A Liberty Not Fully Evolved?: The Case of Rodney LeVake and the Right of Public School Teachers to Criticize Darwinism

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I. INTRODUCTION

In 2001, the Minnesota Court of Appeals reviewed the case of Rodney LeVake, a public school teacher who sought to enhance his school

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district's required science curriculum by suggesting to students alternative viewpoints inconsistent with that curriculum.[1] This case, *LeVake v. Independent School District*,[2] should be of great interest to legal theorists. Its holding, and the reasoning on which it is based, may serve as a Socratic provocation regarding the extent to which public school teachers have constitutional academic freedom (apart from statutory requirements or permission) to voluntarily include criticisms of and alternatives to evolutionary theory.

II. LEVAKE'S STORY

Rodney LeVake was hired as a math and science teacher by his school district in 1984. During the summer of 1997, LeVake was offered an opportunity to teach tenth grade biology in the forthcoming school year. Prior to teaching the class, he conferred with both the principal and the co-chair of the science department about the required curriculum as well as the course itself. According to the requirements, "upon completion of the class, students will be able to understand that evolution involves natural selection and mutations, which constantly cause changes in living things."[3] The required text included three chapters on evolution, only one of which the teacher was obligated to cover. These chapters contained no criticisms of evolution, nor did they offer any alternative theories. Knowing the curriculum and what was expected of him, LeVake agreed to teach the course.[4]

When he taught the course in Spring 1998, LeVake dedicated only one day, including a lab, to the topic of evolution. Although the other biology teachers also did not spend a lot of time covering the topic because of a shortened school year, the co-chair of the science department told the principal and LeVake that he was concerned that LeVake's teaching of evolution had been inadequate. The court wrote that LeVake "essentially told [the co-chair] that he could not teach evolution according to the prescribed curriculum."[5] At an April 1, 1998 meeting with the science department co-chair, principal, and curriculum director, "LeVake indicated that he did not regard evolution as a viable scientific concept."[6] LeVake was asked by the curriculum director whether he "mentioned God or the Bible in class because she wanted to

1. *See* LeVake v. Indep. Sch. Dist., 625 N.W.2d 502 (Minn. Ct. App. 2001), *review denied*, No. C8-00-1613, 2001 Minn. LEXIS 434, at *1 (Minn. July 24, 2001), *and cert. denied*, 122 S. Ct. 814 (2002).
2. *Id.*
3. *Id.* at 505.
4. *Id.*
5. *Id.*
6. *Id.*

be sure that [he] was not discussing religion in a manner that would give the impression that the school was not religiously neutral."[7] At an April 7, 1998 department meeting, organized to discuss LeVake's teaching of the curriculum, LeVake was asked by his principal to compose an essay on how he planned in the future to instruct his biology students on the topic of evolution. LeVake complied and submitted an essay explaining his position that there is no evidence for evolution and that the theory is impossible biologically, anatomically, and physiologically.[8] LeVake maintained that "the complexity of life that we see around us is a testimony that evolution, as it is currently being handled in our text, is impossible."[9] He went on to say:

> I don't believe an unquestioning faith in the theory of evolution is foundational to the goals I have stated in teaching my students about themselves, their responsibilities, and gaining a sense of awe for what they see around them. I will teach, should the department decide that it is appropriate, the theory of evolution. I will also accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory without turning my class into a religious one.[10]

After conferring with the school district's attorneys, the curriculum director, and others, the principal made a decision to remove LeVake from teaching tenth grade biology and to appoint him to teach a ninth grade natural science course instead. The following day LeVake was told of his reassignment. The principal based his decision on his "concern that a basic concept of biology, meaning the theory of evolution, would be diluted and that students would 'lose the gist' of the theory."[11] LeVake appealed this decision to the superintendent, who subsequently rejected LeVake's appeal because he "believed that LeVake differed fundamentally with the 'commonly held principles of the curriculum outlined,'" and that "LeVake's insistence on teaching the inconsistencies of evolution was not an appropriate method for teaching the approved curriculum."[12] On May 24, 1999, LeVake filed a lawsuit against the school district, its superintendent, LeVake's principal, the science department co-chair, and the curriculum director.[13] LeVake

7. *Id.*
8. *Id*. at 505–06.
9. *Id.* at 506 (internal quotes omitted).
10. *Id.* (emphasis omitted).
11. *Id.*
12. *Id.*
13. *Id.*

claimed that the "respondents violated his right to free exercise of religion, free speech, due process, freedom of conscience, and academic freedom."[14] The district court granted the respondents' motion for summary judgment. LeVake appealed that ruling to the Minnesota Court of Appeals and the appeals court affirmed the district court ruling.[15]

III. THE COURT OF APPEALS' OPINION

The court of appeals divided its analysis into the following three parts: freedom of religion, free speech, and due process.[16] In order for LeVake to have prevailed on appeal he would have had to raise a genuine issue of material fact concerning at least one of the fundamental rights that he claimed the defendants violated.

A. Due Process and Free Exercise Claims

Of the three, LeVake's due process claim was the weakest because LeVake was provided with "sufficient notice about what he could and could not teach through the established curriculum and the syllabus," and his contract "required him to 'faithfully perform the teaching . . . prescribed by the School Board.'"[17] In his deposition LeVake essentially confessed that he told the science department co-chair "that [*he could not*] *teach evolution*."[18] In addition, LeVake's argument relied on teacher termination cases, but "he was not even demoted."[19]

However, suppose LeVake had been told in advance that the curriculum required that he publicly deny his Christian faith while affirming a belief in atheism, or face reassignment or possibly demotion, but only after a hearing. Even if LeVake had agreed to these terms, the fact that he was given advance notice and afforded a hearing does not speak to the substance of the terms to which he agreed. Consequently, even though the court was correct that LeVake's claim of procedural malfeasance had little merit, it does not follow that the school did not violate his *substantive* rights. The court assessed these alleged violations under two general categories: freedom of religion and freedom of speech.

The court rejected LeVake's freedom of religion claim on the grounds that "[he] does not contend that the respondents prohibited him from

14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 509 (emphasis omitted) (quoting LeVake's contract with the school district).
18. *Id.* (alteration in original).
19. *Id.*

practicing the religion of his choice" or that they "demanded that he refrain from practicing his religion outside of the scope of his duties as a public school teacher in order to retain his teaching position, and he does not assert that the curriculum requirements incidentally infringed on his religious practice."[20] However, LeVake did not seem to be arguing that the school interfered with his religious practice, but rather, that he was reassigned *because of* his religious *beliefs*. The court conceded as much when it pointed out that LeVake had used "employment discrimination cases to argue that circumstantial evidence of discrimination based on his religious belief exists."[21] Aside from the question of whether it was appropriate to analogize from employment discrimination cases when LeVake had not brought an employment discrimination action, the court maintained that LeVake had "not provided authority demonstrating how the use of this standard raises a genuine issue of material fact regarding his free exercise claim."[22] This last statement is particularly odd since the court, under its free speech analysis, seemed to implicitly concede that LeVake had raised a genuine issue of material fact concerning free exercise and that LeVake was in fact *reassigned because of his belief*, when it wrote that the school's "concern about [LeVake's] inability to teach the prescribed curriculum was well-founded" because it was "[b]ased on LeVake's *belief* that evolution is not a viable theory."[23]

The court's free exercise analysis was terribly confusing. The court of appeals seemed to use the terms "belief" and "practice" interchangeably even though the Supreme Court has recognized a clear distinction between the two. State action that discriminates against someone because of his or her religious *belief* is de facto unconstitutional,[24] whereas a state action that discriminates against a citizen because of his or her religious

20. *Id.* at 507 (citation omitted).
21. *Id.*
22. *Id.*
23. *Id.* at 509 (emphasis added).
24. In *McDaniel v. Paty*, the Supreme Court referred to the "Free Exercise Clause's absolute prohibition of infringements on the 'freedom to believe.'" 435 U.S. 618, 627 (1978). The Court asserted in *Everson v. Board of Education*: "No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance." 330 U.S. 1, 15–16 (1947). According to Eugene Volokh, "The government generally may not prosecute someone or otherwise burden them . . . for their religious *beliefs*." EUGENE VOLOKH, THE FIRST AMENDMENT: PROBLEMS, CASES AND POLICY ARGUMENTS 670 (2001) (citing *McDaniel*, 435 U.S. at 627). *See also* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

practice is prima facie constitutional if it is the result of a generally applicable law.[25] Thus, because the court conceded that LeVake's reassignment was based on his beliefs, an act that is de facto unconstitutional, the court should have ruled in his favor on those grounds.[26]

B. The Free Speech Claim and the Nature of Academic Freedom

The court rejected LeVake's free speech claim as well. It relied on cases that focus on "a public employee's free speech rights,"[27] including two cases that involved conflicts between a teacher's freedom of expression and his employer: *Clark v. Holmes*[28] and *Webster v. New Lenox School District*.[29] Because these cases were intermingled by the court in its analysis, it is necessary to first make a few comments about *Webster* and *Holmes* and then discuss the general question of the extent to which a particular set of public employees, school teachers, possess freedom of speech in their primary workplace, the classroom, and how it applies to the concern of this Essay.

In 1990, the Court of Appeals for the Seventh Circuit affirmed a district court decision to dismiss the complaint of a public school teacher, Ray Webster.[30] The Seventh Circuit ruled that Webster, who taught junior high, had not had his First and Fourteenth Amendment rights violated when the superintendent, writing on behalf of the school board, instructed Webster by letter that "he should restrict his classroom instruction to the curriculum and refrain from advocating a particular religious viewpoint."[31] He was "specifically instructed not to teach creation science, because the teaching of this theory had been held by the federal courts to be religious advocacy."[32] The reason for disciplinary

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25. *See*, *e.g.*, Employment Div. v. Smith, 494 U. S. 872, 879 (1990).

26. Someone may reply that LeVake's belief in evolution's falsity is not *religious* but merely secular, and thus is not protected under the First Amendment's Free Exercise Clause. After all, LeVake admitted that he would critique evolution in the classroom in an entirely nonsectarian manner. Nevertheless, the Court has ruled that freedom of religious belief is grounded in a more general liberty of belief: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

27. *LeVake*, 625 N.W.2d at 508.

28. Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972).

29. Webster v. New Lenox Sch. Dist., 917 F.2d 1004 (7th Cir. 1990).

30. *Id.* at 1008.

31. *Id.* at 1005.

32. *Id.* at 1006 (citing Edwards v. Aguillard, 482 U.S. 578, 592 (1987) (holding that creation science "embodies the religious belief that a supernatural creator was responsible for the creation of humankind")).

action arose when Webster included in his lesson plans "nonevolutionary theories of creation to rebut a statement in the social studies textbook indicating that the world is over four billion years old."[33] Webster defended himself against the charge of having violated the Establishment Clause by arguing that "at most, he encouraged students to explore alternative viewpoints."[34]

The court's holding in *Webster* dealt with the narrow question of whether Webster had "a first amendment right to determine the curriculum content of his junior high school class."[35] Given the controversial content of Webster's extracurricular lessons—creation science has been repudiated as inherently religious by a number of other courts including the U.S. Supreme Court[36]—and the school board's responsibility in shaping curriculum and avoiding Establishment Clause violations in its institutions, Webster's First and Fourteenth Amendment rights were not violated. That is, the court held that a school may censor classroom instruction that seeks to promote or advance a particular religious belief such as creation science.[37] On the other hand, the court admitted that "this case does not present the issue of whether, or under what circumstances, a school board may completely eliminate material from the curriculum,"[38] but rather, what was dispositive in the case was "the principle that an individual teacher has no right to ignore the directives of duly appointed education authorities."[39] Given that LeVake did not teach, and was not trying to teach, creation science, *Webster* is not quite on point.

The *Clark* case concerned a temporary full-time faculty member at Northern Illinois University (NIU).[40] L. Verdelle Clark was offered a two year appointment in 1962 by the department of biological sciences, but he was warned in the department's offer letter that:

> [H]is acceptance . . . should be made with the understanding that he should remedy certain deficiencies in his professional conduct: he counselled an excessive number of students instead of referring them to NIU's professional counsellors; he overemphasized sex in his health survey course; he counselled

33. *Id.*
34. *Id.*
35. *Id.* at 1007.
36. *See* Edwards v. Aguillard, 482 U.S. 578, 594 (1987). The courts have employed the terms "creation science" and "creationism" interchangeably.
37. *Webster*, 917 F.2d at 1008.
38. *Id.* (citation omitted).
39. *Id.*
40. Clark v. Holmes, 474 F.2d 928, 929–30 (7th Cir. 1972).

> students with his office door closed; and he belittled other staff members in discussions with students.[41]

Germane to our analysis of *LeVake* is Clark's claim that his academic freedom—as a species of freedom of speech—was violated by the university when it did not offer him another contract because, in its judgment, he did not remedy the professional deficiencies he agreed to remedy when he accepted the offer of appointment. The court rejected Clark's claim on the grounds that "academic freedom" is not "a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution. First Amendment rights must be applied in light of the special characteristics of the environment in the particular case."[42] The court relied on a balancing test extracted from *Pickering v. Board of Education*,[43] a case to which both the plaintiff and defendants appealed in *Clark*[44] and which the *LeVake* court cited in its analysis of the free speech rights of public employees.[45]

> [I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *The problem in any case is to arrive at a balance* between the interests of *the teacher, as a citizen*, in commenting upon matters of *public concern* and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[46]

Consequently, the question for the court in *LeVake* was whether the school's reassignment of LeVake violated his freedom of speech given (1) his prior performance of not teaching the curriculum adequately, (2) his claim not to believe in evolution, (3) his early assertion that he could not teach the curriculum, and (4) his promise in his essay that he would teach evolution in the future *along with* nonreligious criticisms of the theory. Given the totality of these facts (but excluding the second point because it may be a religious belief and thus cannot be the basis for state

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41. *Id.* at 930.
42. *Id.* at 931 (citation omitted).
43. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).
44. The court wrote:

> Both parties claim to find support in Pickering v. Board of Education . . . a major pronouncement of the First Amendment rights of public school teachers. There, the Supreme Court reversed the dismissal of a teacher who had written a letter to a local newspaper in which he, as a citizen, criticized the Board of Education's allocation of school funds and its method of informing the district's taxpayers about the need for additional tax revenue.

Clark, 474 F.2d at 930 (citation omitted).
45. *LeVake*, 625 N.W.2d at 508.
46. *Clark*, 474 F.2d at 931 (alteration in original) (quoting *Pickering*, 391 U.S. at 568).

action), it appears that Mr. LeVake was reassigned *because* his superiors were not confident that he would teach the course as required in the curriculum. In light of the deference accorded states in matters of public education, and given the school district's legal duty to teach the curriculum correctly, the court seemed to have balanced the interests of LeVake and the school district appropriately.

However, under a different set of facts, LeVake might have had a strong academic freedom claim. Suppose LeVake had accepted the offer to teach the biology class, agreed to teach the curriculum in precisely the way he was told to do so, and subsequently taught everything required in the curriculum. Now suppose that he also offered nonreligious criticisms of evolution that were neither in the textbook nor in the required curriculum but had been developed and defended by qualified and credentialed scholars in respected venues.[47] Imagine that the arguments offered by these scholars propose conclusions whose premises do not contain the Book of Genesis and its tenets as explicit or implicit propositions. These premises and their propositions, unlike those of creationism,[48] are not derived from, nor are they grounded in, any

47. *See, e.g.*, MICHAEL J. BEHE, DARWIN'S BLACK BOX: THE BIOCHEMICAL CHALLENGE TO EVOLUTION (1996) (Behe earned a Ph.D. in biochemistry from University of Pennsylvania and is currently a Professor of Biological Sciences at Lehigh University in Pennsylvania); WILLIAM A. DEMBSKI, NO FREE LUNCH: WHY SPECIFIED COMPLEXITY CANNOT BE PURCHASED WITHOUT INTELLIGENCE (2002) (Dembski earned Ph.D.'s in philosophy and mathematics from University of Illinois and University of Chicago respectively and is currently an Associate Research Professor in the Conceptual Foundations of Science at Baylor University); WILLIAM A. DEMBSKI, THE DESIGN INFERENCE: ELIMINATING CHANCE THROUGH SMALL PROBABILITIES (1998); Robert Kaita, *Design in Physics & Biology: Cosmological Principle & Cosmic Imperative?*, *in* MERE CREATION: SCIENCE, FAITH & INTELLIGENT DESIGN 385 (William A. Dembski ed., 1998) (Kaita earned a Ph.D. in physics from Rutgers University and now serves as a Principal Research Physicist in the Plasma Physics Laboratory at Princeton University); Alvin Plantinga, *An Evolutionary Argument Against Naturalism*, *in* FAITH IN THEORY AND PRACTICE: ESSAYS ON JUSTIFYING RELIGIOUS BELIEF 35 (Carol White and Elizabeth Radcliffe eds. 1993) (Plantinga earned a Ph.D. in philosophy from Yale University and is now a John A. O'Brien Professor of Philosophy at University of Notre Dame); ALVIN PLANTINGA, WARRANT AND PROPER FUNCTION 216–37 (1993); DEL RATZSCH, NATURE, DESIGN AND SCIENCE: THE STATUS OF DESIGN IN NATURAL SCIENCE (2001) (Ratzsch earned a Ph.D. in philosophy from University of Massachusetts, Amherst and is currently a Professor of Philosophy at Calvin College).

48. The Court's historical problem with the creationism curriculum required in the statute struck down in *Edwards* was its transparent connection to the Book of Genesis and the contents of previously repudiated statutes in *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968), and *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255, 1272 (1982). In *Epperson*, the Court struck down on Establishment Clause grounds an Arkansas statute that forbade the teaching of evolution in public schools, because the

particular religion's interpretation of its special revelation. Rather, they are the result of empirical facts, well-grounded conceptual notions, and critical reflection. They subsequently serve as the basis from which one may infer that an intelligent agent is likely responsible for the existence of certain apparently natural phenomena. That is, evolution provides an answer to the *very same* question that this alternative is said to provide an answer: What is the origin of apparent design in biological organisms or other aspects of the natural universe or the universe as a whole? Evolution answers the question by appealing exclusively to the forces of unguided matter—or energy,[49] the latter includes intelligent agency as a

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prohibition was based on evolution's inconsistency with the Genesis account of origins, a religious point of view. *Epperson*, 393 U.S. at 103. In *McLean*, the federal district court struck down on Establishment Clause grounds an Arkansas statute that required public schools to offer balanced treatment of evolution and creationism, because the definition of "creationism" is transparently identical to the Genesis-account of origins, a religious point of view. *McLean*, 529 F. Supp at 1259–64. The *Edwards* court declared as unconstitutional, on Establishment Clause grounds, a Louisiana statute (the Balanced Treatment Act) that required the state's public schools to teach creationism if evolution was taught and to teach evolution if creationism was taught. *Edwards*, 482 U.S. at 589. It concluded that the true purpose of the Act was to advance a particular religious viewpoint, the Genesis account of creation. *Id.* at 593. Like the courts in *Epperson* and *McLean*, the *Edwards* court looked at the "historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution." *Id.* at 590. Therefore, the courts in *Edwards*, *Epperson*, and *McLean* were asking the question: How closely does the curricular content required by the statute parallel the creation story in Genesis, or is the curricular content prohibited by the statute proscribed because it is inconsistent with the creation story in Genesis? Consequently, public school science teachers that voluntarily add an alternative theory to, or criticism of, evolution to the prescribed curriculum do not violate the Establishment Clause if they do not violate any other legal duties and if their lessons do not appeal, either explicitly or implicitly, to the authority of the Book of Genesis (or any other religious text), which was the basis for the courts' repudiation of creationism in the cases listed above.

49. Evolution, as understood in the literature, is a grand materialist explanation for the diversity and apparent design of entities that make up what we call nature, including both organic and inorganic entities. In the words of Douglas Futuyama, "order in nature is no evidence of design." DOUGLAS J. FUTUYMA, SCIENCE ON TRIAL: THE CASE FOR EVOLUTION 114 (1995). "Darwin's great contribution," wrote philosopher James Rachels, "was the final demolition of the idea that nature is the product of intelligent design." JAMES RACHELS, CREATED FROM ANIMALS: THE MORAL IMPLICATIONS OF DARWINISM 110 (1990). However, Jay Wexler disagrees with this analysis. He asserts that "evolution in pure form addresses only the question of how living creatures change over time. It does not address the question of origins nor does it postulate the meaning of life. It deals only with proximate causes, not ultimate ones." Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 462 n.212 (1997) (citations omitted). As I have noted elsewhere, Wexler is simply mistaken. *See* FRANCIS J. BECKWITH, LAW, DARWINISM AND PUBLIC EDUCATION: THE ESTABLISHMENT CLAUSE AND THE CHALLENGE OF INTELLIGENT DESIGN (forthcoming 2003) (manuscript at chapter 4, on file with author). If all that is meant by evolution is that biological species adapt over time to changing environments and pass on those adaptations genetically to their offspring, even most creationists would not disagree with that modest definition of evolution. But that is not what many citizens find objectionable about evolution, and it

legitimate cause that may account for some apparently natural phenomena. The Supreme Court maintained that its holding in *Edwards v. Aguillard*[50] did "not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught."[51] The Court asserted that "teaching a variety of scientific theories about the origins of humankind to schoolchildren might be validly done with the clear secular intent of enhancing the effectiveness of science instruction."[52] Granted, the conclusions inferred by the premises of these arguments may be consistent with and lend support to a tenet or tenets of a particular belief system, but that in itself would not make it constitutionally suspect. As Justice Powell wrote in his *Edwards* concurrence, "A decision respecting the subject matter to be taught in public schools does not violate the Establishment Clause simply because the material to be taught 'happens to coincide or harmonize with the tenets of some or all religions.'"[53] If LeVake had offered to his students an alternative point of view, such as the one just suggested, and if his employer had then prohibited him from engaging in such speech during class time, he surely would have had a case with law in his favor.

Given these different set of facts, the other public employee free speech cases on which the court relied either support or do not address the point of principle that grounds LeVake's free speech rights as a *particular type* of public employee, a high school teacher. *Finch v. Wemlinger*[54] did not deal with a teacher's classroom instruction, but with "an unclassified employee in the Governor's Manpower Office (GMO)," and his firing after he publicly criticized his superiors.[55] Similarly, *Terrell v. University of Texas System Police*[56] dealt with "a public

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is not what is actually defended by proponents of evolutionary theory. What these citizens find objectionable, and what is actually affirmed in the literature, is the methodological naturalism that evolution presupposes (that is, only nonagent, naturalistic explanations may count as "scientific knowledge") and the ontological materialism it entails (that is, because all that exists, or all that we can know, is the material world, one is never warranted in affirming that a nonmaterial agent is the cause of a natural phenomenon).

50. 482 U.S. at 578.

51. *Id.* at 593.

52. *Id.* at 594.

53. *Id.* at 605 (Powell, J., concurring) (quoting Harris v. McRae, 448 U.S. 297, 319 (1980)).

54. Finch v. Wemlinger, 361 N.W.2d 865 (Minn. 1985), *cited in LeVake*, 625 N.W.2d at 508.

55. *Id.* at 866.

56. Terrell v. Univ. of Texas Sys. Police, 792 F.2d 1360 (5th Cir. 1986), *cited in*

employee" of the university police system, who "was fired when his secret diary, which was critical of his supervisor, fell into the supervisor's hands."[57] The case of *Mount Healthy City School District Board of Education v. Doyle*[58] dealt with a nontenured teacher with a history of troublemaking and public altercations who was not rehired after an incident involving his releasing to a local radio station a memo from his principal having to do with the appearance and dress of teachers.[59] The case did not address what is germane to *LeVake*—the extent of a teacher's academic freedom in the classroom. Although in *Mount Healthy* the Supreme Court accepted "the District Court's finding that the [teacher's] communication was protected by the First and Fourteenth Amendments," it is "not . . . entirely in agreement with that court's manner of reasoning from this finding to the conclusion that Doyle is entitled to reinstatement with backpay."[60] Relying on the *Pickering* balancing test,[61] the Court vacated and remanded the case back to the district court telling it that it "should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."[62]

The *LeVake* court cited *Keyishian v. Board of Regents*,[63] involving two faculty members and one librarian who were dismissed by their employer, the State University of New York, for not signing state-mandated loyalty oaths.[64] The faculty members refused to sign a certificate indicating that they were not Communists and the librarian refused to sign a document indicating that he was not a member of a subversive organization that sought or advocated the forceful and violent overthrow of the U.S. government.[65] Ironically, given the different set of facts proposed in this Essay, the Court's decision in *Keyishian* would tend to support rather than undermine LeVake's academic freedom to teach criticisms of evolution. In *Keyishian*, the Court held that the New York statutes on which the firings were based were "invalid insofar as they proscribe mere knowing membership without any showing of

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LeVake, 625 N.W.2d at 508.

57. *Id.* at 1361.

58. Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), *cited in LeVake*, 625 N.W.2d at 508.

59. *Id.* at 281–82.

60. *Id.* at 284.

61. *Id.*

62. *Id.* at 287.

63. Keyishian v. Board of Regents, 385 U.S. 589 (1967), *cited in LeVake*, 625 N.W.2d at 508.

64. *Id.* at 592.

65. *Id.*

specific intent to further the unlawful aims of the Communist Party of the United States or of the State of New York."[66] Thus, the mere fact that LeVake believes that evolutionary theory is false, or may belong to an organization or group that intends to circumvent the law in order to further this belief,[67] does not show any specific intent on LeVake's part to teach religion (creation science) or to teach the curriculum incorrectly, both of which would be unlawful. In addition, the *Keyishian* holding is replete with assertions about the value of academic freedom and that the classroom ought to be a free "marketplace of ideas."[68] For example, the Court wrote:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'[69]

Clearly the *LeVake* court was correct that academic freedom in public schools is not absolute and must be balanced by other state interests—*Clark*, *Pickering*, *Webster*, and *Mount Healthy* unambiguously affirm this. However, if LeVake would have taught the curriculum adequately and included relevant materials critical of evolution, as in the fictional

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66. *Id.* at 609–10.

67. The curriculum director's request that LeVake answer questions about his religious beliefs so that she may infer whether LeVake would unlawfully teach the prescribed curriculum seems analogous to trying to find out if a faculty member is a Communist and inferring from it that the faculty member intends to engage in an unlawful overthrow of the government. One account of LeVake's case published in a conservative Christian magazine, reads:

> LeVake was even more amazed when the curriculum director asked him whether he ever mentioned God or the Bible in his science class. He said no.
>
> Then she asked whether his students knew he was a Christian.
>
> "That was one that I couldn't answer right away. I would like to have said, 'Yes, they do know, just because of the way I act.' But I didn't want to say it that way because she would probably think that I was proselytizing in my classroom. So I said, 'I would hope so because I don't curse, and I don't do things that would make people think I'm not a Christian.'"
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> Although he was surprised by the questions, LeVake said, "It gave me some light on where they were coming from. Those questions betrayed what they were thinking."

Frank York, *No Admittance*, TEACHERS IN FOCUS 2000, http://www.family.org/cforum/teachersmag/features/a0009437.html (last visited Sept. 20, 2002).

68. *Keyishian*, 385 U.S. at 603.

69. *Id.* (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

scenario above, he could have benefited from vast case law on his side.[70]

First, the Court in *Epperson* acknowledged the academic freedom of teachers and students as grounded in their First Amendment right of freedom of expression:

> Our courts . . . have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.
>
> . . . The Court . . . [has] acknowledged the State's power to prescribe the school curriculum, but it held [in *Meyer v. Nebraska*[71]] that these were not adequate to support the restriction upon the liberty of teacher and pupil.[72]

According to a district court in *Moore v. Gaston County Board of Education*,[73] "[t]hat teachers are entitled to First Amendment freedoms is an issue no longer in dispute,"[74] because "[a]lthough academic freedom is not one of the enumerated rights of the First Amendment, the Supreme Court has on numerous occasions emphasized that the right to teach, to inquire, to evaluate and to study is fundamental to a democratic society."[75] This is why, in *Tinker v. Des Moines Independent Community School District*,[76] the Court wrote:

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.[77]

Second, the *Edwards* court assumed that teachers had the academic freedom to "supplant the present science curriculum with the

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70. The depth of case law and legal analysis in this area is immense. This Essay does not attempt to provide comprehensive coverage, but defers to and directs readers to the following excellent articles written by qualified experts: David K. DeWolf, *Academic Freedom After* Edwards, 13 REGENT U. L. REV. 448 (2000–01) [hereinafter DeWolf, *Academic Freedom*]; David K. DeWolf et al., *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 98–110.

71. Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923).

72. *Epperson*, 393 U.S. at 104–05. *See also* William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990).

73. Moore v. Gaston County Bd. of Educ., 357 F. Supp. 1037 (W.D. N.C. 1973).

74. *Id.* at 1039. The *Moore* court held that "[t]o discharge a teacher without warning because his answers to scientific and theological questions do not fit the notions of the local parents and teachers is a violation of the Establishment clause of the First Amendment." *Id.* at 1043.

75. *Id.* at 1039–40 (citation omitted).

76. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

77. *Id.* at 506.

presentation of theories, besides evolution, about the origin of life"[78] without needing the Balanced Treatment Act, which was struck down by the Court on the grounds that the Act's construction would lead to *limiting* rather than advancing the academic freedom of teachers to offer alternative views.[79] The *Webster* court affirmed the principle that a "school may not flatly prohibit teachers from mentioning relevant material."[80] As DeWolf wrote, "The Supreme Court has been emphatic in noting that in public schools, the suppression of ideas based upon a disagreement with the ideas themselves is a violation of the First Amendment."[81]

III. CONCLUSION

In *LeVake*, the court correctly ruled against the plaintiff, but it should have done so not because of his belief in the falsity of evolution or because he sought to offer his students thoughtful nonsectarian criticisms of evolutionary theory, but rather, because of his past performance of teaching the class and his verbal admission that he could not teach the prescribed curriculum. Discriminating against persons because of their religious belief is de facto—not merely prima facie—unconstitutional. Bringing into the classroom relevant material that supplements the curriculum (and does not violate any other legal duties), when public school teachers have adequately fulfilled all of their curricular obligations, *is protected speech* under the rubric of academic freedom.

78. *Edwards*, 482 U.S. at 587.

79. The court stated:

> [U]nder the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught.

Id. at 588–89.

80. *Webster*, 917 F.2d at 1008 (summarizing a principle enunciated in *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305–06 (7th Cir. 1980)).

81. DeWolf, *Academic Freedom*, *supra* note 70, at 479 (citing Bd. of Educ. v. Pico, 457 U.S. 853 (1982)).