

This document is an excerpt from the following law review article:

“The Constitutionality and Pedagogical Benefits of Teaching Evolution Scientifically,” by Casey Luskin, *University of St. Thomas Journal of Law & Public Policy* (Fall 2009).

The entire law review article is available [at this link](#).

Given that evolution lobbyists have sued so many other types of policies, it is difficult to argue that the myriad of policies that require scientific critique of evolution have failed to attract lawsuits simply because evolution lobbyists have not gotten around to filing them yet.

Educational authorities that wish to teach evolution scientifically and critically thus have a variety of legitimate secular purposes to justify their actions and can expect to see a number of important secular effects. Moreover, they will be building their policies upon the precedent of a number of governmental bodies that have sanctioned teaching the scientific controversy over evolution without even incurring legal challenges.

B. THE CONSTITUTIONALITY OF ACADEMIC FREEDOM LEGISLATION

Whereas critical analysis policies found in the various states listed in the previous section require students to critically investigate evolution, academic freedom legislation takes a permissive approach. Support for this type of legislation has been inspired by a growing public awareness that existing law does not protect tenure and employment for public school teachers who present scientific challenges to controversial scientific theories, such as those covering biological origins. Thus, academic freedom legislation aims to provide rights and protection for teachers concerning scientific presentations on biological evolution. Between 2004 and 2008, academic freedom legislation was submitted in the legislatures of no fewer than ten states.¹¹⁵

1. There is a Secular Need to Protect Inquiry-Based Science Education for Teachers Instructing Students in Controversial Scientific Theories Such as Evolution

Academic freedom legislation comes in two basic forms. It can protect the rights of teachers concerning scientific presentations pertaining only to evolution, or it can protect the rights of teachers concerning scientific presentations pertaining to controversial scientific theories in general. Thus, academic freedom legislation can cover multiple scientific subjects and is not necessarily limited to protecting academic freedom only within the context of teaching evolution. But given the questions and controversy commonly associated with evolution, it is probably most pertinent to address such legislation specifically as it relates to the teaching of biological origins.

In the *Scopes* trial of the 1920s, public school teacher John T. Scopes was wrongly disciplined for teaching the scientific evidence in favor of the

115. These states include Alabama, Maryland, Oklahoma, New Mexico, Florida, Louisiana, South Carolina, Missouri, Iowa, and Michigan.

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theory of evolution.¹¹⁶ The right to teach the evidence supporting evolution is now safeguarded.¹¹⁷ Today, however, the teachers whose academic freedom is in jeopardy are those who wish to discuss scientific criticisms of evolutionary theory and delve into discussions about controversial scientific debates. Thus, in a very real sense academic freedom legislation follows in the tradition of John T. Scopes himself when the high school biology teacher reportedly stated: “If you limit a teacher to only one side of anything, the whole country will eventually have only one thought. . . . I believe in teaching every aspect of every problem or theory.”¹¹⁸

Indeed, teachers in the state of Louisiana where academic freedom legislation passed into law expressed sentiments similar to Scopes’, expressing fears about their rights to teach evolution critically and objectively. According to a survey by the Associated Professional Educators of Louisiana (APEL):

- 48% of teachers were “concerned that teaching controversial material could affect your tenure, salary, promotions, or job security.”
- 50% did not “feel legally confident and free to teach alternative models and to critically examine every side of evolution.”
- 55% felt “intimidated regarding the teaching of the controversy surrounding origins.”¹¹⁹

Unfortunately, despite the existence of legitimate scientific debates involving modern Darwinian theory, the right of teachers to cover these debates is often in question.¹²⁰ As a result, there have been repeated cases around the country where professors, teachers and students have been intimidated, ridiculed or penalized for discussing scientific criticisms of the theories of chemical and biological evolution. For example:

116. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

117. See *Epperson*, 393 U.S. 97; *Wright v. Houston Indep. Sch. Dist.*, 366 F. Supp. 1208 (S.D. Tex. 1972); *Moore v. Gaston County Bd. of Educ.*, 357 F. Supp. 1037 (N.C. 1973); *Crowley v. Smithsonian Inst.*, 462 F. Supp. 725 (D.C. 1978); *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995); *Moeller v. Schrenko*, 554 S.E.2d 198 (Ga. Ct. App. 2001).

118. John Angus Campbell and Stephen C. Meyer, *How Should Schools Handle Evolution?*, USA TODAY, August 14, 2005, (quoting John T. Scopes), available at http://www.usatoday.com/news/opinion/editorials/2005-08-14-evolution-debate_x.htm.

119. ASSOCIATED PROFESSIONAL EDUCATORS OF LOUISIANA, A+PEL 2005 ACADEMIC FREEDOM SURVEY (2005), available at <http://www.apeeducators.org/associations/3635/files/Academic%20Freedom%20Survey%20Aug%202005%20DDW%20.pdf>.

120. See, *infra* notes 121–25 and accompanying text.

- In 1998 Minnesota high school teacher Rodney LeVake was removed from teaching biology after expressing skepticism about Darwin's theory. LeVake, who holds a master's degree in biology, agreed to teach evolution as required in the district's curriculum, but said he wanted to "accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory."¹²¹
- Roger DeHart, a public high school biology teacher in Washington State, was denied the right to have his students read articles from mainstream science publications that made scientific criticisms of certain pieces of evidence commonly used to support Darwinian theory. One of the forbidden articles was written by noted evolutionist Stephen Jay Gould. Although DeHart complied with this ban, he was later removed from teaching biology.¹²²
- In Mississippi, chemistry professor Nancy Bryson was asked by Mississippi University for Women to resign as head of the Division of Science and Mathematics after she gave a lecture to honors students called "Critical Thinking on Evolution."¹²³ She remarked, "Students at my college got the message very clearly[:] do not ask any questions about Darwinism."¹²⁴

There have been similar cases of such persecution throughout the nation. For example, in 2005, the president of the University of Idaho instituted a campus-wide classroom speech-code, where "evolution" was declared "the only curriculum that is appropriate" for science classes.¹²⁵ This was a direct attack designed to intimidate university scientists and educators who have expressed skepticism about neo-Darwinian evolution, such as University of Idaho microbiologist Scott Minnich.¹²⁶ If this climate of intellectual intolerance exists in the university, it is likely far worse in secondary public

121. *LeVake v. Indep. Sch. Dist.*, 625 N.W.2d 502, 506 (Minn. Ct. App. 2001), *cert. denied*, 534 U.S. 1081 (2002) (internal citations omitted).

122. See JOHN G. WEST, *DARWIN DAY IN AMERICA: HOW OUR POLITICS AND CULTURE HAVE BEEN DEHUMANIZED IN THE NAME OF SCIENCE* 234-38 (2007).

123. See Texas State Board of Education Hearing Transcript at 505 (September 10, 2003).

124. *Id.*

125. Letter from Timothy P. White, President, University of Idaho, to the University of Idaho Faculty, Staff and Students, *available at* <http://www.president.uidaho.edu/default.aspx?pid=85947>.

126. Dr. Minnich is one of over 800 Ph.D. scientists that signed *A Scientific Dissent from Darwinism*, which declares, "[w]e are skeptical of claims for the ability of random mutation and natural selection to account for the complexity of life. Careful examination of the evidence for Darwinian theory should be encouraged." See *A Scientific Dissent from Darwinism*, Home Page, <http://www.DissentfromDarwin.org> (last visited Dec. 18, 2009).

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schools where teachers have even less academic freedom. Policymakers concerned with attacks upon teacher academic freedom and the harm that such attacks inflict upon the effectiveness of science instruction have every good reason to be concerned about upholding teacher academic freedom.

While academic freedom among teachers has some First Amendment protection at the university level,¹²⁷ below the university level the courts have held that teacher academic freedom is severely limited. The Seventh Circuit described this murky state of the law in *Zykan v. Warsaw Community School Corporation* where it observed “[l]ess clear are the precise contours of this constitutionally protected academic freedom, and particularly its appropriate role . . . [in] the secondary school.”¹²⁸ Yet that same year the Seventh Circuit found a “compelling state interest in the choice and adherence to a suitable curriculum” which implies “[i]t cannot be left to individual teachers to teach what they please.”¹²⁹

According to the Supreme Court, a school board or administrators may impose “reasonable restrictions” on teacher speech in public school classrooms.¹³⁰ The test for constitutionally protected teacher expression “entails striking 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.”¹³¹ Courts have consistently held that restrictions upon speech are permissible if “reasonably related to legitimate pedagogical concerns.”¹³² The Supreme Court has thus given government officials, including school officials, wide discretion to restrict teacher speech:

[W]e have consistently given greater deference to government predictions of harm used to justify restriction of [government] employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.¹³³

Some courts have held that when teaching biological origins, school administrators have the power to prevent teachers from teaching outside of the curriculum. In the case of Rodney LeVake, the Minnesota Court of Appeals found that his district’s prohibition on teaching scientific criticisms of evolution was permissible:

127. *See Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

128. *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

129. *Palmer v. Bd. of Educ.*, 603 F.2d 1271, 1274 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

130. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988).

131. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (*quoting Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

132. *Kuhlmeier*, 484 U.S. at 273.

133. *Waters v. Churchill*, 511 U.S. 661, 673 (1994).

The classroom is a “marketplace of ideas,” and academic freedom should be safeguarded. But *LeVake*, in his role as a public school teacher rather than as a private citizen, wanted to discuss the criticisms of evolution. *LeVake*’s position paper established that he does not believe the theory of evolution is credible. Further, *LeVake*’s proposed method of teaching evolution is in direct conflict with respondents’ curriculum requirements Based on *LeVake*’s belief that evolution is not a viable theory, respondents’ concern about his inability to teach the prescribed curriculum was well-founded.¹³⁴

It should be noted that *LeVake* is sometimes mis-cited as holding that it is unconstitutional to teach scientific criticisms of evolution in public schools.¹³⁵ This case stands for no such proposition. At base, *LeVake* is an employment law case about the freedom of speech retained by a government employee when acting in the course of his employment. The Minnesota Court of Appeals did not attempt to make any determinations about the constitutionality of scientifically critiquing evolution in public schools. It simply balanced *LeVake*’s academic freedom rights to offer material outside the curriculum against the interests of the school district to wield tight control over the curriculum.

Case law suggests that under most circumstances, teachers below the university level do not have the academic freedom to go against reasonable district policies. Because academic freedom is limited below the university level, teachers would find it difficult to overcome reasonable restrictions from a district which prevents discussing scientific critique of evolution. Given the state of the law, it is completely legitimate—and constitutional—for a state legislature or local district to seek to protect, via statute or other policy, the academic freedom rights of teachers and professors to teach about the scientific evidence for and against controversial scientific theories, including evolution.

Academic freedom legislation specifically protects a right to teach “scientific critiques of prevailing scientific theories” that was identified by the Supreme Court in *Edwards*.¹³⁶ As previously noted, groups with widely divergent views on the Establishment Clause issued a “Joint Statement of Current Law” in 1995 that made clear under current law, “any genuinely scientific evidence for or against any explanation of life may be taught.”¹³⁷ Organizations endorsing this statement included the American Civil

134. *LeVake*, 625 N.W.2d at 508–09 (Minn. Ct. App. 2001) (internal citations omitted).

135. This has been the author’s experience when assisting teachers who faced opposition from administrators that sought to shut down the presentation of scientific criticisms of evolution in the classroom.

136. *Edwards*, 482 U.S. at 592 (declaring creationism unconstitutional because it advocates the “religious belief that a supernatural creator was responsible for the creation of humankind”).

137. Religion in the Public Schools: A Joint Statement of Current Law, *supra* note 114.

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Liberties Union (ACLU) and Americans United for Separation of Church and State. Indeed, after an academic freedom bill passed into law in Louisiana in 2008, ACLU Executive Director Marjorie Esman reportedly acknowledged that “if the Act is utilized as written, it should be fine; though she is not sure it will be handled that way.”¹³⁸ Likewise, a similar policy adopted in a public school parish in northern Louisiana in 2006, drew an admission from an attorney working with the ACLU that, “[o]n its face,” the policy “is not objectionable.”¹³⁹

2. *Academic Freedom Policies Have a Secular Effect of Improving Science Education*

Most academic freedom bills have not singled out evolution for special treatment; even if one did, it would not be unconstitutional. Thus, the Louisiana Science Education Act states that public schools should “create and foster an environment within public elementary and secondary schools that promotes critical thinking skills, logical analysis, and open and objective discussion of scientific theories being studied including, but not limited to, evolution, the origins of life, global warming, and human cloning.”¹⁴⁰ Similarly, an academic freedom policy passed by Ouachita Parish, Louisiana states:

[T]he teaching of some scientific subjects, such as biological evolution, the chemical origins of life, global warming, and human cloning, can cause controversy [T]eachers shall be permitted to help students understand, analyze, critique, and review in an objective manner the scientific strengths and weaknesses of existing scientific theories pertinent to the course being taught.¹⁴¹

Thus, adopted academic freedom policies cover multiple scientific subjects and are not limited to protecting academic freedom solely within the context of teaching biological origins.

Academic freedom legislation seeks to ensure that public school educators have the right to present constitutionally permissible scientific information on the topic. As noted, it is perfectly legal for a teacher to present students with scientific critiques of prevailing scientific theories, including evolutionary theory. The effect of this legislation is to protect teacher academic freedom, thereby giving teachers confidence and

138. WWLTV.com, *ACLU Plans To Keep Eye On Science Bill* (June 24, 2008), <http://www.wwltv.com/local/stories/wwl062408tpscienceact.37767059.html>.

139. Barbara Leader, *School Board Commended for Science Education*, NEWS STAR, December 1, 2006 at 1B (on file with author).

140. La. Rev. Stat. Ann. § 17:285.1(B)(1) (2008).

141. BD. OF EDUC. OF OUACHITA PARISH, *OUCHITA PARISH SCIENCE CURRICULUM POLICY* (La. 2006), available at http://www.opsb.net/downloads/forms/Ouachita_Parish_Science_Curriculum_Policy.pdf.

assurance that they can inform students about the scientific evidence pertaining to controversial scientific theories without fear of reprisal. This combats any fear that teachers may have which prevents them from effectively teaching controversial scientific subjects. Students thus receive greater access to scientific information, allowing them to become better-informed, scientifically literate citizens who are capable of participating in civic dialogue on controversial scientific subjects. As they wrestle with the scientific data on these controversial scientific questions, students also gain improved critical thinking skills. Students' rights to hold positions on controversial scientific theories can also be protected under academic freedom legislation.¹⁴²

The ACLU representatives quoted above admitted that facially, these policies are constitutional. This is likely due to the fact that academic freedom legislation expressly does *not* protect the advocacy of any religious viewpoint, as seen in a representative provision taken from the Louisiana Science Education Act:

This Section shall not be construed to promote any religious doctrine, promote discrimination for or against a particular set of religious beliefs, or promote discrimination for or against religion or nonreligion.¹⁴³

Simply put, such legislation does not cover nor protect the teaching of religion. Were a teacher to advocate religion in the classroom, such a law would not protect their actions. The legislation "only protects the teaching of scientific information" such as "the scientific strengths and . . . weaknesses of existing scientific theories covered in the course being taught."¹⁴⁴ Under such language, there is no way that it could endorse or protect the advocacy of religion. Such language also makes it unlikely that academic freedom legislation would be subject to an applied challenge.

C. RESPONSES TO COMMON OBJECTIONS TO TEACHING EVOLUTION SCIENTIFICALLY

Teaching the controversy over evolution can be done under legitimate secular legislative purposes that evince a clear secular intent of enhancing the effectiveness of science instruction and lead to a variety of legitimate

142. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–11 (1969) (holding that students had the right to express their opinions in a public school setting by wearing certain non-disruptive clothing because "state-operated schools may not be enclaves of totalitarianism" and "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views").

143. La. Rev. Stat. Ann. § 17:285.1(D) (2008).

144. For example, see the 2009 Oklahoma Academic Freedom Bill, SB 320, 52nd Leg., 1st Sess. (Okla. 2009).