry, 537 U.S. 1080 (2002) (Thomas & Ginsburg, JJ., dissenting).} Borgner practiced general dentistry, with an emphasis on implant dentistry, as a member of the American Academy of Implant Dentistry.\footnote{See Borgner, 537 U.S. at 1080.} In order to advertise his implant practice emphasis, and the latter membership, Borgner was required to add two specific disclaimers, even in the medium of business card advertising. One disclaimer read:

"IMPLANT DENTISTRY IS NOT RECOGNIZED AS A SPECIALTY AREA BY THE AMERICAN DENTAL ASSOCIATION OR THE FLORIDA BOARD OF DENTISTRY."

The second 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."

We assume that these required disclaimers were well-motivated, rather than simply reflecting interest group influence.\footnote{See supra note 111.} But if we examine especially the text of the second mandated disclaimer, we find a possible source of confusion. To say that a group is not recognized as bona fide may mean only that the group is not recognized for some reason not going to its merits. To other readers, however, the same language may suggest...
that the group is in some respect less than fully meritorious.\textsuperscript{118}

State-mandated disclaimers in the professional advertising context may not
admittedly carry quite the same dignitary sting as in some other contexts.\textsuperscript{119} Still, there
must typically be some dignitary impact\textsuperscript{120} in being forced by the state to qualify, if not
somehow minimize or even undermine, one's own representations about one's own
professional abilities. And this dignitary 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.\textsuperscript{121}

\textsuperscript{118} See Borgner, 537 U.S. at 1080.

\textsuperscript{119} See supra note 102 and accompanying text.

\textsuperscript{120} Of course, if no potential client--and no 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.

\textsuperscript{121} 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 thus demeaning oneself. For the standard
judicial preference, however, for state-mandated disclaimers over the prohibition of
deceptive speech, see Borgner, 284 F.3d at 1214 (apparently treating mandatory
disclaimers as equivalent to mandatory disclosures of true and relevant information).
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. This language might persuade some readers, perhaps correctly, that the professional actually remains convinced of the disclaimed representations. Such language thus comes close to a disclaimer, by one interested but expert party, of the mandated disclaimer itself. All of this counsels against the overall legal value of the mandatory disclaimer itself.

E. Securities "Disclaimers"

Claims of fraud brought by securities investors or by the government, based on corporate communications of one sort or another, are common. A number of such cases involve the application of a possible 'safe harbor' for the companies' otherwise risky optimistic forecasts of future corporate performance. Such optimistic forecasts must be accompanied by "meaningful cautionary statements" that more or less identify the

122 For typical such claims, see, e.g., United States 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. Securities Litigation, 502 F. Supp. 2d 861 (D. Minn. 2007).

123 See, e.g., Broc Romanek, Corporate Web Disclaimers: To Disclaim Or Not Disclaim, It Should Not Be a Question, 2001 Glasser Legal Works 132, 133.

risks or contingencies that might derail the corporate speaker's optimistic projections.\textsuperscript{126} The legal effect of the cautionary language is referred to as the "bespeaks caution" doctrine.\textsuperscript{127}

Let us initially think of the qualifying, or the less optimistic, language in these corporate statements as disclaimers. There need be no harm in doing so. But we should notice that in doing so, we depart somewhat from the paradigm cases of a disclaimer. As we have seen 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. But the essence of the securities claim in these cases is the allegedly fraudulent or misleading character of the corporate communication at issue. And the corporate communication may not fit the standard model of a main body of communication, followed or preceded by a separate and distinct disclaimer.

We can certainly imagine an optimistic "claim" by a corporation, followed, at (1995), codified at 15 U.S.C. §§ 77a - 78lll, and in particular at § 78u-5(c)(1)(B).

\textsuperscript{125} See Harris, 182 F.3d at 807 (failure to explicitly mention the eventually decisive countervailing factor as not necessarily controlling).

\textsuperscript{126} See id.

\textsuperscript{127} See, e.g., 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. See id. See also Employers Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox Co., 353 F.3d 1125, 1132 (9th Cir. 2004).
some remove, by a separate and distinct disclaimer. But 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 inescapable in every sentence that contributes, jointly, to making up the overall integrated forecast.

It may thus be deeply artificial to try to physically separate out 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, we should be extremely reluctant to give the corporation the benefit of that remote disclaimer. Even if such a disclaimer is not classed as mere "boilerplate," we must ask why the disclaiming 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 be disentangled from the company's forecast itself, and thus cannot easily count as a separate disclaimer for

practical purposes. But a physically separated disclaimer invites investor misanalysis.\textsuperscript{129} Such a disclaimer should, in accordance with our general thesis,\textsuperscript{130} 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 on appropriate grounds what kinds of corporate claims should count as fraudulent in the first place.

\textbf{F. Dietary Supplement Health}

\textbf{Claims and Mandatory Disclaimers}

Under the present legal regime, dietary supplements\textsuperscript{131} may carry true and non-deceptive health claims,\textsuperscript{132} as long as the health claims are determined to relate to the structure and healthy function of the body, but not to the prevention or treatment of any disease.\textsuperscript{133} Health claims relating to bodily structure and function must be substantiated

\textsuperscript{128} See Daniel S. Floyd & Sogol K. Pirnarzar, supra note 128, at 6-18.

\textsuperscript{130} See supra Section I.

\textsuperscript{131} For our purposes, dietary supplements typically provide vitamins, minerals, herbs or other botanicals, etc. See 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).

\textsuperscript{132} E.g., of the role that calcium and Vitamin D may play in bone density, see id. at 376.

\textsuperscript{133} See 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.
by the marketer.\textsuperscript{134}

But even so, products making thus limited and substantiated and 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."\textsuperscript{135}

Now, we must here separate a critique of the distinctive features of this disclaimer rule from a broader critique of the legal value of disclaimers more generally. 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 to FDA standards,\textsuperscript{136} then the above mandated FDA disclaimer, if it has any effect at all, may discourage use of a helpful supplement more than it discourages the use of a risky or ineffective supplement. By our assumption, the supplement's health claims have been supported to 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 under-consumption.\textsuperscript{137}

\textsuperscript{134}See id.

\textsuperscript{135}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.

\textsuperscript{136}For an unusually interesting discussion of related issues, see Pearson v. Shalala, 164 F.3d 650 (D.C. Cir. 1999).

\textsuperscript{137}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
But more broadly, isn't there 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.\textsuperscript{138} Merely potentially misleading claims\textsuperscript{139} should simply be rewritten until deemed not thus misleading.\textsuperscript{140} 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 straightforwardly non-misleading health claim. No vital free speech interest is upheld in this commercial case by judicially preferring the first such option over the second. For the sake of consumer health, safety, or even medical efficacy, potentially misleading health claims should be rewritten, by one entity or another,\textsuperscript{141} so as to not be thus misleading. It furthers no significant free speech interest in this context to opt for the disclaimer route, even where the disclaimer is not itself potentially misleading. There is no useful role here for the disclaimer.

\textbf{G. Employment Contract Disclaimers}

supplement might be limited. See R. William Soller, supra note 131, at 376.


\textsuperscript{139} See Pearson, 138 F.3d at 655-59.

\textsuperscript{140} For a related set of circumstances, see id. at 659-60.

\textsuperscript{141} See id. at 659. Presumably the supplement seller or manufacturer would typically offer to redraft and then document the health claim found potentially misleading.
Disclaimers often play a role in contract disputes between employees and employers. Often, the employer appears to have supplied language that may seem inconsistent with employment at will.  But it has been said that "an employer may include a clear disclaimer . . . to avoid contractual liability for a personnel policy." Courts often consider apparent disclaimers of employee job rights in rather formalistic ways. The clarity and conspicuousness of a particular disclaimer of employment rights beyond at-will status may thus be a central focus, and may be determined by the court as a matter of law.

The conspicuousness of such a disclaimer is, however, no guarantee that it will be judicially recognized as effective. 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" as opposed to "straightforward terms." Nor are even clear and conspicuous disclaimers always given effect; inconsistent writings, oral representations, or actual employment practices may negate a disclaimer of

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142 See, e.g., Zahodnick v. IBM Corp., 135 F.3d 911, 914 (4th Cir. 1997) (per curiam).


146 Id. at 414, 643 A.2d at 560.

147 Id.
employment rights beyond at-will employment.\textsuperscript{148}

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 invariably as focused on the bare disclaimer itself as is sometimes suggested. Often, there seem to be deeper issues at stake than the form or content or even the context of the disclaimer in question.

Consider, for example, one court's declaration that "[w]e reject the premises, 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."\textsuperscript{149} Whether we agree with this disfavoring of employment contract disclaimers or not, the logic and grounds of the judicial attitude here take us 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 then be characterized as a disclaimer (of some otherwise plausible employee claim, perhaps)\textsuperscript{150} rather than as just one of the terms of the employment contract. But if the disclaimer was

\textsuperscript{148} See, e.g., Swanson v. Liquid Air Corp., 118 Wash. 2d 512, 532-33, 826 P.2d 664, 674-75 (1992) (en banc).

\textsuperscript{149} Id. at 532, 826 P.2d at 674.

\textsuperscript{150} See supra note 1.
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 else not clear and conspicuous, and therefore unenforceable. This focus on the disclaimer itself is often evasive or superficial, and may encourage judicial manipulativeness in grounding what may really be a deeper policy judgment on doubtful formalistic grounds.  

This is not to suggest that either employers or employees should win more of the employment disclaimer cases. The point is instead that such employment termination cases should be decided, whether by statute or common law, by some candid reference to the significant underlying substantive elements, rather than by either simple or

\[\text{(151) For a disclaimer rejected on grounds of ambiguity, apart, apparently, from the underlying power relationships, conflicts, and public policies at stake, see, e.g., Whittington v. City of Crisfield, 204 Fed. Appx. 183, 184 (4th Cir. 2006) (per curiam) (unpublished opinion) (discussing similar cases).} \]

\[\text{(152) The disclaimer itself, prior to litigation, may have practical effects, including effects on employee morale. See Swanson, 118 Wash. 2d at 541 n.3, 826 P.2d at 679 n.3 As well, if many employees are involved in different circumstances, disclaimers may be difficult to apply uniformly and consistently. See id. More broadly, every disclaimer may be seen as to some extent an attempt to influence power relationships either between primary parties or with respect to some outside party, including the public or the courts. Any adverse effect on employee morale, productivity, or turnover caused by disclaimers would simply be an anticipated or unanticipated element of the underlying problem.}\]
complex reference to the disclaimer.\textsuperscript{153}

H. Commercial and Consumer Implied Warranty

and Tort Disclaimer Cases

When we turn to implied warranty disclaimers\textsuperscript{154} for both commercial and ordinary consumer customers, as well as to attempts to disclaim liability for tort injuries, we again find an unjustifiable focus on various aspects of the disclaimer itself, at the expense of inquiring into more fundamental substantive matters. Again, we need not 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.

\textsuperscript{153} 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, e.g., the arguments collected in Michael J. Philips, Disclaimers of Wrongful Discharge Liability: Time For a Crackdown?, 70 Wash. U. L.Q. 1131, 1155 (1992). For public policy arguments running to the contrary, see id. at 1156-57.

\textsuperscript{154} For a concise definition of a disclaimer in this specific context, see Lecates v. Hetrich Pontiac Buick Co., 515 A.2d 163, 171 (Del. Sup. 1986) ("[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").
The standard first, and too often final, step in testing a disclaimer under the Uniform Commercial Code\textsuperscript{155} involves invoking some generalized boilerplate principle. Conspicuousness is one such focus. Commonly, the required conspicuousness of a disclaimer is measured by the manipulable test of what a "reasonable person against whom it is to operate"\textsuperscript{156} should have noticed.

The question then might arise whether a particular disclaimer could be conspicuous (or clear) to a merchant buyer, even if not to a non-merchant consumer. Courts often then emphasize broader "reasonable person" language as distinct from the more contextual "reasonable person against whom it is to operate."\textsuperscript{157} Such courts consider the disclaimer itself in light of the U.C.C., performing judicial examinations of typefaces, fonts, capitals, set-offs, boxes, lines of asterisks, margin sizes, boldface and italics, colors and contrasting colors of ink, placement in a document and reference thereto, as well as of visual contrasts.\textsuperscript{158}

Out of such typographical inquiries, a judicial result of some sort may emerge. If all courts were to focus, however, on matters such as actual power relationships among

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155 See U.C.C. § 2-136 (as discussed in, e.g., Clark v. DeLaval Separator Corp., 639 F.2d 1320, 1323 (5th Cir. 1981) ("[a] disclaimer is 'conspicuous' when it is so written that a reasonable person against whom it is to operate ought to have noticed it").

156 See supra note 155; Cate v. Dover Corp., 790 S.W.2d 559, 560 (Tex. 1990).


158 See, e.g., Accurate Transmissions, Inc. v. Sonnax Industries, Inc., 2007 WL 1773195 (N.D. Ill. June 14, 2007), slip op. at 3-4; Cate, 790 S.W.2d at 560.
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the parties, they might be more open to asymmetries between repeat-player merchants and one-time player consumers, particularly if the latter tend, perhaps quite reasonably, to not read warranty disclaimers in standard form contracts. \(^{159}\) Realistic consideration of power relations and policy considerations leads some legislatures and courts to sometimes refuse to give effect even to clear and conspicuous disclaimers in consumer cases. \(^{160}\)

Courts may decide, in a more formalistic way, whether a phrase like "in its present condition" either is \(^{162}\) or is not \(^{163}\) sufficiently like the phrase "as is" to immunize the seller. \(^{164}\) But courts and legislatures may more justifiably focus instead on substantive matters such as the minimal reasonableness, assuming the freedom and understanding of the parties, of exchanging what is purportedly being exchanged for the specified price in question. \(^{165}\) It may be unclear, for example, why a free and

\(^{159}\) See, e.g., Cate, 790 S.W.2d at 560.

\(^{160}\) See id. at 565 (Spears, J., concurring).

\(^{161}\) See id. at 565-66 (Spears, J., concurring) (citing statutes and cases). See also Michael J. Phillips, Unconscionability and Article 2 Implied Warranty Disclaimers, 62 Chi.-Kent L. Rev. 199, 262-63 (1985).


\(^{164}\) See Lecates, 515 A.2d at 168.

\(^{165}\) In Blankenship v. Northtown Ford, Inc., 95 Ill. App. 3d 303, 306-07, 420 N.E.2d 167, 170-71 (1981), the court initially engaged in a merely formalistic investigation into the disclaimer's conspicuousness, 95 Ill. App. 3d at 306, 420 N.E.2d at 170, but then focused
knowledgeable consumer would consent to pay 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. Some courts have decisively rejected attempts to disclaim liability for injurious products where the claim is brought either in negligence or in strict liability. To the extent that courts hold open the possibility of disclaiming tort injuries, though, our recommendation would remain the same. Instead of reading a number of aspects of the typography of the disclaimer, on realistic underlying considerations, id. at 307, 420 N.E.2d at 171 (citing U.C.C. § 2-313, comment 4).


168 See the various conspicuousness factors referred to supra note 158 and accompanying text.
courts and legislatures should focus on underlying power relationships, conflicts of interest, and public policies. Merely as one possible such 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 bear the risk of non-negligent injuries.\footnote{See, classically, Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970).}

\section{I. Disclaimers of Implied Warranties of Habitability}

In consumer as well as in commercial contexts, the courts and legislatures differ in their readiness to enforce disclaimers of an implied warranty of habitability.\footnote{See, e.g., P.H. Investment v. Oliver, 818 P.2d 1018, 1021 (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, id. at 1021 n.1).}

Regardless of 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 of 'implied warranty of habitability' in the disclaimer.\footnote{See Board of Managers of the Village Centre Condominium Ass'n v. Wilmette Partners, 198 Ill. 2d 132, 136, 760 N.E.2d 976, 979 (2001).} The trial court
focused as well on the conspicuousness of the disclaimer’s location, the typeface size of the disclaimer, and the "plain language" of the disclaimer. The Illinois Supreme Court endorsed the relevance of the latter considerations on a case-by-case basis, but decided the case solely on the grounds that the disclaimer had failed to refer explicitly to an implied warranty of habitability.

Courts often decide habitability disclaimer cases on similarly formalistic grounds, as on the supposed clarity or lack of clarity of a (read or unread) disclaimer. Rather than focusing on the clarity or lack thereof of 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 by independent counsel; and whether the buyer or lessee had ample opportunity to meaningfully inspect the property.

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172 See id.
173 See id.
174 See id.
175 See id. at 141, 760 N.E.2d at 981.
176 See id. at 140, 760 N.E.2d at 981.
177 See Frickel v. Sunnyside Enterprises, Inc., 106 Wash. 2d 714, 721, 725 P.2d 422, 426 (1986) (en banc) ("[w]hat could be more clear to a buyer than the following language . . . .").
178 In Frickel, id., virtually all these considerations cut in favor of the seller and thus in favor of enforcing the disclaimer. See id. at 715, 725 P.2d at 423. But even the
Courts often take some account of one or more of the relevant underlying considerations in the habitability warranty cases. To judicially inquire into underlying matters is, admittedly, not to absolutely ensure the best outcome. To judicially probe the underlying circumstances of any individual case can also be costly even if ultimately accurate, and to reduce such costs by relying on generalizations invites occasional inaccuracy. Thus if a court always assumes, for example, that grossly unequal bargaining power will characterize residential tenancies but not commercial tenancies, 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 thus worth assuming that modern residential tenants are interested more in living space than in land; have a limited repair skill set; are geographically mobile

dissenters adopted a formalistic approach, focusing on the disclaimer itself. See id. at 736, 725 P.2d at 434 (Pearson, C.J., dissenting) ("a valid disclaimer of the implied warranty of a residential structure should be written, conspicuous, . . . include the term "habitability," [and] should be explicitly negotiated").

See, e.g., Gym-N-I Playgrounds, Inc. v. Snider, 220 S.W.3d 905, 913 (Tex. 2007) (considering "unequal bargaining power" between the parties).

See, e.g., id.

See id. (citing 2 Richard R. Powell, Powell On Real Property § 232 [2][b] (Patrick J. Rohan ed. 1991)).

See id. (similarly citing Powell, id.).


See id.
and thus only minimally interested in making elaborate repairs;\textsuperscript{185} would require access to expensive equipment and common areas to effect some repairs;\textsuperscript{186} and may simply not have enough of an interest in the property to justify repair financing.\textsuperscript{187} 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.

\section*{V. Conclusion}

Let us conclude with a brief reflection on a disclaimer that has popularly come to represent all disclaimers. A recent Google web search for the phrase "your mileage may vary" resulted in 822,000 hits.\textsuperscript{188} But let us 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 for us 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 legal effect to this disclaimer. Our recommended approach, however, is

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item See id.
\item See id.
\item Search performed June 29, 2008. A relative few hits were obtained under Google 'news' and 'shopping' respectively. Remarkably, the Internet abbreviation 'YMMV' turned up 1,980,000 hits the same day.
\end{enumerate}
\end{footnotesize}
to look elsewhere, and specifically at matters such as the conflicting interests, power relationships, and public policies at stake. We of course cannot undertake that task here, in any detail. But we can briefly illustrate the mistake of judicially focusing on the disclaimer itself. Let us ask simply about the real social value of this particular disclaimer under ordinary circumstances.

Suppose, as has sometimes been suggested in the past, that the official EPA gas mileage estimates are not only inaccurate, but inaccurate in a systematic way, and in particular in a way that tends to overstate gas mileage figures by about fifteen percent. Let us in any event simply assume, hypothetically, that the EPA mileage figures, for both stop-and-go city and uninterrupted highway driving, as displayed on vehicles for sale, were consistently and substantially higher than what many drivers would experience.

Let us further suppose, even less happily, that for one reason or another, 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


191 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).
percentage basis, to count as in some cases misleading, or at least potentially so. We must then ask about the real value of the disclaimer "your mileage may vary." If the idea is that this disclaimer may dampen unrealistic expectations generated by the assumedly misleading mileage figures, we must ask 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 accurate, 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. 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 gas mileage.

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192 For the permissibility of governmental regulation of misleading private commercial speech, as opposed to government speech or government-mandated commercial speech, see Central Hudson Gas & Elec. v. PSC, 447 U.S. 557, 566 (1980).

193 See supra note 190 for some relevant factors.

194 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 (2007). But an extrinsic educational pamphlet has generally moved well beyond what we think of as a disclaimer.
This is of course not to suggest that most disclaimers in general are useless or harmful. But the example of the EPA vehicle mileage disclaimer usefully redirects our attention away from the disclaimer itself, and toward more important questions of public understanding, of possibly misleading or deceptive speech, of sensible regulatory policy, and of the public interest, quite apart from the disclaimer. The standard EPA mileage disclaimer thus should serve mainly to call our attention to those underlying circumstances and policies. And in this respect the EPA mileage disclaimer is entirely typical of the various sorts of disclaimers surveyed above.