Evolutionary Due Process

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The issue of evolution instruction in American public schools has a new master, and its name is due process. The debate in the United States about whether and how to teach evolution in public school science classes has been singularly focused on questions 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 model permits individual educators to treat evolution issues on a case-by-case basis and in turn highlights a new constitutional issue—procedural due process—that could affect the future course of evolution education even more profoundly than the Establishment Clause by creating powerful disincentives for antievolutionist policymakers.

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, antievolutionists put forth generally-applicable, detailed mandates regarding the teaching of evolution. By contrast, the adjudicative model relies on higher-level policy statements that do not focus explicitly or exclusively on evolution, but that empower individual educators to engage student inquires 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 oft-discussed rule-order distinction in administrative law.[1] Instead of addressing the evolution issue through generalized legislation or rulemaking, state and local governments are encouraged 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 development of the 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. A series of pro-evolution decisions,[2] however, forced antievolutionists to move from straightforward, religiously based attacks on evolution to more indirect, facially neutral ones. The courts rejected this move as well when, with the *Selman* and *Kitzmiller* cases in 2005, they made clear that even facially secular evolution

[1] 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), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915).
[2] *See, e.g.,* Epperson v. Arkansas, 393 U.S. 97 (1968) (invalidating a prohibition on evolution instruction because it violated the Establishment Clause); Edwards v. Aguillard, 482 U.S. 578 (1987) (invalidating "balanced treatment legislation" requiring the creationism and evolution receive equal attention).

disclaimers violate the Establishment Clause.[3] Prohibited from engaging in legislation or rulemaking that confronts evolution directly, antievolutionists shifted their focus toward higher-level policy statements described as promoting an open-minded, critical dialogue about the sciences. These broad policy statements promote a regime under which specific evolution questions are addressed by individual teachers in individual classrooms.

Recent enactments in Louisiana and Texas exemplify 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."[4] In March of 2009, the state board of education in Texas[5] adopted a new set of science standards requiring that students examine "all sides of scientific evidence," including with regard to evolution.[6] Both States enacted these measures with significant national attention and input from representatives of both sides of the evolution instruction debate,[7] and although the enactments do not make any explicit statements about how or whether evolution should be taught, they are widely understood to represent antievolutionists' 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.[8]

There are two significant consequences of this shift toward the adjudicative model. First, the Establishment Clause analysis, particularly as it depends on application of the *Lemon* test, becomes increasingly difficult to apply; facially neutral policies like those associated with

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[3] *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 745 (M.D. Pa. 2005); Selman v. Cobb County Sch. Dist., 390 F. Supp. 2d 1286 (N.D. Ga. 2005).

[4] LA. REV. STAT. ANN. § 17:285.1 (2008).

[5] Texas is a particularly important participant in the evolution debate because it is the Nation's largest purchaser of school textbooks and therefore retains significant influence over the content and direction of educational science texts. *See* April Castro, *Texas Ed Board Approves Science Standards*, HOUSTON CHRONICLE, Mar. 27, 2009, *available at* http://www.chron.com/disp/story.mpl/ap/tx/6346723.html.

[6] The full text of the policy revisions is available at http://ritter.tea.state.tx.us/rules/home/sboeprop.html.

[7] *See, e.g., Darwin's in the Details* (NPR radio broadcast Apr. 3, 2009) (interview with Eugenie Scott, 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); Letter from Richard O'Grady, PhD., Executive Director, American Institute of Biological Sciences to Louisiana State Representatives (June 9, 2008) (on file with author) (criticizing Louisiana statute as promoting religious explanations of human origins in the classroom); Memorandum from Paul G. Pastorek to City, Parish, and other Local School Superintendents et al. (Aug. 27, 2008) (defending Louisiana statute as "not promoting any religious doctrine").

[8] *See Darwin's in the Details* (NPR radio broadcast Apr. 3, 2009) (statement of Eugenie Scott, Director of the National Center for Science Education explaining that Texas' new policy permits individual teachers to respond to student inquiries about evolution by saying "perhaps you should read Genesis"); *Id.* (statement of Christine Castillo Comer, the former Director of Science for the Texas Education Agency stating that Texas' new science standards may bind teachers "to just have to teach any kind of pseudo-science" in response to student inquiries about evolution).

the adjudicative model do not fit easily into the Court's Establishment Clause rubric.[9] 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 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 dealing with educational decisions that are adverse to evolution. First, whereas Establishment Clause challenges become more difficult when—like 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 Supreme Court's three-part balancing test from *Mathews v. Eldridge* makes this clear.[10] In situations where educators are confronted with a student inquiry about the veracity or exclusivity of evolution as an explanation of human origins, any response that supports the biblical or any other religiously-based explanation immediately implicates the students' First Amendment liberty interest in being protected from government establishment of religion.[11] 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 untrained in the Constitution and are asked to make contemporaneous decisions about how to address the evolution debate are highly likely to overstep their constitutional bounds without the presence of procedural protections. 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 inconvenient in terms of the lesson plan for that class and may pose additional administrative costs, but when weighed against the students' strong liberty interests and the high probability that those interests will be threatened without additional process, 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 also problematic for educators because of their ready availability. PDP challenges will be a viable option every time an educator chooses to answer a student question about the validity of evolutionary theory. This prevalence will deter educators from engaging in a scientific "critique" of evolution. Legislative or rulemaking efforts to combat evolution instruction are generally subject to a single Establishment Clause challenge, and as such the resultant costs to

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[9] *See* Louis J. Virelli III, *Making* Lemon*ade*: *A New Approach to Evaluating Evolution Disclaimers Under the Establishment Clause*, 60 U. MIAMI L. REV. 423 (2006) (discussing how current doctrine is both over- and under-inclusive in dealing with facially neutral state action implicating the Establishment Clause).

[10] 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 and the government interest in not employing additional procedures).

[11] *See, e.g., Ingraham v. Wright*, 430 U.S. 651 (1977) (defining a "liberty interest" under PDP as, *inter alia*, any "interest within the protection of the Fourteenth Amendment"); *Everson v. Board of Educ.*, 330 U.S. 1 (1947) (incorporating the Establishment Clause into the Due Process Clause of the 14th Amendment).

schools and educators, although potentially significant, are more predictable and easier to control. Moreover, the possibility of success in defending an indeterminate, facially-neutral policy measure like the adjudicative model may encourage schools to more rigorously contest an Establishment Clause challenge, particularly if there is strong ideological support for that position in the community. By contrast, PDP challenges to the adjudicative model will be more frequent, fact-specific, and successful and thus more disruptive to educators. 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.

There are two obvious questions raised by the suggestion that the availability of PDP challenges under the adjudicative model will seriously impact the evolution instruction 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 it that it does little to alleviate the difficulties for antievolutionists created by PDP challenges. Rather than facilitate educators' ability to address the evolution issue on a case-by-case basis, adopting procedures beforehand would create precisely the sort of deterrents to discussing alternate theories of human origins that antievolutionists seek to avoid. Moreover, since it would only make sense to adopt a procedural regime that is immune to constitutional challenge, the deterrent of a voluntary procedural system would likely be even greater than that prescribed by the courts.

A second question asks why the individualized nature of PDP challenges is somehow a more powerful deterrent to antievolutionist policymakers than that of individualized, "as-applied" Establishment Clause objections. The answer lies in the likelihood of success of PDP challenges and the resultant attractiveness of those challenges for the movant 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.

Antievolutionists' 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 effects of other constitutional issues—namely, procedural due process—on their ability to effectively limit evolution instruction.