

## EVOLUTIONARY DUE PROCESS

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### I. INTRODUCTION

The issue of evolution instruction in American public schools is becoming increasingly complex, both legally and politically. Until recently, the controversy over whether and how to teach evolution in public school science classes has been singularly focused on the constitutional limits of government support for religion under the First Amendment's Establishment Clause. Current measures in Louisiana and Texas, however, represent a shift toward a new "adjudicative model" for addressing questions of evolution instruction. This adjudicative model permits individual educators to treat evolution issues on a case-by-case basis, which, in turn, implicates a new constitutional issue in the evolution education debate: procedural due process. By creating powerful disincentives for anti-evolutionist policymakers, procedural due process concerns could affect the future of evolution education even more profoundly than does the Establishment Clause. This Essay explores the relationship between evolution education policy and procedural due process by first identifying and defining the adjudicative model. It then considers the model's constitutional ramifications for evolution instruction, concluding that this new approach to policymaking introduces procedural due process concerns that radically alter the legal and political calculus of the debate over evolution education.

### II. THE ADJUDICATIVE MODEL

The adjudicative model is a new approach to combating evolution instruction that emerged in response to a series of pro-evolution decisions in the federal courts. Prior to this new approach, anti-evolutionists had put forth generally applicable, detailed mandates regarding the teaching of evolution in public schools. The adjudicative model, by contrast, relies on higher-level policy statements that do not necessarily focus explicitly or exclusively on evolution; rather, the adjudicative model empowers individual educators to engage student inquiries about evolution on a case-by-case basis. This transfer of discretionary authority to local educators fundamentally alters the nature of the government action involved in addressing evolution questions by traversing the well-known rule/order distinction in

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administrative law.<sup>1</sup> Instead of confronting the evolution issue through generalized legislation or rulemaking, the adjudicative model encourages state and local governments to treat questions of evolution instruction as individualized cases to be “adjudicated” by educators as they occur.

The adjudicative model is the product of the ongoing evolution instruction debate in the federal courts. Because this debate is fundamentally about religion, conflicts about whether and how evolution should be taught in public school science classes have centered on the Establishment Clause.<sup>2</sup> A series of pro-evolution decisions,<sup>3</sup> however, forced anti-evolutionists to move from straightforward, religion-based attacks on evolution to more indirect, facially neutral ones. The courts rejected this move as well when, with the *Kitzmiller* and *Selman* cases in 2005, they made clear that even facially secular evolution disclaimers violate the Establishment Clause.<sup>4</sup> Prohibited from engaging in legislation or rulemaking that confronts evolution education directly, anti-evolutionists shifted their focus toward higher-level policy statements described as promoting an open-minded, critical academic dialogue about the sciences. These broad policy statements promote a regime under which individual teachers in individual classrooms decide how they will address questions about the veracity of evolutionary theory.

Recent enactments in Louisiana and Texas typify the adjudicative model. In June of 2008, Louisiana passed a statute requiring the State Board of Secondary and Elementary Education to “allow and assist . . . teachers” to help students think critically about “scientific theories . . . including . . . evolution.”<sup>5</sup> In March of 2009, the Texas State Board of Education<sup>6</sup> adopted a new set of science standards requiring that students examine

<sup>1</sup> This distinction is a fundamental issue in American administrative law and is frequently identified by reference to two Supreme Court opinions from the early twentieth century. Compare *Londoner v. City and County of Denver*, 210 U.S. 373 (1908) (holding that an administrative determination imposing a retrospective duty upon a specific, narrowly defined group of persons was an adjudicative order subject to the safeguards of procedural due process) (link), with *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915) (holding that the prospective increased valuation of all of the property in the city of Denver was, like any piece of legislation that states a general and prospective law, a rule not subject to any procedural safeguards) (link).

<sup>2</sup> U.S. CONST. amend. I (link).

<sup>3</sup> See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (invalidating a prohibition on evolution instruction because it violated the Establishment Clause) (link); *Edwards v. Aguillard*, 482 U.S. 578, 580 (1987) (invalidating “[b]alanced [t]reatment” legislation requiring that creationism and evolution receive equal attention) (link).

<sup>4</sup> See *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 762–66 (M.D. Pa. 2005); *Selman v. Cobb County Sch. Dist.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), *vacated and remanded on other grounds* by 449 F.3d 1320 (11th Cir. 2006).

<sup>5</sup> LA. REV. STAT. ANN. § 17:285.1(B)(1) (2008) (link).

<sup>6</sup> Texas is a particularly important participant in the evolution debate because it is one of the nation’s largest purchasers of school textbooks and therefore wields “significant influence over the content” and direction of educational science texts. See April Castro, *Texas Ed Board’s Vote a Mixed Bag for Evolution*, BREITBART.COM, Mar. 26, 2009, [http://www.breitbart.com/article.php?id=D9761TOG0&show\\_article=1](http://www.breitbart.com/article.php?id=D9761TOG0&show_article=1) (link).

“all sides of scientific evidence,” including with regard to evolution.<sup>7</sup> Both Louisiana and Texas enacted these measures while facing significant national attention, and they did so with input from representatives on both sides of the evolution instruction debate.<sup>8</sup> Although the enactments do not make any explicit statements about how or whether evolution should be taught, they are widely understood to represent anti-evolutionists’ latest attempt to frustrate public evolution instruction by supporting critical treatment of some scientific theories, including evolution, by individual educators on a case-specific basis.<sup>9</sup> When examined more closely, however, the adjudicative model may do the anti-evolutionist cause more harm than good.

### III. PROCEDURAL DUE PROCESS AND THE ADJUDICATIVE MODEL

There are two significant consequences of the shift toward the adjudicative model. First, the Establishment Clause analysis, particularly as it depends on the *Lemon* test,<sup>10</sup> becomes increasingly difficult to apply; facially

<sup>7</sup> The full text of the revised standards is published in Chapter 112 of Title 19 of the Texas Administrative Code. See 19 Tex. Admin. Code § 112 (2009). For one example of the many recurrences of the quoted phrase in the revised standards, see 19 Tex. Admin. Code § 112.32(c)(3)(A) (“The student is expected to: (A) in all fields of science, analyze, evaluate, and critique scientific explanations . . . including examining *all sides of scientific evidence* of those scientific explanations . . .” (emphasis added)) (link).

<sup>8</sup> See, e.g., *Darwin’s in the Details* (NPR radio broadcast Apr. 3, 2009), transcript available at <http://www.onthemedial.org/transcripts/2009/04/03/01> (interview with Eugenie Scott, Executive Director of the National Center for Science Education, and Casey Luskin of the Discovery Institute regarding how the new Texas science standards affect evolution instruction) (link); Letter from Richard O’Grady, Executive Director, Am. Inst. of Biological Scis., to La. State Representatives (June 9, 2008) (on file with author) (criticizing the Louisiana statute as promoting religious explanations of human origins in the classroom); Memorandum from Paul G. Pastorek, La. Dep’t of Educ., to City, Parish, and other Local School Superintendents et al. (Aug. 27, 2008) (on file with author) (defending the Louisiana statute as “not . . . promot[ing] any religious doctrine”).

<sup>9</sup> See *Darwin’s in the Details*, *supra* note 8 (statement of Eugenie Scott, Executive Director of the National Center for Science Education, explaining that Texas’s new policy permits individual teachers to respond to student inquiries about evolution by saying, “[P]erhaps you should just read Genesis”); *id.* (statement of Christine Castillo Comer, the former Director of Science for the Texas Education Agency, stating that Texas’s new science standards may bind teachers “to just have to teach any kind of pseudo-science” in response to student inquiries about evolution).

<sup>10</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (explaining that in order to survive Establishment Clause scrutiny, a statute must have “a secular legislative purpose” and a “principal or primary effect . . . that neither advances nor inhibits religion,” and must *not* “foster ‘an excessive government entanglement with religion’” (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970))) (link).

The *Lemon* test has been maligned by certain members of the Court, in particular Justice Scalia. See *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring) (“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, . . . *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.”) (link). Nevertheless, it remains the primary doctrinal tool for evaluating the constitutionality of evolution instruction policy under the Establishment Clause. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 582–83 (1987) (relying on the *Lemon* test to resolve a constitutional challenge to an evolution disclaimer); *Tangipahoa Parish Bd. of Educ. v. Freiler*, 530 U.S. 1251 (2000) (Scalia, J., dissenting) (acknowledging the applicability of the *Lemon*

neutral policies like the adjudicative model do not fit easily into the Court's Establishment Clause rubric.<sup>11</sup> Second, and more importantly for purposes of this discussion, evolution proponents will have a new weapon at their disposal in protecting the integrity of evolution instruction in science classes: procedural due process ("PDP") objections.

PDP challenges may seem relatively benign in the context of the evolution debate, particularly when compared to substantive objections under the Establishment Clause. There are two reasons, however, why the Due Process Clause could be more effective than the Establishment Clause in combating educational approaches that are adverse to evolution. First, whereas Establishment Clause challenges become more difficult when—as with the adjudicative model—policy measures become less specific in their treatment of evolution or religion, PDP objections to such measures are likely to succeed. A simple application of the three-part balancing test for PDP claims articulated by the Supreme Court in *Mathews v. Eldridge*<sup>12</sup> makes this clear. In situations where, for example, educators are confronted with a student inquiry about the veracity or exclusivity of evolution as an explanation of human origins,<sup>13</sup> any response that supports the biblical or any other religion-based explanation immediately implicates the students' First Amendment liberty interest in being protected from government establishment of religion.<sup>14</sup> Moreover, when the decision as to how to respond to a student question is made by individual teachers or administrators, the risk of erroneous deprivation of that interest is significant; individuals who are

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test in an evolution disclaimer case), *denying cert. to Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337 (5th Cir. 1999).

<sup>11</sup> See Louis J. Virelli III, *Making Lemonade: A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423, 434–44 (2006) (arguing that current doctrine is both over- and under-inclusive in dealing with facially neutral state action implicating the Establishment Clause).

<sup>12</sup> 424 U.S. 319 (1976) (prescribing a three-part balancing test to evaluate PDP questions in which the individual's protected interest is weighed against the risk of erroneous deprivation of that interest under the existing procedural regime and the government's interest in not employing additional procedures) (link).

<sup>13</sup> Although the procedural due process analysis does not depend on whether it is the teacher or the student who instigates a discussion of alternatives to evolution, the Establishment Clause analysis may vary significantly. A teacher's unsolicited introduction of a creationist account of human origins into the classroom, for instance, would likely be perceived to have a very different purpose and primary effect under *Lemon* than a response to a question from a student about how creationism can be reconciled with Darwinism. Whereas the former appears religiously motivated and sympathetic, the latter could be more easily justified in terms of the secular, pedagogical goals of respecting and promoting student curiosity. As a result, the above example of a student prompting the discussion was chosen because it represents the closer constitutional question under the Establishment Clause, and thus is a more powerful example of the relative clarity of the procedural due process analysis when applied to the adjudicative model.

<sup>14</sup> See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 672 (1977) (defining a "liberty interest" under PDP as, *inter alia*, any "interest within the protection of the Fourteenth Amendment") (link); *Everson v. Bd. of Educ.*, 330 U.S. 1, 5 (1947) (stating that the Establishment Clause has been incorporated into the Due Process Clause of the Fourteenth Amendment) (link).

untrained in the Constitution and are asked to make contemporaneous decisions about how to address the evolution debate in the classroom are highly likely to overstep their constitutional bounds without the presence of procedural protections.<sup>15</sup> Finally, the government has little interest in allowing these decisions to be made without any process. There is no obvious reason why such decisions must be made quickly and without prior deliberation. Delaying the answer to a student inquiry may be pedagogically inconvenient and pose additional administrative costs, but when weighed against the students' strong liberty interests and the high probability that those interests will be threatened if no additional process is provided, at least some opportunity for notice and a hearing is constitutionally required.

In addition to the likelihood that they will be successful, PDP challenges are problematic for anti-evolutionists because of their ready availability. Legislative or rulemaking efforts to combat evolution instruction are generally subject to a single Establishment Clause challenge and the resultant costs to schools and educators, although potentially significant, are therefore relatively predictable and easy to control. PDP challenges, on the other hand, could be a viable option every time an educator chooses to introduce or entertain a question about the validity of evolutionary theory. This prevalence will deter educators from engaging in a scientific "critique" of evolution. Moreover, although the possibility of success in defending an indeterminate, facially neutral policy measure like the adjudicative model may encourage schools to more readily defend against an Establishment Clause challenge (particularly if there is strong ideological support for that position in the community), PDP challenges to the adjudicative model will be more frequent, fact-specific, and successful. This makes PDP challenges not only highly disruptive to educators, but also far less likely to incite the same degree of public passion or support from anti-evolutionists as a single Establishment Clause challenge designed to invalidate an entire policy. The inevitability of, and difficulty in defending against, a PDP challenge, coupled with the fact that even a successful defense does not insulate a school or educator against the ultimate Establishment Clause action, makes these challenges a powerful deterrent for educators weighing whether to encourage their students to consider evolution alternatives.

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<sup>15</sup> The Court supported this point in *Mathews*. In evaluating the "the fairness and reliability of the existing . . . procedures, and the probable value, if any, of additional procedural safeguards" as part of its procedural due process analysis, the Court explained that "the nature of the relevant [governmental] inquiry" is "central" to the constitutional question. *Mathews*, 424 U.S. at 343. It concluded that an inquiry for which "a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical" was more likely to require additional procedural safeguards than one that is "more sharply focused and easily documented." *Id.* at 343–44. The Establishment Clause question confronted by individual educators under the adjudicative model requires precisely the type of complicated factual balancing and interpretation that the *Mathews* Court considered worthy of additional safeguards. See, e.g., *Lemon*, 403 U.S. at 612–14 (requiring evaluations of the purpose and effect of the challenged government conduct that are by definition neither sharply focused nor easily documented).

#### IV. THE ANTI-EVOLUTIONIST RESPONSE

There are two obvious questions raised by the suggestion that the availability of PDP challenges under the adjudicative model will seriously impact the evolution debate. The first is whether educators could simply avoid the issue by adopting preemptive procedures for addressing student concerns about evolution instruction. The problem with this response is that it does little to alleviate the difficulties for anti-evolutionists created by the adjudicative model. Rather than facilitate educators' ability to address the evolution issue on a case-by-case basis, adopting procedures beforehand would deter classroom discussions about alternate theories of human origins that the adjudicative model seeks to promote. Moreover, since it would only make sense to adopt a procedural regime that is constitutionally sound, the deterrent effect of a voluntary procedural system would likely be even greater than one prescribed by the courts.

A second question is why the individualized nature of PDP challenges is somehow a more powerful deterrent to anti-evolutionist policymakers than that of individualized, "as-applied" Establishment Clause objections. The answer lies in the likelihood of success of PDP challenges and their resultant attractiveness for the movant as compared with Establishment Clause challenges. Successful PDP challenges create an administrative burden for educators on top of the cost of litigating an Establishment Clause case. This additional cost is also useful to movants because it could be sufficient on its own to discourage educators from taking the risk of engaging students in any discussion of evolution that even approaches the constitutional line, and thereby to preclude consideration of the Establishment Clause question altogether.

#### V. CONCLUSION

Anti-evolutionists' adoption of the adjudicative model is understandable in light of the consistent constitutional rulings against more direct attempts to combat the teaching of evolution in public schools. What proponents of this new approach are likely missing, however, is the potentially negative effect of procedural due process challenges on their ability to effectively limit evolution instruction. By moving their political focus from broad legislative prescriptions for evolution education to an adjudicative model designed to address questions about human origins on an individual basis, evolution opponents have exposed educators to a potential barrage of PDP challenges that will at minimum frustrate, and possibly completely deter, any attempts to introduce alternative theories of evolution into public science classrooms.