TEACHERS' FREE EXPRESSION IN THE CLASSROOM: AN EXERCISE WORTH PROTECTING

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I. Introduction

'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' [1]

Teachers who practice the "inside out approach" focus on the *students* as great learners rather than on themselves as "omniscient sages".[2] Public school teachers, as governmental actors, must carry out their classroom duties within the guidelines set by the U.S. Constitution and the local laws. One way that the United States Department of Education promotes a safe learning environment is by protecting students from invidious discrimination that is tantamount to harassment. [3] However, such regulations "are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution."[4] Thus, the Department of Education protects teachers' free speech unless it creates a hostile learning environment for students.[5] The Supreme Court cases regarding teacher's freedom of expression, particularly freedom of political association, support the goals of the Department of Education but the issue remains highly controversial. This paper will discuss the evolution of teacher's protection of political association and show that allowing teachers more free speech rights increases students' interest and participation in the political process. Freedom of expression allows teachers to engage students in more active learning and critical thinking about the political process, which is the goal when focusing educational practices on developing students into great learners.

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[1] Shelton v. Tucker (1960)

[2] *Advice to New Teachers: Turn it Inside Out,* American Political Science and Politics Journal, Syracuse University, Rosemary O'Leary, (2002)

[3] *Personal Decisions and Political Affiliations,* Illinois Municipal Review, Thomas W. Kelty (Illinois, 1990).

[4] Id.

[5] Id.

II. Freedom of Speech and Association of Public Employees

"*The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."* [6]

The Supreme Court first elevated the status of First Amendment freedoms to the fundamental rights protected by the due process clause of the Fourteenth Amendment in 1925.[7] The First Amendment freedoms are religion, speech, press, assembly, association, and petition. Although the Constitution applies to all people, public employees are treated slightly differently under the First Amendment, which will be discussed in this paper. Although the Court ruled that free speech could not be impeded by states, it was hesitant to liberalize this saying, "without limitation, it might become the scourge of the republic."[8] Thus, the First Amendment rights are not absolute but can be controlled by compelling state interests when no less restrictive means of accomplishing the goal are available. The Court's fearful view of free speech has slowly lessened and freedom of expression expanded. In 1937, Chief Justice Hughes said,

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.

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[6] Roth v. U.S. (1957)

[7] Gitlow v. New York (1925) saying, "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

[8] Id. (It is a fundamental principle, long established, that the freedom of speech and of the press which is secured by the Constitution, does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, or an unrestricted and unbridled license that gives immunity for every possible use of language and prevents the punishment of those who abuse this freedom.

The restriction on free speech of public employees greatly loosened under Chief Justice Warren's Court in the late 1950's. [9]

The Court ruled in favor of protecting the employee from state encroachment in Pickering v Board of Education. A teacher was fired for submitting a letter to a local newspaper criticizing the Board of Education and the superintendent for their handling of a bond issue that funded two schools and the allocation of funds between educational and athletic programs.[10] The teacher's article also blamed the superintendent for attempting to persuade the teachers not to oppose or criticize the bond issue. [11] The Court recognized the need to differentiate teachers' constitutional benefits from those of ordinary citizens, especially when their speech involves matters of public concern. [12] Therefore, the Court established a balancing test that weighed the public employee's First Amendment freedom with the state's interest in regulating it. [13]

In Perry v Sindermann, the Court defined public employment as a valuable benefit that a person has no 'right', but that cannot be denied in a way that infringes on his constitutionally guaranteed interests.[14] Therefore, the government may not restrict employment on the basis of something an employee said or his association with a group because it would inhibit the free exercise of those rights.[15] In Perry, an untenured teacher was not rehired after sharing public disapproval of his supervisors at a committee

[9] Pickering v Board of Education (1968)
[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] Perry v Sindermann (1972)
[15] Id.

meeting.[16] The court reiterated its finding in Keyishan that teachers have a constitutional right to openly make statements of public concern about their supervisors. [17] The court also found that the teacher's constitutional claims were not defeated because he did not have tenure. [18]

In general, First Amendment cases are automatically held to strict scrutiny of review, requiring that the action be necessary to achieve a compelling government interest and narrowly tailored to that interest. Rather, where the speaker is a public employee, the court weighs the public interest in employee loyalty and an effective workplace against the employee's free-speech rights. In Mount Healthy City Board of Education v. Doyle, the Court determined that the teacher initially has the burden of proving that the expression was protected by the constitution and was a "substantial factor" or a "motivating factor" in the employment decision not to rehire. [19] The burden then shifts to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. [20]

In Connick v. Myers, the Court articulated that in a First Amendment case, the subject matter of the speech determines the type of balancing test that is required.[21] That is, speech that concerns matters of "public concerns" calls for a balancing approach, weighing the employee's right to free speech and the government's concern for effective execution of public services.[22] Conversely, the Court will way more heavily in favor of

[16] Id.
[17] Id.
[18] Id.
[19] Mount Healthy City Board of Education v. Doyle (1977)
[20] Id.
[21] Connick v. Myers (1983)
[22] Id.

employer's interest in maintaining the work environment when the speech concerns matters of "personal interest."[23] In Connick, the Court held that a District Attorney did not impede an Assistant District Attorney's First Amendment rights for firing her for her free expression.[24] The Assistant District Attorney distributed a questionnaire to the other employees requesting their views of the office transfer policy, due to her pending transfer.[25] The questionnaire included topics such as office morale, the need for a grievance committee, the level of confidence in office supervisors, and whether employees felt pressured to work in political campaigns. [26] The Court examined the content, form and context of the statement, as revealed by the whole record, to determine whether the statement was a matter of public or private interest.[27] While statements of personal interest warrant the dismissal of a public employee when they damage workplace efficiency and are a clear attempt to undermine office relations, statements regarding public concern will also be scrutinized for their degree of harm to the workplace relationships.

Over the past eighty-eight years, the Court has progressively recognized freedom of speech violations where employees' right to express their opinions outweighs the government employers' interest to maintain a peaceful workplace. In addition to expanding freedom of speech rights, the court also liberalized the rights of public employees to associate, or join political parties. In the past, "a government employee could be prevented or "chilled" by the fear of discharge for joining political parties and

[23] Id.
[24] Id.
[25] Id.
[26] Id.
[27] Id.

other associations that certain public officials might find "subversive.""[28] The Court's modern view on freedom of association provides public employees much more job security to openly be members of a political party. [29]

In 1958, the Court ruled in NAACP v. Alabama ex rel. Patterson, that freedom of association garnered separate protection under the Fourteenth Amendment.[30] The freedom of association under the Fourteenth Amendment embraces the First Amendment right of free speech, accounting for their conspicuously similar analysis. However, freedom of association, or political patronage, spurs more conflicting opinions among Supreme Court justices and the public.

Political patronage is "the allocation of the discretionary favors of government on the basis of partisan affiliation."[31] Political patronage philosophy is referred to as the "spoils system" or "to the victors belong the spoils" and was born with the political parties themselves, over two hundred years ago.[32] Succeeding government officials would appoint loyal party supporters to government positions. [33] The spoils system was highly controversial but was not contested by the Court until the late 1950's. Supporters viewed the practice as necessary and appropriate for the maintenance of a two-party system, the political process, and democracy. [34]A majority of Congress disapproved of the system due to its corruption and inefficiency and passed civil service laws in 1883,

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[28] Id.
[29] Id.
[30] NAACP v. Alabama ex rel. Patterson (1958) footnote: ("This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.") (Strict scrutiny is automatically applied to freedom of association matters.)
[31] *The Future of Rutan v. Republican Party of Illinois: A Proposal for Insulating Independent Contractors from Political Patronage,* Valparaiso University Law Review, Bradford S. Moyer (Indiana, 1993)
[32] Id.
[33] Id.
[34] Id.

which replaced patronage systems with merit systems. However, there were many public employment positions that were not covered under these laws and the practices continued. [35] The rational was that employees had no constitutional right to their job, and therefore, the Court had no authority to curtail the employer's dismissal. [36]

The spoils system continues to create a fissure among American leaders today. Those in support of political patronage argue, "it stabilizes and strengthens political parties to prevent excessive political fragmentation."[37] Further, that it instills hope of a reward, which supporters argue accounts for most of the political party support and loyalty. They believe implementing policy depends on the cooperation of public employees and it increases their accountability. [38] Finally, proponents argue that it "provides a powerful means of achieving the social and political integration of excluded groups."[39] Opponents argue the exact opposite, asserting that it pressures employees to support political parties which they do not agree with, discouraging a true elective process and free political expression. [40] Additionally, opponents insist that there are other less intrusive means, which would allow public employees to enjoy the same freedoms as the general public. [41]

Nine years after the Court created the legal protection for freedom of association in NAACP, it applied it to Keyishian v. Board of Regents.[42] English and philosophy

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[35] Id.
[36] Moyer (The classic formulation of this position was Justice Holmes', who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "A policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.")
[37] Id.
[38] Id.
[39] Id.
[40] Id.
[41] Id.
[42] Keyishian v. Board of Regents (1967)

professors at New York State University were threatened dismissal if they would not sign a document stating that they were not members of the Communist party.[43] The 5-4 decision found that the practices "to prevent the appointment or retention of 'subversive' persons in state employment" were invalid due to vagueness. [44] That is, the University's rules were not explicitly defined, but rather invited arbitrary and discriminatory enforcement.[45] The Court found that mere knowing membership without specific purpose to further the unlawful aims of a party is not grounds for dismissal.[46] The Court overturned deeply rooted precedent by stating, "the theory that public employment which may be denied altogether may be subject to any conditions, regardless of how unreasonable, has been uniformly rejected." [47]

The University in Keyishian was not using political patronage to promote the policies of the communist party, but rather using association as a basis for dismissal. However, the case paved the way for the Court to oppose the practice of political patronage in Elrod v. Burns. In Elrod, a Sheriff's Office had a long history of using patronage to dictate the employment of non-civil-service positions.[48] At the time, the Chief Deputy of the Process Division, who supervised all of the employers of the Sheriff's Office on his floor, was a Democrat. In order to maintain employment, each person had to either: pledge their political allegiance to the Democratic Party, work for the election of other candidates of the Democratic Party, contribute a portion of their

[43] Id.
44 Id.
[45] Id.
[46] Id.

[47] Id.
[48] Elrod v. Burns (1976)

wages to the Party, or obtain the sponsorship of a member of the Party.[49] The Court held that patronage dismissals equate to coerced belief and work against the electoral process because they restrict competition in ideas and policies. [50] However, patronage was not found invalid when used for policymaking positions. The Court modified the policymaking position exception in Branti v. Finkel. It required the government to prove that "party affiliation is an appropriate requirement for the effective performance of the public office involved." [51]

In 1990, the Court extended freedom of association in Rutan v. Republican Party of Illinois, by banning patronage hiring, promotions, transfers, and recalls. [52] An Illinois Governor issued a hiring freeze for all of the agencies, bureaus, boards, and commissions under his control, in order to approve of each employment decision. [53] The Court found that because the employment decisions were not based on work performance, they were not used to further a vital government interest, namely efficiency. [54] Thus the Court ruled in favor of the employees' First Amendment freedom of association.

III. Youth Political Engagement

"Generation Next clearly stands out in its progressive approach to some of the major social issues of the day."[55]

"Generation Next" is the name of the Americans age 18-25, the group that has most recently finished school and are entering the workforce.[56] They were taught in the

[49] Id.
[50] Id.
[51] Branti v. Finkel (1980)
[52] Rutan v. Republican Party of Illinois (1990)
[53] Id.
[54] Id.
[55] *How Young People View Their Lives, Futures and Politics,* Pew Research Center For The People & The Press, Andrew Kohut, Director, (2007)

1990s when teacher's political speech freedoms reached the most expansive point in the nation's history. Generation Next is defined by their reliance on technology and use of social media, as the "look at me" generation, hence their political views can be shared easily and may even be shaped by the views posted online by their peers. They lead any past generation in supporting immigration, gay and interracial marriage.[57] Generation Next is the least Republican generation, at 35% support compared to 48% Democratic support.[58] Generation Next is pro government regulation of business but against government provided social security.[59] They are significantly more confident about the government's use of time and money.[60] 84% say that their life is good or excellent and 93% say they are happy with their family lives. [61] 78% say they are satisfied by their standard of living.[62] They are more satisfied with the conditions in America than older adults.[63] They are extremely confident about the future of the country for children.[64] When asked to compare life as a young adult today compared to twenty years ago, they gave higher rankings to their lives in areas like getting a good education, getting a good job, having sexual freedom, living in an exciting time, bringing about social change, and enjoying financial security.[65] They ranking buying a house much lower today than twenty years ago. [66]Only 2% of Generation Nexters are worried about health concerns compared

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[56] Id.
[57] Id.
[58] Id.
[59] Id.
[60] Id.
[61] Id.
[62] Id.
[63] Id.
[64] Id.
[65] Id.
[66] Id.

to 15% of those over age 25. [67] Overall, this generation has an optimistic view of the future, is determined to contribute to more human rights freedoms and believes that the government has played a positive role in shaping our country. They have a greater potential of being politically active to keep the country continuing down this good path.

Generation Next votes and keeps up with national affairs more than earlier generations did at their age, but they are less concerned with local affairs.[68] Their central concerns are preserving the environment, immigration, and privatizing social security. The early skepticism that public employees would overthrow the government if they were given the freedom to associate and use political discourse during their jobs was not well founded. The research suggests that allowing teachers to express their political views in the classroom is making more young children engaged and optimistic about the future. They feel empowered to leave the country better than when they were born rather than to take over the country and destroy the government. By expanding teacher's freedom to associate without the fear of negative consequences, students are able to discuss political issues during class and receive constructive criticism from their teacher rather than left to ponder political affairs alone. The amount of first amendment protection should continue to expand, which will deepen citizen's engagement with the political process.

[67] Id.
[68] Id.