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**ELECTION CONVECTION:  
SCHOOL EMPLOYEE & STUDENT  
POLITICAL EXPRESSION**

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## INTRODUCTION

The First Amendment ... concerns a variety of activities that are deep in our tradition: forming ad hoc committees to lobby measures through a council or other legislative body; organizing protective associations to protect lakes, rivers, islands of wilderness, or a neighborhood; preparing and circulating petitions for signatures in support of legislative reforms; making protest marches or picketing the statehouse for a public cause--these as well as debate, passing out campaign literature, watching at the polls, making radio and TV appearances, addressing rallies in parks or auditoriums, are all part of the intense process of mobilizing 'we the people' for or against specific measures, shaping public opinion, getting X rather than Y elected, and so on. A bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive. It is the First Amendment that makes it alert, vigilant, and alive. It is suppression of First Amendment rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice.<sup>1</sup>

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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.<sup>2</sup>

Free speech in the schools is a broad topic: Social media, letters to the editor, the use of school communication systems by employees and outsiders, the use of school property by employees and outsiders for political purposes, union rights, and academic freedom in the classroom come to mind. In some cases, free speech analysis may overlap with religious freedom, freedom of the press, and the freedom to associate. To complicate matters, EVERYTHING IS POLITICAL: Education, religion, news, immigration, music, guns, war/peace, climate, hurricanes, sports, food, bathrooms, sexual orientation, marriage, pollution, homelessness, the cars we drive. There are social cues in most conversations that signal how we voted or plan to vote. To narrow the focus, this paper attempts to explore the rights of school employees and students to engage in pure, political expression; expression designed to advocate for a candidate or a ballot measure in an election.

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<sup>1</sup> Part of Justice Douglas' dissent in Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908, 2920 (1973), where the Supreme Court upheld an Oklahoma statute restricting the political activities of the State's classified civil servants in much the same manner that the Hatch Act proscribes partisan political activities of federal employees. See also United States Civil Service Comm. v. National Ass'n of Letter Carriers, 413 U.S. 548, 93 S.Ct. 2880 (1973).

<sup>2</sup> Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 505, 89 S.Ct. 733 (1969).

The schoolhouse is an incubator for political expression, where politics inspire impassioned debate. Schools are run by politicians from the school board, the state legislature, the governor, congress, the president and bureaucracies in between. Schools are one of our largest community gathering places in this country. Suffice it to say, the 2020 election perhaps more than any in our lifetime, will create interesting free speech events, some of which have already begun.

## **PART 1: SCHOOL EMPLOYEE SPEECH**

### **1. THE CONNICK-PICKERING FRAMEWORK**

The U.S. Supreme Court has acknowledged that school employees are in a particularly advantageous position to expound upon matters pertaining to the schools.<sup>3</sup> How is school employee free speech analyzed differently than free speech from a citizen not employed by the government?

... the state has interests as an employer in regulating the speech of its employees that differs significantly from those it may possess in connection with regulation of the speech of the citizenry in general. The problem is to arrive at a balance between the interests of the teacher, as a citizen, in participating in matters of a political nature, and the interests of the state as an employer, in promoting the efficiency of the public services it performs through its employees.

**Pickering v. Board of Educ.**, 391 U.S. 563, 568, 88 S.Ct. 1731 (1968); See **Connick vs. Myers**, 461 U.S. at 140-41, 103 S.Ct. 1684 (1983).

If the speech is made pursuant one's duties, it is likely not protected. "Restricting one's speech that owes its existence to a public employee's ... responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." **Garcetti v. Ceballos**, 547 U.S. 410 (2006)

### **CONNICK "MATTER OF PUBLIC CONCERN" TEST**

First, a court determines if "the speech at issue was that of a private citizen speaking on a matter of public concern." This question turns on "whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee.' If the speech does not involve a matter of public concern, but instead addresses a "personal interest," then the speech is not protected by the First Amendment. In such a case, the court need not continue

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<sup>3</sup> "Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal." **Pickering v. Board of Educ.**, 391 U.S. 563, 572, 88 S.Ct. 1731 (1968)

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