

PRESENTED AT

38th Annual School Law Conference

February 9-10, 2023
Austin TX

**SCHOOL EMPLOYEES IN THE CULTURE WARS:
What are the responses?**

Kevin F. Lungwitz

Kevin F. Lungwitz
The Lungwitz Law Firm, P.C.
Austin TX

Kevin@LungwitzLaw.com

SCHOOL EMPLOYEES IN THE CULTURE WARS: WHAT ARE THE RESPONSES?

Political things are toxic, and everything is political. Does this mean everything is toxic? Maybe not. But many things that never were, are: Education, science, history, elections, religion, COVID/vaccines/masks, news, abortion, immigration, music, guns, war, climate, hurricanes, energy, sports, food, bathrooms, sexual orientation, marriage, pollution, homelessness, the economy, health care, cars we drive, etc. There are social cues in what we do, how we live, and in most conversations that signal how we voted or how we plan to vote.

Early culture wars in First Amendment cases

There is a tradition in this country of pushing and prodding the constitution, to see what it might say, depending on the newest, tedious set of facts, and, increasingly, depending on who is sitting on the courts. Religion and politics in the schools have always provided interesting First Amendment cases. Those cases involve a student, parents or community members, or a school employee, testing the limits of the First Amendment through the cultural wars of the day:

- Can students wear arm bands in a non-disruptive manner to protest a war? (Yes. *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 505, 89 S.Ct. 733 (1969)).
- Can a student stay seated for the pledge of allegiance? (Yes. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 U.S. (1943).
- Can a school district regulate the speech of a student (or employee) that bears its imprimatur? (Yes. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988)).
- Can a student be disciplined for off-campus, lewd speech? (Depends. *Mahanoy Area Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021)).
- Can a teacher exercise First amendment rights as a citizen on a matter of public concern? (Yes. *Connick vs. Myers*, 461 U.S. at 140-41, 103 S.Ct. 1684 (1983); see *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731 (1968)).

- Can a coach pray on the football field after a game? (Yes. *Kennedy v. Bremerton School Dist.*, 597 U.S. ____ (2022))
- Does a governmental employee have First Amendment protection for speech related to their job? (No. *Garcetti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951 (2006))
- Can students exchange religiously embossed gifts in a non-disruptive manner at a Winter Break party during class? (Yes. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011 *en banc*))

Somewhere along the way, honest conflicts began to take on the tone of a darker culture war, where every case carries with it the heaviness of a hardened right and a hardened left, and where the decisions of the jurists are becoming easier to predict depending who elected or appointed them.

Dictionary.com defines a culture war as “a conflict or struggle for dominance between groups within a society or between societies, arising from their differing beliefs, practices, etc.”

While the case blurbs above involve school employees and others on the offensive, this paper examines employees who are on the receiving end of these battles. When conflicts erupt, school employees are often swallowed up in the litigation. Consider *Morgan v Swanson*, a case that arose in Plano ISD in 2003. The facts placed Principal Swanson on the horns of a dilemma.¹ No matter her decision, Principal Swanson might have faced legal action from an angry parent (e.g. Allow Jesus candy canes to be distributed in class, and anger some parents; or forbid Jesus candy canes to be distributed in class, and anger other parents). Principal Swanson even sought legal advice from the district’s lawyers who contacted the parents’ lawyers before the events in controversy:

Counsel pointed the Morgans [plaintiffs] to the Third Circuit's decision in *Walz v. Egg Harbor Township Board of Education* [342 F.3d 271 (3d Cir.2003)], in which that court upheld a school's restriction on a student seeking to distribute a written message—almost verbatim with “The Legend of the Candy Cane” - at a classroom winter holiday party.

¹ The case involves different allegations against two principals. For brevity and clarity, this paper only discusses Principal Swanson.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Employees in the Culture Wars: What are the responses?

First appeared as part of the conference materials for the
38th Annual School Law Conference session
"Culture Wars in the School District: Employees"